



The **LAW** *and* **PRACTICE**
of the **IRELAND–**
NORTHERN IRELAND
PROTOCOL

EDITED BY Christopher McCrudden

THE LAW AND PRACTICE OF THE IRELAND–NORTHERN IRELAND PROTOCOL

The Ireland–Northern Ireland Protocol, part of the Withdrawal Agreement concluded between the European Union and the United Kingdom, is intended to address the difficult and complex impact of Brexit on the island of Ireland, North and South, and between Ireland and Great Britain. It has become an exceptionally important, if controversial, part of the new architecture that governs the relationship between the UK and the EU more generally, covering issues that range from trade flows to free movement, from North–South co-operation to the protection of human rights, from customs arrangements to democratic oversight by the Northern Ireland Assembly. This edited collection offers insights from a wide array of academic experts and practitioners in each of the various areas of legal practice that the Protocol affects, providing a comprehensive examination of the Protocol in all its legal dimensions, drawing on international law, EU law, and domestic constitutional and public law. This title is also available as Open Access.

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Queen's University Belfast; University of Michigan Law School



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CONTENTS

<i>Notes on Contributors</i>	page	viii
<i>Foreword</i>	xi	
BY SIR DECLAN MORGAN, <i>Lord Chief Justice of Northern Ireland (2009–21)</i>		
<i>Acknowledgements</i>	xiii	
<i>Table of Cases</i>	xvi	
<i>Table of Treaties, Instruments and Legislation</i>	xx	
<i>Update: Developments from July 2021 to September 2021</i>	xxxvi	
<i>List of Abbreviations</i>	1	
1 Introduction	1	
CHRISTOPHER MCCRUDDEN		
PART I Context 19		
2 The 1998 Agreement: Context and Status	21	
COLIN HARVEY		
PART II EU Governance of the Protocol 31		
3 Legal Structure, Rights and Enforceability	33	
PAUL CRAIG		
4 The Committees of the Protocol	44	
KATY HAYWARD		
5 Dispute Settlement	55	
JAN WOUTERS		
PART III Interpreting the Agreements 67		
6 Interpreting the Protocol	69	
STEPHEN WEATHERILL		
7 International Law Rules on Treaty Interpretation	80	
STEVEN R RATNER		

- 8 Good Faith and Sincere Co-operation 92
CHRISTOPHER MCCRUDDEN
- PART IV Governance of the Protocol in Ireland
and the United Kingdom 105**
- 9 The Status of the Withdrawal Agreement in UK
Law 107
CATHERINE BARNARD
- 10 The Protocol in Northern Ireland Law 118
GORDON ANTHONY
- 11 The Protocol in Irish Law 129
DAVID FENNELLY
- PART V Fundamental Rights in the Protocol 141**
- 12 Human Rights and Equality 143
CHRISTOPHER MCCRUDDEN
- 13 The Charter of Fundamental Rights 159
SIR BERNARD MCCLOSKEY
- PART VI Citizenship and Free Movement
of Persons in the Protocol 171**
- 14 The Common Travel Area 173
IMELDA MAHER
- 15 Citizenship and Identity in Northern Ireland 183
CRG MURRAY
- 16 Citizenship beyond Irish and British 194
TOBIAS LOCK
- PART VII Goods, Customs and the Single Market
in the Protocol 205**
- 17 The Irish Sea Customs Border 207
ANNA JERZEWSKA
- 18 Competition 219
VINCENT JG POWER SC
- 19 State Aid 232
GEORGE PERETZ QC
- 20 Environment and Trade 245
MARY DOBBS AND VIVIANE GRAVEY

- 21 Free Movement of Services 256
GAVIN BARRETT
- 22 Public Procurement 269
CATHERINE DONNELLY SC
- PART VIII **Judicial Co-operation** 283
- 23 Law Enforcement and Judicial Co-operation
in Criminal Matters 285
GEMMA DAVIES
- 24 Jurisdiction, Choice of Law and Enforcement of Foreign
Judgments 296
DAVID KENNY
- PART IX **Safeguards** 307
- 25 Safeguard Provisions 309
BILLY MELO ARAUJO AND STEPHEN BRITTAIN
- Index* 322

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FOREWORD

Brexit is one of the most constitutionally challenging events to occur in the United Kingdom of Great Britain and Northern Ireland in a generation. The outworking of it on the small jurisdiction of Northern Ireland is potentially very significant, set against the important background of the Good Friday Agreement and its framework for peace and reconciliation in a society emerging from conflict.

The suite of primary legislative instruments comprising the European Union (Withdrawal) Act 2018, the European Union (Withdrawal Agreement) Act 2020 and the European Union (Future Relationship) Act 2020 gives effect to the range of domestic, European Union and international legal principles with which the courts of the United Kingdom have to engage.

Northern Ireland's position was unique. It was the only part of the United Kingdom to acquire a land border with the European Union as a result of Brexit. Its framework for peace and reconciliation was underwritten by the governments of the United Kingdom and Ireland. Those factors were significant in securing an agreement on the withdrawal of the United Kingdom from the European Union with both parties signing up to a Northern Ireland Protocol to the Withdrawal Agreement.

On 31 January 2021 the Ireland–Northern Ireland Protocol to the EU–UK Withdrawal Agreement ('the Protocol') came into force. Its stated purpose is to set out Northern Ireland's post-Brexit relationship with both the EU and Great Britain. Its principal intent is to maintain an open land border between Ireland and Northern Ireland.

The Protocol has been beset by difficulties – practically, politically and legally. Its very existence and many facets, some of which have been subject to examination and challenge to date, together with analysis of other parts, perhaps for the meantime less prominent, are thoroughly analysed in this book.

All of this presented considerable challenges for the Northern Ireland judiciary. The new arrangements were so wide-ranging that sensitive and

difficult issues could easily arise at any tier. It was clear that a comprehensive programme of seminars and lectures was required in order to ensure that the judiciary was ready for the challenges that were likely to emerge.

Through the endeavours, primarily, of Professor Christopher McCrudden, working in close partnership with my office, particularly the Judicial Studies Board Chairman Lord Justice McCloskey, an important and informative Brexit resource for Northern Ireland has been brought into existence. Those combined efforts have produced a model for collaborative working: academics and the judiciary combining their knowledge and expertise to provide a comprehensive commentary on new and emerging issues in a difficult and complicated area of law. Between January and June 2021, the Judicial Studies Board hosted an array of informed and talented speakers, many of whom were from Queen's University Belfast School of Law or were colleagues from other academic institutions who kindly agreed to participate, upon the invitation of Professor McCrudden.

This comprehensive discussion of the issues presented by these new arrangements is of immeasurable benefit to legal practitioners, academics, judges and wider society. On behalf of the Northern Ireland judiciary, I want to thank all of those who have contributed.

*Sir Declan Morgan, Lord Chief Justice of Northern
Ireland (2009–21)
July 2021*

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The origins of this book may be traced back to the good judgment of John Temple Lang and Brian Doherty in suggesting that a series of legal seminars should be organised on the implications for the island of Ireland of the Withdrawal Agreement (especially the Protocol) and the Trade and Cooperation Agreement for the Irish Centre on European Law (ICEL) of Trinity College Dublin. I was delighted to be asked to organise these, together with Stephen Brittain, the Director of the Centre. These took place, in collaboration with the School of Law at Queen's University Belfast, during the months of November and December 2020, and then in March 2021, via teleconference. These seminars attracted a significant audience, including many legal practitioners, public officials of several governments, and members of the judiciary from Ireland and Northern Ireland.

Coincidentally, as a member of the Northern Ireland Judicial Studies Board (JSB), I proposed and then organised, in close collaboration with Sir Bernard McCloskey and Terence Dunlop, respectively the Chair and Secretary of the Board, a separate series of in-house, Chatham House Rule seminars for all tiers of the Northern Ireland judiciary on the implication of the Protocol for their work. These were conducted online between January and June 2021. The enthusiastic support of the then Lord Chief Justice of Northern Ireland, Sir Declan Morgan, was critical to the success of these judicial seminars and I thank him for his support throughout the project, for his insightful contributions to the discussions, and for generously providing the Preface to this volume.

The greater proportion of the chapters in this book grew out of one or other of the ICEL and JSB seminars, and in several cases, both. Those who participated in the seminars often asked challenging questions and stimulated useful discussion. Those contributing papers were able to draw on these when they revised their papers into chapters for the book. Sincere thanks are due to Sir Bernard, Stephen Brittain, Terence Dunlop and his team, and all those who attended these seminars.

More than most books, this has been a collaborative effort by all the contributors. My most profound thanks go to all those who spoke at the seminars and have contributed chapters. Some chapters were specially commissioned, following the seminars on the basis of helpful suggestions from seminar participants as to what it would be useful for the book to include, and I am particularly grateful to those who stepped in at this stage. All authors contributed to the project with enthusiasm, but under considerable pressure. They all responded magnificently even under the constant bombardment of my interminable reminders, which they received with good grace. Despite this pressure, all have managed to produce authoritative yet readable contributions, on-time and within tight word limits.

Several different methods of quality control operated. Three anonymous reviewers swiftly supported publication and made suggestions for revisions and for additional chapters, all of which were gratefully received and acted on. Each draft chapter was reviewed by at least two other contributors and the suggestions that arose from this peer-review process have added significantly to the quality of the final product, not least in drawing out the many connections between chapters. John Temple Lang, who was not only present at the birth of the project and stayed with it throughout, was an important source of advice as it developed. He also read the complete draft manuscript and, based on his immense experience of EU law, made many important suggestions for improvements and corrections, for which I am enormously grateful.

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Max Barrett for drawing his attention to some useful source materials for this chapter. Imelda Maher thanks Margaret Gallagher for research assistance. Catherine Donnelly thanks Hugh O'Donnell BL for assistance. Mary Dobbs and Viviane Gravey thank, in particular, Ludivine Petetin, Katy Hayward, Billy Melo Araujo, Dagmar Schiek, David Phinnemore and everyone in the Brexit and Environment network for their ongoing valuable insights and support, as well as Christopher McCrudden and Gemma Davies for their feedback on earlier drafts of their chapter. Gemma Davies thanks the members of the UK–Irish Criminal Justice Cooperation Network. David Fennelly thanks Catherine Donnelly and John Temple Lang for comments on a draft of his chapter.

Finally, I hope a more personal note of thanks and appreciation is not out of place. This book began life during the Covid-19 pandemic and most of the stages of preparation and production took place during restrictions of one sort or another. All contributors depended on loved ones for support throughout these difficult times. I particularly want to record my love, admiration and gratitude to Caroline, my wife and the mother of our children, not only for her selfless support and unlimited tolerance during Brexit, Covid and the production of this book, but throughout our life together, first in Oxford and then in Northern Ireland. Thank you.

TABLE OF CASES

Court of Justice of the EU

- Åklagaren v Hans Åkerberg Fransson* Case C-617/10 EU:C:2013:105, 165
Angonese Case C-281/98 EU:C:2000:296; [2000] ECR I-4134, 198
Associação Sindical dos Juizes Portugueses Case C-64/16 EU:C:2018:117, 274
Belgium v Commission (“Tubemeuse”) Case C-142/87 EU:C:1990:125; [1990] ECR I-959
Carpenter v Secretary of State for the Home Department Case C-60/00 EU:C:2002:434; [2002] ECR I-6279, 203
Commission v Ireland Case C-494/01 EU:C:2005:250; [2005] ECR I-3331, 246
Commission v Italy Case C-158/94 EU:C:1997:500; [1997] ECR I-5789, 236
Commission v Italy Case C-412/04 EU:C:2008:102; [2008] ECR I-00619, 276
Commission v Poland Case C-619/18 EU:C:2018:1021, 274
Commission v Poland Case C-619/1 EU:C:2019:531, 274
Commission v Spain Case C-503/03 EU:C:2006:74; [2006] ECR I-1097, 200
Commission v Sweden Case C-246/07 EU:C:2010:203; [2010] ECR I-3317, 98
Corsica Ferries Italia Case C-18/93 EU:C:1994:195; [1994] ECR I-1783, 96
Costa v ENEL Case 6/64 EU:C:1964:66; [1964] ECR 585, 119
Eurocoton and Others v Council Case C-7601 P, EU:C:2003:511; [2003] ECR I-1091, 313
Eventech v Parking Adjudicator Case C-518/13 EU:C:2015:9; [2015] 1 WLR 3881, [2015] 2 CMLR 33, 76, 239
Extramet v Council Case C-358/89 EU:C:1991:214; [1991] ECR 2501, 315
Haegeman v Belgium Case 181/73 EU:C:1974:41; [1974] ECR 449, 131
IATA Case C-344/04 EU:C:2006:10; [2006] ECR I-00403, 132
Inuit Tapiriit Kanatami and Others v Parliament and Council Case C-583/11 P EU:C:2013:625, 315
Krombach v Bamberski Case C-7/98 EU:C:2000:164; [2000] ECR I-1935, 301
Kupferberg Case 104/81 EU:C:1982:362; [1982] ECR 3641, 131
LM Case C-216/18 PPU EU:C:2018:586, 274
Lounes v Secretary of State for the Home Department Case C-165/16 EU:C:2017:862, 191
McCarthy and Others Case C-202/13 EU:C:2014:2450, 200
McCarthy v Secretary of State for the Home Department Case C-434/09 EU:C:2011:277; [2011] ECR I-3375, 185
Minister for Justice and Equality v Workplace Relations Commission Case C-378/17, EU:C:1978:49, 132
MRAX v Belgium Case C-459/99 EU:C:2002:461; [2002] ECR I-6591, 200

- NS v SSHD* Case C-411/10 EU:C:2011:865; [2012] 2 CMLR 9, 163
Owusu v Jackson Case C-281/02 EU:C:2005:120; [2005] ECR I-1383, 301
P&O European Ferries v Commission Joined Cases C-442P and 471/03P EU:C:2006:356; [2006] ECR I-4845, 242
Raccanelli Case C-94/07 EU:C:2008:425; [2008] ECR I-5939, 198
Savas Case C-37/98, EU:C:2000:224; [2000] ECR I-2927, 132
SECAP SpA and Santorso Joined Cases C-147/06 and C-148/06 EU:C:2008:277; [2008] ECR I-3565, 276
Sevince Case C-192/89, EU:C:1990:322; [1990] ECR I-3461, 132
Simmenthal Case 106/77 EU:C:1978:49; [1978] ECR 629, 119, 132
Soysal and Savatli Case C-228/06, EU:C:2009:101; [2009] ECR I-01031, 132
Surinder Singh Case C-370/90 EU:C:1992:296; [1992] ECR I-4265, 200
Vander Elst Case C-43/93 EU:C:1994:310; [1994] ECR I-3803, 200
Wilson Case C-506/04 EU:C:2006:587; [2006] ECR I-8613, 274

EFTA Court

- Criminal proceedings against A* Case E-1/07 [2007] EFTA Court Reports 246, 100
Fesil and Finnjord Joined Cases E-5/04, E-6/04 and E-7/04 [2005] EFTA Court Reports 117, 101
Fokus Bank ASA Case E-1/04 [2004] EFTA Court Reports 11, 97
Irish Bank Resolution Corporation v Kaupthing Bank Case E-18/11, [2012] EFTA Court Reports 592, 99
Jan Anfinn Wahl Case E-15/12 [2013] EFTA Court Reports 534, 100
L'Oreal Norge Joined Cases E-9/07 and E-10/07 [2008] EFTA Court Reports 258, 100
Sveinsbjörnsdóttir Case E-9/97, [1998] EFTA Court Reports 95, 100, 155

European Court of Human Rights

- MSS v Belgium and Greece*, Application no. 30696/09 (2011) 53 EHRR 2, 163
Tyrer v UK, Application no 5856/72 (1980) 2 EHRR 1, 164

International Court of Justice/Permanent Court of Arbitration

- Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v Serbia)*, 2007 ICJ Rep. 43 (26 February), 87
Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russia), Preliminary Objections, 2011 ICJ Rep. 70, 84
Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 ICJ Rep. 16 (Advisory Opinion of 21 June), 86
North Atlantic Coast Fisheries Case (Great Britain v United States of America) (Award) [1910] XI RIAA 167 (PCA), 99

Whaling in the Antarctic (Australia v Japan, NZ Intervening), 2014 ICJ Rep. 226 (March 14), 85, 87

Decisions of Joint Committees

- Decision No. 1/2020 of the Separation Agreement Joint Committee, Rules of Procedure, 18 December 2020, 49
- Decision No. 2/2020 of the WA Joint Committee [2020/2246], 51
- Decision No. 4/2020 of the WA Joint Committee of 17 December 2020 [2020/2248] on the determination of goods not at risk, 75, 213
- Decision No. 5/2020 of the WA Joint Committee of 17 December 2020 regarding Art 10(2) of the Protocol [2020/2249], 77
- Decision No. 6/2020 of the WA Joint Committee of 17 December 2020 on arrangements under Article 12(2) of the Protocol [2020/2250], 50
- Decision No. 7/2020 of the WA Joint Committee of 22 December 2020 establishing a list of 25 persons who are willing and able to serve as members of an arbitration panel under the Agreement [2020/2251], 62

National Cases

Ireland

- Doherty v Governor of Portlaoise Prison* [2002] 2 IR 252, 136
- Goshawk Dedicated Ltd v Life Receivables Ireland Ltd* [2008] IEHC 90, 301
- Grehan v Medical Incorp. & Valley Pines* [1986] IR 528, 297
- Hasnain Saqlain v The Governor of Cloverhill Prison & Salman Shahzad v The Governor of Mountjoy Prison* [2021] IESC 45 (unapproved judgment of Mr Justice Clarke, Chief Justice, delivered 20 July 2021) (Irish Supreme Court), 132, 290
- Kweder v Minister for Justice* [1996] 1 IR 381, 181
- Maher v Minister for Agriculture* [2001] 2 IR 139, 130
- Minister for Justice and Equality v Delano Demetrius Brissett* [2021] IEHC 95, 289
- Minister for Justice and Equality v Shahzad* [2021] IEHC 89, 132
- Morelli v An Taoiseach* [2018] IEHC 215, 136
- O'Neill v The Governor of Castlereagh Prison* [2004] 1 IR 298, 136
- Pachero v Minister for Justice* [2011] IEHC 491, 177, 181
- Re Logue* [1933] 67 ILTR 253, 185
- Riordan v An Taoiseach* [1999] IESC 1, 29
- Saqlain v The Governor of Cloverhill Prison & Ors* [2021] IEHC 208, 132

United Kingdom

- AB v Facebook* [2013] NIQB 14, 122
- Axa General Insurance v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868, 127

- Benkharbouche v Embassy of the Republic of Sudan* [2013] UKEAT 0401/12GE, [2014] ICR 169, 167
- Fratila and Tanase v Secretary of State for Work and Pensions* [2020] EWCA Civ 1741, 115
- In re McCord* [2020] NICA 23, 27, 28
- JR80's Application* [2019] NICA 58, 28
- Phillips v Eyre* (1870) LR 6 QB 1, 297
- Polakowski & others v Westminster Magistrates' Court* [2021] EWHC 53, 288
- R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2)* [2008] UKHL 61, 318
- R (Buckinghamshire CC) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324, 125
- R (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 950 (Admin), 126
- R (Jackson) v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262, 127
- R (Miller) v The Prime Minister and Cherry & Ors v Advocate General for Scotland* [2019] UKSC 41, 7, 167
- R (Miller) v Secretary of State for Exiting the European Union; In the matter of an application by Agnew and others for Judicial Review; In the matter of an application by Raymond McCord for Judicial Review* [2017] UKSC 5, [2018] AC 61, 6, 28, 127
- R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2020] AC 491, 125
- R (Smith and others) v The Ministry of Defence* [1996] 1 All ER 257, 164
- R v Ministry of Agriculture, Fisheries and Food, ex p First City Trading* [1997] 1 CMLR 250, 121
- R v Secretary of State for Transport, ex p Factortame (No 2)* [1991] 1 AC 603, 125
- Re McCord/JR83/Waring* [2019] NICA 49, 121
- Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [2015] AC 1016, 127
- Robinson v Secretary of State for Northern Ireland* [2002] NI 390; [2002] UKHL 32, 27, 28, 118, 125
- Ryanair Holdings v Competition and Market Authority* [2015] EWCA Civ 83, 98
- Secretary of State for the Home Department v De Souza* [2019] UKUT 355 (IAC), 186
- Smith v Secretary of State for the Home Department* (2021) SC/169/2020, 188
- Thoburn v Sunderland CC* [2003] QB 151, 119, 125, 126
- UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64, [2019] AC 1022, 127

TABLE OF TREATIES, INSTRUMENTS AND LEGISLATION

Treaties and Agreements

- Aarhus Convention (UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998), [251](#)
- Agreement between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland, 1999 (British–Irish Agreement), [22](#), [122](#), [135](#)
- Preamble, [23](#), [136](#)
- Article 1, [26](#)
- Article 2, [26](#)
- Article 3, [25](#)
- Article 4, [26](#), [29](#)
- Agreement on the European Economic Area (1994) (EEA)
- Article 1, [95](#)
- Article 3, [92](#)
- Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ L29/7 (Withdrawal Agreement)
- Preamble, [64](#), [85](#)
- Article 1, [95](#), [96](#)
- Article 4, [60](#), [94](#), [102](#), [131](#)
- Article 4(3), [151](#)
- Article 4(4), [94](#)
- Article 5, [16](#), [59](#), [60](#), [92–103](#), [113](#), [138](#)
- Article 12(7)(b), [58](#)
- Article 14, [199](#)
- Article 15, [202](#)
- Article 15(2), [199](#)
- Article 15(3), [199](#)
- Article 18, [115](#)
- Article 24, [115](#), [196](#)
- Article 24(3), [196](#)

- Article 25, 115
- Article 26, 115
- Article 27, 115
- Article 36(2), 93
- Article 38(2), 134
- Article 75, 270
- Article 76, 270
- Article 76(1)(a), 220
- Article 76(3), 220
- Article 78, 270
- Article 89(2), 63
- Article 91(3), 58
- Article 92(1)(b), 220
- Article 92(3)(c)(ii), 220
- Article 94(2), 57
- Article 95(2), 220
- Article 126–132, 219
- Article 127(1), 219, 258
- Article 158, 83
- Article 159, 83
- Article 159(3), 93
- Article 162, 83
- Article 164, 44
- Article 164(3), 46
- Article 164(5)(d), 70
- Article 165, 51
- Article 165(4), 51
- Article 166, 47
- Article 166(3), 44
- Article 168, 61, 319
- Article 169(1), 46, 93, 100
- Article 170, 46, 243
- Article 171(1), 62
- Article 171(3), 61
- Article 171(4), 61
- Article 171(5), 62
- Article 171(6), 62
- Article 171(9), 62
- Article 173, 319
- Article 173(1), 62
- Article 173(2), 62
- Article 174, 62, 63
- Article 174(2), 63

- Article 175, 63, 93, 319
- Article 176(1), 63
- Article 176(2), 63
- Article 177(1), 64
- Article 177(2), 64
- Article 177(4), 64
- Article 178, 64
- Article 178(2), 64
- Article 178(5), 64
- Article 179, 64
- Article 180(1), 62
- Article 182, 131
- Article 184, 93
- Protocol on issues related to the implementation of the Protocol on Gibraltar, 10, 51
- Protocol on Sovereign Base Areas in Cyprus, 51
- Protocol on the financial provisions of the Withdrawal Agreement, 51
- Protocol on Ireland-Northern Ireland
 - Preamble, 11, 64, 84, 85, 87, 129, 137, 147, 188, 207
 - Article 1, 137, 144
 - Article 1(3), 71
 - Article 2, 57, 122, 137, 143–155, 188, 293
 - Article 3, 133, 134, 135, 144, 194, 258
 - Article 3(2), 134
 - Article 4, 129
 - Article 5, 319
 - Article 5(2), 211, 212
 - Article 5(3), 59, 234, 236
 - Article 5(4), 59, 70, 101
 - Article 5(5), 236
 - Article 6, 57, 210
 - Article 6(2), 73, 210
 - Article 6(4), 209
 - Article 7, 56, 276, 277
 - Article 8, 56
 - Article 9, 56, 224, 236
 - Article 10, 76, 233–244
 - Article 10(1), 234, 242
 - Article 10(2), 77
 - Article 11, 56, 121–123, 137, 220, 293
 - Article 11(1), 123
 - Article 11(2), 50
 - Article 12(1), 111
 - Article 12(4), 55, 58–59, 111, 235, 319
 - Article 12(5), 56, 111
 - Article 12(6), 57

- Article 12(7), 57
 Article 13(1), 112
 Article 13(2), 241
 Article 13(3), 48
 Article 13(4), 123
 Article 14, 44
 Article 14(e), 53
 Article 15, 44, 53–54
 Article 16, 15, 60, 77, 309–321
 Article 18, 50, 58, 124, 137, 219, 227
 Annex 1, 57, 145, 151, 154
 Annex 2, 42, 48, 59, 70, 101, 111, 209, 247–255
 Annex 4, 224
 Annex 6, 50
- Agreement reached in the Multi-party Negotiations (1998) (Belfast-Good Friday Agreement), 2–15, 21–30, 85, 88, 96, 122–4, 129–30, 135–138, 175–176, 180–181, 184–187, 192, 245–251, 255
- Constitutional Issues
 Article 1(v), 28
 Article 1(vi), 183, 191
 Annex B, 29
- Strand Two
 paragraph 17, 136
 paragraph 3(iii), 136
- Strand Three
 paragraph 5, 136
- Rights, Safeguards and Equality of Opportunity, 145–147, 149–151, 188, 293
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (1989), 251
- Charter of Fundamental Rights 2000, 3, 11, 149, 151, 159–161
- Preamble, 160–161
 Article 3(1), 167
 Article 5(3), 167
 Article 8, 167
 Article 9, 167
 Article 10(2), 167
 Article 11, 149
 Article 12, 149
 Article 13, 167
 Article 15, 167
 Article 16, 166
 Article 18, 167
 Article 21, 166
 Article 24, 166
 Articles 27–38, 166

- Article 40, 149
- Article 51, 149, 165
- Convention on Biological Diversity (1992), 251
- Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968) (Brussels Convention), 298, 302
- Comprehensive Economic and Trade Agreement between the European Union and Canada, 30 October 2016, 197, 259
 - Article 29.17, 81
 - Chapter 10, 197
- Convention on International Trade on Endangered Species of Wild Fauna and Flora (1973), 74, 209, 253
- Convention on Social Security between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (2019), 134, 179, 180
- European Convention on Extradition (1957), 286
- European Convention on Human Rights (1950), 13, 18, 25, 29, 83, 87–88, 144–148, 156–7, 160–169, 190, 289, 294–295
 - Article 8, 192
- European Convention on Mutual Assistance in Criminal Matters (1959), 292
- European Convention on the Suppression of Terrorism (1977)
 - Article 1, 288
 - Article 2, 288
- Free Trade Agreement Between the European Union and the Socialist Republic of Viet Nam (2020)
 - Article 15.21, 81
- General Agreement on Tariffs and Trade (1947), 310
- Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, [2019] OJ C384 I/02, 36–37, 85, 208
- St Andrews Agreement (2006), 22
- Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part, OJ 2021 No. L149/10 (TCA)
 - Preamble, 37, 84
 - Part 2
 - Title I, 248
 - Title II, 258–259
 - Title VI, 269–282
 - Title VII, 276
 - Title XI, 220–226, 238, 248
 - Part 3
 - Title II, 291
 - Title III, 291
 - Title V, 292

- Title VI, 292
- Title VII, 287–289
- Title VIII, 292
- Title IX, 291
- Part 6
 - Title I, 278
 - Article 1, 84
 - Article 2, 86
 - Article 3, 94, 96–97
 - Article 4, 94, 131
 - Article 4(1), 80, 229, 231
 - Article 4(2), 94
 - Article 5, 35–38, 131
 - Article 32, 311
 - Articles 140–143, 197
 - Articles 140–145, 201
 - Article 276, 270
 - Article 277(1), 270–271
 - Article 277(2), 270
 - Article 278, 273
 - Article 279, 273
 - Article 280, 272, 273
 - Article 281, 273
 - Article 282, 272–273
 - Article 282(3), 274
 - Article 282(4), 274
 - Article 282(5), 275
 - Article 283, 272–273
 - Article 284, 273, 280
 - Article 285, 273
 - Article 286, 274–275
 - Article 286(2), 274
 - Article 287(1), 275
 - Article 287(2), 275
 - Article 288, 275
 - Article 289, 278
 - Article 290, 278
 - Article 291, 278
 - Article 292, 278
 - Article 293, 278
 - Article 294, 278
 - Article 295, 277
 - Article 296, 277
 - Article 297, 277
 - Articles 303–310, 224

- Article 303(1), 224
- Article 303(2), 224
- Article 303(4), 224
- Article 304, 224
- Article 305, 224
- Article 355, 222
- Article 355(2), 222
- Article 355(3), 222
- Article 355(4), 222–223
- Article 356(1), 222
- Article 356(3), 222
- Article 358(1), 223
- Article 359(2), 224
- Article 359(3), 223
- Article 360(1), 226
- Article 360(2), 226
- Article 360(3), 226
- Article 361, 226
- Article 361(1), 226
- Article 361(2), 226
- Article 361(3), 226
- Articles 363–375, 220
- Article 363(2)(a), 221
- Article 369(2), 221
- Article 369(6), 39
- Article 371, 38
- Article 372(1), 38
- Article 372(3), 38–39
- Article 372(4), 39–40
- Article 373(2), 39
- Article 373(5), 40
- Article 376(1)(d), 225
- Article 376(2), 225
- Article 373(3), 225
- Article 381(1), 225
- Article 383, 221
- Article 384, 221
- Article 376(2), 225
- Article 524, 88, 294
- Article 540, 291
- Article 577, 292
- Article 597, 288
- Article 602(2), 288
- Article 607, 290
- Article 608, 290

- Article 649, 291
- Article 692, 294
- Article 693, 294
- Article 763, 156
- Article 773, 309, 311, 312, 320
- Article 778, 84
- Annex 19, 259
- Annex 20, 259
- Annex 21, 198, 260
- Annex 23, 201
- Annex 25
 - Section A, 272
 - Section B, 270, 271
- Annex 27, 225
- Annex 44, 291
- Annex 45, 288
- Protocol on Social Security Coordination, Art. SSC.15-20, 34, 189
- Treaty on European Union
 - Article 3, 95, 99
 - Article 4(2), 137
 - Article 4(3), 63, 92–102, 138
 - Article 6(1), 160
 - Article 6(3), 160–161
 - Article 50, 8–10, 133, 187
- Treaty establishing the European Coal and Steel Community (1951)
 - Articles 4, 232
 - Article 54, 232
 - Article 95, 232
- Treaty establishing the European Economic Community (1957)
 - Article 87, 232
 - Article 88, 232
 - Article 89, 232
- Treaty on the Functioning of the European Union (TFEU)
 - Article 18, 199
 - Article 30, 136
 - Article 34, 236
 - Article 36, 276
 - Article 45, 198
 - Article 54, 275
 - Article 56, 198
 - Article 102, 221
 - Article 107, 76, 232, 237, 239, 241
 - Article 108, 232, 235
 - Article 110, 236
 - Article 216(2), 131

- Article 256(1), 312
- Article 258, 59, 111, 113, 278
- Article 260(2), 112
- Article 263(1), 313
- Article 263(2), 312, 313
- Article 263(4), 313–314
- Article 263(6), 313
- Article 264(4), 313, 317
- Article 267, 42, 56, 110, 120, 127, 131, 132, 312, 315, 319
- Article 267(3), 316
- Article 268, 313
- Protocol 20, 133, 175
- Protocol 21, 290
- United Nations Framework Convention on Climate Change (1992), 251
- Vienna Convention on the Law of Treaties (1969)
 - Article 26, 92, 96, 99, 144
 - Article 27, 26
 - Article 31, 80–91
 - Article 31(1), 26
 - Article 31(3)(6), 85, 86
 - Article 32, 80–90
 - Article 60, 90
 - Article 62, 90
- WTO Agreement on Safeguards (1994)
 - Article 3, 310
- WTO Agreement on Subsidies and Countervailing Measures (1994), 310
- WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), 253
- WTO Agreement on the Implementation of Article VI of GATT, Antidumping Agreement (1994), 310
- WTO Government Procurement Agreement (1994), 269–282
 - Article I, 272
 - Article II, 272
 - Article III, 272, 275
 - Article IV.1.a
 - Article IV.2, 272
 - Article IV.4, 272
 - Article IV.5, 272
 - Article IV.6, 272
 - Article IV.7, 272
 - Article VIII.3, 272
 - Article VIII.4, 272
 - Article X.2, 273
 - Articles XI–XIV, 273
 - Article XV, 272, Article XVII, 273

Article XVIII, [274](#)

WTO Revised Agreement on Government Procurement (2012), [272](#)

European Legislative Instruments

Council Decisions

Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1, [286](#)

Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union [2008] OJ L 327/ 27, [292](#)

Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions [2008] OJ L 337/ 102, [292](#)

Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention [2009] OJ L 294/ 20, [292](#)

Decision 2020/135 of 30 January 2020 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L 29/1

Article 1, [131](#)

Article 4, [137](#)

Decision 2020/1599 of 23 October 2020 on the position to be taken on behalf of the European Union in the Joint Consultative Working Group as regards the adoption of its rules of procedure [2020] OJ 2020 L 365/3, [53](#)

Commission Decisions

Commission Decision 89/205/EEC of 21 December 1988 relating to a proceeding under Article 86 of the EEC Treaty (IV/31.851 – Magill TV Guide/ITP, BBC and RTÉ) [1989] OJ L 078/43, [230](#)

Directives

Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources [1991] OJ L375/1, [248](#)

Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by

citizens of the Union residing in a Member State of which they are not nationals
[1994] OJ L 368/38, 149

Article 2, 149

Directive 96/71/EC of the European Parliament and of the Council of

16 December 1996 concerning the posting of workers in the framework of the
provision of services [1996] OJ L18/1, 197, 201

Directive 2000/60/EC of the European Parliament and of the Council of

23 October 2000 establishing a framework for Community action in the field of
water policy [2000] OJ L327/1, 248, 252

Directive 2000/78/EC of the European Parliament and of the Council establishing a general
framework for equal treatment in employment and occupation [2000] OJ L 303/ 16

Article 15, 136

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004

on the right of citizens of the Union and their family members to move and
reside freely within the territory of the Member States [2004] OJ L157/77 (the
Citizens' Rights Directive (CRD))

Preamble, 203

Article 3, 202

Article 5, 202

Article 5(1), 201

Article 5(2), 201–202

Article 6, 196, 199

Article 6(2), 195

Article 7, 196, 199

Article 7(2), 195

Article 10, 201–202

Article 16(3), 199

Directive 2013/19/EU of 13 May 2013 adapting Directive 94/80/EC laying down
detailed arrangements for the exercise of the right to vote and to stand as
a candidate in municipal elections by citizens of the Union residing in a Member
State of which they are not nationals, by reason of the accession of the Republic
of Croatia [2013] OJ L 158/231, 149

Directive 2014/104/EU of the European Parliament and of the Council of

26 November 2014 on certain rules governing actions for damages under
national law for infringements of the competition law provisions of the Member
States and of the European Union [2014] OJ L 349/1, 228

Directive 2019/1/EU of the European Parliament and of the Council of

11 December 2018 to empower the competition authorities of the Member
States to be more effective enforcers and to ensure the proper functioning of the
internal market [2019] OJ L 11/3, 228

Directive 2019/904/EU of the European Parliament and of the Council of 5 June 2019
on the reduction of the impact of certain plastic products on the environment
[2019] OJ L 155/1, 248

Regulations

- Regulation 44/2001/EC of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1, 298
- Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/25, 228
- Regulation 139/2004/EC of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24/1
- Article 1, 228
- Regulation 864/2007/EC on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 119/40, 299
- Article 3, 300
- Regulation 593/2008/EC of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6, 299
- Article 2, 300
- Regulation 330/2010/EU of 23 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (Block Exemption Regulation) [2010] OJ L 102/1, 77, 233, 234
- Regulation 1215/2012/EU on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I (Recast)) [2012] OJ L 351/1, 298
- Recital 21, 299
- Article 6, 299
- Article 8, 299
- Article 30, 299
- Article 31.2, 303
- Articles 33–34, 303
- Articles 36–44, 303
- Articles 45–51, 301
- Regulation 952/2013 of 9 October 2013 laying down the Union Customs Code (Recast) [2013] OJ L 269/1, 72, 73
- Article 5, 72
- Regulation 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU [2018] OJ L 312/56
- Article 65, 290

National Legislation

Ireland

- Aliens (Amendment No 3) Order 1997 SI No. 277/1997, [180](#)
 Article [3](#), [176](#)
- Aliens (Amendment) (No 2) Order 1999 SI No. 24/1999, [174](#)
- Constitution (Bunreacht na hÉireann)
 Article 3.1, [29](#)
 Article 3.2, [29](#)
 Article 8.1, [28](#)
 Article 9.2, [29](#), [192](#)
 Article 29.4.6, [130](#)
 Article 29.6, [28](#), [130](#)
 Article 29.7.2, [29](#)
 Article [47](#), [28](#)
 Nineteenth Amendment 1998, [29](#)
 Twenty-Seventh Amendment 2004, [29](#)
- Electoral Act 1992, [179](#)
- European Convention on Human Rights Act 2003, [29](#)
- Immigration Act 2004, [174](#)
 section [11](#), [177](#)
 section [12](#), [177](#)
- Immigration Act 2004 (Visas) Orders 2014 SI 473/2014, [181](#)
- Irish Nationality and Citizenship Act 1956
 section 7(1), [185](#)
 section 21(1), [193](#)
- Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act 1988, [298](#)
- Public Transport Regulation Act 2009, [261](#)
- Student Support Act 2011
 Section [14](#), [179](#)
- Trade Marks Act 1996, [261](#)
- Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020, [173](#)
 Part [2](#), [134](#), [178](#)
 Part [14](#), [134](#)
 Part [17](#), [134](#)
 section [114](#), [174](#)

United Kingdom

- Assembly Members (Reduction of Numbers) Act (Northern Ireland) 2016, [23](#)
- British Nationality Act 1981, [184](#), [186](#), [190](#)
 section 1(1), [184](#)
 section 50(2), [184](#)

- Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020 SI 2020/1213, 196
- Civil Jurisdiction and Judgments Act 1982, 298
- Civil Procedure Rules
- Rule 54.5, 316
- Constitutional Reform and Governance Act 2010
- section 25(2), 47
- Education (Student Fees, Awards and Support) (Amendment) Regulations 2021 SI 2021/127, 179
- European Communities Act 1972, 14, 109, 119–130, 159
- section 2, 109–110, 125, 130
- European Union (Future Relationship) Act 2020, 18, 33, 108, 281
- section 29, 34–36, 281
- European Union (Withdrawal Agreement) Act 2020 (EUWAA), 14, 33, 107, 114, 119–120, 164–165
- section 5, 107–108, 166
- sections 7–17, 114
- sections 21–24, 23
- Schedule 2, 114
- Schedule 3, 23, 153
- European Union (Withdrawal) Act 2018 (EUWA), 14, 33, 40, 42, 106, 108, 118–119, 120–121, 125–126, 159, 246, 250
- section 1, 110
- section 1B, 108
- sections 2–7, 119
- section 3, 41
- section 4, 41
- section 5, 122
- section 5(1), 110
- section 5(2) 108
- section 5(4), 159, 161, 165, 166
- section 5(5), 162
- section 6, 162
- section 6(1)(a), 162
- section 6(1)(b), 120
- section 6(2), 162
- section 7, 162
- section 7A, 14, 42, 108–111, 120–126, 153, 165–166, 235, 242
- section 8C, 42, 111, 121, 123
- sections 8C(7), 118
- sections 10–12, 23
- section 10, 118, 121–123
- section 10(2)(a), 27
- section 20(1)–(5), 107
- section 23(6), 162
- section 24(1), 109

- Schedule 1
 - paragraph 2, 162
- Schedule 2, 23
- Schedule 3, 126
 - paragraph 51(2), 126
- Schedule 8
 - Parts 3 and 4, 162
 - paragraph 39(3), 161–162
 - paragraph 39(5), 161
- European Union (Withdrawal Agreement) Act 1920 (Commencement No. 1)
 - Regulations 2020 SI 2020/75
 - Regulation 4(c), 107
- Human Rights Act 1998, 168, 295
 - section 4(2), 167
- Immigration Act 1971
 - section 3ZA, 174, 176–177
 - section 3ZA(1)(3), 176
 - section 9, 177
- Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020, 173
 - section 2, 174
- Immigration (Control of Entry through Republic of Ireland) Order 1972 SI 1972/1610, 174, 180
- Immigration (European Economic Area) (Amendment) Regulations 2012 SI 2012/1547, 185
- Immigration Rules (UK) HC 395 (2016)
 - Appendix FM-SE, 186
- Ireland Act 1949
 - section 2(1), 174
- Law Applicable to Contractual Obligations and Non-contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 SI 2019/834, 300
- Northern Ireland Act 1998, 14–15, 27–28, 30, 118, 121–127, 143
 - section 1(1), 118
 - sections 6(2)(ca), 118, 122, 153
 - section 6A, 120
 - section 7, 125
 - section 7(1)(e), 126
 - section 24(1)(aa), 118, 122, 153
 - section 26, 123, 153
 - section 42, 124
 - section 52B, 122
 - section 56A, 118
 - section 69(10A), 118
 - section 71, 118
 - section 74(7), 118
 - section 78A–E, 118

- section 98(1), 28
- Schedule 2
 - paragraph 3, 122
- Schedule 6A, 118, 124, 126
- Northern Ireland (St Andrews Agreement) Act 2006
 - section 8, 22
- Persons Subject to Immigration Control (Housing Authority Accommodation and Homelessness) Order 2000 SI 2000/706, 179
- Private International Law (Miscellaneous Provisions) Act 1995, 297
- Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020 SI 2020/1500
 - Part 3, 124
 - Part 4, 124
- Representation of the People Act 1983, 179
- Trade Remedies (Increase in Imports Causing Serious Injury to UK Producers) (EU Exit) Regulations 2019 SI 219/449
 - section 31, 310
- United Kingdom Internal Market Act 2020, 14, 126, 250, 255
 - section 11, 250
 - section 47, 253
 - section 48(4), 242
 - section 49, 242

UPDATE: DEVELOPMENTS FROM JULY 2021 TO SEPTEMBER 2021

This section identifies significant developments from the beginning of July 2021 to mid-September 2021 that are of particular relevance for this book. The section is divided into six main parts: (1) legal challenges to the Withdrawal Agreement (WA), the Protocol, and/or the Trade and Cooperation Agreement (TCA) in UK or Irish courts; (2) cases in which the Protocol has been or is going to be relied on; (3) the various proposals and counter-proposals on how to address the practical outworking of the Protocol in Northern Ireland; (4) developments relevant for the outworking of the Common Travel Area (CTA);¹ (5) developments in the area of environment and trade; and (6) issues concerned with citizenship, particularly the rights of EU citizens in Northern Ireland. Each part identifies which chapter of the book is particularly impacted by the development discussed.

1 Legal Challenges to the Protocol

Allister Case

[[Chapters 1, 2, 6 and 10](#)]

At the end of June 2021, Coulton J of the Northern Ireland High Court handed down a lengthy and thorough judgment on the constitutional challenge to the Protocol by a group of Unionist politicians and others.² Although the applicants' formal challenge was to a set of UK regulations (the Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU) Regulations 2020), the court recognized that the challenge was in effect to the Protocol itself, and to the European Union (Withdrawal) Act 2018 (EUWA 2018) and the European Union (Withdrawal Agreement) Act

¹ I am grateful to Imelda Maher for the information in the section on the CTA.

² *In the matter of an application by Allister, et al* [2021] NIQB 64.

2020 (EUWAA 2020) which implemented the Protocol in UK law, under which the 2020 Regulations were made.

The five grounds of challenge were: first, that the Protocol and the 2020 Regulations were incompatible with Article VI of the Act of Union 1800 which the applicants described as a ‘constitutional statute’; second, that section 1(1) of the Northern Ireland Act 1998 (NI Act 1998) prevented what they described as ‘the profound constitutional changes in the relationship of Northern Ireland with Great Britain’ that they claimed were effected by the Protocol (a similar argument was made by a separate applicant, using the Belfast-Good Friday Agreement (‘the 1998 Agreement’) as the basis for this claim); third, that the UK government acted incompatibly with the constitutional safeguards enshrined in section 42 of the NI Act 1998 in making an agreement with the EU which included Article 18 of the Protocol (which provides the opportunity for taking a vote on democratic consent in Northern Ireland on the continued application of Articles 5–10 of the Protocol but without requiring that the vote be subject to cross-community acceptance); fourth, that the effect of the Protocol is that laws made by the EU will continue to be applicable in Northern Ireland without the electorate there being granted the free expression of their opinion in the choice of the legislature making those laws, and was therefore contrary to Article 3 of Protocol 1 ECHR and Article 14 ECHR; and fifth, that the Protocol is invalid because it conflicts with EU law and in particular Article 50 of the Treaty of the European Union and Article 10 of the Treaty on European Union (TEU).

The High Court comprehensively rejected all of these arguments and judicial review on any or all of these grounds was refused. It is unclear at the time of writing whether the applicants will seek to appeal any or all of these issues.³

JR83 Case

[Chapters 1, 2, 6 and 10]

At the end of August 2021, the Northern Ireland Court of Appeal refused a renewed application for leave to issue judicial review proceedings

³ For commentary on the judgment, see C Murray, ‘Vichy France and Vassalage: Hyperbole versus the Northern Ireland Protocol’, UK Constitutional Law Blog (1 July 2021) (available at <https://ukconstitutionallaw.org/>) and Anurag Deb, ‘The Union in Court: Allister and Others’ Application for Judicial Review’ [2021] NIQB 64 *Northern Ireland Legal Quarterly*, Advance Vol 72 AD1: 91 (<https://nilq.qub.ac.uk/index.php/nilq/article/view/943>).

against the decision of the Prime Minister to sign the WA including the Ireland–Northern Ireland Protocol.⁴

On 30 October 2020, the appellant had sought leave to issue judicial review proceedings seeking a declaration that the decision of the Prime Minister on 24 January 2020 to sign the WA, including the Protocol, was unlawful in that he did not intend that the UK government would fully implement the agreement. The application for leave, which was lodged more than nine months after the WA had been signed by the Prime Minister, was refused on the basis that the court did not consider that the mindset of the Prime Minister when signing the WA was a matter that the court could or should examine.

The appellant renewed her application to the Court of Appeal on the basis that the decision of the Prime Minister frustrated the will of Parliament and that it was unlawful for the Prime Minister to sign the WA if he did not intend to adhere to and fully implement it. The trigger for the renewed application was the publication of the UK Internal Markets Bill, which included provisions authorizing the UK government to breach international law, including the Protocol (subsequently blocked by the House of Lords), and statements at that time by ministers justifying its introduction.

The Court of Appeal held that this was an impermissible challenge to the introduction of the Bill which was prohibited by Article 9 of the Bill of Rights Act 1689, which precludes the courts questioning the lawfulness of proceedings in Parliament. The Court considered that the appellant sought to challenge the substance of inherently political decisions about the manner in which negotiations with the EU about the terms of exit were conducted. In any event, the challenge proceeded on the basis that the appellant wished to see the implementation of the WA, which was now academic as that outcome had been secured by the signing of the Agreement by the Prime Minister.

Human Rights Act Challenge to Protocol

[Chapters 1, 2, 6 and 10]

Other groups and individuals have also been reported as having considered challenging the Ireland–Northern Ireland Protocol in judicial review

⁴ *In re JR83 (EU Withdrawal Agreement)* [2021] NICA, 1 September 2021, www.judiciaryni.uk/sites/judiciary/files/decisions/Summary%20of%20Judgment%20-%20Court%20Refuses%20Leave%20to%20Issue%20Proceedings%20Against%20Prime%20Minister%20-%20In%20re%20JR83%20%28EU%20Withdrawal%20Agreement%29%20.pdf.

proceedings in the English High Court on the basis that the Protocol was incompatible, *inter alia*, with the property rights of traders in Northern Ireland, as protected by Article 1 of Protocol 1 to the European Convention on Human Rights (ECHR), and the rights of the people of Northern Ireland, as protected by Article 3 of Protocol 1 (ECHR). It appeared that the aim would have been to attempt to secure Declarations under section 4 of the Human Rights Act 1998 that section 7A of the EUWA 2018 and all other provisions giving effect to the Protocol in UK law are incompatible with Article 3 of Protocol 1. So far as is known at the time of writing, these proceedings have not (yet) been issued.

Challenge to the Surrender Provisions in Ireland

[Chapters 11 and 23]

In Case C-479/21 PPU, *SN v The Governor of Cloverhill Prison, Ireland and the Attorney General; SD v The Governor of Mountjoy Prison*, the Supreme Court of Ireland referred several questions for preliminary ruling to the Court of Justice of the European Union (CJEU). The applicants challenge the validity of the application of the surrender provisions of the WA and the TCA in Ireland, on the basis that the EU did not have the competence to bind Ireland to those arrangements. The argument, in brief, is that the EU did not have the competence to bind Ireland to these surrender provisions by virtue of the provisions of Protocol 21 to the TEU and the Treaty on the Functioning of the European Union (TFEU) '[o]n the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice [AFSJ]', which the applicants argue indicates that the EU lacks the competence to bind Ireland to EU law measures in the AFSJ.⁵ A judgment is awaited from the CJEU.

2 Use of the Protocol in Litigation

Challenge to Abortion in Northern Ireland

[Chapters 3, 9 and 12]

In a case that due to be heard in the Northern Ireland High Court at the beginning of October 2021, SPUC Pro-Life Limited seeks to challenge the validity and lawfulness of the Abortion (Northern Ireland) Regulations 2021 (the 2021 Regulations) on several grounds. Of particular relevance

⁵ With thanks to Stephen Brittain for this information.

for the operation of the Protocol, several of the grounds of challenge argue that the Regulations are contrary to Article 2 of the Protocol. In brief, SPUC Pro-Life Limited argues that insofar as the 2021 Regulations are intended to facilitate the implementation of abortion on the ground of disability, they are ultra vires by reason of Article 2(1) of the Protocol, as well as being ultra vires as incompatible with a general principle of EU law (the prohibition of discrimination) contrary to Article 2(1) of the Ireland–Northern Ireland Protocol. As part of their claim, the applicants argue that when the Abortion Regulations were made, EU law (in the form of the United Nations Convention on the Rights of Persons with Disability) and the general principles of EU law prevented the provision of abortion on the ground of disability. The Equality Commission for Northern Ireland (ECNI) has intervened to assist the Court on these issues.⁶

Challenge to Triggering of Article 16 (Safeguards)

[Chapters 1 and 25]

In January 2021, the Commission, briefly, appeared to propose that it would trigger Article 16 of the Protocol on safeguards. An action has been initiated (Case T-161/21, *McCord v Commission*) seeking an order from the General Court of the European Union annulling the decision (or the draft Regulation, or both) of the Commission and (in effect) requiring the Commission to publish its policy on the circumstances in which the Commission would trigger Article 16 in the future.

3 Proposals on the Operation of the Protocol

Grace Period for Chilled Meats

[Chapters 1 and 17]

In the UK's Unilateral Declaration to the Joint Committee on 17 December 2020 regarding meat products, of which the European Union took note the same day, the UK had been effectively permitted a 'grace period' for the movement of chilled meats from Great Britain to Northern Ireland, until the end of June. At the end of June, the UK government extended this period until 30 September 2021, which meant

⁶ Christopher McCrudden is counsel for the ECNI in this case.

that the full set of EU regulatory requirements would continue not to apply.

As before, the Commission ‘took note’ of this extension by the UK government, indicating that it would not oppose this move, at least for the time being, and making clear that the purpose of this additional period was to allow stakeholders, and in particular supermarkets in Northern Ireland, to complete the adjustment of their supply chains. Although a lighter touch regulatory system is in operation, conditions are still applicable during the grace period,⁷ including that chilled meats are sold exclusively to end consumers in supermarkets located in Northern Ireland, and they are not to be sold to other operators of the food chain; and that they will bear a label making clear that the products are for sale only in the United Kingdom.

In September 2021, prior to the end of the grace period at the end of that month, the UK government announced that it would again extend the grace period for chilled meats entering Northern Ireland from GB, this time indefinitely. The Commission responded by again ‘taking note’ of this development, of which it had been notified previously, and indicating that it would not take action against the UK, considering that the grace period should be used to attempt to reach a sustainable longer-term resolution of issues concerning the Protocol, including proposals advanced by the UK government in July 2021 (see [next section](#)).

European Commission June Package

[[Chapters 1, 4 and 7](#)]

At the end of June 2021, the European Commission proposed a package of measures to address some of the most pressing issues related to the implementation of the Protocol,⁸ including (in effect) agreeing to extend a grace period for the movement of chilled meats from GB to Northern Ireland (see above section). In its June package, the Commission also put forward measures in a number of other areas. According to the Commission, these measures were to ensure that the application of the Protocol impacted as little as possible on the everyday life of communities

⁷ Declaration by the United Kingdom on Meat Products: 30 June 2021, www.gov.uk/government/publications/declaration-by-the-united-kingdom-on-meat-products-30-june-2021.

⁸ European Commission, ‘EU–UK Relations: Solutions Found to Help Implementation of the Protocol on Ireland and Northern Ireland’, Press Release, 30 June 2021, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3324.

in Northern Ireland. In all cases, the measures took advantage of flexibilities and technical solutions permitted by the Protocol itself, rather than necessitating any departure from or renegotiation of the Protocol, or invoking the safeguard provision.

Regarding the long-term supply of medicines from Great Britain to Northern Ireland, the EU offered to change its own rules so that regulatory compliance functions for medicines authorized by the UK for the Northern Ireland market, in accordance with the Protocol, could be located in Great Britain, subject to specific conditions ensuring that the medicines concerned are not further distributed in the EU Internal Market.

Regarding the movement of livestock from Great Britain to Northern Ireland, several further measures were identified, including: removing the need for re-tagging when animals move multiple times between Great Britain and Northern Ireland during their life; working on a regulatory solution to facilitate the swift return of livestock to Northern Ireland from exhibitions or trade fairs in Great Britain; and facilitating the movement of sheep and goats between Great Britain and Northern Ireland. Other measures identified included measures ensuring the continued supply of guide dogs, as well as a decision waiving the need to show an insurance green card.

UK Government's July Proposals

[[Chapters 1, 4, 7, 17 and 19](#)]

Clearly, the UK government did not consider these measures sufficient. In July 2021, the UK government published a Command Paper setting out its analysis of the operation of the Protocol to date, and making proposals for a revision of the Protocol.⁹ It accused the Commission of applying the Protocol in an inflexible way and it considered that the tensions that the Protocol resulted in (in terms of the strain it was placing on Northern Ireland institutions, trade and identity) meant that the Protocol in its current form was unsustainable.

The issues that the government considered needed to be renegotiated focused primarily on trade in goods, state aid, and the overarching institutional architecture of the Protocol, rather than the arrangements for the CTA, the workings of the all-island Single Electricity Market, and the provisions that ensure that there is no diminution of human rights in

⁹ HM Government, *Northern Ireland Protocol: The Way Forward* (CP 502, July 2021).

Northern Ireland as a result of the UK's withdrawal from the European Union. These latter issues the paper considered 'not controversial'.¹⁰

Safeguard Provision

[Chapter 25]

The paper disclosed that the UK government had considered invoking the Protocol Article 16 safeguard provisions, and that it considered that it would have been justified in doing so but had ultimately concluded that it would not do so, at this time. Instead, it proposed a set of significant changes to both the operation and the structure of the Protocol itself to which it hoped that the EU would agree. In September, Lord Frost again reiterated that triggering Article 16 would be justified in the current circumstances, although the government preferred to negotiate changes to the Protocol with the Commission.

Trade in Goods

[Chapters 6 and 17]

As regards trade in goods, the paper proposed two major sets of changes: first, 'ensuring that full customs and SPS [sanitary and phytosanitary] processes are applied only to goods destined for the EU';¹¹ and second, 'allowing goods made to UK rules and regulated by UK authorities to circulate freely in Northern Ireland as long as they remain in Northern Ireland'.¹²

As regards the first, 'one possible alternative' suggested was that there

would be arrangements under which it would be the primary responsibility of any UK trader moving goods to Northern Ireland to declare whether the final destination of those goods was Northern Ireland or Ireland. Full customs formalities would be required for goods going to Ireland and the UK would undertake to enforce them. Other goods would not require customs processes.¹³

Ensuring that these arrangements would be implemented in practice would be by way of a 'light touch' system of primarily self-regulation,

¹⁰ *Ibid*, para 37.

¹¹ *Ibid*, para 39.

¹² *Ibid*, para 40.

¹³ *Ibid*, para 48.

with only periodic checks ‘on a risk-based and intelligence led basis’.¹⁴ Additional arrangements would also address SPS requirements for the transport of live animals (with the exception of pets) and certain plant products (with the exception of garden plants and seeds), with a regulatory regime essentially mirroring that which had existed for the transport of animals between GB and Northern Ireland prior to Brexit.

Regarding the second, the circulation of goods within Northern Ireland, the UK government proposed a dual regulatory regime in Northern Ireland. ‘Goods, whether manufactured or SPS goods, should be able to circulate within Northern Ireland if they meet either UK or EU rules, as determined by UK or EU regulators, and should be labelled accordingly.’¹⁵ On the other hand, ‘goods destined or produced for the EU Single Market would need to meet EU rules in full’,¹⁶ including full normal EU customs processes. Medicines would need to be treated differently, however, and the difficulties were such that it was proposed that ‘the simplest way forward may be to remove all medicines from the scope of the Protocol entirely’.¹⁷

State Aid

[Chapter 19]

On state aid (or ‘subsidy controls’, as the proposals term it), the government argued that Article 10 of the Protocol was ‘redundant’ in its current form,¹⁸ but was willing to accept ‘enhanced processes for any subsidies on a significant scale relating directly to Northern Ireland’.¹⁹

Governance

[Chapters 1, 2, 4 and 5]

As regards the institutional arrangements proposed, the UK government’s position was clear and wide-ranging: reforming the governance arrangements by ensuring that ‘the relationship between the UK and the

¹⁴ *Ibid.*

¹⁵ *Ibid.*, para 59.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, para 61.

¹⁸ *Ibid.*, para 64.

¹⁹ *Ibid.*, para 65. See further George Peretz QC and James Webber, ‘The UK’s Proposed Revisions to Article 10 of the Northern Ireland Protocol: A Sensible Basis for Negotiation’, *EU Relations Law*, <https://eurelationslaw.com/blog/the-uks-proposed-revisions-to-article-10-of-the-northern-ireland-protocol-a-sensible-basis-for-negotiation>.

EU is not ultimately policed by the EU institutions including the Court of Justice',²⁰ using only international arbitration, and increasing the role that Northern Ireland actors, including the Assembly and the Executive, and wider Northern Ireland civic society and business would play in being consulted on future changes in EU law that affect Northern Ireland.

Regarding the role of the CJEU, the UK government sought to abolish the current arrangements and substitute instead an arrangement equivalent to that which operates under the TCA, what the government refers to as 'a normal treaty framework',²¹ stripping away any role for the CJEU and the European Commission in ensuring compliance with the Protocol. The paper recognized that such a change would require a new agreement, as envisaged under Article 13(8) of the Protocol.

As regards giving a greater role to Northern Ireland, the UK government suggested that where EU law continues to apply in Northern Ireland, it will be necessary to establish 'more robust arrangements to ensure that, as rules are developed, they take account of their implications for Northern Ireland – and provide a stronger role for those in Northern Ireland to whom they apply (including the Northern Ireland Assembly and Executive, and wider Northern Ireland civic society and business)'.²²

Pausing Infringement Action

[[Chapters 1, 5, 8, 9 and 25](#)]

Following this, Vice-President Maroš Šefčovič released a statement on the same day as the UK government's proposals were published, in which he said: 'We are ready to continue to seek creative solutions, within the framework of the Protocol, in the interest of all communities in Northern Ireland. However, we will not agree to a renegotiation of the Protocol.'²³

In one respect, however, the Commission was more disposed to accept a UK proposal made in the context of its July proposals to ease tensions between the UK and the EU. The UK had proposed a 'standstill period' while negotiations continued which would allow the grace periods due to expire in September to continue after that date, and (critically) for a freeze on legal action by the Commission. The Commission, in

²⁰ *Ibid*, para 41.

²¹ *Ibid*, para 69.

²² *Ibid*, para 71.

²³ Statement by Vice-President Maroš Šefčovič following today's announcement by the UK government regarding the Protocol on Ireland–Northern Ireland, Brussels, 21 July 2021.

response, indicated that it would consider the issue of the grace periods (subsequently agreed in September – see ‘Grace Period for Chilled Meats’, above), and agreed that it would pause its infringement action against the UK, and not move to the next stage of issuing a Reasoned Opinion.

4 Common Travel Area

[[Chapters 1, 2 and 14](#)]

MOU between Irish and UK Governments on Education

The Irish and UK governments signed a Memorandum of Understanding (MOU) in July 2021 recognizing reciprocal rights for students from primary to university level. Significantly, unlike other EU students, Irish students will be treated as equivalent to British students.²⁴

Mutual Recognition of Qualifications

Bilateral meetings between the Irish Department of Education and the UK’s Department of Business, Energy and Industrial Strategy commenced in January 2021 on mutual recognition of qualifications.²⁵ There is an expectation that these arrangements covering 190²⁶ professions of which 44 are regulated by competent authorities or in Ireland will be replaced by EU/UK mutual recognition under the CTA, but that will take several years. In the meantime, this administrative approach has led to some variation between Irish and UK regulators, for example with some professions adopting MOUs and others modifying their third-country qualifications policies to recognize those from the UK.²⁷ In

²⁴ Memorandum of Understanding (MOU) on the Education Principles associated with the Common Travel Area. Not yet published; see Irish government press release, 14 July 2021.

²⁵ Seanad Committee on Withdrawal of UK from the EU: Contribution of Minister Harris, Minister for Further and Higher Education, Research, Innovation and Science, 26 April 2021, www.gov.ie/en/speech/2c0eb-seanad-committee-on-withdrawal-of-uk-from-the-eu-monday-26-april-2021/#erasmus-and-ni-students.

²⁶ The CIPD noted 182 professions, but this suggests that there may not be a single definition of ‘profession’.

²⁷ With engineers adopting a MOU and the Teaching Council and the Medical Council changing their third-country policies.

some instances, legislation is required, and where qualifications are part of wider EU Directives or international agreements then the UK profession has to take a competency test in Ireland.

Erasmus Scheme

The Irish government has agreed with the European Commission that Northern Irish students will be temporarily registered to Irish higher education institutions and can then avail themselves of the Erasmus scheme.²⁸

5 Environment and Trade

[Chapter 20]

The European Commission has proposed a wide-ranging set of proposals to tackle climate change ('Fit for 55'). As part of this package, in July 2021 the Commission proposed a carbon-border adjustment mechanism (CBAM)²⁹ which would require importers of certain goods from outside the EU (mainly electricity, iron and steel, cement, aluminium and some fertilizers) to pay a price for these imports that reflects their carbon content in order to ensure that there is no incentive to substitute imported goods for goods produced in the EU that will be subject to strict carbon emission standards. The issue that has arisen is how this requirement would apply in Northern Ireland if (as seems to be the case) the CBAM requirements fall within the scope of the requirements of the Protocol.³⁰ The Joint Committee (JC) would need to consent to the implementation of CBAM in Northern Ireland, under Article 13. One possibility would require amending Annex 2 to include this mechanism.³¹ The UK could also sign up to CBAM more generally, especially as it links to level playing fields. CBAM highlights the potential

²⁸ Ministerial speech (n 24).

²⁹ European Commission, Proposal for a Regulation of the European Parliament and of the Council Establishing a Carbon Border Adjustment Mechanism, COM(2021) 564 Final (14 July 2021).

³⁰ Sam Lowe, 'CBAM: What Might an EU Carbon-Border Adjustment Mechanism Mean for the UK?' UK in a Changing Europe, 3 August 2021, <https://ukandeu.ac.uk/eu-cbam-uk/>.

³¹ Elisabetta Cornago and Sam Lowe, 'Avoiding the Pitfalls of an EU Carbon Border Adjustment Mechanism', Centre for European Reform, 5 July 2021, www.cer.eu/insights/avoiding-pitfalls-eu-carbon-border-adjustment-mechanism.

for there to be major policy developments in the EU (or the UK), the potential for subsequent policy divergence (and knock-on effects) and the potential to try to address or limit this divergence through various mechanisms. By September, it did not appear that the JC had yet considered the proposal.³²

6 Citizenship Issues

[Chapters 12, 15 and 16]

Voting Rights

Currently, EU citizens have the right to vote in various UK elections. It was a requirement of membership of the EU that EU citizens living in the UK could both stand and vote in local elections. In August 2021, the UK government introduced legislation that would change these arrangements. Schedule 7 of the Elections Bill would limit the extent to which EU citizens would continue to have such voting rights.³³ EU citizens who have been living in the UK since before the end of the Implementation Period, which ended at 23:00 on 31 December 2020, will retain their local voting and candidacy rights, provided they retain lawful immigration status. The local voting and candidacy rights of EU citizens who arrived in the UK after this point, however, will rest on the principle of a mutual grant of rights, through agreements with EU member states. The voting and candidacy rights of Irish citizens are not affected by these measures, as these long-standing rights long predate EU membership, but these changes will affect both local and Assembly elections in Northern Ireland. Following the successful passage of the Elections Bill, measures to bring about these changes will be made using secondary legislation. Whether these proposed changes are consistent with Article 2 of the Protocol remains to be seen.

Citizenship and Passports

At the end of the UK parliamentary session in the summer of 2021, the Northern Ireland Affairs Committee issued its report on citizenship and

³² With thanks to Mary Dobbs and Viviane Gravey for this information.

³³ Policy paper, 'Local Voting Rights for EU Citizens Living in the UK', 17 June 2021, www.gov.uk/government/publications/local-voting-rights-for-eu-citizens-living-in-the-uk/local-voting-rights-for-eu-citizens-living-in-the-uk.

passport processes relating to Northern Ireland.³⁴ The Committee recommended that the UK government take steps to facilitate Irish citizens applying for UK citizenship, including waiving applicable fees and the taking of tests as part of the application process, in light of the historic connections between the UK and Ireland.³⁵ This suggestion, it must be noted, is not grounded in any requirements under the 1998 Agreement. With regard to the 1998 Agreement's birthright provisions, the Committee was convinced that there was significance to the phrase 'to be accepted as [a British or Irish citizen, or both]', and urged the UK government to clarify its interpretation and negotiate a common understanding with the Irish government.³⁶ A response from the UK government is awaited.

Christopher McCrudden
10 September 2021

³⁴ Thanks to CRG Murray for the information in this paragraph.

³⁵ Northern Ireland Affairs Committee, *Citizenship and Passport Processes Relating to Northern Ireland* (2021) HC 158, para 7.

³⁶ *Ibid*, para 14.

ABBREVIATIONS

AC	appeal cases
All ER	All England Law Reports
ASFJ	Area for Security, Freedom and Justice
CBAM	carbon-border adjustment mechanism
CCPC	Competition and Consumer Protection Commission
CCR	Concession Contracts Regulations 2016
CETA	EU–Canada Comprehensive Economic and Trade Agreement
CFR	Charter of Fundamental Rights of the European Union
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CJEU	Court of Justice of the European Union
CMA	Competition and Markets Authority
CMLR	Common Market Law Reports
COE	Council of Europe
CRD	Citizens’ Rights Directive
CTA	Common Travel Area
DRM	dispute resolution mechanism
DUP	Democratic Unionist Party
EAW	European arrest warrant
EAT	employment appeal tribunal
EC	European Community
ECA 1972	European Communities Act 1972
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECN	European Competition Network
ECR	European Court Reports
ECRIS	European Criminal Records Information System
ECtHR	European Court of Human Rights
EDPB	European Data Protection Board
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
EHIC	European Health Insurance Card

EHRR	European Human Rights Reports
EIO	European investigation order
ERASMUS+	EU exchange programme for education, training, youth and sport
EU	European Union
EUFRA	European Union (Future Relationship) Act 2020
EUMR	EU Merger Regulation
Eurojust	European Judicial Cooperation Union
Europol	European Police Office
EUWA 2018	European Union (Withdrawal) Act 2018
EUWAA 2020	European Union (Withdrawal Agreement) Act 2020
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
GATT	General Agreement on Tariffs and Trade
GB	Great Britain
GDPR	General Data Protection Regulation
GPA	WTO General Procurement Agreement
HL	House of Lords
HMRC	HM Revenue and Customs
HRA	Human Rights Act 1998
HS	Harmonized System
ICJ	International Court of Justice
ICN	International Competition Network
ICR	Industrial Cases Reports
IEHC	Irish High Court
ILC	International Law Commission
ILO	International Labour Organization
ILTR	Irish Law Times Reports
IMA	Independent Monitoring Authority
INISC	Specialised Committee on the Implementation of the Protocol on Ireland and Northern Ireland
IR	Irish Reports
JC	Joint Committee
JCWG	Joint Consultative Working Group
LIBE	Civil Liberties, Justice and Home Affairs Committee of the European Parliament
MOU	Memorandum of Understanding
NEFM	non-EU family members
NICA	Northern Ireland Court of Appeal
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Communities
PCA	Permanent Court of Arbitration
PCR	Public Contracts Regulations 2016

PPN	Procurement Policy Note
Protocol	The Ireland–Northern Ireland Protocol to the Withdrawal Agreement
PSNI	Police Service of Northern Ireland
QB	Queen’s Bench
SEM	Single Electricity Market
SI	Statutory Instrument
SIS II	Second-Generation Information System
SME	small and medium-sized enterprise
SPS	sanitary and phytosanitary
TCA	Trade and Cooperation Agreement
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TSS	Trader Support Service
UCC	Union Customs Code
UCR	Utilities Contracts Regulations 2016
UK	United Kingdom
UKCRIS	Criminal Record Information System
UKHL	House of Lords
UKSC	United Kingdom Supreme Court
UKTPO	UK Trade Policy Observatory
UKUT	Upper Tribunal
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
VAT	value added tax
VCLT	Vienna Convention on the Law of Treaties
WA	Withdrawal Agreement
WTO	World Trade Organization

Introduction

CHRISTOPHER McCRUDDEN

The aim of this book is to analyse the principal legal dimensions of the Ireland–Northern Ireland Protocol (the Protocol), which is part of the EU–UK Withdrawal Agreement (WA), negotiated to enable the United Kingdom (UK) to leave the European Union (EU) in an orderly fashion. The purpose of this Introduction is to set out some of the basic background needed to understand the scope and content of the Protocol, and how this book attempts systematically to describe and analyse it. The Protocol is most appropriately seen in the context of the desire to preserve the Belfast–Good Friday Agreement (1998 Agreement), the changing politics of the UK Parliament and government over the relevant period, and the subsequently negotiated Trade and Cooperation Agreement (TCA).

1.1 Referendum and Aftermath

The vote to leave the EU in June 2016 was perhaps the greatest shock to the politics of the UK since the Second World War. For a decision of such immense gravity, it was taken without full and proper consideration of many of the most important effects of a vote to leave the EU. In particular, the UK was soon faced with the difficulty of how to leave without endangering the unstable peace that had existed in Northern Ireland since 1998. This difficulty, however obvious it seems in retrospect, was seldom discussed before the Referendum itself, particularly in the rest of the UK.

This absence of public discussion, combined with the decision of Prime Minister David Cameron to instruct civil servants not to plan for the consequences of a ‘leave’ vote, meant that the full extent of the problems that disentangling the forty-five-year-old relationship between the UK and the EU would present for Northern Ireland were only fully realized by UK negotiators during the course of the post-Referendum negotiations between the two sides. The EU was much better prepared,

since Ireland had been concerned from the time the Referendum was first announced that a leave vote could seriously destabilize Northern Ireland, and thus the island of Ireland, and had already begun serious planning. As a continuing member of the EU, it shared these insights with EU negotiators. The EU's understanding of, and approach to, the Northern Ireland difficulty was thus initially framed by Ireland's analysis, and Ireland was to remain a dominant influence.

1.2 Belfast-Good Friday Agreement

A principal difficulty identified by Ireland (and the EU) was the challenge that the UK's exit from the EU would pose for the 1998 Agreement.¹ This had helped bring about a *modus vivendi* between the different communities in Northern Ireland, long immersed in a violent conflict between unionists and loyalists (who want Northern Ireland to remain in the UK) and nationalists and republicans (who want Northern Ireland to unify with Ireland). The 1998 Agreement succeeded in bringing a degree of stability by setting the internal Northern Ireland conflict in the broader context of relations between the UK and Ireland generally (the East–West dimension) and between Northern Ireland and Ireland generally (the North–South dimension).

The 1998 Agreement is a wide-ranging peace agreement, with multiple moving parts. In broad outline, it provides for the establishment of devolved government in Northern Ireland, consisting of a Northern Ireland Assembly and a power-sharing Executive composed of representatives from both communities. The Executive and the Assembly have powers devolved to them from the UK Parliament at Westminster. Although Northern Ireland remains in the UK, it does so on the basis of the consent of the people of Northern Ireland who may vote to decide whether to remain or to unify with Ireland. Institutions are in place to bring together the government of Northern Ireland and Ireland to consider common interests, and several North–South bodies are established to organize and oversee particular projects in mostly non-contentious areas of activity, such as waterways and tourism. Several bodies are established to enable the governments of Northern Ireland, Ireland and the UK to meet with devolved governments in Scotland and Wales, as well as the Channel Islands and the Isle of Man, the so-called East–West dimension.

¹ See [Chapter 2](#).

The 1998 Agreement also set in train reforms in other major areas of contention, in particular in policing, and established mechanisms to address the legacy of armed conflict, such as decommissioning the weapons of armed groups, releasing convicted prisoners associated with paramilitary organizations, and implementing a panoply of human rights and equality measures to address long-standing grievances.² With the onset of peace, the border between Northern Ireland and Ireland was demilitarized (reducing the need for a contentious British Army presence), and cross-border economic activity was better able to flourish. This was also helped in part by the resuscitation of the Common Travel Area,³ which eased the flow of cross-border employment and health-care arrangements. The establishment of an all-island economy was not simply a by-product of the 1998 Agreement, however; it was an important dimension of the overall strategy. If successful, it would help provide economic growth which would ease social change, and longer term it would help reduce the ‘otherness’ which has long bedevilled political, social and economic relationships on the island.

1.3 Role of the European Union

At the time that the 1998 Agreement was concluded, both the UK and Ireland were members of the EU and this shared membership did much to ease tensions between the UK and Irish governments. Set in this wider context, Irish and British polities were able to identify with a broader identity as EU member states. The constant involvement of UK and Irish diplomats, civil servants and politicians in European meetings also helped build trust, which proved invaluable when relationships came to be tested in the difficult peace process negotiations. With some justice, the EU came to identify the 1998 Agreement as a success story to which it had contributed.

The role of the EU was more than the provision of alternative narratives and opportunities to engage. It also played a positive part in providing an important supporting structure for several elements of the 1998 Agreement itself. Many of the various activities detailed above involved a role for EU law. Human rights and equality measures were underpinned by European anti-discrimination directives⁴ and the EU Charter of Fundamental Rights

² See [Chapter 12](#).

³ See [Chapter 14](#).

⁴ See [Chapter 12](#).

(CFR).⁵ Cross-border trade in goods and services was significantly facilitated by membership in the EU Single Market.⁶ Barriers to entrepreneurial activity North and South were reduced by common provisions on state aid,⁷ competition⁸ and public procurement.⁹ Labour mobility was facilitated by EU free movement requirements. Cross-border employment was eased by a common set of labour regulations. Cross-border enforcement of commercial judgments was facilitated by shared rules of private international law.¹⁰ The EU also provided extensive funding of projects linked to the peace process and economic regeneration in deprived and border areas. The North–South bodies were able to organize co-operation across a range of areas of activity considerably more easily because these areas frequently depended on common membership of various EU bodies. Co-operation in anti-terrorism between the Police Service of Northern Ireland and An Garda Síochána was eased by common EU rules on data transfer. From the time when extradition between Dublin and Belfast was governed by EU rules, the previous long-running controversy over the extradition of terrorist suspects almost completely disappeared.¹¹ A cross-border public procurement market could emerge based on a common set of EU rules. And so on.

1.4 Options for the United Kingdom

What ‘Brexit’ involved was never clearly articulated prior to the Referendum, and it became apparent relatively quickly after the vote that there were several vitally important UK policy objectives in play, not all of which could be satisfied: to leave the EU, regain (as it was seen) its sovereignty and ‘take back control’ of its ‘borders, money and laws’;¹² to negotiate a range of free trade agreements with non-EU states to replace access to the EU market; to retain Northern Ireland in the UK, on equal terms with the other component parts, thus lessening the sense among unionists/loyalists that their British heritage might be compromised; and to preserve the close links between Northern Ireland and Ireland, ensuring that the removal of the underpinnings provided by

⁵ See [Chapter 13](#).

⁶ See [Chapter 21](#).

⁷ See [Chapter 19](#).

⁸ See [Chapter 18](#).

⁹ See [Chapter 22](#).

¹⁰ See [Chapter 24](#).

¹¹ See [Chapter 23](#).

¹² UK Government, EU Exit: Taking back control of our borders, money and laws while protecting our economy, security and Union, CM 9741, November 2018.

EU law and practice would not destabilize the 1998 Agreement, and with it the entire peace process. A central issue in this context, though by no means the only one, was the problem of how to deal with the fact that the border between Northern Ireland and Ireland would, after the UK's exit, become an international border between the EU (Ireland) and a non-EU state (the UK).

There were (roughly) three options that the UK had available to it: (i) the UK could continue to remain closely aligned to the EU, thus enabling it to continue its close relationships between East–West and North–South, but at the cost of not fully ‘taking back control’ and becoming a rule-taker; (ii) the UK could fully ‘take back control’, retaining an ability to distance itself from EU institutions and policy, while keeping Northern Ireland aligned with the UK, satisfying unionists, but at the cost of weakening the 1998 Agreement, antagonizing Irish opinion, requiring customs and regulatory checks and controls at the Ireland–Northern Ireland border (the infamous ‘hard’ border), and thereby risking the return to republican violence; or (iii) the UK could create a different and distinct relationship between Northern Ireland, on the one hand, and the rest of the UK (that is, Scotland, Wales and England, known as Great Britain), on the other, with Northern Ireland remaining closely aligned to the EU, preserving important elements of EU underpinnings to the 1998 Agreement, but with Great Britain alone ‘taking back control’ and retaining an ability to distance itself from the EU. The costs of the third option were clear: there would be a need for a customs and regulatory ‘border’ between Northern Ireland and Great Britain, with the consequent significant risk of antagonizing unionist/loyalist opinion.

We shall see that the EU initially proposed something like the third option, but this was rejected out of hand by then Prime Minister Theresa May, as entirely unacceptable – not an option that any British prime minister could contemplate. The EU and the UK then negotiated ‘the backstop’ – a combination of the first and third options, with the UK aligned with EU customs rules but Northern Ireland alone aligned in terms of regulatory requirements. This did not, however, secure UK parliamentary support. The UK attempted, unsuccessfully, to argue in favour of versions of the second option, suggesting mechanisms that would seek to avoid physical infrastructure at the Ireland–Northern Ireland border, but these were unacceptable to the EU. Finally, the EU proposed a variation of the third option, again, which was accepted by the new (current) Prime Minister Boris Johnson, who had replaced Theresa May. The current Protocol is essentially this third option and, in this

book, we are concerned with the details of how this option was elaborated and implemented.

1.5 Westminster's Changing Politics

To understand why the third option was ultimately accepted by the UK government, we need to retrace our steps to the period immediately following the Referendum vote. A Conservative government was in power in Westminster, with an absolute majority, and then Prime Minister David Cameron, who had called the Referendum, immediately resigned and triggered a contest for leadership of the Conservative Party. Theresa May won, and also became Prime Minister. May immediately accepted the referendum result and interpreted its implications as being at the more extreme end of the spectrum. For example, suggestions that the UK should join the European Economic Area (EEA) were quickly dismissed, and with it the close alignment with the EU that this membership would have brought. The Labour Party remained as divided over the exit from the EU as it was during the Referendum campaign, and provided no credible alternative set of policies as to how to handle the aftermath of the Referendum.

At this point, a critical question arose as to *how* the government was to proceed, meaning the method of doing so, and in particular how the UK was to indicate to the EU formally that it would be leaving the EU. The government claimed that it was able to act under executive powers, termed the Royal Prerogative, while others argued that the decision to leave and to authorize the triggering of the negotiations with the EU had to be taken by Parliament, rather than by the government alone. Campaigners challenged the use of the Royal Prerogative to do this and the UK Supreme Court ultimately accepted their argument.¹³ A decision of this importance, the Court held, had to be authorized by Parliament. This put Parliament in the ultimate driving seat, and so it remained for the next two years.

Partly because Prime Minister May wanted to shore up support for her government and her premiership (after all, she had become Prime Minister solely by virtue of being elected head of the Conservative Party), and partly in order to strengthen her hand in dealing with those in her own Party who

¹³ *R (on the application of Miller and another) v Secretary of State for Exiting the European Union; In the matter of an application by Agnew and others for Judicial Review; In the matter of an application by Raymond McCord for Judicial Review* [2017] UKSC 5.

supported an even harder Brexit than she was comfortable with, she called a General Election for June 2017. Disastrously for her, rather than increasing her majority in the House of Commons, she lost her absolute majority, leaving her even more exposed to pressure from hard-Brexit supporting Conservative MPs. After negotiations, she reached a 'confidence and supply' agreement with the Democratic Unionist Party of Northern Ireland (DUP), which meant that that party's MPs in Westminster would support the government on all major votes, including on the exit of the UK from the EU. This left May with a working majority in the House of Commons, but at the cost of being dependent on the only political party in Northern Ireland that supported a leave vote in the Referendum. All other Northern Ireland political parties had supported a remain vote, and this reflected the balance of public opinion in Northern Ireland, with 55.8 per cent voting to remain and 44.2 per cent voting to leave.

The May government staggered on for the next two years. However, her room for manoeuvre was significantly reduced, as was to become crystal clear when the leader of the DUP vetoed part of an agreement with the EU which May was about to sign off on. This led her to reject the initial compromise offered by the EU, as described earlier, and when she eventually agreed to the second compromise offered by the EU, she found herself with a depleted Cabinet (several of her ministers, including Boris Johnson, resigned because she accepted the EU's plan). Faced with a House of Commons in which it was impossible to garner enough votes to close on the deal, May was forced to resign in June 2019 – the second prime minister to leave 10 Downing Street over Brexit.

In July, she was replaced as leader of the Conservative Party (and Prime Minister) by Boris Johnson, who immediately restarted the stalled negotiations with the EU. Like May, Johnson faced a bitterly divided House of Commons which he tried to circumvent by persuading the Queen to prorogue (suspend) Parliament between 9 September and 14 October.¹⁴ This was challenged in the Supreme Court, which decided later that month that the prorogation had been unlawful. So, although he reached an agreement with the EU in October that amounted to the third option described earlier, there remained the problem of securing sufficient support in the House of Commons to enable the deal to be delivered, and he failed to do so. With the aim of increasing his support in the Commons and, as he described it, 'get[ting] Brexit done', he then

¹⁴ *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41.

called a General Election for December 2020. He succeeded in securing a large overall Conservative majority, enabling him to pass the necessary legislation to enable the UK to ratify the Withdrawal Agreement (WA), and leave the EU at the end of January 2020. Under the WA the UK essentially remained in the EU for all intents and purposes for the next year, during the so-called 'transition' or 'implementation' period.

Following the conclusion of the WA, the UK and the EU turned to the negotiation of an agreement on future relations: what became the Trade and Cooperation Agreement (TCA). Buoyed by its success in the General Election, and with a clear majority in Parliament, the UK government reconsidered its position. In particular, it needed to decide whether it wished the UK to remain closely aligned to the EU in the future or whether it wished to give itself the freedom to depart from the EU's Single Market policies. On the one hand, the closer the continuing alignment, the more that potential tensions arising from the regulatory and customs border between Northern Ireland and Great Britain could be reduced, and concerns among unionists/loyalists in Northern Ireland that they were being cut off from the rest of the UK could be alleviated. The more easily, too, would any remaining tensions on the island of Ireland, between North and South, be addressed. On the other hand, the more the UK adopted a policy of freedom to depart from EU rules, the more those who advocated a 'hard' Brexit would be satisfied, and the greater the freedom the UK would have in negotiating free trade agreements with other non-EU states, in particular the United States, which would be likely to negotiate robustly to ensure that the UK's markets would be open to products that would not conform to EU requirements. Put somewhat, but not overly, simplistically, the UK government broadly opted for the second approach, with the preservation of 'national sovereignty' high on the political agenda, but at the cost of putting additional pressure on what quickly became known as the 'border down the Irish Sea'.

1.6 Scope of Article 50 Negotiations

Understanding the British political scene during this period is critical to gaining an appreciation of what eventually emerged as the WA and the TCA, but it is only part of the story. The other important element was the EU itself. From the EU's point of view, the second option identified earlier quickly became unacceptable because it would have required a 'hard' border on the island of Ireland, and if the UK had pressed it rather than either of the other two, it is highly unlikely that there would

have been a successfully concluded WA. The first and the third options were identified by the EU as an acceptable basis for negotiation; they put in place provisions to protect the 1998 Agreement and reduced the need for a 'hard' border. The avoidance of a 'hard' border was critical, amounting at a minimum to a prohibition on any physical infrastructure, such as customs posts, at crossing points between Northern Ireland and Ireland. The first and the third options also satisfied the EU's other 'red lines': the absolute need to protect its Single Market; preserving the autonomy of the Court of Justice of the European Union (CJEU); preventing the UK from becoming a serious competitor to the EU as a whole while retaining access to EU markets; and heading off the likelihood that an easy Brexit could encourage other EU states with Eurosceptic citizens to consider leaving, thus destabilizing and disrupting the Union still further.

There was, however, another more legal dimension to the form and content of the WA. The negotiations that the UK triggered after the leave vote in the Referendum were conducted under Article 50 of the Treaty on European Union (TEU), which provided a (somewhat ambiguous) road-map for how a member state could lawfully leave the EU. Crucially, Article 50 distinguished between negotiating to leave the EU and negotiating a new future relationship after departure. As a result, it would have been contrary to Article 50 to confuse or blur the line between the two. This meant that negotiations between the EU and the UK over future relations (including on the important questions of trade relations) could not take place unless and until an agreement had been reached on withdrawal. The question remained, however, as to what exactly could or should be included within the scope of these withdrawal negotiations.

What became critically important in determining the content of the subsequent WA was an EU–UK political agreement, early in the summer of 2017, that the withdrawal negotiations would focus on four main issues only. One issue concerned the EU budget and the UK contribution to it. A second issue was the complex question of how EU states should treat UK citizens resident in the EU, and vice versa, after the UK had exited. The third concerned how best to sequence the UK's departure, and in particular the form of any transition period. The fourth issue identified was the one on which most time was spent, and became the make-or-break issue in the negotiations, namely, how to handle Northern Ireland.

In addressing each of these issues in the negotiations, the question of trust (or, rather, the lack of trust) was a recurring theme. There has been a growing appreciation in international relations scholarship, and latterly in international legal studies, of the important role that distrust plays in the

structuring of international agreements, and the content of the WA, and in particular the Protocol, bears this out. Many of the features of the Protocol indicate the lengths to which the EU side went in attempting to guard against backsliding by the UK government after any agreement was concluded, in particular the emphasis placed on the need for effective domestic enforcement mechanisms, and the role given to international governance arrangements, including a role for the CJEU, in resolving disputes, interpreting the agreement and imposing sanctions in the event of an unresolved breach.

1.7 Withdrawal Agreement in Outline

Although this book principally concerns the Protocol, it is set in the context of the WA as a whole, the aim of which is to ensure that the UK left the EU in an orderly manner. The Agreement attempts to bring legal certainty in areas where the UK's withdrawal created uncertainty. In different parts of the Agreement, it addresses citizens' rights¹⁵ and lays out the financial settlement, and it provided for a transition period up until the end of 2020. Elaborate governance arrangements are established, in particular a Joint Committee of representatives of the EU and the UK to consider outstanding issues and resolve disputes,¹⁶ and an international arbitration body whose role is to adjudicate on such disputes in the event that they cannot be resolved politically.¹⁷

A set of common provisions at the beginning of the WA provides for general principles regarding the proper understanding and operation of the Agreement as a whole, including the Protocol.¹⁸ In brief, the provisions of the Agreement must have the same legal effects in the UK as in the EU and its member states; the UK must engage with CJEU case law; UK judicial authorities must be empowered to disapply any inconsistent or incompatible national legislation; and the UK and the EU must ensure that the WA is capable of being invoked before national courts in the UK and the EU. In addition, there is an overall obligation on the UK and the EU to apply the provisions of the WA 'in good faith'.¹⁹

These provisions apply to Northern Ireland in the same way as to the rest of the UK. Special arrangements for Ireland–Northern Ireland, Gibraltar and Cyprus are to be found in a series of Protocols, attached

¹⁵ For the implications of these provisions for the island of Ireland, see [Chapter 16](#).

¹⁶ See [Chapter 4](#).

¹⁷ See [Chapter 5](#).

¹⁸ See [Chapters 3](#) and [6](#).

¹⁹ See [Chapter 8](#).

to the Agreement, which are stated explicitly to be integral parts of the Agreement and of equal status. Put briefly, the broad aims in negotiating the Ireland–Northern Ireland Protocol were to ensure (i) that there is no ‘hard’ border between Northern Ireland and Ireland, while at the same time ensuring that there are arrangements to preserve the integrity of the EU’s Single Market; and (ii) the protection of the 1998 Agreement ‘in all its dimensions’, including ‘no diminution of rights’ and maintaining ‘the necessary conditions for continued North–South cooperation’.²⁰

To accomplish the first, Northern Ireland remains aligned to a limited set of EU rules that the EU considers are indispensable for avoiding a ‘hard’ border, while protecting the Single Market.²¹ The Single Market measures identified are only a subset of the totality of such provisions applying to Member States: rules regarding value added tax (VAT) and excise of goods; legislation on product requirements; sanitary rules for veterinary controls (the so-called SPS rules); rules on agricultural production and marketing; and state aid rules. The Protocol thus falls far short of the close alignment with the EU that membership in the EEA brings in this respect. Northern Ireland also exited the EU Customs Union, but the EU’s Customs Code and other customs legislation apply to all goods entering Northern Ireland.²² Any amendment or replacement of these rules by the EU will apply to Northern Ireland, involving so-called dynamic alignment. The controversial nature of these provisions is recognized by subjecting these provisions (but only these provisions) to a ‘democratic consent’ mechanism, under which Northern Ireland politicians will be given the opportunity to vote on whether to continue with these arrangements, initially at the end of 2024, and periodically thereafter.²³

That comprises the bulk of the substantive provisions of the Protocol. The other aims are addressed more briefly. To accomplish the second set of aims, the UK commits itself to no diminution of rights, safeguards and equality of opportunity as set out in the 1998 Agreement,²⁴ but with significant uncertainty about the future role of the EU CFR.²⁵ The Common Travel Area (CTA) could continue to apply, in conformity with EU law,²⁶ with important implications for the role of EU, Irish and

²⁰ Protocol, Preamble and Article 1.

²¹ See [Chapter 6](#).

²² See [Chapter 17](#).

²³ See [Chapter 10](#).

²⁴ See [Chapter 12](#).

²⁵ See [Chapter 13](#).

²⁶ See [Chapter 14](#).

British citizenship,²⁷ and a provision that North–South co-operation could continue, including through the continued operation of the North–South Bodies, in the areas of environment, health, agriculture, transport, education and tourism, as well as in the areas of energy, telecommunications, broadcasting, inland fisheries, justice and security, higher education and sport. There is a specific provision preserving the Single Electricity Market on the island of Ireland.

The Protocol introduces several specific additions and modifications of the WA’s common provisions and governance arrangements, notably providing (i) that UK courts could – and, where the court is one of last resort, should – refer the interpretation of the Single Market and customs arrangements to the CJEU in the event of domestic litigation concerning their interpretation;²⁸ (ii) that a Specialised Committee and a Joint Consultative Working Group on the application of the Protocol should be established alongside the Joint Committee;²⁹ and (iii) that a ‘safeguards’ provision be put in place permitting the suspension of aspects of the Protocol, under tightly controlled conditions.³⁰

1.8 Trade and Cooperation Agreement

The WA and the Protocol are only part of the new architecture that governs EU–UK relations. Although the TCA does not replace or amend the Protocol, it may significantly affect how it will operate in practice. This is because the TCA does little to ‘soften’ the regulatory and customs border in the Irish Sea; it does little to align the rest of the UK to EU rules; and it significantly does not deal with a host of issues that were also left unaddressed in the WA and the Protocol, such as trade in services,³¹ competition,³² the regulation of financial markets,³³ private international law rules applying in the context of commercial disputes,³⁴ and mutual recognition of professional qualifications, among other issues that affect everyday activity in Northern Ireland as well as East–West and North–South issues.

²⁷ See Chapters 15 and 16.

²⁸ See Chapter 9.

²⁹ See Chapter 4.

³⁰ See Chapter 25.

³¹ See Chapter 21.

³² See Chapter 18.

³³ See Chapter 21.

³⁴ See Chapter 24.

The TCA is, primarily, a trade agreement of a rather rudimentary and limited kind, closer to the agreement between the EU and Canada than to that between the European Free Trade Association (EFTA) countries and the EU, for example. There are measures that go beyond trade, including important provisions on data transfers and extradition,³⁵ level-playing field issues (including on labour, social and environmental issues),³⁶ public procurement,³⁷ state aid,³⁸ and human rights including the role of the European Convention on Human Rights (ECHR),³⁹ but the overall result is one in which the UK exchanged access to EU markets for increased freedom to depart from EU rules in a host of areas.

The approach to interpretation of the two Agreements is illustrative of a widening gap between the WA and the TCA. Whereas the Protocol requires that ordinary rule of EU interpretation continue to apply, the TCA stipulates that international law methods of interpretation must govern.⁴⁰ Whereas the Protocol requires a continuing role for the CJEU, there is no role for that Court in the TCA. Whereas the provisions of the Protocol are substantially directly effective in domestic law, those of the TCA are explicitly not directly effective. Whereas the Protocol embraces dynamic alignment, the TCA rejects it. The full implications for Northern Ireland of the TCA are unclear, but they may be significant, given that Northern Ireland will effectively remain aligned with the EU under the WA, while the rest of the UK under the TCA may increasingly distance itself from EU rules and standards.

1.9 The UK and Ireland Implementing Legislation

We turn, finally, to the way in which the UK and Ireland sought to implement both the WA and the TCA in their respective domestic legal systems. The important point to bear in mind is that both Ireland's and the UK's general approach to international law is 'dualist', that is, domestic law will not enforce international treaties unless they have been incorporated into domestic law, usually by the Oireachtas or Parliament. So, for example, although the Agreement between the UK and Ireland concluded as part of the 1998 Agreement negotiations is binding in international law, it is not

³⁵ See [Chapter 23](#).

³⁶ See [Chapters 12](#) and [20](#).

³⁷ See [Chapter 22](#).

³⁸ See [Chapter 19](#).

³⁹ See [Chapter 12](#).

⁴⁰ See [Chapter 7](#).

enforceable directly in UK or Irish domestic law. In Northern Ireland, its domestic legal implementation is by way of the Northern Ireland Act 1998.⁴¹ So too with regard to the WA and the TCA. For domestic courts and lawyers, the measures in which the UK and Ireland incorporated the two Agreements are the source of domestic legal rights and obligations, not the Agreements themselves, and it is these measures that dominate legal debate, at least initially.

Ireland's approach to implementation of the WA is relatively straightforward.⁴² The UK's approach to implementation is by far the more complex of the two.⁴³ There are several Acts that accomplish incorporation, establishing the basic structure of implementation. The European Union (Withdrawal) Act 2018 (EUWA) provides for the implementation of the WA and the Protocol. Importantly, it also provides that the bulk of EU law applying to the UK prior to exit remains in effect after exit as 'retained EU law' but provides for extensive ministerial powers to repeal these provisions, at their discretion. The European Union (Withdrawal Agreement) Act 2020 (EUWAA) provides for the implementation of the TCA, but has also amended the 2018 legislation to address the version of the Protocol agreed to by Prime Minister Johnson in December 2020, including details of the 'democratic consent' mechanism.

These are the two principal pieces of primary legislation, but subsequent primary legislation supplements these in important respects, in particular the UK Internal Market Act 2020, and each piece of primary legislation is accompanied by a flurry of secondary legislation that provides the flesh on the bare bones of the primary legislation. From the perspective of the interpretation and application of the Protocol in domestic law, the most important single provision is section 7A of EUWA 2018 (as amended), which accords the Agreement and the Protocol essentially the same status in UK domestic law as that which section 2 of the European Communities Act 1972 accorded the EU Treaties, including according it supremacy over all other UK legislation, subject to the ability of Parliament to expressly repeal it.⁴⁴

1.10 Initial Disputes Concerning the Protocol

The overall construction as well as the practical implications of the Protocol are complicated, in part because constructing and understanding

⁴¹ See [Chapter 10](#).

⁴² See [Chapter 11](#).

⁴³ See [Chapters 9 and 10](#).

⁴⁴ See [Chapter 10](#).

the Protocol involves juxtaposing the 1998 Agreement, Brexit, devolution, the WA and the TCA, leaving aside the unprecedented idea of a region being, in effect, in two single markets and customs unions simultaneously. When this complexity is combined with a significant element of political toxicity because of the choices made by the political actors, disputes could be predicted with some confidence.

At the time of writing, four disputes illustrate the contentiousness of the Protocol, and perhaps indicate the shape of things to come. First, a wide-ranging challenge to the Protocol was launched by several unionist politicians in the Northern Ireland courts in early 2021.⁴⁵ In essence, this challenge sought to convince the High Court that the Protocol was contrary to UK constitutional law and EU law. In brief, the Protocol was alleged to breach the 1800 Acts of Union between Ireland and the UK, the Northern Ireland Act 1998 and obligations under EU law requiring democratic participation in lawmaking. At first instance, in the Northern Ireland High Court, Coulton J comprehensively rejected all the grounds of challenge.⁴⁶ This is discussed in more detail in ‘Update on Developments from June to September 2021’ at the front of this book, as is any appeal from this decision.

Second, during the negotiations on what became the TCA, the UK government proposed a UK Internal Market Bill, which included provisions that would have permitted the UK government to breach any international agreement that it regarded as contrary to the aims of the Bill.⁴⁷ This led to a flurry of protests, including by the European Commission, which announced that it regarded the proposed legislation as a direct breach of the WA, including the UK’s obligation that it would implement the Agreement in ‘good faith’, and took the first steps in legal proceedings against the UK. During the course of the parliamentary debates on the Bill, these contentious provisions were removed.

Third, both the European Commission and the UK have invoked the ‘safeguards’ provision of the Protocol, Article 16, leading to disputes.⁴⁸ The European Commission, briefly, invoked Article 16 to justify a proposal that would have restricted the transport of vaccines to the UK (including Northern Ireland) from EU member states (including Ireland), leading to allegations that the EU was threatening to establish a ‘hard’ border for vaccines on the island of Ireland, despite all its

⁴⁵ *Ibid.*

⁴⁶ *In the matter of an Application by Allister, et al* [2021] NIQB 64.

⁴⁷ See [Chapter 10](#).

⁴⁸ See [Chapter 15](#).

previous efforts in trying to prevent just such a border. Within hours, the EU, highly embarrassed, withdrew its proposals, but not before substantial damage had been done to the Commission's reputation for competence and sensitivity to Northern Ireland issues.

Fourth, amid continuing anger over the implementation of the Protocol in Northern Ireland by unionist politicians and loyalist street protesters, because of the symbolic and practical effect of the regulatory and customs border in the Irish Sea, the UK government unilaterally extended several measures delaying the full implementation of a few of the customs regulations that the Protocol provides for, and that had been earlier agreed by the UK and the EU in the Joint Committee. Despite protests by the European Commission and the Irish government, the UK did not revoke the measures. The European Commission responded by initiating the dispute settlement procedures of the Protocol. The Commission argued that the UK was in breach of the relevant substantive provisions of the Protocol and, separately, was in violation of the duty of 'good faith' set out in Article 5 WA.⁴⁹

1.11 The Future of the Protocol

Given the complexity of the architecture, the economic importance of the issues covered, and the political controversy that has accompanied each step in the Brexit process, it would be unsurprising if these disputes are merely the tip of the iceberg, providing the domestic courts and the dispute settlement procedures with work over the coming years. Part of the problem lies in the structural complexity and the Protocol's ambitions. For example, the difficulty, or, perhaps, impossibility, of being in two customs unions at once is yet to be resolved, and negotiations on what to do were continuing up to the time of writing. The UK government produced an ambitious set of proposals for renegotiation of the Protocol in July 2021.⁵⁰ These proposals are discussed in more detail in 'Update on Developments from June to September 2021' at the front of this book.

From the EU's perspective, a significant uncertainty is whether the UK intends to obey international law in the shape of the Protocol, or whether the Protocol was only ever a temporary political expedient. The as yet unresolved debate in the UK is whether to embrace a 'realist' understanding of international law, one where whether to comply is

⁴⁹ See [Chapter 8](#).

⁵⁰ HM Government, *Northern Ireland Protocol: The Way Forward* (CP 502, July 2021).

based solely on immediate self-interest and where compliance, even when accepted, is based on the narrowest interpretation possible; or, alternatively, whether to follow a more liberal-institutionalist understanding of international agreements, in which compliance takes place irrespective of perceived immediate self-interest, and the aim is to make the system as a whole effective, not least because of the need to support a rule-based international order. Put more theoretically, there is a conflict between diachronic consistency (*pacta sunt servanda*), which provides external reassurance to the other party that their expectations will continue to be fulfilled, and the objectives of the agreement furthered in a spirit of co-operation, versus continuing popular responsiveness, providing internal reassurance to the state's political representatives and citizens that the popular will continues to be protected, so that democratic politics can take place, but at the cost of weakening the Rule of (International) Law.⁵¹ At the time of writing, the outcome of this debate is by no means certain.

1.12 Note on Terminology

As anyone familiar with the politics of Northern Ireland knows, avoiding controversy in the use of language is next to impossible. Even this first sentence is controversial because it uses the term 'Northern Ireland' rather than 'the north of Ireland'. Where possible, we seek to employ neutral language in this book. The 1998 agreement that frequently forms the starting point for our discussion of the Ireland–Northern Ireland Protocol (and formally termed the 'Agreement reached in the multi-party negotiations') is a good example of the controversy over terminology since it is variously known as the Belfast Agreement, the Good Friday Agreement, or, more cumbrously, the Belfast-Good Friday Agreement. In this book we will describe it as the '1998 Agreement', which we will generally take as encompassing the adjustments to the Agreement made in subsequent years. On other issues of terminological controversy, we take the text of the 1998 Agreement as our guide. Thus, we refer to the six counties of the island of Ireland currently in the United Kingdom as 'Northern Ireland', reflecting the accepted legal status quo. We refer to the remaining twenty-six counties as 'Ireland'. Where clarity is needed that we are referring to the whole of the island of Ireland, we use this phrase.

⁵¹ Sean Fleming, 'A Political Theory of Treaty Repudiation' (2020) 28(1) *Journal of Political Philosophy* 3.

There is another critical element in our choice of terminology and our frequent use of abbreviations which is much more pragmatic: to reduce the number of words in the text as well as needless repetition of the same explanations. For this reason, we have erred on the side of extensive use of abbreviations, and our explanations for these here must suffice for all of the chapters that follow. A complete set of these abbreviations is to be found earlier in the book, but some are so frequent and important that we draw special attention to them here. We apologize in advance for the alphabet soup that sometimes results.

We refer to the United Kingdom as the 'UK'; to the part of the UK that does not include Northern Ireland as 'Great Britain' or 'GB'; to the UK–Ireland Common Travel Area as the 'CTA'. As regards institutions and bodies in Europe, we refer to the European Union as the 'EU'; to the European Economic Area as the 'EEA'; to the European Free Trade Association as 'EFTA'; and to the European Convention on Human Rights as the 'ECHR'. As regards how we refer to the institutions and treaties of the EU, we follow conventional usage. We refer to the Treaty on the Functioning of the European Union as 'TFEU'; to the Court of Justice of the European Union as 'CJEU'; and to the Commission of the European Union as 'the Commission'. Cases of the CJEU are cited using the ECLI (European Case-Law Identifier) citation, where it is available for a particular case.

As regards the various EU–UK Agreements that go to form the main international legal basis for Brexit, we refer to the EU–UK Withdrawal Agreement as the 'WA'; to the Ireland–Northern Ireland Protocol as 'the Protocol'; and to the EU–UK Trade and Cooperation Agreement as the 'TCA'. The main bodies that the WA establishes to oversee the operation of the WA/Protocol are the Joint Committee (sometimes referred to as the 'JC'); the Specialised Committee on the Implementation of the Protocol on Ireland and Northern Ireland ('INISC'), which is established to facilitate and administer the Protocol; and a Joint Consultative Working Group ('JCWG'). The three principal UK statutes to which most frequent mention is made are the European Union (Withdrawal) Act 2018 (referred to as 'EUWA'); the European Union (Withdrawal Agreement) Act 2020 (referred to as 'EUWAA'); and the European Union (Future Relationship) Act 2020 (referred to as 'EUFRA').

PART I

Context

The 1998 Agreement

Context and Status

COLIN HARVEY

2.1 Introduction

Northern Ireland remains a special arrangement, with distinctive legal, political and constitutional features. Its particular circumstances were reflected and confirmed in the 1998 Agreement and what has happened since it was agreed and endorsed in concurrent referendums on the island of Ireland. One of the intriguing aspects of the Brexit debate is the role that the 1998 Agreement continues to play in the discussions. The status it is accorded in practical terms, and in the political rhetoric of the negotiations, defies easy classification, and legal analysis risks underplaying the scale of its real-world impact. It is lauded around the world, most notably in the United States, and the defence of the 1998 Agreement, and the associated peace process, became a priority for the EU throughout the Brexit process. But the text is often deployed by opposing actors in the public sphere for diverging reasons, which can make the reconciliation of competing claims based on the 1998 Agreement difficult, especially where domestic legal implementation is absent.

The conflict in, and about, Northern Ireland has been absorbed into the interpretative struggles over the meaning of a text that contains significant ambiguity. Little about this is news for lawyers and would be familiar to literary critics and theologians. But it has a sharpened edge in the contested constitutional politics of a post-conflict society where precision and clarity matter in distinctive ways. Law has its own internalized ideas about what counts as a 'good legal argument' or even a 'good lawyer', and these can develop and be influenced by the community of interpreters. The aim of this chapter is to reflect on the context and legal status of the 1998 Agreement, with a view to framing its place as

a foundational document when considering the Protocol. Although written with a legal audience in mind, there is no suggestion that this is either the only or even the most helpful lens through which to understand it.

2.2 Context and Content

The Agreement is the result of a peace process and a political process spanning decades and is a sophisticated attempt to accommodate competing ethno-national objectives in a credible and sustainable way. Many of its core concepts were prefigured in earlier texts; it did not simply emerge in 1998. It is a peace and political agreement that leads multiple lives. Viewed narrowly within the political and constitutional dynamics of the UK, it can be construed as part of a story of decentralization, modernization and reform. Standard accounts of UK constitutional law risk perpetuating that limited view. The Agreement is better understood, however, as a foundational constitutional document that reflects the complex political reality of a deeply divided transitional society, with solutions offered that acknowledge the origins of conflict in the fraught relationships across 'these islands'. Such an understanding was, however, always likely to create friction with an exclusively internal UK legal narrative.

The 1998 Agreement is a multi-party agreement, signed on 10 April 1998 and approved in referendums on the island of Ireland on 22 May 1998. It contains commitments by the British and Irish governments around its implementation in domestic law and a British–Irish Agreement (a bilateral treaty) that entered into force more than a year after the document was signed.¹ While the overall principled framework has remained securely in place, alterations to the application of the arrangements have been made, indicating that pragmatic evolution is possible. The Agreement has been supplemented by other agreements since 1998, notably the St Andrews Agreement 2006.² There have been significant changes including, for example, to the operation of the Northern Ireland Executive, the appointment of the First Minister and the deputy First Minister,³ the number of

¹ Agreement between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland, *Irish Treaty Series* No 18 of 2000, entry into force 2 December 1999.

² The St Andrews Agreement, October 2006, www.gov.uk/government/publications/the-st-andrews-agreement-october-2006.

³ Northern Ireland (St Andrews Agreement) Act 2006, s 8.

Members of the Northern Ireland Assembly (MLAs)⁴ and some as a result of Brexit.⁵

The 1998 Agreement is structured around a three-stranded approach, locating the Northern Ireland conflict in the context of the need to establish stable political institutions within Northern Ireland (Strand One), the relationship between Northern Ireland and Ireland (Strand Two, the North–South dimension) and the relationship between Ireland and Britain (Strand Three, the East–West dimension). Commitments are framed by a ‘declaration of support’ and a section on ‘constitutional issues’. The Agreement also addresses matters such as ‘rights, safeguards and equality of opportunity’, ‘decommissioning’, ‘security’, ‘policing and justice’, ‘prisoners’ and ‘validation, implementation and review’. It contains annexes dealing with draft legislation to be taken forward by both governments as well as a British–Irish Agreement that provides an international legal grounding.⁶

The design of the 1998 Agreement is itself of considerable interest, as is its structure. For example, where legal precision is demanded on constitutional guarantees, it is provided in the text. Its legitimacy and strength reside not merely in the fact that it was agreed by most of the political parties in Northern Ireland⁷ but also in its being anchored in an all-island exercise in popular sovereignty connected to the achievement of sustainable peace. That popular basis of support on the island of Ireland lends a formidable weight in the arena of political constitutionalism, and politics in general.⁸

For the purpose of understanding its relationship with the Protocol, several elements of the Agreement are worth highlighting. First, the participants in the negotiations, in recommending the Agreement for endorsement, committed to a range of overarching principles. These include ‘partnership, equality and mutual respect’, ‘reconciliation, tolerance, and mutual trust, and . . . the protection and vindication of the human rights of all’, the use of ‘exclusively democratic and peaceful means’ including ‘opposition to any use or threat of force by others for any political purpose’ and

⁴ The Agreement notes 108, but this has been reduced to 90, Assembly Members (Reduction of Numbers) Act (Northern Ireland) 2016.

⁵ For example, EUWA Act 2018, ss 10–12 and sch 2; EUWAA 2020, ss 21–24 and sch 3.

⁶ The preamble to the British–Irish Agreement provides: ‘Wishing to develop still further the unique relationship between their peoples and the close co-operation between their countries as friendly neighbours and as partners in the European Union . . .’ above n 1.

⁷ The Democratic Unionist Party (DUP) did not participate in the negotiations.

⁸ The ‘yes’ vote was 71.1 per cent in the North and 94.4 per cent in the South, www.ark.ac.uk/elections/fref98.htm.

recognition of 'equally legitimate ... political aspirations'. There is no suggestion that these values necessarily cohere into a singular narrative, but they still regularly enter public debate, not least over the acceptability of the Protocol, with different participants selecting the principles that suit their own political or policy agenda at the time.

Second, the constitutional core of the Agreement contains a formula for dealing with the right of self-determination and the principle of consent. Respecting the Agreement requires that the only way that a change will take place in the constitutional status of Northern Ireland, as a constituent part of the UK, is by way of a process that involves an exercise in concurrent consent by voters North and South, with the outcome to be determined on a simple majority vote in each jurisdiction. If people vote for change, then there is a 'binding obligation' on both governments 'to introduce and support in their respective Parliaments legislation to give effect to that wish'. The Protocol is explicit that it is 'without prejudice' to these provisions of the Agreement, and that it 'respects the territorial integrity' of the UK.⁹

Third, as we have seen, this is not only an internal Northern Ireland arrangement; it is a deliberately three-stranded approach. The obvious implication of this approach is that it highlights just how distinctive the governance of Northern Ireland already was before Brexit. It underlines the centrality of power-sharing between 'nationalists' and 'unionists', the close relationality among the different parts of 'these islands', and the connection to the EU that was clearly contemplated in the Agreement.

Strand One deals with 'democratic institutions in Northern Ireland' (the Northern Ireland Assembly and Executive), including their nature, safeguards, operation, as well as their relationship to other institutions. The Assembly is elected on the basis of proportional representation (STV) and there are power-sharing mechanisms in place to ensure cross-community participation. For example, MLAs must register a designation ('nationalist', 'unionist' or 'other'), which is then used to assist the functioning of the power-sharing arrangements. Strand Two agrees the establishment of a North–South Ministerial Council as a vehicle for 'consultation, cooperation and action within the island of Ireland' between the Northern Ireland Executive and the Irish government. Notably, the Council has a role in considering 'institutional or cross-sectoral matters' and that includes those 'in relation to the EU' and 'the implementation of EU policies and programmes and proposals under consideration in the EU framework'. The

⁹ Article 1(1) and (2).

Agreement is clear on the need to ‘ensure that the views of the Council are taken into account and represented appropriately at relevant EU meetings’. Six North–South Implementation Bodies have been established, including the Special European Union Programmes Body, and there are six areas of agreed co-operation (agriculture, education, environment, health, tourism and transport). Strand Three covers the institutional expression of ‘East–West’ relationships through the British–Irish Council (including representatives of the governments of the UK and Ireland, the devolved administrations (Scotland, Wales and Northern Ireland) and the Isle of Man and the Channel Islands) and the British–Irish Intergovernmental Conference.

Fourth, the Agreement contains a dedicated section with commitments on human rights and equality.¹⁰ The Agreement led to significant changes in the UK and Ireland in this regard, including the establishment of the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland, an express agreement to incorporate the European Convention on Human Rights (ECHR), as well as an agreement on the creation of a new public sector statutory equality duty. It also provided the basis for a Northern Ireland Bill of Rights process to build on the ECHR. The Joint Committee of the Human Rights Commissions on the island of Ireland was envisaged as providing a useful ‘forum for consideration of human rights issues in the island of Ireland’. We shall see that these issues featured in discussions around the impact of Brexit and led to an important provision in the Protocol.

Consideration of the Protocol has to include, then, how in particular it interacts with the power-sharing, relational, and rights and equality dimensions of what was agreed and endorsed in 1998. Although there is much value in internal UK comparisons, it is more often unhelpful to view Northern Ireland solely through a devolutionary lens. Northern Ireland is not just like Scotland and Wales and its distinctive role within an asymmetrical and pluralist ‘Union state’, and on the island of Ireland, must be appreciated.

2.3 Legal Status

2.3.1 *International Law*

The 1998 Agreement contains a British–Irish Agreement that replaces the Anglo–Irish Agreement 1985.¹¹ The British–Irish Agreement has four

¹⁰ British–Irish Agreement above n 1.

¹¹ British–Irish Agreement above n 1, Article 3.

articles and two annexes (annex 1 is the 'Agreement Reached in the Multi-Party Talks' and annex 2 is a declaration on citizenship).¹² The political agreement between the political parties and the governments is therefore an intrinsic part of a bilateral and binding international legal agreement entered into by both governments. The British–Irish Agreement replicates the 'constitutional issues' section of the Agreement;¹³ the governments 'affirm their solemn commitment to support, and where appropriate implement, the provisions of the Multi-Party Agreement';¹⁴ and several conditions must be met before it could enter into force.¹⁵ The British–Irish Agreement provides no mechanism for enforcement or oversight other than through the operation of bilateral engagement, in particular through the British–Irish Intergovernmental Conference.¹⁶

The UK and Ireland are both state parties to the Vienna Convention on the Law of Treaties 1969.¹⁷ Various obligations arise from this, in particular the obligation of 'good faith' performance.¹⁸ Domestic law is not a valid reason for failure in this regard.¹⁹ The British–Irish Agreement 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.²⁰ Subsequent agreements regarding application or interpretation may be taken into account²¹ as can practice 'which establishes the agreement of the parties regarding its interpretation'.²²

The question of whether the British–Irish Agreement has been implemented in good faith still arises, occasionally resulting in rival claims about what this requires. This is not solely a debate about whether a political agreement is being honoured. It is a discussion about the rule of international law in the bilateral relations between states: both the UK and Ireland are bound as a matter of international law by the

¹² British–Irish Agreement above n 1.

¹³ Article 1.

¹⁴ Article 2.

¹⁵ Article 4.

¹⁶ The Agreement contains a section on 'Validation, Implementation and Review'. Ireland does not accept the jurisdiction of the International Court of Justice in any legal dispute with the UK in regard to Northern Ireland.

¹⁷ 1155 UNTS 331, entry into force 27 January 1980.

¹⁸ Article 26.

¹⁹ Article 27.

²⁰ Article 31(1).

²¹ Article 31(3)(a).

²² Article 31(3)(b).

commitments undertaken. As we shall see, this becomes significant in the light of the application of the Protocol.

Although the international legal underpinning matters, in practical terms, it is the reception of these obligations in domestic law that tends to matter most, and to which the attention now turns. Unsurprisingly given the present constitutional status of Northern Ireland, much of the focus is on the UK, but the Irish government is a co-guarantor and also agreed to make significant changes, with ongoing implications for discussions of Brexit and the Protocol. The Agreement has not been incorporated in its entirety into the domestic law of either Ireland or the UK.

2.3.2 *United Kingdom*

The Northern Ireland Act 1998 (NI Act 1998) is the legislative vehicle for the domestic incorporation of aspects of the Agreement. The Agreement itself does not have the direct ‘force of law’ in the UK.²³ The starting point therefore, from the perspective of domestic law in the UK, is the NI Act 1998 and the way it gives effect to the Agreement.²⁴ The constitutional significance of the NI Act 1998 for Northern Ireland has been recognized. In *Robinson v Secretary of State for Northern Ireland and Others* Lord Hoffmann stated:²⁵

In choosing between these two approaches to construction, it is necessary to have regard to the background to the 1998 Act. It was passed to give effect to the Belfast Agreement concluded on Good Friday 1998. This agreement was the product of multi-party negotiations to devise constitutional arrangements for a fresh start in Northern Ireland. . . . The 1998 Act is a constitution for Northern Ireland, framed to create a continuing form of government against the background of the history of the territory and the principles agreed in Belfast.

For Lord Bingham it was also clear: ‘The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution.’²⁶ The recognition of the particular constitutional circumstances of Northern Ireland in *Robinson* retains its significance, and

²³ For example, see Stephens LJ in *In re McCord* [2020] NICA 23, [45], regarding the provisions of the 1998 Agreement which refer to a border poll as not themselves having the force of law.

²⁴ Note, however, that the Agreement is also referenced in EUWA 2018 s 10(2)(a) where there is an attempt to protect North–South co-operation on the island of Ireland.

²⁵ [2002] UKHL 32, [25]. A point underlined even further at [33].

²⁶ *Ibid* [11].

concepts developed in the case have proven influential.²⁷ Although there is, understandably, a tendency to view this from the perspective of other devolution arrangements,²⁸ this has only limited applicability to the special constitutional status that is in place for Northern Ireland. This constitutional framing matters because otherwise there may be a tendency in discussions of the Protocol to neglect or underplay the particularity of Northern Ireland's special status.

The legislation is intended to implement the Agreement, but it does not give effect to all its parts.²⁹ The obligation in the 1998 Agreement of 'rigorous impartiality' is not, for example, included in domestic law.³⁰ The British–Irish Agreement and the 1998 Agreement as a whole are regarded as aids to the interpretation of the NI Act 1998, as an international treaty and as a political agreement.³¹ Debate continues on whether the Agreement has been faithfully implemented in domestic law in the UK, and the absence from the Act of some key concepts is often noted. The fact that the Protocol consistently refers to the 1998 Agreement, rather than the NI Act 1998 is, therefore, significant.

2.3.3 Ireland

Both states are dualist in their approach to international law, but Ireland has distinctive constitutional arrangements.³² Ireland has a codified constitution (*Bunreacht na hÉireann*³³) that is open to amendment through an established referendum process.³⁴ As with the UK, although the Agreement was not incorporated directly into domestic law, specific

²⁷ See, for example, *In re McCord* above n 23 and *JR80's Application* [2019] NICA 58.

²⁸ The approach adopted in *Robinson* contrasts with the cursory treatment of the 1998 Agreement in *R (Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [128], where a majority in the Supreme Court appears to miss significant dimensions of the Agreement.

²⁹ The Act refers to the 'Belfast Agreement' by which it 'means the agreement reached at multi-party talks on Northern Ireland set out in Command Paper 3883', Northern Ireland Act 1998 s 98 (1).

³⁰ British–Irish Agreement above n 1 Article 1(v). But note the role this concept played in *In re McCord* above n 23.

³¹ *In re McCord* above n 23 [47]. See also *In re Allister and others v Secretary of State for Northern Ireland* [2021] NIQB 64.

³² See, for example, Article 29(6): 'No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.'

³³ The Irish language is the 'national language' and thus constitutionally recognized as the first official language, Article 8(1).

³⁴ Article 47.

changes were made to reflect the obligations undertaken and the commitments made.³⁵

The Irish government agreed in the negotiations leading to the 1998 Agreement to propose changes to the Irish Constitution to be put to a referendum.³⁶ This constitutional change was achieved through an amendment to Article 29, which allowed the state to consent to be bound by the British–Irish Agreement and provided for the eventual replacement of Articles 2 and 3.³⁷ Article 2 now contains a commitment to those born on the island of Ireland to be ‘part of the Irish Nation’, an entitlement also applicable to ‘all persons otherwise qualified in accordance with law to be citizens of Ireland’. The scope of this birthright obligation was subsequently narrowed following a referendum in 2004.³⁸ The new version of Article 3 is intended to soothe anxieties about any territorial claim to Northern Ireland.³⁹ It reflects an imperative to ‘unite all the people who share the territory of the island of Ireland’ with the recognition ‘that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island’.⁴⁰ The changes also made clear the ability of Agreement institutions to exercise powers and functions across the island.⁴¹

The Irish government agreed to ‘take steps to further strengthen the protection of human rights in its jurisdiction’ and this led to the establishment of the Irish Human Rights Commission (now the Irish Human Rights and Equality Commission), the domestic incorporation of the ECHR (at the sub-constitutional level),⁴² the ratification of the Framework Convention on National Minorities, as well as advances on equality and non-discrimination. The 1998 Agreement contains the

³⁵ For example, the British–Irish Agreement Act 1999, dealing with the North–South Ministerial Council, the British–Irish Council and the North–South Implementation Bodies. There are Amendment Acts to reflect subsequent agreements.

³⁶ To confirm that the British–Irish Agreement had entered into force. See the Agreement ‘Constitutional Issues’ Annex B and British–Irish Agreement Article 4.

³⁷ See Nineteenth Amendment of the Constitution Act 1998. A challenge to the proposals was rejected by the Irish Supreme Court in *Riordan v An Taoiseach* [1999] IESC 1.

³⁸ See Article 9(2) and the Twenty-Seventh Amendment of the Constitution Act 2004.

³⁹ The previous version referred to the ‘re-integration of the national territory’. Its replacement is notable, and the ‘shared island’ language adopted has informed developments since, including the establishment of a Shared Island Unit within the Department of the Taoiseach. For further information: www.gov.ie/en/publication/de9fc-shared-island/.

⁴⁰ Article 3(1).

⁴¹ Articles 29(7)(2) and 3(2).

⁴² European Convention on Human Rights Act 2003.

notion of 'equivalence', the idea being that the steps taken by the Irish government would 'ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland'. While the concept is used in the Agreement to refer to what is required from the Irish government, there is merit in a generous and purposive interpretation that acknowledges the underlying rationale: that all those on the island of Ireland should enjoy an equivalent range of guarantees, and that current or future constitutional status should not have detrimental rights-based consequences. Brexit gives 'equivalence' additional relevance, with the well-founded concern that the two jurisdictions on the island may begin to diverge even more significantly.

2.4 Conclusion

The aim of this chapter is to provide an overview of the 1998 Agreement and address questions around its legal status. Its international and domestic reception is not easily explained in terms of simple legal categorization as it has taken on a foundational constitutional quality as a peace, as well as a political, agreement. For domestic legal purposes in the UK and Ireland, it is primarily a political agreement and a bilateral treaty that has resulted in major constitutional and legislative reform. Subsequent agreements have brought changes, and the NI Act 1998, for example, has been heavily amended. But the Agreement retains its iconic standing. The fact that the EU was willing to place its protection at the heart of its negotiating strategy signals a widespread determination not to permit Brexit to destabilize a successful peace project. And the tendency of those who remain sceptical about its existence to wield it when required suggests that it has durability. Although almost everyone now anchors their argumentative strategy around its defence, there is disagreement about what it means, so the contestations ahead, and the varied arenas within which they take place, will be required to consider and to settle on the most plausible legal interpretations.

PART II

EU Governance of the Protocol

Legal Structure, Rights and Enforceability

PAUL CRAIG

3.1 Introduction

Brexit was a complex political process and this was no less so legally. It entailed five principal legal instruments. There were two treaties: the Withdrawal Agreement (WA), which settled the terms on which the UK left the EU;¹ and the Trade and Cooperation Agreement (TCA), which contained the detailed provisions as to the relationship between the UK and the EU on trade and other issues.² The three principal UK statutes are the European Union (Withdrawal) Act 2018 (EUWA 2018), which dealt with the *acquis* of EU law within the UK post-withdrawal; the European Union (Withdrawal Agreement) Act 2020 (EUWAA 2020), which gave legal force in UK law to the WA, in part by amending EUWA 2018; and the European Union (Future Relationship) Act 2020 (EUFRA), which incorporated the TCA into UK law. The focus of this chapter is on private rights that flow from the preceding instruments. This is a complex topic, not all dimensions of which can be addressed within the available space. The discussion will therefore concentrate on four such issues, which are central to the post-Brexit schema and to the situation in Northern Ireland.

3.2 The TCA, EUFRA and Rights

The TCA contains a plethora of enforcement provisions.³ The present focus is as to whether it has direct effect, or anything analogous thereto.

¹ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ 2019 No. C384 I/01.

² The Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part, OJ 2021 No. L149/10.

³ P Craig, 'Brexit, a Drama, the Endgame – Part II: Trade, Sovereignty and Control' (2021) 46 *European Law Review* 129.

The answer would appear to be negative, given the wording of Article 5, which provides:

Without prejudice to Article SSC.67 of the Protocol on Social Security Coordination and with the exception, with regard to the Union, of Part Three of this Agreement, nothing in this Agreement or any supplementing agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement or any supplementing agreement to be directly invoked in the domestic legal systems of the Parties.

The TCA would seem therefore to be unequivocally clear: it does not create direct effect and it takes effect solely as an international law obligation between the contracting parties. This *prima facie* conclusion must, however, be seen in the light of section 29 EUFRA, which states:

Existing domestic law has effect on and after the relevant day with such modifications as are required for the purposes of implementing in that law the Trade and Cooperation Agreement or the Security of Classified Information Agreement so far as the agreement concerned is not otherwise so implemented and so far as such implementation is necessary for the purposes of complying with the international obligations of the United Kingdom under the agreement.

The rationale for section 29 is temporal exigency. The normal procedure for addressing inconsistencies between a treaty and existing UK law is through statutory instruments, facilitated by so-called Henry VIII clauses.⁴ Section 31 EUFRA contains the now routine Henry VIII clause. However, the TCA was agreed at the eleventh hour, and there was therefore no time to make the requisite statutory instruments. Section 29 was the legislative response to this problem.

It is important to note that it is not merely an interpretive obligation. It is expressive of substantive change: existing law 'has effect' on and after exit day with such 'modifications' as necessary to implement the TCA, assuming that the inconsistency has not otherwise been addressed. The phrase 'existing law' can clearly cover the common law as well as statute. Common law provisions that are inconsistent with the TCA will, therefore, fall within section 29.

The salient issue for present purposes is whether section 29 EUFRA renders the TCA directly effective in national courts, notwithstanding

⁴ Such clauses enable primary legislation to be amended or repealed through statutory instruments.

Article 5 TCA. There are two conceptual issues to be borne in mind in this respect.

The first is the duality of meaning as to direct effect. It is sometimes used to connote individual rights, also known as subjective direct effect, in the sense of subjective rights, as that phrase would be understood in civil law systems. It is also used in a looser sense, sometimes known as objective direct effect, connoting the idea that a provision of EU law that is sufficiently certain and precise can be legally invoked by an individual.⁵ The second is the duality attendant on statutes and rights as a matter of UK domestic law. A statute may create enforceable rights for individuals, but it will not always do so. It may grant powers or impose duties on a public body or private party, which may not be enforceable by an individual. This is attested to by, for example, the law relating to standing⁶ and breach of statutory duty.⁷ It might therefore be argued that section 29 would not in all instances necessarily generate actionable rights that flow from the TCA. This may be so, but it is nonetheless difficult to deny that it could do so. The salient issue is whether the particular pre-existing statute is amenable to enforcement, or reliance on, by a private party. Consider the following examples.

Scenario 1 is an instance of collateral attack. A customs authority sues a trader for non-compliance with existing UK customs law. The trader responds by claiming rightly that the customs law is inconsistent with TCA provisions, and that therefore the national law must now, in the light of section 29, bear a meaning that is consistent with the TCA. If the trader can successfully make this argument, then it is able to rely on TCA provisions in national law. The conceptual foundation for this is UK law, in the form of section 29, which carries the force of parliamentary sovereignty. However, the consequence is that TCA provisions thereby become enforceable in national courts.

Scenario 2 takes the form of direct attack. A trader instigates an action concerning public procurement. It argues that existing UK law embodies procedures that are inconsistent with the TCA provisions on procurement, and that therefore, in accord with section 29, the existing law must have effect with the requisite modifications. It can be assumed for the sake of

⁵ P Craig and G de de Búrca, *EU Law, Text, Cases and Materials* (Oxford University Press 2020) ch 8.

⁶ P Craig, *Administrative Law* (9th edn, Sweet & Maxwell 2021) ch 25.

⁷ *Marksenis and Deakin's Tort Law* (Simon Deakin and Zoe Adams eds, 8th edn, Oxford University Press 2019) ch 7.

argument that procedures such as those in the TCA would be regarded as giving rise to individual rights if they were embodied in a UK statute. If the trader can do this, then it is able to rely on TCA provisions in national law.

We will have to await the view of the Supreme Court on the preceding issues. The following considerations are relevant in this regard. It might appear counter-intuitive for the TCA to be legally enforceable in UK courts, given the wording of Article 5. However, it would be highly problematic for the defendant/claimant in the previous scenarios not to be able to rely on the TCA provision. There would, for example, be profound legal problems with enabling a customs authority to sue a trader on the basis of a law that no longer contains the legal provisions that constitute the offence, since they have been 'modified' and 'have effect' subject to the TCA through section 29 EUFRA.

It should also be borne in mind that Article 5 TCA is not denuded of all effect, even if some form of direct effect operates through section 29 EUFRA. This is because it operates only in relation to existing law, and therefore the denial of direct effect in the TCA would continue to operate in relation to post-EUFRA legislation. Thus, a trader could not rely on the TCA to complain that legislation enacted in 2021 was inconsistent with the TCA. The other limit is that section 29 operates only where there is existing law that is inconsistent with the TCA. It does not cover the situation where there is no national law on the matter.

The final consideration is that insofar as Article 5 TCA is compromised, it is through the will of Parliament as expressed in section 29 EUFRA. This is important, given that this Article is framed in terms 'nothing in the TCA shall be construed' as giving rise to enforceable rights. This does not preclude Parliament from choosing to do so, or enacting legislation that has this effect, more especially given that section 29, thus construed, would avail UK and EU traders alike, assuming that the existing UK law was inconsistent with TCA provisions.

3.3 The TCA, the Level Playing Field and Rights

The TCA level playing field provisions cover a variety of areas: competition, subsidies, state-owned enterprises, taxation, labour and social standards, environment and climate, other instruments for trade and sustainable development, and horizontal provisions. The Political Declaration attached to the WA attested to the centrality the EU accorded

to the level playing field restrictions.⁸ Prime Minister Theresa May was willing to accept such regulatory alignment, since it would facilitate the frictionless trade that she sought.⁹ When Boris Johnson became Prime Minister, he made clear that his stance towards the trade negotiations was markedly different. This became readily apparent from his Greenwich speech,¹⁰ and from the UK's Negotiation Document.¹¹ The latter document affirmed that the UK would no longer be part of the EU Customs Union or Single Market.¹² It stated, moreover, that the envisaged agreement would be between sovereign equals and that the government would not 'negotiate any arrangement in which the UK does not have control of its own laws and political life'. The UK would not therefore 'agree to any obligations for our laws to be aligned with the EU's, or for the EU institutions, including the Court of Justice, to have any jurisdiction in the UK'.¹³

The TCA reflects the hard-fought battles over the parties' degree of freedom and constraint on these issues. It is evident in the very preamble to the TCA, and the same duality runs through the substantive text. The provisions are complex and are examined in detail in later chapters.¹⁴ The present discussion focuses on two general issues that pertain to private rights and the level playing field provisions.

3.3.1 *Private Rights and the Level Playing Field: Conceptual Relationship*

The first issue is the conceptual relationship between the level playing field provisions that generate rights of action in national courts and Article 5 TCA. The latter, as noted in [Section 3.2](#), provides that, subject to limited exceptions, the TCA does not generate rights. The level playing

⁸ Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, OJ 2019 No. C384 I/02.

⁹ The Future Relationship between the United Kingdom and the European Union, Cm 9593 (2018); P Craig, 'Brexit, a Drama, the Endgame – Part I' (2020) 45 *European Law Review* 163 at 171–72; K Armstrong, 'Regulatory Autonomy after EU Membership: Alignment, Divergence and the Discipline of Law' (2020) 45 *European Law Review* 207.

¹⁰ Prime Minister Boris Johnson, Greenwich Speech, 3 February 2020, www.gov.uk/government/speeches/pm-speech-in-greenwich-3-february-2020.

¹¹ The Future Relationship with the EU, The UK's Approach to Negotiations, CP211, February 2020.

¹² The Future Relationship with the EU, Introduction [2].

¹³ The Future Relationship with the EU, Introduction [5].

¹⁴ See especially [Chapters 18–22](#) and 25.

field provisions are not one of the two exceptions to Article 5. This then begs the question as to the relationship between the level playing field provisions stipulating rights of action in national courts, and the denial of direct effect for the TCA.

The answer is as follows. If the UK, as a contracting party to the TCA, failed to provide for the rights specified in the TCA level playing field provisions concerning causes of action in national courts, and judicial review, an individual could not argue in a UK court that the obligation to provide for such measures generated rights that were enforceable in national courts. Such an argument would be precluded by Article 5 TCA. The failure to fulfil such obligations would generate other TCA remedial mechanisms, but it could not be redressed through an action brought by an individual in a UK national court, since the relevant TCA provisions are not directly effective.

3.3.2 *Private Rights and the Level Playing Field: UK Implementation*

The second issue is related, but distinct. It concerns the scope of the rights granted by the level playing field provisions and whether they can be effectuated by existing UK law. The provisions concerning subsidies can be taken by way of example.

The TCA contains remedial obligations to effectuate the substantive duties in relation to subsidies.¹⁵ Each party must establish an independent body that must have an ‘appropriate role in its subsidy control regime’,¹⁶ which in the UK will be the Competition and Markets Authority. There must be access to courts/tribunals to review subsidy decisions to ensure compliance with the relevant TCA principles and conditions, and to hear interested parties that have standing under that party’s law. The parties must ensure that courts/tribunals have power to impose remedies, including suspension, prohibition or requirement of action by the granting authority, the award of damages, and recovery of subsidy from its beneficiary, if and to the extent that they are available under the respective laws on the date of entry into force of the TCA.¹⁷ Private enforcement takes the form of an action brought by an interested party before the relevant UK court.¹⁸ The

¹⁵ The situation in Northern Ireland is different, although Art 10 of the Protocol could have ramifications for the UK.

¹⁶ Art 371 TCA.

¹⁷ Art 372(1) TCA, subject to qualifications in Art 372(3).

¹⁸ ‘Interested party’ means any natural or legal person, economic actor or association of economic actors whose interest might be affected by the granting of a subsidy, in

TCA specifies that each party shall have in place an effective mechanism of recovery in respect of subsidies, without prejudice to other remedies that exist in that party's law. The court must be able to order recovery where, for example, the subsidy has been granted in breach of the principles contained in the TCA, or where the grantor of the subsidy acted outside its powers.¹⁹

The remedial obligations are, however, qualified, although the nature of the qualification is itself contestable. Articles 372(3)–(4) TCA state:

- (3) Without prejudice to the obligations to maintain or, where necessary, to create the competencies, remedies and rights of intervention referred to in paragraphs 1 and 2 of this Article, and Article 373, nothing in this Article requires either Party to create rights of action, remedies, procedures, or the scope or grounds of review of decisions of their respective public authorities, beyond those existing under its law on the date of entry into force of this Agreement.
- (4) Nothing in this Article requires either Party to widen the scope or grounds of review by its courts and tribunals of Acts of the United Kingdom Parliament, of acts of the European Parliament and the Council of the European Union, or of acts of the Council of the European Union beyond those existing under its law on the date of entry into force of this Agreement.²⁰

There is clearly a tension in Article 372(3). Indeed, it might even be that the two halves were drafted by different contracting parties and then bolted together. The provision is best read as stating that the contracting parties have a Treaty obligation to maintain or create the relevant remedies and rights of intervention thus specified, but not if this requires the creation of rights or action etc, or grounds of review, of a kind that go beyond those in existing law. The salient point for present purposes is that UK law does contain principles of judicial review that allow a court to suspend, prohibit or require action to be taken by the granting authority.²¹ These principles can, without conceptual difficulty, be applied to cover non-compliance with the conditions for the award of subsidies contained in the TCA. UK law also has tortious causes of action for the award of damages, provided that the requisite criteria for the particular action are met.²²

particular the beneficiary, economic actors competing with the beneficiary or relevant trade associations of the respective parties, Art 369(6) TCA.

¹⁹ Art 373(2) TCA.

²⁰ Art 372(3)–(4) TCA.

²¹ Craig (n 6) chs 26–27.

²² Craig (n 6) ch 30.

There is a further limitation, which precludes recovery of a subsidy when it is granted 'on the basis of an Act of Parliament,²³ and UK governments might be tempted to give these words a broad interpretation, to prevent recovery where a minister grants aid pursuant to statutory discretionary power. This does not, however, render the subsidy lawful, and the other remedial duties continue to apply. Thus, an action could still be brought to prevent the subsidy being given, or to claim damages if it was awarded contrary to the TCA criteria. This possibility is in turn subject to Article 372(4) TCA, set out above, which would preclude an action if the subsidy was directly mandated by a statute. If such an award were in breach of the TCA subsidy provisions it could nonetheless lead to the triggering of other remedial mechanisms, in particular those relating to public enforcement between the contracting parties.

3.4 The EUWA 2018, Retained Law and Rights

The EUWA 2018 served primarily to convert the EU legal *acquis* into UK law. The rationale for the legislation is readily apparent.²⁴ The UK had been a member of the EU since 1972, and many areas of life were regulated by EU law. Directives were already transformed into UK law. There was, however, much EU law, such as regulations, that was directly applicable, taking effect in domestic law when enacted by the EU, without the need for further national legislation. The regulatory architecture in any area was typically an admixture of Treaty provisions, directives, regulations and decisions. It would, in theory, have been possible to reject this regulatory material in the event of Brexit. This would, however, have led to chaos. The EU rules regulated matters from product safety to creditworthiness of banks, from securities markets to intellectual property and from the environment to consumer protection. There could not simply be a legal void in these areas, and pre-existing UK law would often not exist.

This was the rationale for the EUWA 2018, the foundational premise being that the entirety of the EU legal *acquis* was converted into UK law. Parliament could then decide, in two stages, which measures to retain, amend or repeal. Stage one was to ensure that the EU rules retained as

²³ Art 373(5) TCA.

²⁴ Legislating for the United Kingdom's Withdrawal from the European Union, Cm 9446 (2017), [1.13].

domestic law were fit for legal purpose when the UK left the EU; stage two was the period post-Brexit, when Parliament could decide at greater leisure whether it wished to retain these rules.

An important issue concerns the EUWA 2018, section 3 of which deals with the incorporation of direct EU legislation, such as regulations. It provides that, so far as operative immediately before exit day, it forms part of domestic law on and after exit day. The apposite issue for the present chapter is whether this comes with direct effect in a post-Brexit world, such that individuals can derive rights from regulations when they would have had these prior to Brexit, with the consequence that they can rely on such rights without the need to prove the conditions for breach of statutory duty. There are three arguments in favour of direct effect.

The first is that it coheres with the purpose of EUWA 2018, which was to bring the entire *acquis* into UK law and then decide what to do thereafter. The second argument is that it is consistent with section 4 EUWA 2018, which brings directly effective rights into UK law, thereby precluding any argument that this is contrary to the intent of the EUWA. The third reason that warrants this conclusion is that it is consistent with section 4(2)(a) EUWA 2018, which provides that section 4(1) does not apply to any rights etc so far as they form part of domestic law by virtue of section 3. This thereby expressly contemplates that rights can flow from regulations that are incorporated via section 3.

3.5 The WA, the Protocol and Rights

The final section of this chapter addresses rights-based issues that pertain specifically to Northern Ireland. The starting point is Article 4(1) of the WA, which states:

The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States. Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.

Article 4(1) thus gives direct effect to the provisions of the WA and the provisions of EU law made applicable by the Agreement, when they meet the requisite conditions for direct effect. This binding treaty obligation was then duly incorporated into UK law, in accord with dualist precepts,

through amendment to the EUWA 2018. Section 7A EUWA made provision for directly effective rights flowing from Article 4(1) to be enforceable in national courts. This was complemented by section 8C EUWA, which concerns Northern Ireland. It empowers a minister of the Crown to make regulations as the minister considers appropriate to, *inter alia*, implement the Protocol and supplement the effect of section 7A EUWA in relation to the Protocol. There are multiple opportunities for individuals to bring actions based on rights that flow from the Protocol. Two examples will suffice for present purposes.

An individual might claim that action taken by state authorities is contrary to one of the many Single Market regulations that continue to apply in Northern Ireland post-Brexit. Annex 2 of the Protocol renders a very great many Single Market provisions applicable to Northern Ireland, and many of these regulations, decisions and directives fulfil the conditions for direct effect as developed by the CJEU. Thus, provided that the particular article of the regulation, directive or decision is sufficiently precise, certain and unconditional, it will generate rights that can be enforced in national courts. There will also be horizontal direct effect for provisions of EU regulations and decisions that continue to apply in Northern Ireland, provided that they meet the preceding criteria. They can therefore be enforced against private parties, as well as emanations of the state. The courts in Northern Ireland will adjudicate on such claims, and insofar as any such case relates to Articles 5, 7–10 of the Protocol, there might then be a reference to the CJEU pursuant to Article 12(4) of the Protocol.

Consider a second example, which concerns the powers of EU institutions within the UK. EU institutions are accorded powers pursuant to Article 12(4) of the Protocol. It provides:

As regards the second subparagraph of paragraph 2 of this Article, Article 5 and Articles 7 to 10, the institutions, bodies, offices, and agencies of the Union shall in relation to the United Kingdom and natural and legal persons residing or established in the territory of the United Kingdom have the powers conferred upon them by Union law. In particular, the Court of Justice of the European Union shall have the jurisdiction provided for in the Treaties in this respect. The second and third paragraphs of Article 267 TFEU shall apply to and in the United Kingdom in this respect.

This is further reinforced by Article 12(5), which stipulates that the actions of such Union bodies have the same legal effect as those they produce when such bodies act within the EU. It follows that an individual could argue that

action by Northern Ireland authorities was invalid because it was inconsistent with imperatives flowing from such EU institutions.

3.6 Conclusion

This chapter has addressed some of the difficult issues concerning rights and enforceability that flow from the WA, the TCA and the principal UK legislation dealing with Brexit. Exigencies of space mean that not all such matters have been considered. There will doubtless be litigation that addresses these issues, and resolves some of the uncertainties raised in the preceding discussion.

The Committees of the Protocol

KATY HAYWARD

4.1 Introduction

The implementation of the Protocol is governed by three UK–EU institutions established by the Withdrawal Agreement (WA). The Joint Committee (JC) is to oversee the implementation and application of the WA and the Protocol.¹ The Specialised Committee on the Implementation of the Protocol on Ireland and Northern Ireland (INISC) is to facilitate and administer the Protocol.² The Joint Consultative Working Group (JCWG) is for the ‘exchange of information’ and ‘mutual consultation’ between the UK and the EU,³ which then informs the work of the INISC. The rules of procedure for the JC and all six Specialised Committees are set out in Annex VIII of the WA. Each body comprises, and is co-chaired by, representatives from the EU Commission and the UK government. Aside from governance, they are important mechanisms for formal and informal dialogue between the two sides. This chapter summarizes the constitution, remit and operation of each of them, as set out in the WA and as they operated in practice during the first months of their establishment.

4.2 The Joint Committee

4.2.1 *The Formal and Informal Joint Committee*

The JC is the only decision-making body overseeing the WA, drawing on recommendations from the Specialised Committees. The JC will make all its decisions and recommendations ‘by mutual consent’.⁴ It follows that the JC cannot act if either the UK or the Commission is not in agreement. Almost immediately after it came into effect on 1 February 2020, the

¹ Art 164 WA.

² Protocol Art 14.

³ Protocol Art 15.

⁴ Art 166(3) WA.

Protocol was a source of tension in the UK–EU relationship precisely because it required agreement and co-operation between them. The JC has been key to enabling progress to be made in such circumstances, but not in the way strictly envisaged by the WA.

The JC is to be chaired by members of the EU Commission and the UK government, although they can designate high-level officials to act as their alternates.⁵ The fact that the JC is led by senior political representatives from the two sides is a double-edged sword. The first co-chairs of the JC were European Commission Vice-President Maroš Šefčovič and the UK Chancellor of the Duchy of Lancaster, the Rt Hon Michael Gove. Lord Frost, Prime Minister Johnson's chief negotiator for exiting the EU (July 2019–January 2020) and subsequently chief UK negotiator in the UK–EU Trade and Cooperation Agreement (TCA) negotiations in 2020, was made Minister of State in the Cabinet Office and (unusually) a full member of the UK Cabinet on 1 March 2021. He replaced Minister Gove as co-chair of the JC.⁶

The JC is to meet at least once a year, and at the request of the EU or the UK. The first meeting of the JC was held on 30 March 2020 and in the intervening twelve months it had five further official meetings, plus an extraordinary meeting (10 September 2020) in response to the UK Internal Market (UKIM) Bill in which the UK government proposed to equip its ministers to breach the obligations of the Protocol. In a context of high stakes over the TCA negotiations and the Protocol implementation, the political standing of the co-chairs enabled them to opt to meet informally in so-called political meetings. The first such meeting, on 7–8 December 2020, allowed the two to negotiate a breakthrough (and, in the UK case, resulted in the withdrawal of the offending UKIM clauses). The joint statement from Minister Gove and Vice President Šefčovič after that meeting paved the way for the decisions to be approved in the official meeting of the JC they chaired eleven days later.⁷ Informal meetings between the co-chairs remained important in the first few months of implementing the Protocol, especially against the backdrop of a UK–EU dispute.⁸

⁵ Its Secretariat is composed of an official of the European Commission and an official of the UK government.

⁶ And the Partnership Council of the TCA, also co-chaired by V-P Šefčovič.

⁷ Summary Minutes, Fifth Regular Meeting of the JC, 17 December 2020.

⁸ These meetings are usually followed by joint statements – in contrast to the formal meetings of the JC, for which the Commission and the UK government issued separate statements (at least up to May 2021).

4.2.2 *Dispute Settlement and the Joint Committee*

Within two days of Lord Frost's appointment, the UK government announced unilateral action to extend the 'grace periods' for the Protocol's implementation.⁹ In Lord Frost's call to Vice President Šeřčovič later that day (classed by the UK government press release as their 'first meeting'), he described the measures as 'the minimum necessary steps to allow time for constructive discussions in the Joint Committee'.¹⁰ The notion that in an informal 'meeting' a co-chair can justify action that their counterpart would not consent to in an official meeting represents a peculiar use and interpretation of the role of the JC. The UK co-chair is far freer than their EU counterpart (the Commission being very different from a sovereign government) to engage in such game-playing. This can be problematic, not least given the importance of the JC as the forum for dispute resolution.

Resolving disputes by consensus is a core function of the JC. Each party may refer 'any issue relating to the implementation, application and interpretation' of the WA to the JC.¹¹ In the event of this happening, '[t]he Union and the United Kingdom shall endeavour to resolve any dispute regarding the interpretation and application of the provisions of this Agreement by entering into consultations in the Joint Committee in good faith, with the aim of reaching a mutually agreed solution'.¹² If no resolution to a dispute sent to the JC is found within three months, the issue will be referred to the arbitration panel, whose decision will be final and binding.¹³ In matters where the arbitration panel requires an interpretation of EU law, the arbitration panel must ask for the European Court of Justice's ruling on the matter. It is notable that when the EU commenced legal proceedings against the UK for breaching the substantive provisions of the Protocol in September 2020 and March 2021, the JC co-chairs resorted to informal meetings. The behind-scenes negotiations and political bargaining have thus been shown to play an important, if unofficial, part in the dispute settlement role of the JC.

⁹ Statement by the Secretary of State for NI, Brandon Lewis, to the House of Commons on the 'NI Protocol: Implementation', 3 March 2021, HCWS819.

¹⁰ UK Government Press Release, Lord Frost call with European Commission Vice President Maroš Šeřčovič, 3 March 2021.

¹¹ Art 164(3) WA.

¹² Art 169(1) WA.

¹³ Art 170 WA; see also [Chapter 5](#).

4.2.3 *The Operation of the Joint Committee*

Officially, the JC is to hold its meetings alternately in Brussels and London. In practice, it met in virtual and in hybrid form (a mix of in-person and videoconferencing) during the Covid-19 pandemic. Where appropriate and by decision of the co-chairs, experts or others may be invited to attend meetings of the JC. Following a UK government commitment in the *New Decade, New Approach* document, which saw the restoration of power-sharing in Northern Ireland in January 2020, representatives from the Northern Ireland Executive are invited to be part of the UK delegation in meetings of the JC.¹⁴ These invitations will happen only in instances where the Committee concerned is discussing Northern Ireland-specific matters and which are also attended by the Irish government as part of the EU's delegation.¹⁵ Representatives from EU member states are also allowed to attend official JC meetings.¹⁶

According to the JC's rules of procedure, the provisional agenda for each meeting of the JC is to include items requested by the Union or the UK. The agenda for the first six regular meetings typically saw a stocktake on the work of the Specialised Committees and an update on WA implementation. It became evident by late 2020 that the Protocols on Citizens' Rights and on Ireland-Northern Ireland would demand the most attention from the JC, given the evolving conditions and the emerging issues from these that the JC must oversee.

4.2.4 *The Powers of the Joint Committee*

The UK and the EU are obliged to implement the JC's decisions, which will have the same legal effect as the WA itself.¹⁷ At no point is there an obligation for the UK or the European Parliament to discuss such issues, and neither will be asked or required to ratify decisions taken by the JC as a rule.¹⁸ The

¹⁴ *New Decade, New Approach*, 8 January 2020, p 47.

¹⁵ In practice, the two junior ministers (DUP and Sinn Féin) at the Executive Office have attended JC meetings more frequently than the First and Deputy First Ministers themselves.

¹⁶ For example, the third JC meeting on 28 September 2020 was attended by EU member-state representatives. Gove, statement to the House of Commons on JC Meeting, 29 September 2020, Hansard, Vol 681, HCWS476. This is a sign of the concern across EU member states about the implementation of the Protocol even as the TCA was being negotiated.

¹⁷ Art 166 WA.

¹⁸ Unless the JC makes a decision that constitutes an amendment or replacement to part of the WA (pursuant to s 25(2) of the Constitutional Reform and Governance Act 2010), see

scope and effect of the Protocol will evolve under the oversight of the JC. This will happen in three main ways. First, until the end of 2024, the JC has the authority under Article 164(5) of the WA to adopt decisions amending it (including the Protocol), ‘provided that such amendments are necessary to correct errors, to address omissions or other deficiencies, or to address situations unforeseen when this Agreement was signed, and provided that such decisions may not amend the essential elements of this Agreement’.¹⁹ Second, Protocol Article 13(3) provides for dynamic alignment to specific areas of the EU *acquis*. Where planned Union acts amend or directly replace EU acts listed in the Protocol, they will be automatically updated and apply in Northern Ireland. In principle, they cannot be blocked by the UK. Third, under Article 13(4) of the Protocol, the JC will decide whether a new EU law which falls within the scope of the Protocol should apply in Northern Ireland. The procedure for this is that the EU informs the UK of such a newly adopted act, initially through the JCWG to allow the UK to consider it, with clarification and consultation being offered through that channel as needs be. The debate in the JC will centre on whether such acts are necessary for the ‘proper functioning of the Protocol’. The JC shall then either add the new act to the relevant Protocol annex or, where the UK objects, ‘examine all further possibilities to maintain the good functioning of this Protocol and take *any decision necessary to this effect*’.²⁰ This second sub-paragraph grants considerable power to the JC in influencing how the Protocol functions. In the absence of a decision by the JC, the EU may take ‘appropriate remedial measures’.

4.2.5 *The Remit of the Joint Committee*

The JC has a broad and substantial remit. This includes deciding the tasks of the Specialised Committees, supervising their work, establishing new Specialised Committees, and disestablishing existing Specialised Committees. It is also charged with ‘preventing problems’, resolving disputes and considering ‘any matter of interest’ relating to the WA. And it must issue an annual report on the functioning of the WA (something the Secretariat failed to do by the 1 May deadline after its

Lord Keen of Elie, Lords Spokesperson (Ministry of Justice), House of Lords Debate on the UK–EU JC, 20 March 2019, c1436.

¹⁹ In May 2020 the Commission proposed the addition of eight acts to Annex 2 of the Protocol. Those which were accepted by the UK were approved in the second meeting of the JC on 12 June 2020.

²⁰ Protocol Art 13(4), emphasis added.

first year).²¹ With respect to the Protocol, the JC was tasked with particular responsibilities to complete during the transition period. This included setting the criteria for goods entering Northern Ireland from outside the EU (including GB) to manage the risk posed to the Single Market.²² The fifth formal meeting of the JC included several decisions about the operationalization of the Protocol, plus a set of time-limited unilateral declarations which allowed ‘grace periods’ on the full application of EU rules on heavily regulated areas, including medicines and chilled meat products.

The temporary yet all-important nature of these arrangements was shown in the fact that, six months later, in June 2021, the Commission announced a package of measures aimed at addressing some of the challenges that had arisen for movement across the Irish Sea under the Protocol. This included agreeing to a further extension of the grace period for the movement of chilled meats from GB to Northern Ireland until 30 September 2021, proposing an amendment to EU law on medicines to ensure the continued long-term supply of medicines from GB to Northern Ireland, and facilitating the movement of guide dogs accompanying travellers from GB to Northern Ireland.²³ The fact that this was not, however, officially a joint decision by the JC reflected the strains in the political relationship and the consequent tendency during the early implementation of the Protocol to act unilaterally or (at best) in parallel, rather than jointly through the JC despite its considerable powers.

The JC has six particular areas of responsibility: defining ‘at risk’ goods;²⁴ the operation of the UK Trader Scheme;²⁵ application of value

²¹ Rule 14, Rules of Procedure, Decision No 01/2020 of the JC established by the Separation Agreement of 18 December 2020 Adopting the Rules of Procedure of the JC.

²² Art 5(2) of the Protocol: ‘Before the end of the transition period, the JC shall by decision establish the criteria for considering that a good brought into NI from outside the Union is not at risk of subsequently being moved into the Union.’ The EU’s Common External Tariff has to be paid on those goods that are considered to be ‘at risk’; this should be reimbursed if it is proven that those goods stayed within the UK. Whether goods entering NI via GB are ‘at risk’ or not, they are all subject to customs controls and paperwork, and, potentially, regulatory checks.

²³ European Commission, Press Release, ‘EU–UK Relations: Solutions Found to Help Implementation of the Protocol on Ireland and Northern Ireland’, 30 June 2021, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3324. This package of measures is discussed further in ‘Update: Developments from July 2021 to September 2021’ at the front of this book.

²⁴ According to Art 5(2), the JC may amend at any time its decisions adopted relating to ‘at risk’ goods.

²⁵ The JC co-chairs informally agreed the terms of the UK (Trusted) Trader Scheme on 8 December; the JC is to keep this under review and can enact an ‘emergency brake’ if deemed necessary.

added tax (VAT) and excise rules;²⁶ agricultural support scheme limits;²⁷ working arrangements for EU presence in NI;²⁸ proposing the alternative for Articles 5–10 of the Protocol if the Northern Ireland Assembly withholds its consent for their continued application.²⁹ All these point to the breadth and significance of the future decisions of the JC for Northern Ireland.

4.2.6 *The Monitoring and Reviewing Role of the Joint Committee*

The JC carries extraordinary responsibility when it comes to keeping under constant review three dynamic processes that are very consequential for the UK and Ireland. First, relating to the movement of goods to and from Northern Ireland, it is to review the facilitation of trade within the UK:

Having regard to Northern Ireland's integral place in the United Kingdom's internal market, the Union and the United Kingdom shall use their best endeavours to facilitate the trade between Northern Ireland and other parts of the United Kingdom, in accordance with applicable legislation and taking into account their respective regulatory regimes as well as the implementation thereof. The Joint Committee shall keep the application of this paragraph under constant review and shall adopt appropriate recommendations with a view to avoiding controls at the ports and airports of Northern Ireland to the extent possible.³⁰

Second, relating to cross-border co-operation on the island of Ireland: 'The Joint Committee shall keep under constant review the extent to which the implementation and application of this Protocol maintains the necessary conditions for North-South cooperation. The Joint Committee may make appropriate recommendations to the Union and the United Kingdom in this respect, including on a recommendation from the Specialised Committee.'³¹

²⁶ According to Art 8, the JC has the competence to review the application of the rules relating to VAT and excise, 'and may adopt appropriate measures as necessary'.

²⁷ Protocol Annex 6.

²⁸ Protocol Art 12. These arrangements are to be reviewed by the JC 'at the latest [three] years after entry into force and following a request from the Union or the United Kingdom'. See Decision No 6/2020 of the WA JC on arrangements under Art 12(2) of the Protocol.

²⁹ Protocol Art 18; see also [Chapter 10](#) in this volume. This would have to occur within two years, when Arts 5–10 would automatically cease to apply. The JC 'may seek an opinion from institutions created by the 1998 Agreement' before making its recommendation.

³⁰ Protocol Art 6(2).

³¹ Protocol Art 11(2).

Finally, the JC has the power to review and terminate arrangements arising from its decisions made just before the end of the transition period. These cover ‘at risk’ goods, the authorization for trusted-trader status and exchange of information in relation to customs and the movement of goods.³²

If either Party considers there is significant diversion of trade, or fraud or other illegal activities, that Party shall inform the other Party in the Joint Committee by 1 August 2023, and the Parties shall use their best endeavours to find a mutually satisfactory resolution of the matter. If the Parties do not find a mutually satisfactory resolution, Articles 3(1)(a)(ii), 3(1)(b)(ii) and 5 to 8 of this Decision shall cease to apply from 1 August 2024, unless the Joint Committee decides before 1 April 2024 to continue their application.³³

If they do cease to apply, then the JC shall ‘make appropriate alternative provision applicable from 1 August 2024, having regard to the specific circumstances in Northern Ireland and fully respecting Northern Ireland’s place in the United Kingdom’s customs territory’. Thus, the JC retains a responsibility to meet the objectives of the Protocol at the same time as it is charged with monitoring and reviewing its implementation, making decisions on its scope and evolution, and maintaining dialogue between the UK and the EU.

4.3 The Specialised Committee on Ireland–Northern Ireland

4.3.1 *The Operation of the Specialised Committees*

The JC is supported by six Specialised Committees ranging over the gamut of issues relevant for the operation of the WA, co-chaired by senior officials from the EU Commission and the UK government.³⁴ Unless the co-chairs decide otherwise, the Specialised Committees shall meet at least once a year, but additional meetings may be held at the request of the EU, the UK or the JC.³⁵ The Union and the UK can bring ‘any matter directly to the Joint Committee’, so the existence of the Specialised Committees is not allowed to slow down a matter that requires a high-level decision.³⁶

³² Protocol Art 5.

³³ Decision No 2/2020 of the JC [2020/2246] (OJ L 443/2020), Art 9 on ‘review and termination’.

³⁴ The other specialized committees are on citizens’ rights; the other separation provisions; issues related to the Sovereign Base Areas in Cyprus; issues related to the implementation of the Protocol on Gibraltar; and the financial provisions of the WA.

³⁵ Art 165 WA.

³⁶ Art 165(4) WA.

The meeting schedule and agenda of the Specialised Committees shall be set by mutual consent. The Specialised Committee on Ireland–Northern Ireland (INISC) met eight times in the first eighteen months of the WA being in effect. For all but one of these meetings, there was no agenda published and where there were statements issued afterwards, these were released separately by the EU Commission and the UK government. The lack of transparency in the operation of the INISC combined with political and media interest in the UK–EU tension over the Protocol meant that there were leaks to journalists from INISC meetings. This had the effect of sending the work of the INISC deeper into the echelons of the Cabinet Office and Commission, and making its formal meetings less frequent than they might otherwise have been. This only intensified the difficulties for Northern Ireland civil servants charged with keeping up with the work of the INISC. Officials from the Northern Ireland Civil Service are present at official INISC meetings at the invitation of the UK government; whether they are kept informed of the background work of the INISC officials is rather more ad hoc. When asked (amid growing political and public tensions over the Protocol implementation in Northern Ireland) in April 2021 for an update on the engagement by the UK and the EU with Northern Ireland stakeholders, including the Executive, and on formal consultation mechanisms to ensure their full participation in the WA institutions, Lord Frost replied that ‘representatives of the NI Executive attend[ed] the JC and the Specialised Committee’ – meetings that had happened four to eight weeks earlier.³⁷

4.3.2 *The Remit of the Specialised Committee on Ireland–Northern Ireland*

The INISC has a broad power to discuss ‘any point . . . of relevance’ to the Protocol that ‘gives rise to a difficulty’, as raised by either the UK or the EU. It can also make recommendations to the JC as regards the functioning of the Protocol. In so doing, it in turn may receive proposals from the North–South Ministerial Council (covering aspects of policy and governance relating to transport, agriculture, education, health, environment and tourism) and the six North–South Implementation Bodies, which include north–south trade, EU programmes, waterways and food

³⁷ Lord Frost reply to Lord Kinnoull, chair of the Lords EU Committee, on the Protocol on Ireland/Northern Ireland, 28 April 2021, MC2021/05342.

safety. It should also consider ‘any matter of relevance’ brought to its attention by designated bodies relating to the implementation of the Protocol’s human rights provisions, namely 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. The most it could do with these proposals and issues would be to ‘make recommendations to the Joint Committee’ for decisions.³⁸

4.4 Joint Consultative Working Group

The JCWG reports to the INISC on issues related to the implementation of the Protocol. Its rules of procedure were not drafted until nine months into the transition period.³⁹ The JCWG exchanges information and acts as a forum for mutual consultation in respect of the Protocol between the UK and the EU. The focus is on ‘planned, on-going and final relevant implementation measures’ relating to changes in EU or UK acts covered by the Protocol. It, too, is co-chaired by the EU and the UK and is composed of representatives of the EU and the UK, who carry out its functions under the supervision of the INISC. There is a degree of flexibility in the composition of participants for each JCWG meeting.⁴⁰ The UK government has committed to including ‘representatives of the NI Executive as part of the UK delegation to the group’.⁴¹ According to Article 15 and its rules of procedure, JCWG is to meet at least once a month, unless otherwise decided by the EU and the UK by mutual consent. However, its first meeting on Friday 29 January 2021 (a noteworthy day for the Protocol, as it happens) was merely to sign off on its rules of procedure. Its second meeting was not held until 15 April 2021, and no statement or documentation was published in relation to that.

If, as intended, the JCWG meets more frequently than either the JC or INISC, it will form a vital means of communication between officials in

³⁸ Protocol Art 14(e).

³⁹ Council Decision (EU) 2020/1599 of 23 October 2020 on the position to be taken on behalf of the European Union in the Joint Consultative Working Group as regards the adoption of its rules of procedure, OJ 2020 L 365/3.

⁴⁰ ‘Where appropriate and by decision of the co-chairs, experts or other persons who are not members of delegations may be invited to attend meetings of the working group in order to provide information on a particular subject’ (Rule 3(2)).

⁴¹ Letter from Rt Hon Michael Gove to Colin McGrath, MLA, chair of the Committee for the Executive Office, Northern Ireland Assembly, 6 January 2021, MC2020/17995.

the UK and the EU. Along with this comes the potential for keeping Northern Ireland civil servants informed and connected. This is particularly important given the need for Northern Ireland officials to be aware of the evolving regulatory environment as created by the Protocol. Article 15(7) of the Protocol places an obligation on the EU to communicate the views and information shared in the JCWG to ‘the relevant institutions, bodies, offices and agencies of the Union without undue delay’. There is no similar obligation on the UK, despite the obvious need for effective communication on the work covered by the JCWG to institutions, agencies and offices in Northern Ireland.

4.5 Conclusion

A House of Lords European Union Committee Report concluded that the effectiveness of the UK–EU committees established under the WA ‘will depend on the frequency of their meetings, the flexibility of their remit, senior political representation on both sides, and a mutual commitment to effective communication, appropriate powers, and full accountability’.⁴² The operation of the UK–EU bodies during the transition period and in the first few months of ‘Brexit proper’ after the transition period ended has revealed chronic inadequacy in all these areas. This marks an inauspicious beginning for these important new UK–EU institutions.

⁴² House of Lords, European Union Committee (2019) ‘Beyond Brexit: How to Win Friends and Influence People’, 35th Report of Session 2017–19.

Dispute Settlement

JAN WOUTERS

5.1 Introduction

This chapter examines the system of dispute settlement that is applicable to the Protocol. This system presents a rather unique combination of, on the one hand, continued jurisdiction of the Court of Justice of the European Union (CJEU) and, on the other hand, an arbitration procedure. As has been rightly observed,¹ these are two very different enforcement mechanisms. The former (the CJEU) relies on an existing supranational court which monitors respect for the EU legal order, works together with national courts, and allows some measure of access to individuals. The role of the CJEU is controversial: its case law and jurisdiction were one of the political drivers of the proponents of the withdrawal of the UK from the EU. The latter (arbitration), in contrast, represents a much more traditional public international law method that is new and available only to the parties of the Withdrawal Agreement (WA).

5.2 Jurisdiction of the CJEU

5.2.1 Provisions of the Protocol

Regarding the jurisdiction of the CJEU, the Protocol itself contains explicit provisions. Protocol Article 12(4) provides:

As regards the second subparagraph of paragraph 2 of this Article, Article 5 and Articles 7 to 10, the institutions, bodies, offices, and agencies of the Union shall in relation to the United Kingdom and natural and legal persons residing or established in the territory of the United Kingdom have the powers conferred upon them by Union law. In particular, the Court of Justice of the European Union shall have the jurisdiction provided for in the Treaties in this respect. The second and third paragraphs

¹ Joris Larik, 'Decision-Making and Dispute Settlement' in Federico Fabbrini (ed), *The Law and Politics of Brexit* (Oxford University Press 2020) 191, at 198.

of Article 267 TFEU [Treaty on the Functioning of the European Union] shall apply to and in the United Kingdom in this respect.

In other words, the Protocol confers ‘full jurisdiction’ upon the CJEU to oversee the operation of EU law applying to Northern Ireland in relation to certain areas, essentially to attain the Protocol’s not explicitly stated objective of protecting the integrity of the internal market.² These are: customs and movement of goods (Article 5), as well as the monthly exchange of information on this matter (Article 12(2), second subparagraph); technical regulations (Article 7); value added tax (VAT) and excise (Article 8); the Single Electricity Market (Article 9); and state aid (Article 10). This jurisdiction of the Court does not stand alone: it goes hand in hand with the exercise, in these areas, of ‘the powers conferred upon them by Union law’ by ‘the institutions, bodies, offices, and agencies of the Union’, in other words, with the continuous evolution of the *acquis* of the Union. And that *acquis*, by Protocol Article 12(5), must produce in the UK ‘the same legal effects as those which they produce within the Union and its Member States’. This means with all the features of EU law, including primacy, direct effect, state liability, and so on. If this does not constitute the acceptance by the UK of a major limitation of sovereignty, notably without any representation of the UK in the decision-making and adjudicatory processes of the EU, it would be difficult to identify what is.

The ‘jurisdiction provided for in the Treaties’ covers the totality of the well-known proceedings before the CJEU, including infringement procedures brought by the Commission and the preliminary rulings procedures based on questions from national courts, both in the UK and in EU member states. There is also the possibility of the imposition of lump sums and penalty payments.³

It is interesting to consider which parts of the Protocol do *not* fall firmly within the competence of EU institutions, bodies, offices and agencies, or within the jurisdiction of the CJEU. The matter is less obvious than it sounds, especially for provisions which cross-reference to Protocol Articles 5 to 10, such as Protocol Article 11, on ‘other areas of North–South cooperation’. The reference to the requirement of consistency with ‘the arrangements set out in Articles 5 to 10’ in that Article seem to imply that, if only indirectly, it cannot be excluded that the jurisdiction of the CJEU

² House of Lords, European Union Committee, *The Protocol on Ireland/Northern Ireland*, Ninth Report of Session 2019–21, 1 June 2020, HL Paper 66, paras 107 and 256.

³ *Ibid.*

may be triggered in the many domains listed there, such as environment, health, agriculture, transport, education and tourism, energy, telecommunications, broadcasting, inland fisheries, justice and security, higher education and sport. On the other hand, where no such cross-reference is included, it seems clear that no powers of EU institutions, bodies, offices or agencies or CJEU jurisdiction apply. This is the case, for instance, with the many provisions of EU law in the area of protection against discrimination, contained in the measures listed in Annex 1 to the Protocol, to which reference is made in Protocol Article 2(1). In other words, although this EU non-discrimination law remains binding on the UK with regard to Northern Ireland, and must be implemented ‘through dedicated mechanisms’, there is no EU competence to enforce these through the regular EU institutions, such as the CJEU.

Delicate questions may arise with regard to Protocol Article 6, ‘protection of the *UK* internal market’. This Article has not been brought under the jurisdiction of the CJEU, but its first paragraph especially raises intricate questions on judicial protection in case of export restrictions or prohibitions flowing from the application of EU law. It is stipulated that such provisions of Union law ‘shall only be applied to trade between Northern Ireland and other parts of the United Kingdom to the extent strictly required by any international obligations of the Union’. To this is added, somewhat cryptically, the obligation that ‘[t]he United Kingdom shall ensure full protection under international requirements and commitments that are relevant to the prohibitions and restrictions on the exportation of goods from the Union to third countries as set out in Union law’. One may think of export prohibitions or restrictions imposed by binding UN Security Council resolutions. This being said, purely unilateral EU export prohibitions or restrictions, such as, for instance, those imposed in relation to the Covid-19 pandemic, do not appear to fall under this provision.

Two more procedural aspects are dealt with in paragraphs 6 and 7 of Protocol Article 12. Paragraph 6 confirms that lawyers authorized to practise before the courts or tribunals of the UK shall ‘in every respect’ be treated as lawyers authorized to practise before the courts or tribunals of member states.⁴ The latter paragraph stipulates that in cases brought before the CJEU, the UK may participate in CJEU proceedings ‘in the same way as a Member State’ – without, however, any longer having a judge on the Court – and a comparable clause regarding lawyers

⁴ Compare Art 94(2) WA.

authorized to practise before UK courts applies with regard to the representation or assistance of a party before the CJEU.⁵

Last but not least, it is important to note that there is no time-limit to the jurisdiction of the CJEU, unless one reads the ‘democratic consent’ clause of Article 18 of the Protocol to be such: it may indeed be such a time-limit if, either within four years after the end of the transition period (ie, by 31 December 2024) or after the end of any subsequent period of four years, the Northern Ireland Assembly votes against the continued application of Protocol Articles 5 to 10. In that case, the CJEU’s jurisdiction will, of course, also lapse, subject to a transition period.⁶

5.2.2 *Practical Application*

Protocol Article 12(4) came to life in the spring of 2021 with tensions between the UK and the EU regarding the former’s unilateral decisions to delay the application in full of EU law made applicable by the Protocol. The dispute had been building up since December 2020. At the Joint Committee (JC) meeting of 17 December 2020, the UK made a unilateral declaration concerning the certification required for food imports into Northern Ireland, setting out the practice it intended to put in place as regards imports of those products into Northern Ireland, ‘during a maximum time period of three months after the end of the transition period’. The UK had committed itself to the fact that, ‘[d]uring the above-mentioned period of time, the UK authorities will take all necessary measures to ensure compliance with the Protocol and relevant Union law as of 1 April 2021’, and it had accepted that ‘this solution is not renewable’.⁷

However, less than three months later, the UK decided unilaterally to depart from the rules of the Protocol: on 3 March 2021 the Secretary of State for Northern Ireland announced before the UK Parliament that the UK government would extend certain ‘grace periods’ and make provision for further flexibilities not provided for in EU law. Later that day, the UK informed its traders that they could continue to move products of animal

⁵ For the latter, compare the slightly different wording of Art 91(3) WA. Interestingly, it follows from the formulation of Art 12(7)(b) WA that such lawyers may represent or assist any party, including adversaries of the UK authorities in the dispute at hand.

⁶ See further [Chapter 10](#).

⁷ See https://ec.europa.eu/info/sites/default/files/brexit_files/info_site/2._export_health_certificates_ukeu_declarations_to_publish.pdf.

origin, composite products, food and feed of non-animal origin and plants and plant products from Great Britain to Northern Ireland without the need for official certification until ‘at least 1 October 2021’.⁸ Furthermore, in early March 2021, the UK had updated its guidance on the sending of parcels to and from Northern Ireland⁹ and on travelling with pets from Great Britain to Northern Ireland,¹⁰ aspects which had not been the subject of an understanding between it and the EU.

On 15 March 2021, the Commission informed the UK government that it considered the UK’s unilateral action to be a violation of Protocol Article 5(3) and (4), read in conjunction with relevant EU law listed in Protocol Annex 2, and in itself to be a violation of the duty of good faith provided for in Article 5 WA.¹¹ The Commission responded in two ways, which interestingly illustrate the two main dispute settlement mechanisms discussed in the present chapter.

First, as regards the substantive breaches of the Protocol, the Commission referred to Protocol Article 12(4) and announced that it was initiating infringement proceedings by sending a letter of formal notice to the UK government pursuant to this provision, in conjunction with Article 258 TFEU. The UK had one month to respond to the formal notice.¹² On 14 May 2021, the UK government replied.¹³ Around the same time, Lord Frost, the UK’s representative, publicly observed that the Protocol, in its current form, did not meet the challenges that the situation in Northern Ireland posed.¹⁴ The implementation of the WA, including the Protocol, and the Trade and Cooperation Agreement

⁸ See www.gov.uk/guidance/export-or-move-composite-food-products.

⁹ www.gov.uk/guidance/sending-parcels-between-great-britain-and-northern-ireland.

¹⁰ www.gov.uk/taking-your-pet-abroad/travelling-to-an-eu-country-or-northern-ireland.

¹¹ Letter of 15 March 2021 addressed by Commission Vice-President Maroš Šefčovič, EU Co-chair of the Joint Committee, to Lord David Frost, UK Minister of State.

¹² ‘Commission Formally Launches Infringement Proceedings against London for Breach of Northern Ireland Protocol’ *Agence Europe* (15 March 2021).

¹³ ‘London Responds to Commission’s letter of formal notice on Northern Ireland Protocol, but is challenging scheme’ *Agence Europe* (17 May 2021). On 15 April 2021, following a meeting with Commission Vice-President Šefčovič and Minister Frost, Lord Frost issued a statement saying that recent meetings had begun to ‘clarify’ things and create ‘positive momentum’, but that ‘difficult issues’ remained: ‘Discussions with EU Should Continue to Address Problems of Implementation of Protocol on Ireland/Northern Ireland’ *Agence Europe* (16 April 2021).

¹⁴ See ‘Lord Frost Calls on EU to Show Pragmatism on the Protocol after Meetings with a Number of Business and Community Representatives in Northern Ireland’ (11 May 2021) www.gov.uk/government/news/lord-frost-calls-on-eu-to-show-pragmatism-on-the-protocol-after-meetings-with-a-number-of-business-and-community-representatives-in-northern-ireland. On 16 May Lord Frost published an op-ed in which he

(TCA) was discussed by the European Council on 24–25 May 2021. The Council ‘invite[d] the Commission to continue its efforts to ensure full implementation of the Agreements’ and stressed that ‘[t]he EU will remain united in its engagement with the UK’.¹⁵

Second, the Commission considered that the UK’s unilateral measures also violated the duty of ‘good faith’ under Article 5 WA. This provision requires that both parties not only must take all appropriate measures to ensure the fulfilment of the obligations arising under the WA but also must refrain from any measure which could frustrate the attainment of its objectives, including the results prescribed by Protocol Articles 5(3) and (4), read in conjunction with Article 4 WA, which requires the UK to give full effect to applicable provisions of EU law. The UK authorities’ authorization of individuals to disregard EU law, ‘even though it is directly applicable to them by virtue of Article 5(3) and (4) of the Protocol read in conjunction with Article 4 of the Withdrawal Agreement’, was seen as especially problematic by the Commission.¹⁶

This second complaint, regarding a breach of ‘good faith’, apparently does not fall within the Commission’s infringement action. Rather, the Commission expressed its intention to ‘provide written notice to the Joint Committee to commence consultations under [WA] Article 169 . . . , as a first step in the dispute settlement process set out in [WA] Title III of Part Six . . .’.¹⁷ This brings us to the second dispute settlement applicable to the Protocol, namely the arbitration procedure.

5.3 Arbitration Procedure

The Protocol itself does not specifically mention other forms of dispute settlement between the parties, such as the arbitration procedure laid down in the WA. However, the ‘dispute settlement’ Title in Part Six WA

criticized the EU’s ‘purist views’ and indicated that the UK was considering ‘all our options’ regarding the Protocol: ‘The EU Must Stop Point Scoring and Work with Us to Protect Peace’ *Daily Mail* (16 May 2021) www.dailymail.co.uk/debate/article-9582447/LORD-FROST-EU-stop-point-scoring-work-protect-peace.html. On 20 May 2021 Lord Frost suggested that the UK may invoke Protocol Article 16 in light of the difficulties raised by the Protocol: ‘Ex-UK Brexit Negotiator: EU Vaccine Move Is to Blame for Northern Ireland Issues’ *Politico* (20 May 2021) www.politico.eu/article/former-uk-brexit-negotiator-says-eu-move-to-blame-for-northern-ireland-problems/.

¹⁵ European Council Conclusions, 24–25 May 2021, paras 13 and 14.

¹⁶ Letter of 15 March 2021 of Maroš Šefčovič to Lord Frost.

¹⁷ *Ibid.*

applies to the Protocol, 'without prejudice to [its] provisions'.¹⁸ As a consequence, the exclusivity clause of Article 168 WA applies: 'For any dispute between the Union and the United Kingdom arising under this Agreement, the Union and the United Kingdom shall only have recourse to the procedures provided for in this Agreement.'

This implies concretely that in the event that the JC is not able to reach agreement on a dispute, 'arbitration under the terms of the Withdrawal Agreement will be the end result',¹⁹ except where a remedy is explicitly provided for in the Protocol. An example where arbitration could well arise would concern the provisions in Protocol Article 5 on customs and movement of goods, including the definition of goods 'at risk'.²⁰

Before having recourse to the arbitration procedure, the EU and the UK must 'endeavour to resolve any dispute regarding the interpretation and application of the provisions of this Agreement by entering into consultations in the Joint Committee in good faith, with the aim of reaching a mutually agreed solution'.²¹ If no mutually agreed solution has been reached within three months after a written notice has been provided to the JC, Article 170(1) WA stipulates that the EU or the UK may request the establishment of an arbitration panel. Such request must be made in writing to the other party and to the International Bureau of the Permanent Court of Arbitration (PCA); it must identify the subject matter of the dispute to be brought before the arbitration panel and a summary of the legal arguments in support of the request.

The arbitration panel must be composed of five members. It must be established within fifteen days of the date of a request.²² The EU and the UK must each nominate two members to the panel from among the persons on the list of twenty-five persons which has been established by

¹⁸ Protocol Art 13(1), third sub-para.

¹⁹ House of Lords, European Union Committee, *The Protocol on Ireland/Northern Ireland* (n 2) para 270.

²⁰ *Ibid*, para 274. See also the testimony of Dr de Mars before the House of Lords European Union Committee, according to whom

the Protocol is 'beautifully silent' as to how any disagreement would be resolved, 'but if there is no agreement and if the parties are not both happy with saying that EU tariffs apply on all products going from Great Britain to Northern Ireland, then one of the two parties is likely to start consultations in the Joint Committee leading to arbitration on that point'.

(*ibid*, para 102)

²¹ Art 169 WA.

²² Art 171(3) and (4) WA.

the JC in December 2020.²³ That list comprises persons whose independence is beyond doubt, who possess the qualifications required for appointment to the highest judicial office in their respective countries or who are jurisconsults of recognized competence, and who possess specialized knowledge or experience of EU law and public international law. It also contains five persons which the EU and the UK have jointly proposed to act as chairperson of an arbitration panel. The chairperson must be selected by consensus by the nominated panel members from those five persons.²⁴ The WA provides for a procedure if the EU and the UK fail to establish an arbitration panel within three months from the date of the request made pursuant to Article 170.²⁵

The time frame of the procedure is laid down in Article 173: the arbitration panel must notify its ruling to the EU, the UK and the JC within twelve months from the date of its establishment.²⁶ There is also a possibility of an expediated procedure: within ten days of the establishment of the panel, the EU or the UK may submit a reasoned request to the effect that the case is urgent. In that case, the panel must give a ruling on the urgency within fifteen days from the receipt of such request, and if it accepts that urgency has been established, it must make every effort to notify its ruling within six months from the date of its establishment.²⁷ The panel must make every effort to take decisions by consensus, but where this is not possible, ‘the matter at issue shall be decided by a majority vote’, without the possibility of any published dissenting opinions.²⁸

Even in this very ‘classical’ arbitration procedure, the CJEU lurks around the corner. The Court makes a surprise comeback under Article 174 WA for ‘[d]isputes raising questions of Union law’.²⁹ Where

²³ Pursuant to Art 171(1) WA: Decision No 7/2020 of the Joint Committee establishing a list of 25 persons who are willing and able to serve as members of an arbitration panel under the Agreement, OJ 2020 L443/22.

²⁴ If they are unable to agree on the selection of the chairperson, the EU or the UK may request the Secretary-General of the PCA to select – within five days – the chairperson by lot from among those five jointly proposed persons: Arts 171(5), sub-para 2, and (6) WA.

²⁵ It is then for the Secretary-General of the PCA, upon request by either the EU or the UK, within fifteen days, and after consultation with the EU and the UK, to appoint persons who fulfil the aforementioned requirements of independence and competence to constitute the arbitration panel: Art 171(9) WA.

²⁶ If the arbitration panel considers that it cannot comply with this time limit, its chairperson must notify the EU and the UK, stating the reasons for the delay and the date on which the panel intends to conclude its work: Art 173(1) WA.

²⁷ Art 173(2) WA.

²⁸ Art 180(1) WA.

²⁹ Title of Art 174 WA.

a dispute ‘raises a question of interpretation of a concept of Union law, a question of interpretation of a provision of Union law referred to in this Agreement or a question of whether the United Kingdom has complied with its obligations under Article 89(2)’,³⁰ the arbitration panel may not decide on ‘any such question’; rather, it must request the CJEU to give a ruling on the question. The CJEU is given jurisdiction to give such a ruling, ‘which shall be binding on the arbitration panel’.

It has been correctly observed that neither party can force the arbitration panel to request a ruling from the CJEU.³¹ However, the EU and the UK are allowed to make submissions to the arbitration panel to the effect that a request to the CJEU be made. In responding to these submissions, the panel must provide a reasoned assessment. Within ten days, either party may request the panel to review its assessment, and a hearing must be organized within fifteen days for the parties to be heard on the matter. The arbitration panel must again provide reasons for its ultimate assessment.³²

While there is as of yet no practice with regard to Article 174 WA, one may expect some vexing questions to arise. For instance, the Article 5 WA duty of good faith mentioned in [Section 5.2.2](#) of this chapter will probably be seen by some as a notion of public international law, whereas others will point to the striking resemblance of the formulation of this obligation to the principle of sincere co-operation laid down in Article 4(3) TEU.³³

With regard to compliance, Article 175 WA stipulates that the arbitration panel ruling is binding on the EU and the UK, and that they must take ‘any measures necessary to comply in good faith with the arbitration panel ruling and shall endeavour to agree on the period of time to comply with the ruling’. As to the latter, it is for the respondent, if the panel has ruled in favour of the complainant, to notify the latter of the ‘reasonable period of time’ it considers it will require for compliance.³⁴ If there is disagreement between the parties on the reasonable period of time to comply with the arbitration panel ruling, the original panel can be requested to determine the length of that period of time.³⁵ The respondent must notify the complainant before the end of that period of any measure it has taken to

³⁰ Art 89(2) WA concerns the obligation of the UK to comply with a judgment in which the CJEU has found that the UK has failed to fulfil an obligation under the Treaties or under the WA.

³¹ Larik (n 1) 207.

³² Art 174(2) WA.

³³ See Jan Wouters, ‘The Institutional Dimension of the EU–UK Relationship after Brexit’ (2020) 25(4) *European Foreign Affairs Review* 613, 627. See also [Chapter 8](#).

³⁴ Art 176(1) WA.

³⁵ Art 176(2) WA.

comply with the arbitration panel ruling.³⁶ If, at the end of the reasonable period of time, the complainant considers that the respondent has failed to comply with the panel ruling, it may request the original panel to rule on the matter. The panel must notify its new ruling to the EU and the UK within ninety days of the date of submission of such request.³⁷ If the case referred to the panel raises the question of EU law as defined above, the panel must request the CJEU to give a ruling.³⁸ If the panel rules that the respondent has failed to comply, it may, at the request of the complainant, impose a lump sum or penalty payment to be paid to the complainant.³⁹ If there is continued non-compliance, or non-payment, the complainant will be entitled, upon notification to the respondent, to suspend relevant obligations under the WA.⁴⁰ Such suspensions must 'be temporary and shall be applied only until any measure found to be inconsistent with the provisions of this Agreement has been withdrawn or amended' or until the EU and the UK 'have agreed to otherwise settle the dispute'.⁴¹ The original arbitration panel may be asked to rule on whether the notified measure after penalty or suspension brings the respondent into conformity with the WA.⁴²

5.4 Conclusion

Aware of the challenges that implementation of the WA would pose, the parties found it 'essential to establish provisions ensuring . . . binding dispute-settlement and enforcement rules that fully respect the autonomy of the respective legal orders of the Union and of the United Kingdom as well as the United Kingdom's status as a third country'.⁴³ This chapter has considered the detailed and complex provisions that the EU and the UK agreed to in order to meet those objectives. At the moment, the dispute settlement process of the Protocol combines traditional international arbitration with a significant role for the CJEU, but

³⁶ Art 177(1) WA.

³⁷ Art 177(2) WA.

³⁸ Art 177(4) WA.

³⁹ Art 178 WA.

⁴⁰ Art 178(2) WA.

⁴¹ Art 178(5) WA. For a further discussion, including of the possibility to suspend 'parts of any other agreement between the Union and the United Kingdom' (Art 178(2) first para, sub b WA), see Larik (n 1) 208.

⁴² Art 179 WA.

⁴³ WA, 11th recital of the preamble. On the repeated emphasis in the WA on the autonomy of the EU's and the UK's legal orders, see Wouters (n 33) 628.

this hybrid approach remains controversial. The UK government's July 2021 proposals for renegotiating the Protocol proposed the eradication of the role of the CJEU in the governance of the Protocol as one of its key demands.⁴⁴ It is clear that challenging times lie ahead for both the CJEU and the arbitration panels.

⁴⁴ HM Government, *Northern Ireland Protocol: The Way Forward* (CP 502, July 2021), paras 41, 67.

PART III

Interpreting the Agreements

Interpreting the Protocol

STEPHEN WEATHERILL

6.1 Introduction

This chapter provides an overview of what the Protocol does and why it does it. This is a more challenging task than one might initially imagine because the Protocol is written with what one might generously describe as calculated ambiguity, or, less charitably, outright evasion. What the Protocol *does* is not what it *says*.

Elucidating its true meaning requires a journey through four particular matters: (i) identifying the customs territory to which Northern Ireland belongs, (ii) the effect on West to East (Northern Ireland to GB) trade, (iii) the effect on East to West (GB to Northern Ireland) trade, and (iv) state aid. Each of these issues is considered in greater detail in subsequent chapters. The argument of this chapter is that the approach to drafting the provisions of the Protocol is the same: in each case the Protocol is written in a way that understates the nature and the extent of the commitments made on the UK side.

The Protocol's resolution of all four issues has come under pressure as particular affected parties resist its full implications. Helpful adjustments have been made. The Protocol has been supplemented, first, by the Trade and Cooperation Agreement (TCA) which, by providing for tariff-free trade between the UK and the EU, reduces, but does not eliminate, the need for obstacles to intra-UK trade caused by divergent tariffs; second, by decisions taken by the Joint Committee (JC); and third, by adjustments in the form of unilateral declarations, some temporary, some permanent.¹ Life under the Protocol has, however, been regrettably infected by a persisting disregard for and misrepresentation of its terms by members of the UK government.

¹ See https://ec.europa.eu/info/relations-united-kingdom/eu-uk-withdrawal-agreement/meetings-eu-uk-joint-and-specialised-committees-under-withdrawal-agreement_en.

6.2 Content of the Protocol

The Protocol locks Northern Ireland (but not GB) into regulatory alignment with an extensive body of EU rules governing manufactured and agricultural goods. The detail is found in Annex 2 to the Protocol, to which deceptively brief reference is made in Protocol Article 5(4). Two hundred and eighty-seven EU legislative instruments are listed in Annex 2. The list is not static² and it may be amended by the JC.³ Northern Ireland–EU alignment is extended by the Protocol also to cover trade rules concerning the EU's customs regime,⁴ value added tax (VAT) and excise rules,⁵ the single electricity market,⁶ and state aid rules in respect of measures which affect the trade between Northern Ireland and the EU which is subject to the Protocol.⁷ The Protocol also touches on particular aspects of individual rights to equal treatment,⁸ and the preservation of the Common Travel Area (CTA) covering the UK and Ireland.⁹ A series of Annexes contain intricate detail on exactly which EU measures are to be applied by the UK in Northern Ireland. Protocol Article 19 stipulates that 'Annexes 1 to 7 shall form an integral part of this Protocol'.

The application of these rules distinguishes Northern Ireland sharply from GB. This entails both changes in patterns of trade (because Northern Ireland products will be different from products made in GB and production and supply chains are likely to be disrupted) and the emergence of a customs and regulatory border between Northern Ireland and GB (because there has to be some kind of border between territories with divergent regulatory regimes). In so far as the UK chooses to diverge in GB from the EU model, those divisive issues will become ever more prominent over time. In short, then, in the areas covered by the Protocol, Northern Ireland is much more a part of the EU's internal market than it is part of the UK's internal market.

6.3 Why the Protocol Exists

Both sides, the EU and the UK, have made significant compromises in order to address what are recognized in the Protocol as 'the unique

² Protocol Art 13(3).

³ WA Art 164(5)(d) and Protocol Art 13(4).

⁴ Protocol Art 5.

⁵ Protocol Art 8.

⁶ Protocol Art 9.

⁷ Protocol Art 10.

⁸ Protocol Art 2.

⁹ Protocol Art 3.

circumstances on the island of Ireland'.¹⁰ The aim is to keep the border between Northern Ireland and Ireland as soft or invisible as it was immediately before the UK left the EU. This is a matter of economic significance, but much more so of political importance.

The EU has agreed three significant adjustments to its orthodox approach. It has agreed that: (i) its *de jure* external border, between Northern Ireland and Ireland, shall remain soft or invisible; (ii) its *de facto* external border, between Northern Ireland and GB, shall be located within the territory of, and policed by, a non-member state; and (iii) its economic freedoms in particular and its internal market legislative *acquis* in general shall be divided. In Northern Ireland an important package of EU rules shall be applied but not the whole of internal market law.¹¹ The Treaty rules governing free movement of persons and services are not engaged; also excluded from the Protocol are legislative provisions on consumer and environmental protection which, though tied to the internal market by their legal base, do not directly address the composition of products.¹²

For its part, the UK, in order to maintain a soft or invisible border between Northern Ireland and Ireland and also to provide room for GB to pursue a different regulatory course from the EU, has accepted that the rules governing the matters covered by the Protocol will be different in Northern Ireland and in GB. This entails that the border between Northern Ireland and GB acquires a higher legal, economic and political significance than in the past. It is not an international border, but it now counts as a border between a jurisdiction, Northern Ireland, which shares the regulatory features mandated by the Protocol with the EU, and a jurisdiction, GB, which has largely (subject to discussion of state aid; see Section 6.7) separated itself from EU rules. That border, though in formal terms internal to the UK, must become harder than before. The Protocol thus represents a delicate balance which is the result of departures from orthodox approaches made on *both* sides.

Another way to understand this is to grasp that although the UK might have wanted three things – a soft border between Northern Ireland and Ireland; a soft border between Northern Ireland and GB; and the freedom to depart from the EU's regulatory model – it is not possible for the EU to

¹⁰ Protocol Art 1(3).

¹¹ See S Weatherill, 'The Protocol on Ireland/ Northern Ireland: Protecting the EU's Internal Market at the Expense of the UK's' (2020) 45 *European Law Review* 222.

¹² The Protocol's effect on environmental protection is examined in [Chapter 20](#).

accept all three, given the need to preserve the integrity of its internal market, which must be protected by an external border (somewhere). The UK can attain any two of those three objectives – but not all three. Prime Minister May’s deal gave up the freedom to depart from the EU’s regulatory model; Prime Minister Johnson’s deal gave up the soft border between Northern Ireland and GB (albeit with the consequence that the regulatory freedom thereby released attaches to GB, not the whole of the UK). Looming in the future is the acute anxiety that, if the UK persists with its refusal to comply with the Protocol, the soft border between Northern Ireland and Ireland may have to be given up.

6.4 Customs Territory

The Protocol provides that *de jure* Northern Ireland is part of the UK customs territory.¹³ But the effect of the Protocol is that Northern Ireland is *de facto* part of the EU’s customs territory for the purposes which are covered by the Protocol. This is the consequence of Article 5(3), which provides¹⁴ that Northern Ireland is locked into the entirety of the EU’s Customs Code, the Common Customs Tariff, legislation setting up a Union system of relief from customs duty, and international agreements containing customs provisions in so far as they are applicable in the EU (subject only to a reservation to the JC of the task of establishing the conditions applicable to certain fishery and aquaculture products), and several other customs-related measures,¹⁵ among them the EU’s trade defence instruments covering, *inter alia*, anti-dumping and anti-subsidy measures.

Several articles distant from the claim that Northern Ireland is part of the UK customs territory is Article 13(1). This confirms that this claim is in effect untrue, but does so in the spectacularly evasive terms which are the Protocol’s hallmark. Article 13(1) declares that

any reference to the territory defined in Article 4 of Regulation (EU) No 952/2013 in the applicable provisions of the Withdrawal Agreement and of this Protocol, as well as in the provisions of Union law made applicable to and in the United Kingdom in respect of Northern Ireland by this Protocol, shall be read as including the part of the territory of the United Kingdom to which Regulation (EU) No 952/2013 applies by virtue of Article 5(3) of this Protocol.

¹³ Protocol Art 4.

¹⁴ Via Art 5 of the EU’s Regulation 952/2013.

¹⁵ Via Protocol Art 5(4).

What is ‘the territory defined in Article 4 of Regulation (EU) No 952/2013’? It is the EU customs territory. What is ‘the part of the territory of the United Kingdom to which Regulation (EU) No 952/2013 applies by virtue of Article 5(3) of this Protocol’? It is Northern Ireland. So although the Protocol *says* that Northern Ireland is part of the customs territory of the UK, that is not what it *does*. The Protocol treats Northern Ireland for most purposes as part of the EU’s customs territory. Once it is appreciated that the Protocol contains misleading advertising, it is easier to understand.

6.5 West–East Trade: Northern Ireland to GB

Article 6 of the Protocol asserts that trade from Northern Ireland to GB shall be unfettered, and more generally it asserts an intent to protect the UK’s internal market. But, again, the reality is different.

Article 6(2) of the Protocol directs the EU and the UK to ‘use their best endeavours to facilitate the trade between Northern Ireland and other parts of the United Kingdom’, but this is explicitly stated to occur ‘in accordance with applicable legislation and taking into account their respective regulatory regimes as well as the implementation thereof’. Article 6(2) directs that the JC shall adopt appropriate recommendations with a view to avoiding controls at the ports and airports of Northern Ireland – but only ‘to the extent possible’. Neither, then, offers a basis for setting aside the obligations arising under the Protocol with regard to trade in goods from Northern Ireland to GB. And there are such obligations.

Article 5(3) of the Protocol requires that the normal formalities applicable to goods leaving the EU’s customs territory shall apply to goods leaving Northern Ireland for GB. This entails that a pre-departure declaration be lodged, which shall take the form of a customs declaration, a re-export declaration or an exit summary declaration.¹⁶ Mitigation has occurred. In January 2021, the UK, in a unilateral declaration, announced that it would not require export and exit summary declarations.¹⁷ The EU took note and has accepted this. That acceptance is doubtless conditional on the provision of equivalent information through other means.

Article 6 also envisages impediments to trade between Northern Ireland and GB ‘to the extent strictly required by any international

¹⁶ Pursuant to EU Regulation 952/2013.

¹⁷ See [n 1](#) above.

obligations of the Union' and requires that '[t]he United Kingdom shall ensure full protection under international requirements and commitments that are relevant to the prohibitions and restrictions on the exportation of goods from the Union to third countries'. This entails checks to comply with the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). There are also special rules on movement of some cultural goods.

If the UK chooses to carry out no further checks on goods moving from Northern Ireland to GB, this would prevent it making a distinction between goods made in Northern Ireland and goods made in the EU which have been moved to Northern Ireland. Though not precluded by the Protocol, this would generate a risk of trade diversion in so far as the EU–Northern Ireland–GB route allows evasion of the customs and regulatory checks applied at other crossings from the EU into the UK. This does not seem sustainable.

Article 6 of the Protocol *says* that it is dedicated to protection of the UK internal market and that nothing shall prevent the UK from ensuring unfettered market access for goods moving from Northern Ireland to other parts of the UK's internal market. But that is not what the Protocol *does*. The Protocol entails that the border between Northern Ireland and GB shall acquire a higher legal, economic and political significance than it held in the past.

6.6 East–West Trade: GB to Northern Ireland

The Protocol does *not* suggest that trade in goods moving from GB to Northern Ireland will be unfettered. And it will not be.

Protocol Article 5(1) provides that no customs duties shall be payable for a good brought into Northern Ireland from another part of the UK by direct transport unless that good is at risk of subsequently being moved into the Union, whether by itself or forming part of another good following processing. So it *seems* that the norm is that no duties on GB to Northern Ireland trade are payable, while there is an exception where the good is at risk of onward movement to the EU when payment of duties is required. But this is not the case. Protocol Article 5(2) reverses the presumption by providing that a good brought into Northern Ireland from GB is considered to be at risk of subsequently being moved into the Union unless it is established that that good will not be subject to commercial processing in Northern Ireland and fulfils criteria to be established by the JC. The key point is that, under the Protocol, goods

are deemed to be at risk of onward movement and so attract an obligation to pay duties, unless it is shown that they are not.

The starting point, then, is that duties are payable: in the matter of duties, exports from GB to Northern Ireland are treated in the same way as exports from GB to the EU generally. Exceptions foreseen by Article 5 Protocol are few and limited – for UK residents' personal property; for goods shown to be not at risk of onward movement in rebuttal of the presumption explained in the previous paragraph; for consignments of negligible value; for consignments sent by one individual to another; and for goods contained in travellers' personal baggage. There is also tightly drawn scope for reimbursing duties paid. This confirms that what the Protocol says is not what it does – what it does is *not* treat Northern Ireland as part of the customs territory of the UK. It treats Northern Ireland as part of the EU's customs territory. Mitigation has occurred. The TCA has reduced the scale of the problem by securing tariff-free trade between the UK and the EU, with the consequence that tariffs are payable only on goods which do not qualify for such treatment under the Agreement, most obviously goods imported into GB from third countries. Moreover, in December 2020, the JC agreed criteria to determine when goods are not at risk of onward movement.¹⁸ The sharp edges of the Protocol have in this way been successfully softened, but not eliminated.

Obstacles to trade in goods between GB and Northern Ireland are not limited to payment of duties. The Protocol requires compliance with the obligations imposed by the EU Customs Code in matters such as entry summary declarations and customs declarations. It also requires that checks on goods be carried out in order to ensure that they comply with the EU rules which are applicable in Northern Ireland but not in GB. The full range of checks is not spelled out in the Protocol, in line with its thematic concern to avoid telling the full story about its extent. But compliance with EU rules on the many matters covered by the Protocol such as product composition, safety, technical standards and SPS requirements applicable to agricultural products and food will need to be checked according to the normal rules and procedures governing entry to the EU's territory, because GB will no longer be bound by these rules. Grasping the required intensity, location and nature of such checks, left undefined by the Protocol, will need reference sector-by-sector to applicable EU procedures in order to identify precisely what is at stake.¹⁹

¹⁸ Dec 4/2020 of the Joint Committee of 17 December 2020; see n 1 above and Chapter 17.

¹⁹ The UK government's site is at www.gov.uk/government/collections/moving-goods-into-out-of-or-through-northern-ireland.

The TCA does not change this because it does not include the type of regulatory alignment between the UK and the EU which would have permitted the EU to assume the compliance of GB goods with its rules. 'Grace' periods agreed by the two parties in 2021 were of only temporary effect. Looking forward, the greater the regulatory divergence that develops between GB and Northern Ireland, the greater the incentives to use the GB–Northern Ireland–Ireland trade route, and the more significant will the checks on GB to Northern Ireland trade in goods need to be.

In sum, the Protocol says that it protects the UK's internal market, but that is not what it does. It makes significant changes to it, especially, but not only, for GB to Northern Ireland trade in goods, and it establishes the Irish Sea as a politically, legally and economically significant frontier within it.

6.7 State Aid

The Protocol's treatment of state aid shares the deceptive character of several other provisions, but its geographical reach is considerably wider. Article 10 of the Protocol, combined with Annex 5, locks control of aid covered by the Protocol into the wider network of control exercised across the territory of the twenty-seven member states. Article 10 catches measures where they 'affect that trade between Northern Ireland and the Union which is subject to this Protocol'. This is plainly inspired by Article 107 TFEU, the key EU Treaty provision, which subjects to control any aid granted by a member state which distorts or threatens to distort competition 'in so far as it affects trade between Member States'. It creates a jurisdictionally significant threshold. Aid which does *not* affect trade between member states is not subject to EU law and is instead a matter of purely national concern: in the same way, aid which does *not* affect trade between Northern Ireland and the EU is not subject to the Protocol and is instead purely a matter for the UK. However, in EU law the Court interprets this jurisdictionally significant threshold as low.²⁰

The same applies to the Protocol. Article 10 Protocol is not limited to aid granted directly to firms based in Northern Ireland. It is *much* wider than that. Again, there is far more to it than the Protocol admits. Probably, the grant of aid to small manufacturers of goods in, say, Kent would not affect the trade between Northern Ireland and the EU which is subject to the Protocol, but the grant of aid to firms which are based in GB

²⁰ Eg, Case C-518/13 *Eventech Ltd* ECLI:EU:C:2015:9. See [Chapter 19](#).

but have a presence in Northern Ireland is likely to fall within Article 10. Once aid is being used in the Northern Ireland market (even if mainly being used in GB), that may help the recipient to expand its activities into Ireland (and beyond), and it may deter Irish (or other EU) firms from entering the Northern Ireland market because any competitive advantage they enjoy is eroded by the aid provided by the UK. The effect on interstate trade which is jurisdictionally necessary to trigger the Protocol is then present. The larger the aid, the more likely it is to fall within the Protocol's scope. Such aid is not automatically unlawful, but it must be compatible with EU law. This entails supervision by the Commission according to the terms set by the Treaty and secondary legislation,²¹ and it engages also the role of the Court of Justice of the European Union (CJEU) and of national courts in the same way as under EU law generally.

The only exception is in Protocol Article 10(2), which carves out a limited exception applicable to the agricultural sector. This concession is stated to apply up to a maximum overall annual level of support to be determined by the JC, which was duly set in December 2020.²²

6.8 Enforcement

Some parts of the Protocol are subject to the arbitration procedures established by the Withdrawal Agreement (WA), including the exceptional derogation in Protocol Article 16, but Protocol Articles 5 and 7 to 10, which contain the trade rules considered earlier, are enforced by methods which are closely aligned to those which prevail under orthodox EU law and which applied generally throughout the period of UK membership of the EU.²³ That means that those provisions of the Protocol are enforced through two distinct routes: through the supervisory jurisdiction conferred on the Commission backed up by the role of the CJEU; and through enforcement by private parties before national courts relying on (inter alia) the direct effect and primacy of EU law, which extends to the Protocol, embracing also the preliminary reference procedure.

Article 13(2) adds that 'the provisions of this Protocol referring to Union law or to concepts or provisions thereof shall in their

²¹ Especially but not only the Block Exemption Regulations.

²² Dec 5/2020 of the Joint Committee of 17 December 2020; see n 1 above.

²³ Protocol Art 12.

implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union'. This Protocol-specific provision asserts a longer-term and firmer obligation of compliance with the case law of the CJEU than is imposed by Article 4(4) and (5) WA. Here, there is nothing deceptive about the Protocol. The split within the UK internal market is plain. EU law orthodoxy continues to prevail in Northern Ireland, but not (state aid aside) in GB.

6.9 Conclusion

Ever since the UK's 2016 vote to leave the EU was won on a promise of an undeliverable confection of benefits, it has been plain that the form that the withdrawal would ultimately take would always disappoint some, many or even all of those involved. So too with the Protocol. Just as nobody wanted *this* Brexit, nobody wanted *this* Protocol. The Protocol is the product of reluctant compromise on both sides.

The Protocol entails the creation of a customs and regulatory border between GB and Northern Ireland and, in the areas it covers, its effect is to locate Northern Ireland within the EU's rather than the UK's internal market. The EU has nervously agreed to outsource policing of its de facto external border to a third country, the UK, and has accepted the divisibility of its economic freedoms. This cannot fully satisfy all involved. Yet the problems are caused not by the Protocol but by Brexit itself. The Protocol represents the unavoidable post-Brexit choice among three objectives: no hard border between Northern Ireland and GB; no hard border between Northern Ireland and Ireland; and regulatory autonomy for the UK (or GB). Only two of these can be achieved.

The Protocol is, as explained, drafted in evasive terms, and the areas where clarity is lacking all underplay the extent of the UK's readiness to accept fragmentation of its own internal market. The Protocol belongs alongside the 1998 Agreement as a subtly written offer to all involved to accentuate the positive and live with the negative. It is a genuine attempt to address the unique circumstances arising on the island of Ireland. With goodwill and honesty, the disappointments could be minimized. Those conditions seem increasingly elusive.

In late 2020, the UK Internal Market Bill included provisions that would have directly contradicted the obligations accepted by the UK under the WA, including the Protocol. The UK government eventually backed down. But, in March 2021, it once again set a course in conflict

with the terms of the Protocol by announcing unilateral derogations from its requirements. This provoked the EU to begin legal proceedings.²⁴ British politicians, including the Prime Minister, continue routinely to deny the impact of the Protocol.²⁵ In July 2021, the UK government published a Command Paper which showed shameless disdain for the terms of the deal carefully negotiated and agreed in late 2019 and which included several proposals to amend the Protocol which the UK government is fully aware are unacceptable to the EU.²⁶ It seems painfully clear that the Protocol was a device to 'get Brexit done' as part of a strategy that secured a General Election victory in December 2019 and that the UK government sees no further value in it. The same people who campaigned for Brexit with no regard for its consequences on the island of Ireland are now, having agreed the Protocol, showing disregard for its terms. Can this end well? Only if London is somehow forced to take seriously its binding international obligations. That one needs to make such an observation emphasizes the scale of the reputational damage which this government is prepared to inflict on the UK.

²⁴ European Commission Press Release IP/21/1132, 15 March 2021. See [Chapters 5 and 8](#) of this volume.

²⁵ See S Weatherill, 'Will the United Kingdom Survive the United Kingdom Internal Market Act?' UKICE Working Paper 03/2021, <https://ukandeu.ac.uk/working-paper/will-the-united-kingdom-survive-the-uk-internal-market-act/>, pp 19–22.

²⁶ *Northern Ireland Protocol: The Way Forward* (CP 502).

International Law Rules on Treaty Interpretation

STEVEN R RATNER

7.1 Introduction

International law is central to the interpretation of both of the Brexit-related treaties. The Trade and Cooperation Agreement (TCA) explicitly requires the parties and any dispute settlement body to interpret it according to the rules of interpretation of public international law, notably the 1969 Vienna Convention on the Law of Treaties (VCLT). The Withdrawal Agreement (WA), and thus the Protocol, by specifying that any of its provisions concerning Union law or concepts must be interpreted in accordance with EU law (including the case law of the Court of Justice of the European Union (CJEU)), implies that its many provisions not concerning EU law will need to be interpreted by the default rules of treaty interpretation, namely those of the VCLT. This chapter provides a brief overview of those rules and some of their implications for these two instruments. I focus on Articles 31 and 32 of the VCLT that concern the interpretation of treaties.

7.2 Parsing the TCA and WA Provisions on Interpretation

TCA Article 4(1) states:

The provisions of this Agreement and any supplementing agreement shall be interpreted in good faith in accordance with their ordinary meaning in their context and in light of the object and purpose of the agreement in accordance with customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969.

The following two paragraphs add, ‘for greater certainty’, that parties are not obliged to interpret the agreement in accordance with their domestic law; and that an interpretation by the courts of either party shall not bind the courts of the other party.

The first sentence of Article 4(1) WA begins with language nearly identical to the key sentence in Article 31 VCLT: ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.’ But Article 4(1) then clarifies (or perhaps conditions) this phrase by adding that such interpretation must be ‘in accordance with’ customary international law, including the VCLT. The choice of words is odd, but not unique, as it appears in a number of EU treaties with non-EU states.¹ It refers to customary international law directly, and the VCLT secondarily, as (a) the EU itself is not a party to the VCLT; (b) the VCLT does not govern treaties between international organizations and states; and (c) customary international law includes other rules of interpretation (discussed in Sections 7.5 and 7.7) not mentioned in the VCLT. Nevertheless, the TCA accepts – as is universally accepted – that the VCLT’s rules of interpretation are customary international law.²

The WA, for its part, contains the following two paragraphs in Article 4:

3. The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law.
4. The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period.

From the language of these paragraphs, provisions of the WA that do not refer to EU law, concepts or provisions will not be governed by EU law and CJEU jurisprudence. What, then, will be the framework for their interpretation? The WA cannot mean that non-EU law provisions would be interpreted solely in accordance with the law of one or the other party. The only alternative principles for interpreting any treaty – whether between states or between the EU and a state – are those of public international law. The public international law that applies is essentially

¹ See, eg, Comprehensive Economic and Trade Agreement between the European Union and Canada, 30 October 2016, Art 29.17; Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam, 12 June 2020, Art 15.21.

² The 1986 Vienna Convention between States and International Organizations or between International Organizations is not in force, though it contains the same rules of treaty interpretation.

that set forth in the TCA, namely customary international law, including the VCLT.

7.3 The VCLT's Rules of Interpretation: General Themes

Article 31 is a sort of bible when it comes to treaty interpretation. Global, regional and domestic courts routinely cite it as providing the framework for the treaties they interpret. Before delving into the key provisions and their implications for the Brexit agreements, a few key points should be made:

- (i) The goal of treaty interpretation under the VCLT is to determine the meaning of the treaty viewed from the perspective of the contemporary shared understanding of the parties to the treaties. As James Crawford has pointed out, from the perspective of international law, 'the parties . . . own the treaty',³ even if it is certainly the case that their citizens, animals and plants (and those of other states) may well be affected by how that treaty is interpreted. As a result, the key evidence for interpretation will be the interactions of the parties insofar as it demonstrates that shared understanding.
- (ii) Treaty interpretation is not just a task for tribunals. Parties to treaties are constantly interpreting them, making claims against the other party in diplomatic settings, bilaterally and multilaterally, confidentially and publicly. Only a small handful of these disputes will make it to tribunals due to jurisdictional obstacles and incentives that states have to avoid formal dispute settlement. Yet the provisions remain relevant nonetheless.
- (iii) Although the VCLT's rules of interpretation are laid out in two articles, treaty interpretation is not a formulaic exercise, where boxes are checked and then a decision reached. Moreover, although various indicia of the meaning of the text appear in Articles 31 and 32, the VCLT does not offer a ranking of evidence, insofar as a meaning flowing from one set of evidence will simply override that flowing from recourse to other evidence – with the one obvious exception that the text obviously 'counts' more than anything else. At the same time, there is a general understanding among tribunals

³ James Crawford, 'A Consensualist Interpretation of Article 31(3) of the Vienna Convention on the Law of Treaties' in Georg Nolte et al (eds), *Treaties and Subsequent Practice* (Oxford University Press 2013) 29, 31.

that some evidence will be more probative of the parties' contemporary understanding than others.⁴

- (iv) Treaty interpretation, like statutory interpretation, can easily yield more than one convincing interpretation of a treaty. Just as the states parties to a treaty may have bona fide differences of opinion regarding its meaning, so may judges. At the same time, the tools of treaty interpretation generally succeed in narrowing the range of plausible interpretations, sometimes to one.
- (v) The VCLT's rules for treaty interpretation are default rules. The parties to a treaty are free to include clauses in the treaty, or in subsequent instruments, that offer (a) a particular interpretation of a clause, (b) a particular set of indicia to consider or exclude in future interpretations and (c) a specific process for interpretation that may differ from that in the VCLT.
- (vi) Relatedly, different tribunals have developed interpretive methodologies that are distinct from those in the VCLT, or at least put a particular emphasis on one factor more than others. Notably, both the European Court of Human Rights (ECtHR) and the CJEU have endorsed a broadly teleological approach to treaty interpretation that emphasizes the overall purposes of the European human rights regime or the EU, respectively. In addition, the ECtHR has developed at least one doctrine, the margin of appreciation, that is certainly not part of the VCLT (though it is not precluded by the VCLT either).
- (vii) While the VCLT does not include an explicit obligation on domestic courts to employ it to interpret treaties, it is, of course, a treaty itself, binding on the states parties (which include the UK). So, depending on each state party's approach to the direct application of treaties (eg, monist versus dualist), domestic courts will have a domestic law obligation to interpret the treaty in accordance with the VCLT.⁵

⁴ See Jean-Marc Sorel and Valérie Boré Eveno, 'Article 31: General Rule of Interpretation' in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary*, Vol. 1 (Oxford University Press 2011) 804, 829.

⁵ The Agreements clearly foresee a role for Northern Ireland courts, in WA Arts 4, 158, 159 and 162; and the TCA's general provision barring direct actions by individuals to enforce it excludes provisions on law enforcement co-operation (Art 5(1)). See generally David Sloss, 'Domestic Application of Treaties' in Duncan Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press 2012) 367.

7.4 The Starting Point: Text, Object and Purpose, and Context

The VCLT's first command to a treaty interpreter appears in Article 31(1) and (2):

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

These two articles provide a text-based starting point for treaty interpretation. In the case of the TCA, the text includes all its protocols, annexes, appendices and footnotes.⁶ In the case of the WA, the three Protocols and the nine Annexes are all part of the text.⁷ While the VCLT refers only to the 'ordinary meaning [of] the terms of the treaty', tribunals have relied on additional doctrines, which can be said to constitute customary international law, to engage more meaningfully with the text. Various principles from domestic law, such as *ejusdem generis* and *expressio unius est exclusio alterius*, are frequently borrowed. The principle of effectiveness, or *effet utile*, is particularly worth mentioning. This principle requires that a treaty is to be interpreted to give it, as a whole, and the individual provisions within it meaningful effect. The approaches of international courts reveal that the principle of *effet utile* means that treaty clauses must be interpreted to avoid either rendering them superfluous or depriving them of significance for the relationship between the parties.⁸

As for the 'object and purpose', tribunals have significant discretion in their mode of determining it, as well as its impact on the meaning of the text. Often the text will specify the agreement's purpose, either in the preamble or in an early article. The TCA does so in its very lengthy preamble as well as its rather anodyne Article 1; the WA also has

⁶ TCA Art 778.

⁷ WA Art 182.

⁸ *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russia)*, Preliminary Objections, 2011 ICJ Rep. 70, para 134; Sorel and Eveno (n 4) 830–32.

a lengthy preamble and similar Article 1. However, the Protocol has not only a lengthy preamble but a much more specific Article 1: it clarifies that the Protocol is ‘without prejudice’ to the 1998 Agreement; that it respects UK ‘essential State functions and territorial integrity’; and that its arrangements address ‘unique circumstances on the island of Ireland’, ‘maintain the necessary conditions for continued North–South cooperation’, ‘avoid a hard border’ and ‘protect the 1998 Agreement in all its dimensions’. These clauses clearly inform the interpretation of the Protocol and the WA generally.⁹

The ‘context’ of the treaty is, in a sense, more concrete, as it consists of other written instruments concluded in connection with the treaty. They must be written, agreed upon, ‘relating to the treaty’ and ‘in connection with the conclusion of the treaty’. Typical examples include exchanges of notes between the parties that define terms or include additional commitments. For the TCA and the WA, no simultaneous agreements or exchanges of notes were agreed at the time of their conclusion. At the same time, the term ‘in connection’ does not have a fixed time-limited meaning, so even though more than a year separated the conclusion of the TCA and that of the WA, courts may need to decide whether the WA is part of the context of the TCA as well as whether the TCA is part of the context of the WA. The ‘Political Declaration’ agreed in November 2018 might also be such an instrument¹⁰ (though it might also be part of the negotiating history for purposes of Article 32 of the VCLT).

7.5 Role of Subsequent Agreements, Practice and Other Rules of International Law

Article 31(3) of the VCLT begins an additional list of indicia for interpreters beyond the immediate context of the conclusion of the treaty (a list that continues in Article 32, discussed in Section 7.6 of this chapter):

There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation

⁹ As one small example of the difficulties in determining object and purpose, in Australia’s ICJ case against Japan over whaling, Australia claimed that the purpose of the treaty was to protect whales, while Japan argued that it was to regulate whaling and preserve the whaling industry. In the end, the Court found both to be purposes of the treaty, though neither purpose did much work in its ultimate interpretation of the text. *Whaling in the Antarctic (Australia v Japan, NZ Intervening)*, 2014 ICJ Rep. 224 (14 March 2014), paras 55–58.

¹⁰ ‘Outline of the Political Declaration Setting Out the Framework for the Future Relationship between the European Union and the United Kingdom’, 14 November 2018.

of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.

The first two additional elements concern the way that the parties understand the meaning of the treaty since its entry into force. Subsequent agreements (a) refer to new treaties or other agreements (eg, oral agreements) where the parties clarify how they wish to interpret or apply the treaty. Such agreements are given significant, even dispositive, weight because they clearly demonstrate the parties' contemporaneous understanding of the meaning of a treaty. In the case of the TCA and the WA, such agreements are certainly possible. Indeed, the TCA itself presumes that such agreements will be 'supplementing agreements' that will be an 'integral part of the overall bilateral relations . . . and shall form part of the overall framework'.¹¹ The TCA does not quite call these supplementary agreements an integral part of the TCA text itself, but it suggests that future interpreters using VCLT Article 31(3)(a) should give them heavy weight.

The second interpretive aid, subsequent practice (b), is also very important but much more difficult to identify because it is typically not reduced to a single document. Interpreters have to verify that the two (or more) parties are truly agreed on what a particular provision of the treaty means, as opposed to simply agreeing on something else.¹² In recent years, the UN's International Law Commission (ILC) has offered detailed guidance to states and courts about the meaning of subsequent practice. That guidance clarifies that the range of acts that might constitute subsequent practice includes executive, legislative, judicial or other acts of the parties (but not of non-state actors), as well as a conference, or joint institution, of the parties.¹³ So if, for instance, the highest domestic

¹¹ Art 2 TCA.

¹² One classic example of states giving great weight to subsequent practice concerns Art 27(3) of the UN Charter: 'Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members . . .'. When the UN's members began treating an abstention by a member of the permanent five as equivalent to a 'concurring vote' – which they did the first time it was used in 1946 – the meaning of that term was no longer in doubt; textual or other arguments that 'concurring' meant 'affirmative' simply did not matter (including to the ICJ). *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, 1971 ICJ Rep. 16 (Advisory Opinion of 21 June), para 22.

¹³ ILC, Draft conclusions on subsequent agreement and subsequent practice in relation to the interpretation of treaties, conclusion 5–6, 11(3), 12(2), in *Report of the International Law Commission, Seventieth Session*, UN Doc A/73/10, at 12 (2018).

courts of the two parties to a treaty explicitly shared an understanding of a term in the treaty, and that understanding was not contradicted by other organs of the state, those court judgments would constitute the sort of state practice that is to be taken into account under sub-paragraph (b). If one of the many bilateral institutions established under the WA and the TCA, from the highest political level to the expert/technical level, were to agree on an interpretation of the treaties, that too would be important subsequent practice.¹⁴

The third interpretive aid, other relevant rules of international law applicable in the relations of the parties (c), on its face opens the door to courts interpreting either the WA or the TCA to bring in completely extraneous treaties – whether human rights, environmental law, the law of the sea, international trade law (including intellectual property) – as well as rules of customary international law. Much of this process is not controversial. For example, international courts routinely rely on the customary law rules of state responsibility to determine when an action in violation of a treaty is imputable to one of the parties.¹⁵ So, too, may international courts sometimes rely on an obviously relevant treaty for the purpose of interpreting another treaty, such as interpreting the term ‘territorial sea’ by reference to the UN Convention on the Law of the Sea.

But hard cases abound, where the parties or judges may have to interpret whether a particular norm is a ‘rule’, whether it is ‘relevant’ and whether it is ‘applicable in the relations between the parties’.¹⁶ If one party to a dispute believes that a treaty should be interpreted in light of another treaty to which only one of the states is party, it would be hard to view that second treaty as ‘applicable’ (unless the rule in it has become one of customary law). In the case of the Protocol, two obviously delicate questions will concern whether the 1998 Agreement and the ECHR fit within Article 31(3)(c). The former is mentioned numerous times in the Protocol, with an emphasis on the need to preserve its operation;¹⁷ but the EU is not a party to it. Nor is the EU a party to the ECHR, although all members of the EU are party to that treaty. Courts might nonetheless

¹⁴ See, eg, *Whaling in the Antarctic*, para 83.

¹⁵ See, eg, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v Serbia)*, 2007 ICJ Rep. 43 (26 February), paras 385, 398.

¹⁶ For one useful study, see Bruno Simma and Theodore Kill, ‘Harmonizing Investment Protection and International Human Rights: First Steps towards a Methodology’ in C Binder et al (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 678.

¹⁷ Eg, Protocol Preamble paras 4–5, Arts 1(3), 2.

look past these distinctions and determine that both are indeed ‘relevant’ and ‘applicable’. Regarding the TCA, Part 3 on criminal law enforcement co-operation states that the co-operation is ‘based on’ the ECHR and the importance of giving it domestic effect, and that nothing in the TCA modifies the duty to respect the rights in the ECHR.¹⁸ So clearly the ECHR constitutes a relevant rule for purposes of interpreting Part 3.

7.6 Supplementary Means

The VCLT’s other article on interpretation invites tribunals to consider what are deemed ‘supplementary’ indicia:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.

Although Article 32 begins with the word ‘may’, its drafters fully expected tribunals to refer to these materials, and many tribunals routinely have recourse to supplementary materials, in particular the negotiating history of a treaty (*travaux préparatoires*).¹⁹ As the text makes clear, tribunals are not constrained in when they may turn to these supplementary means, as they can be used to either confirm or rebut what has been found from the deployment of Article 31. Yet the *travaux*, especially of a particular article in a treaty, may be obscure. The deal on the language may have been reached over drinks or coffee at a bar, or just in a conversation off the record, so that those taking notes of the negotiation never wrote down what the parties meant to agree on – or to avoid agreeing on. The negotiating history could be confidential, requiring an interpreting body to request it from the parties. This uncertainty over the availability and reliability of the *travaux préparatoires*, combined with a view that these materials should matter less than those showing the contemporaneous understanding of the parties, may render them ultimately of little use for interpreting some treaties, though tribunals take them into account when they can find them.

¹⁸ TCA Art 524.

¹⁹ Richard Gardiner, ‘The Vienna Convention Rules on Treaty Interpretation’ in Duncan Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press 2012) 475, 479–80, 487–89.

Article 32 is not limited to the preparatory work of the treaty. It includes any other material related to the conclusion of the treaty not covered in Article 31(2), including statements by the negotiators to their legislature during debates over the latter's approval of the treaty. In addition, as the ILC has recently made clear, it includes the conduct of one or all parties to the treaty when that practice does not demonstrate the agreement of the parties required for that practice to be considered under Article 31(3)(b).²⁰ So courts might look at the interpretation of the treaties by the parties to demonstrate that a particular understanding is not shared.

In the case of the WA, some of the negotiating record is easily available – notably the first EU Commission proposed draft, as well as the EU–UK agreed draft rejected by Parliament; other documents are public. The statements of the negotiators to their legislatures are well documented; and both treaties have been the subject of disagreements already. Notably, the EU accused the UK of breaching the WA, including its duty of good faith,²¹ in including a particular clause (later withdrawn) in a bill introduced in Parliament, and in delaying certain customs regulations on goods destined for Northern Ireland.²²

7.7 Conflicts: Peremptory Norms and Other Treaties

While international law gives states virtually unlimited discretion to define, refine, alter and terminate their treaty relations, this discretion is not completely unlimited. Article 53 treats as void *ab initio* any treaty conflicts with a norm of *jus cogens*. Certainly, civil society actors like to make claims that various parts of treaties so conflict, rendering the treaties void. Yet the scope of *jus cogens* norms is extremely limited – the ban on the use of force, a few core human rights norms (the ban on genocide, torture or crimes against humanity), the supremacy of the UN Charter, and perhaps a few others. It seems highly unlikely that any provision of the WA or the TCA would violate *jus cogens*.

A separate question is whether an obligation under either treaty might conflict with another treaty or rule of customary international law, insofar as carrying it out would breach those other rules. In this

²⁰ ILC Draft Conclusions, conclusion 4–5.

²¹ Art 5 WA.

²² See [Chapter 5](#).

scenario, there are various possible responses: the states will amend the treaty to avoid the conflict; one or both will interpret it through recourse to Article 31(c)(3) to avoid the conflict (although conceivably the parties could interpret it differently); or the parties will need to assume the consequences of a breach of the other rule. The VCLT does not set any priorities for treaties nor require that one treaty be interpreted to be consistent with another (although the text of a particular treaty can so provide). So, international law does not require that the WA or the TCA be interpreted to be consistent with something as old as the Act of Union of 1800 unifying Ireland and Great Britain (eg, its provisions on commerce), or something as recent as the WTO Agreements. In addition, Article 30 of the VCLT provides that if the parties to one treaty later conclude another treaty on the same subject matter without terminating the first, the earlier treaty applies only to the extent that it is ‘compatible’ with the later treaty, unless the parties specify otherwise.²³

7.8 Conclusion

Articles 31 and 32 VCLT are central to the interpretation of all treaties and are routinely applied by international, regional and domestic courts and arbitral bodies – and of course by treaty parties themselves in their interactions regarding the implementation of treaties. They are the subject of enormous case law and scholarship; the aim of this chapter has been only to highlight their key features when it comes to the Brexit agreements.²⁴ What remains to be seen is how the different courts and tribunals that engage with the Brexit agreements (domestic courts, the CJEU, the arbitration panels) may use the VCLT, perhaps, in different ways. The CJEU has significant experience using

²³ See, in this context, *In the matter of an Application by Allister, et al* [2021] NIQB 64 (per Colton, J), paras 63–114 (finding that Withdrawal Acts implementing the Brexit agreements override the Act of Union); see also *ibid*, paras 64–66 (rejecting the claim of invalidity of the WA under the VCLT).

²⁴ Beyond the VCLT’s rules on treaty interpretation, several other provisions may at some stage prove relevant to the interpretation and application of the WA and the TCA: Art 26 (all parties to carry out their treaty obligations in ‘good faith’) – see [Chapter 8](#); Art 60 allowing treaty suspension or termination following a ‘material breach’ by the other party – see [Chapter 25](#); and Art 62 permitting treaty suspension or termination in the event of a ‘fundamental change in circumstances’ (*rebus sic stantibus*) – see [Chapter 25](#).

the interpretive methodology of the VCLT in interpreting treaties between the EU and other states (while adopting a *sui generis* framework for interpreting the EU's constitutive instruments). Yet, as numerous commentators have noted, even as it applies the VCLT framework, its approach is often quite idiosyncratic.²⁵

²⁵ For example, it has an expansive notion of the idea of the object and purpose of a treaty, extending the teleological approach it uses to interpret the EU's constitutive acts to other treaties. Jed Odermatt, 'The Use of International Treaty Law by the Court of Justice of the European Union' (2015) 17 *Cambridge Yearbook of European Legal Studies* 121.

Good Faith and Sincere Co-operation

CHRISTOPHER McCRUDDEN

8.1 Introduction

The Withdrawal Agreement (WA) has several common provisions which set out various obligations as to how the WA (and the Protocol as an integral part of the WA) is to be interpreted and applied. Among these are the duty of ‘good faith’ and the duty of ‘sincere cooperation’, which feature in Article 5 WA. This provides, in part, that the EU and the UK ‘shall, in full mutual respect and good faith, assist each other in carrying out tasks which flow from this Agreement’. In addition, Article 5 provides that this obligation of good faith ‘is without prejudice to the application of Union law pursuant to this Agreement, in particular the principle of sincere cooperation’.

8.2 How to Approach the Interpretation of Article 5 WA?

‘Good faith’ is a general principle of international law,¹ including international trade law,² and is explicitly included in Article 26 of the Vienna Convention on the Law of Treaties (VCLT).³ What appear to be somewhat equivalent concepts feature in other specifically *European* agreements. Article 4(3) of the Treaty on European Union (TEU) applies the duty of ‘sincere cooperation’ (sometimes referred to as the principle of ‘loyalty’) to member states and the EU in the application of the EU Treaties.⁴ Article 3 of the European Economic Area (EEA) Agreement applies what the Court of the European Free Trade Association (EFTA

¹ Robert Kolb, *Good Faith in International Law* (Hart 2017).

² Marion Panizzon, *Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement* (Hart 2006).

³ ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith.’

⁴ It states:

Court) terms the duty of 'sincere cooperation' or 'loyalty' to the parties to that Agreement.⁵ The relevant provision in these two European agreements is drafted in very similar terms to Article 5 WA,⁶ except that they do not use the term 'good faith' and Article 4(3) TEU includes the duty to 'facilitate the achievement of the Union's tasks', which neither Article 3 EEA nor Article 5 WA includes. In light of the fact that Article 5 WA thus contains an amalgam of both international law and EU law terms, how should it be interpreted? As more closely related to the international law usage or to EU legal understanding?

Although the matter is not without doubt, a plausible interpretation of Article 5 WA is that the reference to 'good faith' is a reference to the international law concept and should be interpreted as such,⁷ but that this is an additional requirement on the parties, over and above the other obligations in Article 5, which is to be interpreted in light of Union law. Thus, although Article 5 is entitled 'Good Faith', the term only appears in the first paragraph of that provision. The temptation to

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

See further Marcus Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014) and John Temple Lang, 'The Principle of Sincere Cooperation, the Charter, and Digitalisation' in U Bernitz, X Groussot, J Paju and S de Vries (eds), *General Principles of EU Law and the EU Legal Order* (Wolters Kluwer 2020) 31.

⁵ 'The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement. Moreover, they shall facilitate cooperation within the framework of this Agreement.' See further John Temple Lang, 'The Principle of Sincere Cooperation in EEA Law' in Carl Baudenbacher (ed), *The Fundamental Principles of EEA Law: EEA-ities* (Springer 2017) 73; Páll Hreinsson, 'General Principles' in Carl Baudenbacher (ed), *The Handbook of EEA Law* (Springer 2016), 349.

⁶ 'The Union and the United Kingdom shall, in full mutual respect and good faith, assist each other in carrying out tasks which flow from this Agreement. They shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from this Agreement and shall refrain from any measures which could jeopardise the attainment of the objectives of this Agreement.'

⁷ Where 'good faith' appears elsewhere in the WA (Arts 36(2), 159(3), 169(1), 175 and 184), this should be interpreted also according to international law.

interpret the whole Article in light of this, applying an international law lens to the other provisions as well, should be resisted. This understanding draws strength from Article 4 WA. Article 4(4) provides that '[t]he provisions of this Agreement referring to Union law *or to concepts or provisions thereof* shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period'. With the exception of the 'good faith' provision, Article 5 is, therefore, to be interpreted in accordance with Court of Justice of the European Union (CJEU) case law. This interpretation is strengthened further by Article 4(1) WA which provides that '[t]he provisions of this Agreement . . . shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States'. It is clear that, with the exception of the 'good faith' provision, the remainder of Article 5 is likely to be interpreted in the Union and the member states along the lines of the case law on Article 4(3) TEU.

The matter is not free from doubt, however, given that Article 3 of the Trade and Cooperation Agreement (TCA),⁸ drafted in almost identical terms to Article 5 WA, is subject to Article 4 TCA, which states that the provisions of the TCA must be interpreted according to international law, and not according to EU law.⁹ This would seem to result in a conclusion that Article 3 TCA may give rise to different obligations on the parties than does Article 5 WA. While this appears to be counter-intuitive, this conclusion would accurately reflect the way in which the interpretation of these provisions is heavily context specific, a point we return to subsequently. In light of this, this chapter considers primarily how the meaning and scope of Article 5

⁸ Which states:

1. The Parties shall, in full mutual respect and good faith, assist each other in carrying out tasks that flow from this Agreement and any supplementing agreement.

2. They shall take all appropriate measures, whether general or particular, to ensure the fulfilment of the obligations arising from this Agreement and from any supplementing agreement, and shall refrain from any measures which could jeopardise the attainment of the objectives of this Agreement or any supplementing agreement.

⁹ Art 4(2) TCA: 'For greater certainty, neither this Agreement nor any supplementing agreement establishes an obligation to interpret their provisions in accordance with the domestic law of either Party.'

WA is clarified by examining the interpretation of the analogous concepts by the CJEU and the EFTA Court.

8.3 Article 5 WA in Detail

8.3.1 'Objectives' of the WA and the Protocol

Each of the Agreements mentioned so far refers to the 'objectives' of these Agreements and relates the concept of 'good faith' (or equivalent) to the delivery of these 'objectives'. The Agreements differ significantly in what they identify as their objectives and these differences need to be given sufficient weight when interpreting the obligations of the parties in Article 5 WA. Some of these objectives are considerably more ambitious than others. For example, Article 3 TEU, setting out the objectives of the Union, goes considerably further than Article 1 of the EEA Agreement, the objectives of which are simply '... to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area...'. In the EU context, but not in the EEA, the principle of 'sincere cooperation' has been understood as an expression of EU solidarity and a reflection of the principle of 'federal good faith',¹⁰ 'which is designed to secure mutual respect and readiness to co-operate with respect to the powers exercised by the legislative, executive and judicial bodies of different levels of authority within a "federal" system'.¹¹

So, too, the objective of the WA as a whole is stated in deceptively simple, and relatively restrained, terms in Article 1 WA: 'This Agreement sets out the arrangements for the withdrawal of the United Kingdom of Great Britain and Northern Ireland ... from the European Union ...'. The objective of the Protocol, on the other hand, is stated in more specific and wide-ranging terms: addressing the unique circumstances on the island of Ireland, maintaining the necessary conditions for continued North–South co-operation, avoiding a hard border and protecting the 1998 Agreement in all its dimensions. This means that the Protocol has, to an extent, 'Europeanised' the 1998 Agreement, meaning that upholding that Agreement has become an EU

¹⁰ Koen Lenaerts and Piet Van Nuffel, *Europees Recht* (Intersentia 2011), quoted in Hreinsson (n 5) 357. See also Klamert (n 4) 47.

¹¹ Hreinsson (n 5) 357.

objective in the context of the WA, and no longer simply a UK–Irish objective.

How these differences in ambition regarding objectives should lead to differences in the application of the obligations in Article 5 WA is likely to become a contested issue. All that can be said for the moment is that the greater the depth of integration that an agreement is thought to require, the more far-reaching the principle of good faith and the cognate obligations are likely to be, in two different senses: first, in a more extensive treaty the principle of good faith etc will be more far-reaching simply because it applies to more objects; and, second, the application of the principles will involve differential depth of engagement by the parties with each other. If this approach is adopted, then the principle of ‘good faith’ etc in the WA, as applied in the Protocol, is likely to be considered more far-reaching than in Article 26 of the VCLT, Article 3 EEA or Article 3 TCA, but less far-reaching than Article 4(3) TEU. Much will depend, however, on the particular cases in which the issue arises.

8.3.2 *Good Faith etc and Sincere Co-operation as Lex Generalis*

There is also a significant difference between these Agreements in the extent to which they include detailed provisions on a range of issues which potentially overlap with the duties of good faith etc and sincere co-operation. So, for example, the fact that there are specific provisions in the Protocol regarding the requirement for domestic courts to refer issues of EU law to the CJEU means that the role that the duty of sincere co-operation plays in the EEA context in generating a duty to refer in certain circumstances is unnecessary. *Lex specialis* displaces *lex generalis*. The CJEU has been explicit on this point. TEU Article 4(3)’s predecessor provision, the Court held, ‘is worded so generally that there can be no question of applying it autonomously when the situation concerned is governed by a specific provision of the Treaty . . .’¹² Where there are gaps in the Protocol,¹³ however, the role of Article 5 may become critical. Where there are specific, detailed requirements,

¹² Case C-18/93 *Corsica Ferries* [1994] ECR I-1783, para 18.

¹³ Klamert (n 4) 46 refers to the ‘gap-filling’ role of good faith. See also Vaughan Lowe’s reference to the role of ‘good faith’ as ‘interstitial’: ‘The Politics of Law-Making: Are the Methods and Character of Norm Creation Changing?’ in M Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford University Press 2000) 207.

these will reduce the role that the more general concept of ‘good faith’ will need to play. The duty of ‘good faith’ is ‘subsidiary to more specific Treaty provisions’.¹⁴

8.3.3 *Obligations Deriving from Article 5 WA*

Although the *ends* (‘objectives’) that each of the Agreements seeks to achieve differ (in some cases significantly, as we have seen), and the Article 5 WA and Article 3 TCA obligations are also situated in the context of differing substantive obligations in the various Agreements, the *means* by which these objectives and obligations may and should be met are mostly common to both of these Agreements. There are three basic obligations in Article 5 WA and Article 3 TCA, applying to both the EU and the UK: (i) a positive obligation to assist each other in carrying out tasks which flow from the Agreement; (ii) a positive obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from the Agreement; and (iii) a negative obligation to refrain from any measures which could jeopardize the attainment of the objective of the Agreement.

With the exception of (i), which is not included in Article 3 EEA, these obligations mirror equivalently drafted obligations in Article 4(3) TEU, Article 3 EEA and Article 3 TCA. These all relate to the means by which the objectives of the relevant Agreements may and should be fulfilled. As a result, the interpretation of these common ‘means’ provisions should be seen as closely aligned.¹⁵ Following the approach adopted by Hreinsson in the EEA context, we may say that Article 5 WA will be construed in the same manner as the corresponding EU and EFTA provisions, ‘so long as this interpretation is not irreconcilable with the provisions and characteristics’ of the relevant Agreement.¹⁶ Unless any of the differences in drafting are material in a particular case, the CJEU’s application of the concept of ‘sincere co-operation’ and the EFTA Court’s interpretation of the ‘loyalty’ provision in Article 3 EFTA will both be highly relevant in understanding the meaning and scope of the obligations in Article 5 WA.

¹⁴ Klamert (n 4) 13.

¹⁵ In Case E-1/04 *Fokus Bank ASA*, [2004] EFTA Court Reports 11, the EFTA Court stated that Art 3 EEA mirrored Art 10 EC (now Art 4(3) TEU), para 41.

¹⁶ Hreinsson (n 5) 358.

8.3.4 Implications of Article 5 WA Obligations

Several important principles deriving from the CJEU and the EFTA Court jurisprudence on ‘sincere co-operation’ apply to Article 5 WA:

- (i) The obligations set out in Article 5 are legal obligations, not simply political commitments.¹⁷ ‘Good faith’ is sometimes said to be non-justiciable and simply a declaration of political principle. This is inconsistent with the uninterrupted jurisprudence of analogous concepts by the CJEU and the EFTA Court, and Article 5 WA itself requires that this consistent jurisprudence should be followed in the interests of consistency. Obiter comments to the contrary by UK judges, however illustrious, should not be followed.¹⁸
- (ii) The other obligations in Article 5 should not be seen through the international law lens of ‘good faith’ but should rather be seen in light of the interpretation of the analogous concepts in the EEA and the EU. This has significant implications, not only in distancing it from general international law understandings of ‘good faith’. Some have interpreted a ‘good faith’ obligation as consisting of little beyond imposing an obligation to behave ‘reasonably’. This understanding is common in diplomatic and political uses of the term and is reflected in some judicial interpretations of the term. This approach gives insufficient importance to the way in which the other obligations in Article 5 WA have come to possess the more technical meaning that this chapter now considers.
- (iii) ‘Good faith’ and the other obligations in Article 5 WA may also differ significantly from apparently similar domestic law concepts. ‘Good faith’ is not, for example, simply the absence of ‘bad faith’, of a type that is common in UK public law. The positive obligations inherent in a duty of good faith go significantly beyond the concept of the absence of bad faith, as it is hoped this chapter demonstrates. That said, there are, as we have seen, some points of comparison in the use of similar concepts in national federal systems.¹⁹

¹⁷ In Case C-246/07, *Commission v Sweden*, the CJEU referred to the duty of sincere co-operation as giving rise to duties of co-operation that are legal duties – they are not just obligations regarding what is politically desirable.

¹⁸ Such as those by Laws LJ in *Ryanair Holdings v Competition and Market Authority* [2015] EWCA Civ 83, on which see Temple Lang, ‘The Principle of Sincere Cooperation in EEA Law’ (n 5).

¹⁹ Daniel Halberstam, ‘Of Power and Responsibility: The Political Morality of Federal Systems’ (2004) 90(3) *Virginia Law Review* 731 (comparative examination of the duty of co-operation in the EU, Germany and the United States).

- (iv) The obligation of ‘good faith’ and the other obligations in Article 5 WA are addressed to all the organs of the UK, including to UK courts for matters within their jurisdiction.²⁰ The principle also applies to the institutions and bodies established by the WA and the Protocol, as well as to all the organs of the EU. The duty of good faith etc rests on mutual duties, and mutual respect, which bind not only the UK but also the Union institutions. This does not mean either that the ‘good faith’ obligation is symmetrical or that it depends on reciprocity.

Taken as a whole, the duty of ‘good faith’ will be seen to express the ‘gravitational force’ that the Protocol should have on all decisions taken by the UK and the EU that impact those objectives.²¹ The implications this will have for the UK and the EU have yet to be fully identified. That will be a work in progress for many years. However, as a first approximation, it will be useful to consider what the obligations in Article 5 WA are likely to require, using the three basic obligations identified above as the basic structure, considering them in reverse order.

Article 5 lists three obligations. First, the negative obligation to refrain from any measures which could jeopardize the attainment of the objective of the Agreement. As a result, the freedom of action in the future of both the EU and the UK is limited, ‘excluding the right to legislate at will concerning the subject matter of the treaty’.²² At its most basic, Article 5 WA requires that the legal obligations of the Agreement must be upheld, echoing Article 26 VCLT, incorporating the principle of *pacta sunt servanda*. The obligations in Article 5 WA can be seen in part as the equivalent to or an expression of these international law principles.²³ The decision by the UK government to introduce legislation (the UK Internal Market Bill) that included provisions that explicitly empowered ministers to breach international obligations, including those under the Protocol, if that was necessary in order to protect the UK internal market, was a clear breach of this first element of the Article 5 WA obligations. Whether a matter falls within the sovereign power of the EU or the UK does not alter the obligation,

²⁰ Klamert (n 4) 23 (on CJEU case law on the issue). See also EFTA Court decision, Case E-18/11 *Irish Bank Resolution Corporation v Kaupthing Bank* [2012] EFTA Court Reports 592, paras 58 and 123.

²¹ The term ‘gravitational force’ is that of Klamert (n 4) 20, referring to Article 3 TEU.

²² *North Atlantic Coast Fisheries Case (Great Britain v United States of America) (Award)* [1910] XI RIAA 169, para 188 (emphasis added).

²³ Klamert (n 4) 41.

therefore, that, in situations covered by the WA and the Protocol, EU and UK rules must comply with these Agreements.

Second, Article 5 WA imposes the positive obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from the Agreement. This applies in particular to the implementation and enforcement of these obligations, including regarding the provision of national remedies, and respect for the allocation of competences in the Protocol. Several examples may be identified from other chapters: regarding the scope of 'direct effect', as discussed in [Chapter 3](#), in which the duty of good faith tips the balance in favour of a generous interpretation; regarding the availability of damages remedies for failure by the UK to track replacement directives, as discussed in [Chapter 12](#), in which the duty of good faith will be critical in deciding the scope of state liability;²⁴ regarding the debateable role of the Charter of Fundamental Rights (CFR), as discussed in [Chapter 13](#), in which the duty of good faith is relevant in deciding when it should apply. Other examples may also be identified. The UK is required to ensure that directives which have been implemented and satisfy certain conditions prevail over conflicting national law.²⁵ This aspect of the duty of 'good faith' requires respect for the principle of consistent interpretation, developed in EU law.²⁶

The third obligation in Article 5 WA consists in a positive obligation on each party to assist the other in carrying out tasks which flow from this Agreement. This includes the duty, in certain circumstances, to negotiate with the other party, to inform the other party of relevant developments, and not to act unilaterally where this would lead to difficulties for the other party in the sphere of the Protocol. An exemplification of these principles can be seen in the inclusion of 'good faith' in Article 169(1) WA. ('The Union and the United Kingdom shall endeavour to resolve any dispute regarding the interpretation and application of the provisions of this Agreement by entering into consultations in the Joint Committee in good faith, with the aim of reaching a mutually agreed solution.') This third wing of the obligation goes beyond the duty to negotiate, however. In infringement proceedings, the UK would also be required to co-operate in any inquiry of the Commission and to supply it with all the necessary information, and

²⁴ Case E-9/97, *Sveinsbjörnsdóttir*, [1998] EFTA Court Reports 95, para 61.

²⁵ Case E-15/12 *Jan Anfinn Wahl* [2013] EFTA Court Reports 534, para 54.

²⁶ Case E-1/07 *Criminal proceedings against A* [2007] EFTA Court Reports 246, para 39 and Joined Cases E-9/07 and E-10/07 *L'Oreal Norge* [2008] EFTA Court Reports 258, para 28.

vice versa.²⁷ The EFTA Court has decided that the EFTA Surveillance Authority was under a duty in a state aid case not only to respect the right of the state to be heard but also to co-operate sincerely with the latter in that procedure.²⁸

An application of this third element of the Article 5 WA set of obligations is to be found in the Commission's letter to the UK objecting to the unilateral extension by the UK of grace periods,²⁹ and supporting the commencement of legal action by the EU. It drew heavily on WA Article 5's good faith provision. 'The UK', the Commission wrote, 'has resorted to this unilateral action without any discussion or consultation with the EU side in the bodies established by the Agreement. It has therefore acted in breach of the mutual trust and spirit of cooperation ...' The Commission identified two separate sets of legal complaints: (i) a violation of the substantive provisions of the Protocol, Article 5(3) and (4) of the Protocol on Ireland–Northern Ireland, read in conjunction with relevant Union law listed in Annex 2; and, separately, (ii) a violation of the duty of good faith provided by Article 5 WA. The Commission required the UK to enter into consultations in the Joint Committee under Article 169 WA, with the aim of reaching a mutually agreed solution; failure to do so would lead to the triggering by the EU of the dispute settlement procedure under WA Title III of Part Six.

8.4 'Sincere Co-operation' in Article 5 WA

What are we to make of the proviso in Article 5 WA that the obligations we have just examined are 'without prejudice to the application of Union law pursuant to this Agreement, in particular the principle of sincere cooperation'? There appear to be three main implications of this provision. First, the duties that arise from Article 5 cannot be used to limit the scope or application of the principle of sincere co-operation in applying Union law (for example vis-à-vis a member state) that continues to apply to the EU under Article 4(3) TEU. This proviso would prevent the UK from arguing that an obligation on the EU under Article 4(3) TEU was trumped by Article 5 WA.

Second, the proviso is not drafted in such a way that it applies only to the EU institutions. At this point, we need to tread with care. Since the UK has left the EU, the Article 4(3) TEU duty of sincere co-operation

²⁷ Klamert (n 4) 28.

²⁸ Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnjford* [2005] EFTA Court Reports 117, para 128.

²⁹ See Chapter 5.

clearly does not apply to the UK. There is no overarching duty on the UK to fulfil the aims of the *Union* in the exercise of its sovereign authority. However, there are various places in the WA and the Protocol where the UK has agreed to be bound to follow 'Union law', as several chapters of this book describe.³⁰ Where that is the case, we need to bring in another critical common provision of the WA. We have seen that Article 4 WA provides that the '... the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States'. This means that the general principles that continue to apply to the interpretation and application of Union law in the EU also apply to the interpretation and application of Union law if and when it applies in the UK by virtue of the WA and the Protocol. One of these general principles is the duty of sincere co-operation. If the duty of sincere co-operation in Article 4(3) TEU goes beyond the other obligations of the parties in Article 5 WA, then the interpretation of Union law, based on the duty of sincere co-operation, applies.

Arguably, there is a third implication. Article 4 WA also provides that '[t]he provisions of *this Agreement* ... shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States'. The implications of this provision, when read with Article 5 WA, are somewhat less clear. The Union must interpret and apply the WA in such a way that the aims of the Union are upheld. A maximalist interpretation would be that the UK is also required by Article 4 WA to act in such a way in implementing and interpreting the WA as to fulfil the aims of the Union, but that seems a step too far. When Article 5 states that the obligations in Article 5 WA are 'without prejudice to the application of *Union law* pursuant to this Agreement, in particular the principle of sincere cooperation', this implies that the intention was that the duty of sincere co-operation under Article 4(3) TEU applies to the application of Union law only, not to the provisions of the WA itself, which do not constitute 'Union law'.

8.5 Conclusions

Early indications are, then, that Article 5 WA is likely to play a significant role in future disputes between the UK and the EU over the application of

³⁰ Chapters 3, 5, 6, 9 and 10.

the Protocol, not least because it helps to address a feature of EU–UK relations that seems unlikely to disappear quickly, namely the absence of trust. Article 5 WA stresses that, for the parties to the Protocol, it is about following not just the letter of that Agreement but its spirit. It means avoiding weak, implausible interpretations of that Agreement, and working through differences, not looking for reasons to get around the obligations. At the domestic level, however, in practice the primary role of Article 5 WA will be ‘gap filling’: where gaps in coverage are identified, or where anomalous results are likely to arise, or where the issue is simply not otherwise addressed in the text of the Protocol. Where there is no express provision to deal with situations, it is likely to be argued that because the Protocol is intended to meet a specified objective or contains a general obligation, Article 5 WA imposes a specific obligation to do or not to do something. The Northern Ireland legal system, in particular, is so multilayered³¹ that it would be unlikely for gaps not to be identified or for anomalous consequences not to be detected, and so Article 5 WA may become of critical importance.

³¹ Chapter 10.

PART IV

Governance of the Protocol in Ireland
and the United Kingdom

The Status of the Withdrawal Agreement in UK Law

CATHERINE BARNARD

9.1 Introduction

Taking the long view, the Withdrawal Agreement (WA) is likely to be remembered for two matters: the position it takes on the protection of citizens' rights (provisions which have the potential, as we shall see, to last for well over a century) and the provisions of the Protocol which could last indefinitely – or perhaps no longer than four years, depending on the outcome of consent votes in the Northern Ireland Assembly.¹ This chapter looks primarily at the effect of the WA in the UK as a whole.² It will focus on the implementation of the WA in UK law, the enforcement of rights under the Protocol, as they relate to the UK, and the position of EU citizens and their rights.

9.2 Implementation of the WA into UK Law

The WA, an international treaty, provided for the exit of the UK from the EU. Under the UK's dualist approach, Parliament was required to legislate in order to give the WA legal effect in the UK. This was accomplished by the European Union (Withdrawal Agreement) Act 2020 (EUWAA 2020) which, in part, amended the European Union (Withdrawal) Act 2018 (EUWA 2018). The WA took effect in UK law from exit day (31 January 2020, at 11.00 pm).³ The Trade and Cooperation Agreement (TCA), which regulates future relations between the EU and the UK and applies in tandem with the provisions of the WA, came into effect in the UK

¹ See further [Chapter 10](#).

² [Chapter 10](#) considers the operation of the Protocol in Northern Ireland law, and [Chapter 11](#) considers the legal status of the Protocol in Ireland.

³ As a result of s 5 EUWAA 2020. Exit day (as defined in EUWA 2018, s 20(1)–(5)): see SI 2020/75, reg 4(c).

via the European Union (Future Relations) Act 2020 (EUFRA) at the end of December 2020.

What was to be done about the significant mass of EU law that applied in the UK prior to the UK's exit? Although the UK left the EU on 31 January 2020, under the terms of the WA, the UK then entered into a period of *transition* (or, in British terminology, *implementation*), which lasted from 1 February 2020 to 11 pm on 31 December 2020, Implementation Period Completion Day (IPCD). During this transition/implementation period, most of EU law continued to apply in the UK, as EU law.⁴ EUWA 2018 provided that when the UK finally left the EU, all EU legislation then applying was to be 'on-shored' into UK law, becoming 'retained EU law' and giving powers to ministers to amend that legislation where retained EU law no longer operates effectively. Section 5(2) EUWA 2018 provides for the continuation of the supremacy of this EU retained law over conflicting pre-Brexit UK law.

The 2018 Act, as amended, gives effect to the whole of the WA (including the Protocol) in UK law and also gives ministers specific powers to implement matters affecting the Protocol. The principal conduit pipe for the incorporation of the UK's obligations under the WA is section 7A EUWA 2018 ('General implementation of remainder of withdrawal agreement'), introduced as a result of section 5 of EUWAA 2020. The key parts of section 7A provide:

- (1) Subsection (2) applies to –
 - (a) all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement, and
 - (b) all such remedies and procedures from time to time provided for by or under the withdrawal agreement, as in accordance with the withdrawal agreement are without further enactment to be given legal effect or used in the United Kingdom.
- (2) The rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be –
 - (a) recognised and available in domestic law, and
 - (b) enforced, allowed and followed accordingly.
- (3) Every enactment (including an enactment contained in this Act) is to be read and has effect subject to subsection (2).

⁴ This was achieved legally by the conduit pipe of s 1B EUWA 2018 ('Saving for EU-derived domestic legislation for implementation period').

The striking feature of section 7A is how far it draws on the controversial language of section 2(1) European Communities Act 1972 (ECA 1972),⁵ which had been read to give direct effect and supremacy to EU law, and was viewed in UK law as constituting a ‘constitutional statute’. We will return to this point later.

The rights of EU citizens in Part Two of the WA apply to the UK, as do the provisions of the Protocol, since section 7A applies to the territory of the UK as a whole.⁶ In addition, section 8C of the 2018 Act (‘Power in connection with Ireland/Northern Ireland Protocol in withdrawal agreement’) provides additional powers to implement the Protocol. A minister of the Crown may by regulations make such provision as the minister considers appropriate –

- (a) to implement the Protocol on Ireland/Northern Ireland in the withdrawal agreement,
- (b) to supplement the effect of section 7A in relation to the Protocol, or
- (c) otherwise for the purposes of dealing with matters arising out of, or related to, the Protocol (including matters arising by virtue of section 7A and the Protocol).

9.3 Enforcement of Rights

9.3.1 Introduction

As we have noted, the text of section 7A EUWA 2018 draws heavily on the original language of section 2(1) ECA 1972, which was understood to give direct effect and supremacy to EU law in the UK. However, section 7A is intended to give direct effect and supremacy not to EU law but to

⁵ Which reads:

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression ‘enforceable Community right’ and similar expressions shall be read as referring to one to which this subsection applies.

⁶ S 24(1) EUWA 2018: ‘Subject to subsections (2) and (3), this Act extends to England and Wales, Scotland and Northern Ireland.’ This means that the enforcement provisions in Part Six of the WA also apply to breaches of the WA in Northern Ireland as in the rest of the UK.

the WA, thereby expressly implementing the commitments in Article 4(1) and (2) WA, which provides:

1. The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States. Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.
2. The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation.

The reference to ‘direct effect’ in Article 4(1) and ‘supremacy’ in Article 4(2) is a first for an EU Treaty. For good measure, Article 4(3)⁷ makes clear that these concepts should be given an EU meaning: ‘The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law.’

The acceptance of the supremacy and the direct effect of the WA, via section 7A, might be thought to be somewhat ironic given the UK’s express rejection of the supremacy of EU law by section 1 EUWA 2018 (which turns off section 2(1) ECA 1972), and is reiterated in section 5(1) EUWA 2018.

9.3.2 *Individual Enforcement*

The effect of section 7A EUWA 2018, combined with Article 4(1) WA, is that provisions of the WA can be enforced in UK law by ‘individuals’, which is EU-speak for natural and legal persons. So, an EU producer who cannot sell its goods in Northern Ireland could challenge a decision by the Northern Ireland authorities in a Northern Ireland court, relying on the principle of direct effect and the supremacy of the WA, and a reference under Article 267 of the Treaty on the Functioning of the European Union (TFEU) can be made by that court to the Court of Justice of the European Union (CJEU) if necessary.⁸

⁷ This is discussed further in [Chapter 12](#).

⁸ Under Art 267 (Protocol Art 12(4)).

Similarly, a GB business which cannot sell a good into Northern Ireland because, it argues, a Northern Ireland authority has misapplied one of the many single market regulations that continue to apply in Northern Ireland by virtue of Protocol Annex 2 could bring a claim. Alternatively, a GB (or an EU) business prosecuted for non-compliance with Northern Ireland primary or secondary legislation could raise the incompatibility of that legislation with one of the provisions listed in Annex 2. Any such claim may also raise the incompatibility of the Northern Ireland legislation with Articles 5 and 7 to 10 of the Protocol.

Many of the provisions in the EU regulations and the directives in Annex 2 fulfil the conditions for direct effect (clear, precise and unconditional), and therefore come within Article 4 of the WA, read together with section 7A and section 8C EUWA 2018. They will also have supremacy over conflicting UK law.

9.3.3 *Responsibility of the UK Government*

Protocol Article 12(1) ('Implementation, application, supervision and enforcement') provides that the UK government is responsible for 'implementing and applying the provisions of Union law made applicable by this Protocol to and in the United Kingdom in respect of Northern Ireland'. This means that any breach of the Protocol is the responsibility of the UK government, with the result that the Commission may bring enforcement proceedings against the UK government under Article 258 TFEU in respect of aspects of the Protocol.⁹ As Protocol Article 12(4) provides:

As regards the second subparagraph of paragraph 2 of this Article, Article 5 and Articles 7 to 10, the institutions, bodies, offices, and agencies of the Union shall in relation to the United Kingdom and natural and legal persons residing or established in the territory of the United Kingdom have the powers conferred upon them by Union law. In particular, the Court of Justice of the European Union shall have the jurisdiction provided for in the Treaties in this respect. The second and third paragraphs of Article 267 TFEU shall apply to and in the United Kingdom in this respect.

If the UK does not comply, then further enforcement proceedings may be brought against the UK. Since Protocol Article 12(5) provides that 'Acts of

⁹ https://ec.europa.eu/info/sites/default/files/file_import/Commission_report_2015_infograph_en_0.pdf.

the institutions, bodies, offices, and agencies of the Union adopted in accordance with paragraph 4 shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States', the CJEU may also, on the basis of a proposal from the Commission, impose a lump sum or daily penalty payment, or both, on the UK.¹⁰

In addition to the normal EU system of remedies, Protocol Article 13(1), sub-paragraph 3, makes clear that Part Six of the WA, the Institutional and Final provisions, which include the bespoke dispute resolution mechanism (DRM), also applies. The DRM involves, in essence, a political consultation which – if unsuccessful – is followed by binding arbitration (with the possibility of a reference to the CJEU on matters concerning EU law).¹¹ The arbitration panel may ultimately impose financial sanctions. In case of non-payment or persisting non-compliance by one party, the other party may suspend its obligations under the WA (with the exception of the citizens' rights part of the WA) or from the TCA, such as by imposing tariffs on the imports of goods.

9.3.4 *A Case Study*

A dispute that arose soon after the WA and the Protocol took final effect illustrates the practical operation of these provisions, and how they may operate in tandem. As a result of the UK's unilateral decision to extend grace periods under the Protocol in March 2021, the EU deployed a two-pronged approach to enforcement against the UK. Vice-President Maroš Šefčovič sent a political letter to Lord Frost,¹² the UK's co-chair of the Joint Committee (JC), calling on the UK government to rectify and refrain from putting into practice the statements and guidance published in early March 2021. In its letter, the Commission said:

The Protocol on Ireland and Northern Ireland is the only way to protect the Good Friday (Belfast) Agreement and to preserve peace and stability, while avoiding a hard border on the island of Ireland and maintaining the integrity of the EU single market. The EU and the UK agreed the Protocol together. We are also bound to implement it together. Unilateral decisions and international law violations by the UK defeat its very purpose and undermine trust between us. The UK must properly implement it if we are to achieve our

¹⁰ Art 260(2) TFEU applies.

¹¹ See further [Chapter 5](#) on the dispute settlement procedures.

¹² https://ec.europa.eu/info/sites/default/files/lettre_to_lord_frost_1532021_en.pdf.

objectives. That is why we are launching legal action today. I do hope that through the collaborative, pragmatic and constructive spirit that has prevailed in our work so far on implementing the Withdrawal Agreement, we can solve these issues in the Joint Committee without recourse to further legal means.

The letter noted that these unilateral measures are ‘a violation of the duty of good faith under Article 5 of the Withdrawal Agreement’. The letter also called on the UK to enter into bilateral consultations in the JC in good faith, with the aim of reaching a mutually agreed solution by the end of March. The reference to the JC concerned consultations prior to the formal commencement of the DRM in Part Six of the WA.

In addition, the Commission sent the UK a Letter of Formal Notice for breaches of substantive provisions of EU law concerning the movement of goods and pet travel made applicable by virtue of the Protocol on Ireland and Northern Ireland. The Commission noted: ‘This marks the beginning of a formal infringement process, as set out in Article 12(4) of the Protocol, in conjunction with Article 258 of the Treaty on the Functioning of the European Union’, relying on the Commission’s supervisory and enforcement powers under the EU Treaties in relation to specific provisions of the Protocol, including Article 5. The letter requested the UK to carry out swift remedial actions to restore compliance with the terms of the Protocol.

The Commission, therefore, triggered two sets of proceedings against the UK, one for breach of Article 5 WA using the bespoke DRM, the second for breach of Protocol Article 5 using the standard Article 258 TFEU enforcement mechanism. In respect of the Article 258 TFEU enforcement proceedings, the UK had a month to submit its observations. Reportedly, it did so with a robust response. In respect of the DRM, the Commission said that ‘if the UK fails to enter into consultations in the Joint Committee in good faith, with the aim of reaching a mutually agreed solution by the end of this month, the EU may provide written notice to commence consultations under Article 169 WA, as a first step in the Dispute Settlement Mechanism process set out in Title III of Part Six of the Withdrawal Agreement’. At the end of July 2021, the Commission decided to suspend these proceedings ‘in order to provide the necessary space to reflect . . . and find durable solutions to the implementation of the protocol’.¹³

¹³ See further ‘Update: Developments from July 2021 to September 2021’ at the front of this book.

9.4 Citizens' Rights

9.4.1 *The Rules*

In addition to the Protocol, the WA also addresses important issues in respect of citizens' rights in Part Two. These obligations are implemented in the UK by Part Three of the EUWAA 2020.¹⁴ The 2020 Act provides continued residency rights to all EU citizens and their non-EU family members (NEFM) who exercised their right to reside lawfully in the UK before the end of the transition/implementation period (31 December 2020). It also gives the same rights to Norwegian, Icelandic and Liechtenstein nationals under the European Economic Area–European Free Trade Association (EEA–EFTA) separation agreement, and Swiss nationals under the Swiss citizens' rights agreement. For simplicity, we shall refer to EU citizens throughout, but note that these other groups are also covered. The 2020 Act also protects the existing rights to equal treatment and non-discrimination for EU citizens and their NEFM in the UK.

Children are protected under the WA when they are born to, or legally adopted by, those falling under the WA. This protection may last a lifetime. The deadline for applying is 30 June 2021, but there is the possibility of applying after that date if the individual has 'reasonable grounds'. The Guidance released by the Home Office on what constitutes 'reasonable grounds' says that children are eligible to make an application to the scheme up until they reach the age of eighteen (more on this later).

The WA provides that those who have resided legally in the host state in accordance with Union law for a continuous period of five years have the right to permanent residency and those who have resided in the host state for less than five years have the right to acquire permanent residency once they have completed the required five-year period of residence.¹⁵

In the UK, EU nationals and their NEFM are granted either settled status (five years or more of residency) or pre-settled status (less than five years' residency).¹⁶ In the UK, prospective EU settled status applicants need prove only that they have been continuously resident in the UK, rather than that they have been continuously resident and exercising their EU Treaty rights – such as being in work, education, self-employment or self-sufficiency – as they would if they were applying

¹⁴ EUWAA ss 7–17 and Sch 2.

¹⁵ WA Arts 15–16.

¹⁶ For full details on the EUSS, see Barnard et al, *EU Settled Status*, Report for UK in a Changing Europe, <https://ukandeu.ac.uk/research-papers/the-eu-settlement-scheme/>, on which this section draws.

for benefits. The WA says that the right to permanent residency can be lost only through an absence from the host state for a period exceeding five consecutive years. Those with pre-settled status who need to reapply for settled status will need to evidence their ‘continuous’ residency in the UK; this means that they must not be absent from the UK for more than six of twelve rolling months.

The WA also sets out some procedural and administrative guidance/rules regarding issuing residence documents.¹⁷ It says that the deadline for submitting an application should not be less than six months from the end of the transition period – the UK has implemented this exactly with a 30 June 2021 deadline. The WA says that the administrative procedures for applying must be smooth, transparent and simple, without any unnecessary administrative burdens, and that the application forms must be short, simple and user-friendly. Further, the residence document issued must be free of charge or otherwise not cost more than nationals are charged for similar applications.¹⁸

The rights of workers and self-employed persons are outlined under the WA¹⁹ and these remain broadly the same rights as this group held pre-UK exit from the EU under Union law, including equal treatment protection. The WA also covers the rights of frontier workers – these are people who have their residence in one member state but regularly work in another. It also outlines the continuation of the recognition of professional qualifications cross-borders before the end of the transition period.²⁰

Article 30 WA states that EU regulations around social security coordination continue to apply to those who fall within the scope of the WA. As we have seen, in the UK, while settled status confers an automatic ‘right to reside’ for the purpose of welfare benefits, those with pre-settled status must also satisfy additional requirements – such as being in work – in order to be able to access welfare benefits. This tiered distinction between two groups of residency rights holders (ie, those with settled status and those with pre-settled status) in the UK has recently come under scrutiny and is the subject of an appeal as to the legal status of such a distinction.²¹ The outcome of the case will have a significant impact on

¹⁷ WA Art 18.

¹⁸ An initial planned £65.00 fee for application was waived in January 2019 by then prime minister Theresa May.

¹⁹ WA Arts 24, 25, 26.

²⁰ WA Art 27.

²¹ The *Fratila Tanase* case is at the time of writing before the UK Supreme Court, at www.supremecourt.uk/cases/uksc-2021-0008.html.

the lives of some 2.3 million EU pre-settled status holders residing in the UK.

To oversee the implementation of Part Two of the WA in the UK, an Independent Monitoring Authority (IMA) has been established.²² The WA also establishes a JC of the UK and the EU to oversee application of the WA. The CJEU remains partly competent in respect of EU citizens' rights. This means that the UK courts will continue to pay due regard to decisions of the CJEU as well as being able to refer questions of interpretation to the CJEU, where relevant, until 2028.

9.4.2 *What This Means for EU Citizens with (Pre-)Settled Status*

The effect of obtaining (pre-)settled status means that EU citizens will be able to work in both GB and Northern Ireland. (As EU citizens they will also be able to work in Ireland, relying on their free movement rights under EU law.) Any breach of those rules in GB or in Northern Ireland may be challenged in the courts of Northern Ireland or GB, depending on where the breach occurred, relying on the direct effect of the provisions in Part Two of the Protocol, as outlined in Section 9.3 of this chapter. They may also complain to the IMA. For EU citizens arriving in the UK after 1 January 2021, they must either rely on the mobility provisions in the TCA or come under UK domestic immigration law.²³ UK citizens will continue to be able to live and work in Northern Ireland, and Irish citizens in the UK, by virtue of the terms of the Common Travel Area (CTA), which predated EU membership.²⁴ The rights under the CTA have recently been reaffirmed in a Memorandum of Understanding between the UK and Ireland.²⁵

9.5 Conclusions

The relationship between the UK and the EU during the first few months after the end of the transition/implementation period was described as 'a bit bumpy'.²⁶ The UK's reaction to handling the hypersensitive issue of the

²² S 15 and Sch 2 of the 2020 Act.

²³ www.gov.uk/apply-to-come-to-the-uk.

²⁴ See further Chapter 14. See also www.gov.uk/government/publications/common-travel-area-guidance/common-travel-area-guidance.

²⁵ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/800280/CTA-MoU-UK.pdf.

²⁶ www.standard.co.uk/news/uk/brussels-mps-government-director-house-of-commons-b935646.html.

Protocol made matters more difficult. The EU followed up what it saw as the UK's non-compliance, triggering the dispute settlement procedures under the WA, albeit this is currently suspended. Private parties may also enforce their rights, but at the time of writing there was no example of this. Meanwhile, EU citizens with settled status enjoy protection similar to that under EU law and also benefit from a robust enforcement mechanism.

The Protocol in Northern Ireland Law

GORDON ANTHONY

10.1 Introduction

This chapter provides an overview of the Protocol's position in Northern Ireland law. It does so by focusing on the 'legal hybridity' that results from the application of different legal rules under and outside the Protocol. While Northern Ireland is still formally a part of the UK,¹ the reality is that its legal and political institutions now have obligations in relation to two constitutional orders. It is a point that will remain true for so long as the Protocol is in force: presently for four years, with the option of extension by 'democratic consent'.²

The chapter has two main objectives. The first is to consider the nature of the legislative framework that has given effect to Brexit and how that intersects with the Northern Ireland Act 1998 (NI Act 1998). In terms, this is a point about overlapping 'constitutional statutes' and whether the Brexit legislation – principally the European Union (Withdrawal) Act 2018 (as amended) (EUWA 2018) – is consistent with all aspects of the Northern Ireland 'constitution' (ie, the Belfast-Good Friday Agreement 1998 (1998 Agreement) and the NI Act 1998).³ Certainly, the Protocol is said in Article 1 to have the express objective of safeguarding the 1998 Agreement '*in all its dimensions*', whether those relate to (for instance) the protection of rights⁴ or North–South co-operation.⁵ However, it has since been argued in proceedings in the domestic courts that aspects of the Northern Ireland constitution have been weakened by the legislation that gives domestic legal effect to the Protocol, in ways that contradict the logic of case law on constitutional

¹ NI Act 1998, s 1(1).

² NI Act 1998, s 56A and Sch 6A.

³ For the term 'constitution', see *Robinson v Secretary of State for Northern Ireland* [2002] NI 390.

⁴ Protocol Art 2; NI Act 1998, ss 6(2)(ca), 24(1)(aa), 69(10A), 71, 74(7) and 78A–E.

⁵ Protocol Art 11; EUWA 2018, ss 8C(7) and 10.

statutes.⁶ This chapter assesses the strength of those arguments and asks whether legal hybridity itself is contrary to parts of the Northern Ireland constitution.

The second objective is to consider the nature of the obligations that arise under and outside the Protocol. In the first instance, this is a point about the ongoing application of aspects of EU law in Northern Ireland, where Article 4(1) of the Withdrawal Agreement (WA) reads:

The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States . . . the United Kingdom shall ensure . . . its judicial and administrative authorities [have powers] to disapply inconsistent or incompatible domestic provisions.

While the corpus of EU law that has effect in this way does so by reason of an international Treaty, Article 4 appears as a reformulation of the supremacy doctrine that was developed in case law such as *Costa v Enel* and *Simmmenthal*.⁷ This is where the legal hybridity of the Protocol takes form, as, to the extent that Northern Ireland's institutions are bound by norms of EU law under the Protocol, they must follow different rules when engaged in decision-making outside it. The chapter identifies the legal basis for the application of those different rules and 'who' must do 'what', and 'when', as a matter of Northern Ireland law.

10.2 The EUWA 2018 and the Protocol

The legal hybridity that has been created by the Protocol starts with EUWA 2018, as amended by the European Union (Withdrawal Agreement) Act 2020 (EUWAA 2020). The first purpose of EUWA 2018 is, of course, to make provision for the domestic law effects of Brexit, where it governs decision-making *outside* the Protocol not just in Northern Ireland but in the UK more widely. The relevant sections of the Act are considered in [Chapter 9](#) in this volume,⁸ and only the following features are noted here: (i) the Act of 2018 expressly repealed the European Communities Act 1972 (ECA 1972) but kept many aspects of EU law on the statute book as 'retained EU law';⁹ (ii) the principle of

⁶ On which see *Thoburn v Sunderland CC* [2003] QB 151.

⁷ Respectively, Case 6/64, [1964] ECR 585 and Case 106/77, [1978] ECR 629.

⁸ [Chapter 9](#).

⁹ Ss 1 and 2–7.

supremacy no longer applies on its original terms, albeit the courts can still have regard for rulings of the Court of Justice of the European Union (CJEU) when interpreting retained EU law;¹⁰ (iii) references to Article 267 of the Treaty on the Functioning of the European Union (TFEU) are not possible, and nor is the Charter of Fundamental Rights (CFR) a part of domestic law;¹¹ (iv) retained EU law can be modified by the devolved institutions in Northern Ireland in areas within their competence but not where particular aspects of EU law are specified in regulations made by a minister of the Crown;¹² and (v) the general principles of EU law now have only a limited reach in domestic law and, post-Brexit, *Francovich* actions are not possible.¹³

The primary provision of the EUWA 2018 in terms of decision-making *under* the Protocol is section 7A, inserted by EUWAA 2020. Titled ‘General implementation of remainder of withdrawal agreement’, this section provides: ‘(2) The rights, powers, liabilities, obligations, restrictions, remedies and procedures [in the WA] are to be – (a) recognised and available in domestic law, and (b) enforced, allowed and followed accordingly’; and ‘(3) Every enactment (including an enactment contained in this Act) is to be read and has effect subject to subsection (2)’.

The full significance of section 7A becomes apparent when it is read beside Article 4(1) WA (above) and Articles 12(4) and 13(2)–(4) of the Protocol, as these embed EU law (including its general principles and remedies) into the law of Northern Ireland. Article 4(1)’s specific effect is thus to make the provisions of EU law listed in the Protocol applicable in Northern Ireland, where Article 12(4) provides, as regards Articles 5 and 7–10 of the Protocol (and their Annexes), that the CJEU ‘shall have the jurisdiction provided for in the Treaties in this respect. The second and third paragraphs of Article 267 TFEU shall apply to and in the United Kingdom in this respect.’ Article 13(2)–(4) in turn reads:

[T]he provisions of this Protocol referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the [CJEU] . . . [W]here this Protocol makes reference to a Union act, that reference shall be read as referring to that Union act as amended or replaced . . . [T]he [EU may adopt] a new act that falls within the scope of this Protocol, but which

¹⁰ S 5.

¹¹ Ss 5(4) and 6(1)(b).

¹² Ss 7 and 12 (and NI Act 1998, s 6A).

¹³ Sch 1.

neither amends nor replaces [an EU] act listed in the Annexes to this Protocol.

Section 7A is not the only provision of EUWA 2018 that gives effect to the Protocol – for instance, section 8C confers on ministers of the Crown wide regulation-making powers in relation to it, and section 10 (on protection for North–South co-operation) was amended in the light of Article 11 of the Protocol.¹⁴ However, for the purposes of legal hybridity, section 7A, as read with the Act more generally, establishes the different sets of rules that must be followed by Northern Ireland’s institutions, including its courts. While it might be argued that such hybridity is simply a carry-over of the hybridity that applied under the ECA 1972 – where UK courts frequently observed different procedural and substantive rules¹⁵ – the fact that aspects of EU law now apply in only Northern Ireland means that the analogy is not a perfect one. In short, while EU law had previously applied throughout the UK as a whole and in the light of the wider devolution settlement, the Protocol has placed Northern Ireland in a truly unique position. Indeed, it may, on one reading, even be queried whether ‘legal hybridity’ is a strong enough descriptor: economic constitutionalism and the EU’s historical experience with sectoral integration might suggest that something more fundamental is afoot.¹⁶

10.3 The NI Act 1998 and the Protocol

The Protocol has also been implemented through amendment of the NI Act 1998 – and some parts of the Act can now be understood only when read alongside provisions of EUWA 2018. While it is arguable that the ‘catch-all’ nature of section 7A EUWA 2018 would have made all necessary changes by implication (albeit that would raise a question about the interplay of ‘constitutional statutes’; see Section 10.4), the reality is that the complexities of the Protocol required further, specific changes to the NI Act 1998. Those complexities are, of course, a result of the

¹⁴ Note that the powers in s 8C correspond with powers for NI departments under s 11 of, and Sch 2 to, the Act. On the nature of s 10 EUWA 2018, see *Re McCord/JR83/Waring* [2019] NICA 49.

¹⁵ See, eg, *R v Ministry of Agriculture, Fisheries and Food, ex p First City Trading* [1997] 1 CMLR 250; and G Anthony, *UK Public Law and European Law: The Dynamics of Legal Integration* (Hart 2002) chs 4–6.

¹⁶ On sectoral integration, see, eg, Arne Niemann and Philippe C Schmitter, ‘Neofunctionalism’ in Antje Wiener and Thomas Diez (eds), *European Integration Theory* (2nd edn, Oxford University Press 2009) ch 3.

complexities of the 1998 Agreement itself, as the Protocol is intended to protect that Agreement ‘in all its dimensions’.¹⁷ Four provisions of the Protocol in this regard are of particular importance.

The first provision is Article 2, which relates to the protection of rights and, as a result of sections 6(2)(ca) and 24(1)(aa) of the NI Act 1998, now limits the powers of the devolved institutions. The implications of that Article are considered in more detail in a subsequent chapter and will not be analysed in any depth here.¹⁸ However, one point that can be made concerns the CFR and the range of Directives that is listed in Annex I to the Protocol. This is one area where the dynamism of the CFR might well continue to be evident in Northern Ireland law, as the CJEU may draw upon it if required to rule upon the meaning of the Directives – or, indeed, new Directives within the scope of the Protocol – in the future.¹⁹ In the event that it were to do so, the Northern Ireland courts would be required to follow that case law by reason of Article 13(2), which states that: ‘the provisions of this Protocol . . . shall in their implementation and application be interpreted in conformity with the relevant case law of the [CJEU]’. The contrast with the position under section 5 EUWA 2018 – which provides that the CFR does not apply in UK law more generally – could well become of more than passing significance.

The second provision is Article 11, which states that the Protocol ‘shall be implemented and applied so as to maintain the necessary conditions for continued North–South cooperation, including in the areas of environment, health, agriculture, transport, education and tourism, as well as in the areas of energy, telecommunications, broadcasting, inland fisheries, justice and security, higher education and sport’. This is one area where the NI Act 1998 is to be read alongside EUWA 2018, as section 10 of that Act (among others) safeguards the multilayered arrangements that underlie North–South co-operation. Such co-operation was envisaged by Strand Two of the 1998 Agreement (as supported by the British–Irish Agreements of 1998 and 1999), and it takes form in Northern Ireland law in, inter alia, a ministerial duty to participate in meetings of the North–South Ministerial Council, and the possible exercise of legislative powers in relation to agreements reached there.²⁰ The multilayered nature of these arrangements is such that the legal structures for co-operation are found in

¹⁷ Art 1. On the 1998 Agreement, see [Chapter 2](#).

¹⁸ See [Chapter 12](#).

¹⁹ See further [Chapter 13](#). On the dynamic nature of the CFR, see *AB v Facebook* [2013] NIQB 14, para 14, McCloskey J.

²⁰ NI Act 1998, s 52B and Sch 2, para 3.

international law but with a basis in political agreement in Northern Ireland, and this is where section 10 EUWA 2018 becomes significant. Originally enacted before the Protocol was agreed, it was amended in its light and now does three main things: (1) it imposes a duty on ministers of the Crown and Northern Ireland ministers and departments to act compatibly with the NI 1998 when exercising powers under EUWA 2018; (2) it prohibits ministers of the Crown from making regulations which would diminish any form of North–South co-operation as provided for by the 1998 Agreement or which would facilitate physical border infrastructure on the island of Ireland; and (3) it prohibits a minister of the Crown from agreeing to any recommendation by the Protocol’s Joint Committee (JC) that would alter the arrangements for North–South co-operation in the 1998 Agreement, establish a new implementation body, or alter the functions of an existing implementation body. Point (3) would suggest that any such changes would be possible only through a further British–Irish agreement, where previous agreements have been contingent upon political agreement within Northern Ireland itself.²¹

The third provision is Article 13(4). This envisages the adoption by the EU of an act which may either amend or replace existing acts in the Protocol or be in the form of a new act ‘that falls within the scope of this Protocol’. This is where the Protocol is arguably at its most controversial in terms of democratic principle, as it gives the UK government only a peripheral role in relation to such acts and attributes no role at all to the Northern Ireland institutions. Domestic law does, however, oblige those institutions to track developments in relation to Articles 2, 5 and 7–10 of the Protocol, where the Secretary of State has a power under section 26(2) of the NI Act 1998 to make an order in relation to the discharge of international obligations. While it is, of course, unclear quite how those obligations will develop in the future, they lend themselves to a more general point about the Northern Ireland institutions existing as ‘rule-takers’ under the Protocol, rather than as ‘rule-makers’. They are, moreover, rule-takers who could potentially be liable for ‘sufficiently serious’ breaches of EU law in accordance with the ‘*Francovich*’ principle – such is the combined effect of Article 4(1) WA and section 7A(2) EUWA 2018.

²¹ See, to similar effect, s 8C of EUWA 2018 whereby a power for ministers of the Crown to make regulations in relation to the Protocol does not extend to ‘the second sentence of Article 11(1) of the Protocol (which provides that the United Kingdom and the Republic of Ireland may continue to make new arrangements that build on the provisions of the Belfast Agreement in other areas of North–South cooperation on the island of Ireland)’.

The fourth provision is Article 18, which is titled 'Democratic consent in Northern Ireland'. This Article provides that, four years after the end of the transition period, the UK government must 'seek democratic consent in Northern Ireland in a manner consistent with the 1998 Agreement' for the continued application of Articles 5–10 of the Protocol. A number of possible outcomes are envisaged by the Article: (i) a majority of members of the Northern Ireland Assembly (the Assembly) may vote to continue the application of Articles 5–10, in which instance they will apply for a further four years; (ii) there is 'cross-community' support (ie, majority support within unionism *and* nationalism) for the continued application of Articles 5–10, in which instance they will apply for a further eight years; and (iii) a majority of members of the Assembly may vote not to continue the operation of Articles 5–10. In this third instance, Articles 5–10 will remain in force for a further two-year period during which time the JC must make recommendations about future arrangements 'taking into account the obligations of the parties to the 1998 Agreement'.

The mechanisms for obtaining such consent are a matter for the UK alone,²² and the NI Act 1998 has since been amended by regulations made under EUWA 2018.²³ The primary amendments are found in Schedule 6A to the NI Act 1998, which makes provision for a 'default democratic consent process'²⁴ and an 'alternative democratic consent process'.²⁵ Of particular note is paragraph 18 of the Schedule, which 'applies in relation to any motion for a consent resolution whether the default democratic consent process or the alternative democratic consent process is applicable'.²⁶ According to that paragraph, the Assembly may vote on a consent motion only once and, by paragraph 18(5), section 42 of the NI Act 1998 'does not apply in relation to a motion for a consent resolution'. Section 42 governs the 'petition of concern' mechanism whereby either of Northern Ireland's two main ethno-national groups can veto measures with which they disagree, and the regulations that inserted Schedule 6A have thus written out a key feature of the original 1998 Agreement. The significance of this point is returned to in Section 10.4.

²² See the UK government's related 'Unilateral Declaration on Democratic Consent', https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840232/Unilateral_Declaration_on_Consent.pdf.

²³ The Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020 (SI 2020/1500).

²⁴ Part 3: to apply when the offices of the First Minister and deputy First Minister are filled.

²⁵ Part 4: to apply when the offices of the First Minister and deputy First Minister are vacant.

²⁶ Para 17.

10.4 Constitutional Statutes and the Protocol

The remaining matter to be addressed in this chapter is how to conceive of the interplay between EUWA 2018 and the NI Act 1998. As noted in the introduction, this is a point about ‘constitutional statutes’ and how far that imagery can illuminate the relationship between the Acts. The term is famously associated with Laws LJ’s ruling in *Thoburn*, where he said:

[A] constitutional statute is one which (a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights[;] (a) and (b) are of necessity closely related: it is difficult to think of an instance of (a) that is not also an instance of (b).²⁷

While *Thoburn* concerned the effects of ECA 1972 – which, as a constitutional statute, was said to lie beyond the rules of implied repeal – Laws LJ identified a list of other qualifying statutes that included Magna Carta, the Bill of Rights, the Union with Scotland Act 1706, the Human Rights Act 1998 and the devolution legislation for Scotland and Wales.²⁸ It is a commonplace that the NI Act 1998 is also a constitutional statute.²⁹

Two questions arise from this. The first is whether EUWA 2018 ought to be regarded as a constitutional statute, where it would appear that the answer can only be yes. Not only does EUWA 2018 have elements of both (a) and (b) from Laws LJ’s definition; it has been enacted in the very constitutional space that was previously occupied by ECA 1972. Indeed, the similarities with ECA 1972 can be seen in the fact that section 7A EUWA 2018 has largely the same effects as section 2 ECA 1972 – a ‘catch-all’ means of incorporation linked to a requirement to read ‘all other enactments’ in the light of the incorporated law.³⁰ The similarities can also be seen in the fact that EUWA 2018 has replaced ECA 1972 as an ‘entrenched enactment’ under section 7 of the NI Act 1998. This means that EUWA 2018 ‘shall not be modified by an Act of the Assembly or

²⁷ *Thoburn v Sunderland CC* [2003] QB 151, 187, [62]. For subsequent judicial reference to *Thoburn*, see, eg, *R (Buckinghamshire CC) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324, 382–83, [208], Lords Mance and Neuberger; and *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2020] AC 491, 544, [120], Lord Carnwath.

²⁸ *Ibid.*

²⁹ *Robinson* (n 3), describing the NI Act 1998 as a ‘constitution for Northern Ireland’.

³⁰ On s 2 of ECA 1972, see *R v Secretary of State for Transport, ex p Factortame (No 2)* [1991] 1 AC 603.

subordinate legislation made, confirmed or approved by a Minister or Northern Ireland department'.³¹

The second question is what does this all mean in practice? Certainly, much will depend on how the courts regard Laws LJ's statement about constitutional statutes not being subject to implied repeal, and repeal being possible only through the use of 'express words'. While the outworkings of this are uncontroversial when a constitutional statute is succeeded by an 'ordinary' Act of Parliament, the position is more complex where one constitutional statute (the NI Act 1998) has points of cross-over with another constitutional statute (EUWA 2018). The point can again be developed with reference to section 7A EUWA 2018, as the rules on implied repeal would mean that, were there to be any conflict between the WA and the NI Act 1998, the WA would automatically prevail. However, the difficulty with that approach is that it inverts the logic of *Thoburn*, unless it can be said that Laws LJ intended for his statement of principle to apply at only the interface between 'constitutional' and 'ordinary' statutes. There is nothing in the judgment to suggest that he intended for it to be limited in that way.

These are not simply points of abstract interest, as related questions about constitutional statutes are presently before the courts in Northern Ireland.³² While the issue of implied repeal has arisen in those proceedings in the context of a challenge to the Protocol's effects on the Act of Union between Ireland and Britain, the proceedings also challenge the lawfulness of the regulations that inserted Schedule 6A into the NI Act 1998. As already discussed, those regulations have written out the 'petition of concern' mechanism from the democratic consent process and, in so doing, have modified a key feature of the Northern Ireland constitution. Although there are strong practical reasons for limiting the petition's effects in this way – its use could potentially frustrate any future consent motion within the Assembly – the more fundamental point is whether it ought to be possible to change a constitutional statute by way

³¹ NI Act 1998, s 7(1)(e), as inserted by para 51(2) of Sch 3 to EUWA 2018.

³² *In the matter of an Application by Allister, et al* [2021] NIQB 64 (challenge by several Unionist politicians to the constitutionality of the Protocol rejected by High Court). This case is considered further in 'Update: Developments from July 2021 to September 2021' at the front of this book. Whether the High Court decision will be appealed was uncertain at the time of writing (July 2021). For other case law on the interface between constitutional statutes, see *R (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 950 (Admin) (application for judicial review of the question as to whether the United Kingdom Internal Market Act 2020 impliedly limiting the legislative competence of the Senedd was premature).

of regulations made under another constitutional statute. Prior to Brexit, the case law on devolution may well have suggested that this should not be possible, as the courts had acknowledged the importance of the devolution settlement throughout the UK and its localized, democratic basis.³³ However, the case law since Brexit has equally seen the courts return to a more absolutist view of the Westminster Parliament's powers and, in particular, a Diceyan view of legal sovereignty.³⁴ It is a retreat that may ultimately answer all questions in favour of the most recent constitutional statutes.

10.5 Conclusion

This chapter began by noting that it had two main objectives: to consider the nature of the legislative framework that has given effect to Brexit and how that intersects with the NI Act 1998; and to consider the nature of the obligations that arise under and outside the Protocol. It has referred throughout to 'legal hybridity' and the idea that the Northern Ireland institutions must observe different rules under and outside the Protocol. In terms of the Assembly and the Executive, this means that they are able to modify aspects of 'retained EU law' in matters outside the Protocol but that, in matters under the Protocol, they are bound by the first principles of EU law in relation to all provisions of the Protocol. In terms of the courts, EU law no longer applies on its original terms in cases outside the Protocol, but it does apply with its full force in cases under it. At its height, this means that the courts must apply the supremacy principle, observe the CFR, make Article 267 TFEU references in relation to issues arising under Article 5, 7–10 and 12(2) of the Protocol, apply the general principles of EU law, and hear *Francovich* claims.

Is this legal hybridity inconsistent with the Northern Ireland constitution? Much of the answer to this question will be found in the ongoing proceedings before the Northern Ireland courts, where historical and contemporary dimensions to the constitution are in issue. Should the

³³ *R (Jackson) v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262, 302, [102], Lord Steyn; *Axa General Insurance v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868; *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [2015] AC 1016, 1059–60, [118–22], Lord Thomas.

³⁴ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61; and *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64, [2019] AC 1022.

courts ultimately hold that the Protocol and its means of implementation have breached foundational constitutional principle, the EU and the UK may well be required to revisit the international law basis of their future relationship. In the event that the courts rule that the Protocol is not inconsistent with the Northern Ireland constitution, legal hybridity may become one of its defining features.

The Protocol in Irish Law

DAVID FENNELLY

11.1 Introduction

Brexit involves a fundamental reshaping of relations between the UK and the EU and its member states, including Ireland. As the Preamble to the Protocol recognizes, this represents ‘a significant and unique challenge to the island of Ireland’. Since the conclusion of the 1998 Agreement, the EU has provided a critically important, if often invisible, underpinning of the peace process in Ireland. In the wake of Brexit, Northern Ireland is a ‘place between’.¹ On the one hand, it is no longer part of the EU and Protocol Article 4 confirms that it is part of the customs territory of the UK. On the other hand, under the Withdrawal Agreement (WA) and the Protocol, Northern Ireland retains its special relationship with Ireland and remains subject to a substantial body of EU law.² If Brexit involves a shift in the legal framework for EU–UK relations from EU law to international law, that shift is incomplete, particularly for Northern Ireland. And, for Ireland, including in its relations with Northern Ireland, Brexit serves to reinforce the bonds with the EU. This is reflected in the role and status of the Protocol in Irish law, which is examined in this chapter.

The chapter begins by exploring the formal status and effect of the Protocol in the Irish legal system. As part of an international agreement concluded by the EU, the Protocol takes effect in Irish law as EU law. However, its formal status is only part of the story. The Protocol has a wider influence on the legal framework governing relations among Ireland, Northern Ireland and the UK. For this reason, the chapter also

¹ D Phinmore, ‘Northern Ireland – A “Place Between” in UK–EU Relations?’ (2020) 25(4) *European Foreign Affairs Review* 631–49.

² Arts 5–10 Protocol. See S Weatherill, ‘The Protocol on Ireland/Northern Ireland: Protecting the EU’s Internal Market at the Expense of the UK’s’ (2020) 45 *European Law Review* 222–36.

considers how the Protocol has, first, contributed to the formalization in Irish law of the Common Travel Area (CTA) between Ireland and the UK and, second, brought the 1998 Agreement for the first time within the purview of EU law. In these ways, the Protocol adds an increasingly important EU dimension to the legal framework governing relations on the island of Ireland and between Ireland and the UK.

11.2 The Status and Effect of the Protocol in Irish Law

The shifting legal framework governing EU–UK relations is evident in the status of the Protocol in the UK and Irish legal systems. While both Ireland and the UK have traditionally adopted a dualist approach to international agreements, Ireland’s continued membership of the EU is critical in determining the effect of the Protocol in Irish law.

In the UK, although the conclusion of the WA was of great political significance, ‘it had no legal effect within the UK legal order’.³ In accordance with the dualist approach, revived in respect of EU international agreements following Brexit, domestic legislation was necessary to give effect to the WA and the Protocol in UK law.⁴

By contrast, in Ireland, the dualist approach to international agreements⁵ remains significantly qualified by the wide constitutional immunity afforded to EU law.⁶ No provision of the Constitution invalidates laws enacted, acts done or measures adopted by the state that are necessitated by the obligations of EU membership or prevents such laws, acts or measures from having the force of law in the state.⁷ This is complemented by the European Communities Act 1972 (as amended) (ECA 1972), which recognizes that acts of the EU institutions are ‘binding on the State’ and form part of domestic law ‘under the conditions laid down in the treaties governing the European Union’.⁸ It is through this mechanism that EU law – including the EU’s international agreements – takes effect within the Irish legal order.⁹

³ P Craig, *The Ratifications of the Withdrawal Agreement: UK and EU Perspectives* (DCU Brexit Institute, Working Paper No 05/2020) 2.

⁴ See, in particular, the European Union (Withdrawal Agreement) Act 2020 and, in this volume, [Chapters 3 and 9](#).

⁵ Art 29.6 of the Constitution of Ireland (‘the Irish Constitution’).

⁶ See D Fennelly, *International Law in the Irish Legal System* (Round Hall 2014), chs 2 and 3.

⁷ Irish Constitution, Art 29.4.6.

⁸ ECA 1972, s 2.

⁹ *Maher v Minister for Agriculture* [2001] 2 IR 139, 251.

The Protocol forms an ‘integral part’ of the WA, the international agreement concluded between the EU and the UK to ensure an orderly withdrawal process.¹⁰ In accordance with Article 216(2) of the Treaty on the Functioning of the European Union (TFEU), agreements concluded by the Union ‘are binding upon the institutions of the Union and on its Member States’. The Court of Justice of the European Union (CJEU) has long recognized that, upon their entry into force, international agreements concluded by the Union form ‘an integral part’ of EU law and, for the purposes of Article 267 TFEU, are regarded as an act of the EU institutions.¹¹ In this way, upon the entry into force of the WA on 1 February 2020, the Protocol became an integral part of EU law and, by extension, Irish law.

While these principles do not necessarily resolve all questions relating to the internal effect of an international agreement within the EU legal order,¹² the CJEU has recognized that the parties to an international agreement are free to agree the effects within their internal legal order.¹³ In Article 4 WA, the EU and the UK do just that. Having confirmed that the provisions of the WA and the provisions of EU law made applicable by it shall produce the same legal effects for the UK as for the EU and its member states, Article 4(1) WA goes on to provide that ‘legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law’. This approach stands in direct contrast to the position under the Trade and Cooperation Agreement (TCA).¹⁴

It follows that, where provisions of the Protocol meet the conditions for direct effect under EU law, they too may be relied upon directly by legal or natural persons in the context of any disputes concerning the Protocol. Indeed, this extends further to the decisions adopted by the Joint Committee (JC) established under the WA. Article 166(2) expressly provides that such decisions are binding on the Union and the UK and that both parties shall implement those decisions, which shall have ‘the

¹⁰ Art 182 WA. As a matter of EU law, on 30 January 2020, the Council of the European Union approved the WA, thereby allowing it to enter into force on 1 February 2020: Art 1, Council Decision (EU) 2020/135.

¹¹ Judgment of 30 April 1974, *Haegeman*, Case 181/73, EU:C:1974:41, para 5.

¹² See K Lenaerts, ‘Direct Applicability and Direct Effect of International Law in the EU Legal Order’ in I Govaere et al (eds), *The European Union in the World: Essays in Honour of Marc Maresceau* (Brill 2013) 45.

¹³ Judgment of 26 October 1982, *Kupferberg*, 104/81, EU:C:1982:362, para 17.

¹⁴ Arts 4 and 5 TCA.

same legal effect' as the Agreement itself.¹⁵ In addition, and of considerable practical importance, Article 4(3) and (4) WA requires that the provisions of the Agreement (and by extension the Protocol) which refer to EU law be interpreted in a manner consistent with EU law.

The significance of the Protocol's status as an international agreement concluded by the EU is not confined to its binding character or its capacity to be directly effective. In the EU legal order, international agreements occupy an intermediate status between EU primary and secondary law: while they must comply with the Treaties, international agreements prevail in the event of conflict with EU secondary legislation.¹⁶ Moreover, for member states such as Ireland, the principle of the primacy of EU law means that international agreements concluded by the EU, such as the Protocol, would prevail over any inconsistent domestic law, even of constitutional status.¹⁷

In short, the Protocol – as an integral part of an international agreement concluded by the EU – is endowed with the full force and effect of EU law within the Irish legal system. This greatly facilitates the application and implementation of the Protocol in Irish law. Given that most of the core obligations under the Protocol are directed at the UK, it remains to be seen to what extent disputes concerning the Protocol will arise before the Irish authorities and the Irish courts.¹⁸ However, even if the direct implications for Irish law prove limited in practice, the Protocol will nonetheless have a broader influence on the Irish legal system, serving as a vital reference point in relations between Ireland and its nearest neighbour, in the context of both the CTA and the constitutional settlement under the 1998 Agreement.

¹⁵ This is in line with the approach adopted by the CJEU to the decisions adopted by bodies established under Association Agreements: see, eg, *Sevince*, C-192/89, EU:C:1990:322; *Savas*, C-37/98, EU:C:2000:224; *Soysal and Savatli*, C-228/06, EU:C:2009:101.

¹⁶ Judgment of 10 January 2006, *IATA*, C-344/04, EU:C:2006:10, para 35.

¹⁷ Judgment of 9 March 1978, *Simmenthal*, Case 106/77, EU:C:1978:49; judgment of 4 December 2018, *Minister for Justice and Equality*, C-378/17, EU:C:1978:49.

¹⁸ While no disputes concerning the Protocol have yet to come before the Irish courts, there have been a number of cases raising important issues in relation to the surrender arrangements between Ireland and the UK under the WA and the TCA: see, in particular, *Minister for Justice and Equality v Shahzad* [2021] IEHC 89; *Saqlain v The Governor of Cloverhill Prison & Ors* [2021] IEHC 208, which have since been the subject of appeals to the Supreme Court, which decided on 20 July 2021 to make a reference under Article 267 TFEU to the CJEU, *Hasnain Saqlain v The Governor of Cloverhill Prison & Salman Shahzad v The Governor of Mountjoy Prison* [2021] IESC 45 (unapproved judgment of Mr. Justice Clarke, Chief Justice, delivered 20 July 2021) (Irish Supreme Court). See further [Chapter 23](#).

11.3 The Common Travel Area

While the Protocol may not require any specific implementing measures in Irish law, its presence can be felt in Irish law in the increasing formalization of the CTA between Ireland and the UK.¹⁹

At its core, the CTA allows Irish and UK nationals to enter and reside in each other's jurisdictions. Over time, this has been supplemented by arrangements providing for access to work, health care, social welfare, education, as well as other measures such as voting rights in local and parliamentary elections.²⁰ Although the CTA is long established, Brexit exposed its relatively fragile legal basis. In legal terms, the CTA has traditionally been based on 'a combination of informal administrative understandings and latterly more formal "sectoral agreements"' which are then reflected in domestic law and practice.²¹

When both Ireland and the UK were members of the EU and remained outside the Schengen system, this informal system gave rise to little difficulty. Indeed, Article 2 of Protocol No 20 to the TFEU – under which the UK and Ireland were entitled to control their own borders – allowed the two states to continue 'to make arrangements between themselves relating to the movement of persons between their territories ("the Common Travel Area")' while fully respecting the rights of persons exercising their right of free movement under EU law. However, with the departure of the UK from the EU, the status of the CTA became much more precarious.

From an early stage, there was a political commitment to preserving the CTA. This was confirmed in the Joint Report of the EU and UK negotiators in December 2017.²² Later, in the Memorandum of Understanding and Joint Declaration of 8 May 2019, the Irish and UK governments reaffirmed their commitment to the CTA.²³ That political commitment was ultimately reflected in Protocol Article 3, which provides, first, that the UK and Ireland 'may continue to make arrangements

¹⁹ See further [Chapter 14](#).

²⁰ For an excellent overview of the CTA, see S de Mars, C Murra y, A O'Donoghue and B Warwick, *Discussion Paper on the Common Travel Area* (IHREC/NIHRC Joint Committee 2018).

²¹ *Ibid.*, 14. See also I Maher, *The Common Travel Area: More Than Just Travel* (RIA/British Academy Brexit Policy Discussion Paper, 2017) and [Chapter 14](#) in this volume.

²² *Joint Report from the Negotiators of the European Union and the UK Government on Progress during Phase 1 of Negotiations under Article 50 TEU on the UK's Orderly Withdrawal from the European Union*, 8 December 2017, para 54.

²³ See the website of the Department of Foreign Affairs, www.dfa.ie/brexit/getting-ireland-brexit-ready/brexit-and-you/common-travel-area/.

between themselves relating to the movement of persons between their territories (“the Common Travel Area”), while fully respecting the rights of natural persons conferred by Union law’. Second, Article 3(2) requires the UK to ensure that the CTA and the rights and privileges associated therewith ‘can continue to apply without affecting the obligations of Ireland under Union law, in particular with respect to free movement to, from and within Ireland for Union citizens and their family members, irrespective of their nationality’. Article 3 thus strengthens the formal recognition of the CTA in EU law and permits its continued operation subject to its consistency with EU law and, specifically, the right of free movement.²⁴

For its part, the Oireachtas (the Irish Parliament) has enacted a series of measures to place the CTA on a firmer legal footing in Irish law. The Minister for Health has been given the power to adopt measures providing for health care and reimbursement arrangements in accordance with the Memorandum of Understanding on the CTA.²⁵ The Minister for Social Protection is empowered to make an order providing for the implementation of the 2019 Convention on Social Security between the Irish and UK governments which ensures the continuity of social protection arrangements under the CTA.²⁶ The definition of ‘non-national’ in Irish law is amended so as to ensure that a UK citizen does not come within that definition, thereby retaining the legal basis for the exemption of UK citizens from passport checks within the CTA.²⁷ The enactment of this legislation to protect and maintain the CTA was described as ‘a key part of Ireland’s planning and preparations’ for Brexit.²⁸

However, the greater formalization of the CTA in Irish and EU law is not without its challenges. With the departure of the UK from the EU, the scope for tension between the CTA and EU law increases. As the terms of Protocol Article 3 make clear, the CTA is permitted to continue subject to the requirement that it does not affect the obligations of Ireland under EU law, particularly in the context of free movement. If measures of Irish law afford non-EU citizens more favourable treatment than EU citizens in areas falling within the scope of the Treaties, they would be vulnerable

²⁴ Note in this regard Art 38(2) WA.

²⁵ Part 2 of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020.

²⁶ Part 14 of the Act.

²⁷ Part 17 of the Act.

²⁸ Department of Foreign Affairs, *Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Bill 2020 – Explanatory Memorandum*, October 2020.

to challenge.²⁹ Recent debates around travel-related restrictions necessitated by Covid-19 show that this concern is not merely academic.³⁰ While Protocol Article 3 may assist in justifying measures adopted as part of the CTA, it is far from a blanket defence. In conclusion, while the recognition of the CTA in the Protocol has reinforced its formal status in EU and Irish law, it also means that the continued existence and development of the CTA will be increasingly influenced by its consistency with EU law.

11.4 The 1998 Agreement

Of even greater constitutional significance for Ireland is the Protocol's express affirmation of the 1998 Agreement. Since it was concluded, the 1998 Agreement has been the overarching framework governing relations across Ireland, the UK and Northern Ireland. The constitutional changes necessitated by the 1998 Agreement have been described as 'arguably the most momentous' since the adoption of the 1937 Irish Constitution.³¹ By referendum, the Irish people voted to allow the state to conclude the British–Irish Agreement, the intergovernmental agreement which formed part of the 1998 Agreement, and to amend Articles 2 and 3 of the Irish Constitution. Whereas Article 2 in its original form had defined the national territory as consisting of 'the whole island of Ireland, its islands and the territorial seas', the new Article 2 recognized the entitlement and birthright of every person born in the island 'to be part of the Irish Nation'. For its part, the new Article 3 expressed 'the firm will of the Irish Nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions', while recognizing that a united Ireland could be brought about only 'by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island'. Although the 1998 Agreement as such does not directly form part of Irish law,³² it occupies a central place in Ireland's constitutional landscape.

²⁹ See, eg, E Spaventa, *The Impact of Brexit in Relation to the Right to Petition and on the Competences, Responsibilities and Activities of the Committee on Petitions*, Study for the PETI Committee of the European Parliament, June 2017, 39–40.

³⁰ See, eg, N O'Leary and S Pollak, 'European Commission Contacts Ireland on "Concerns" over Hotel Quarantine' *Irish Times* (15 April 2021).

³¹ G Hogan, G Whyte, D Kenny and R Walsh (eds), *JM Kelly: The Irish Constitution* (5th edn, Butterworths 2018) para 3.1.01.

³² Although implementing legislation was also enacted, neither the constitutional amendment nor this legislation gave the British–Irish Agreement, or the 1998 Agreement more broadly, the force of law in Ireland. In a series of cases, the Irish courts have rejected

Prior to Brexit, the relationship between the 1998 Agreement and EU law might have been described as largely silent but mutually supportive. For its part, the 1998 Agreement makes very limited reference to the EU. The Preamble to the British–Irish Agreement refers to the close co-operation between Ireland and the UK ‘as friendly neighbours and as partners in the European Union’. Under Strand Two of the Multi-party Agreement, one of the tasks of the North–South Ministerial Council is to ‘consider the European Union dimension of relevant matters, including the implementation of EU policies and programmes and proposals under consideration in the EU framework’, with arrangements to be made ‘to ensure that the views of the Council are taken into account and represented appropriately at relevant EU meetings’.³³ Under Strand Three, EU issues are identified among the suitable issues for early discussion in the British–Irish Council.³⁴ Prior to the Protocol, however, the 1998 Agreement did not feature in any significant way within the wider body of EU law.³⁵

However, the relative silence in formal terms belies the critical role of the EU in practice, both in the political backdrop to the 1998 Agreement and in its effective implementation.³⁶ As discussed in [Chapter 1](#), common EU membership played ‘a positive part in providing an important supporting structure for several elements of the 1998 Agreement itself, as well as providing extensive funding of projects relating to the peace process and the Irish border.’³⁷ In many ways, the 1998 Agreement and the forms of co-operation which it set in train were premised on the continuing EU membership of the UK and Ireland.

With Brexit, this largely silent and invisible underpinning of the peace process has been forced to the surface. At its heart, the Protocol is a response to the ‘significant and unique challenge’ that Brexit presents

arguments that the 1998 Agreement, as such, forms part of Irish law: *Doherty v Governor of Portlaoise Prison* [2002] 2 IR 252; *O’Neill v The Governor of Castlereagh Prison* [2004] 1 IR 298; *Morelli v An Taoiseach* [2018] IEHC 215.

³³ Multi-party Agreement, Strand Two, para 17; see also para 3(iii).

³⁴ Strand Three, para 5.

³⁵ One notable exception is Art 15 of the Framework Employment Directive, Directive 2000/78, which makes special provision in respect of the police force and the employment of teachers in Northern Ireland.

³⁶ See, eg, D Litter, ‘Understanding the Role of European Council Summits in Reaching the Good Friday Agreement’ *LSE European Politics and Policy (EUROPP) blog* (26 March 2021) <https://blogs.lse.ac.uk/europpblog/2021/03/26/understanding-the-role-of-european-council-summits-in-reaching-the-good-friday-agreement/>.

³⁷ [Chapter 1](#) in this volume.

for the island of Ireland and the peace process.³⁸ It is in this context that the EU and the UK expressly affirm that the 1998 Agreement ‘should be protected in all its parts’. The Protocol treads a careful path in this regard.

On the one hand, the Protocol recognizes that the constitutional status of Northern Ireland is not a matter of EU law.³⁹ Thus, in its first and second paragraphs, Protocol Article 1 provides that the Protocol is without prejudice to the provisions of the 1998 Agreement in respect of the constitutional status of Northern Ireland and the principle of consent and that the Protocol respects the essential state functions and territorial integrity of the UK.⁴⁰

On the other hand, the whole purpose of the Protocol is to set out ‘arrangements necessary to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North–South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions’.⁴¹ The commitment to the 1998 Agreement is reflected in the operative provisions of the Protocol: from Article 2, which protects the rights and values which underpin the peace process, through Articles 5 to 10, which seek to avoid a hard border on the island of Ireland, to Article 11, which aims to facilitate ongoing North–South co-operation and, of course, Article 18, which enshrines the principle of democratic consent in Northern Ireland within the Protocol. In this way, the Protocol provides a mechanism for ensuring that the continued application of the 1998 Agreement is not unduly impaired by the UK’s departure from the EU. Indeed, while the Protocol formally does not make it part of EU law, through both its affirmation of the 1998 Agreement and its substantive provisions, the Protocol gives the 1998 Agreement a mooring in EU law which may allow it to be relied upon, if only indirectly, in litigation before the national and EU courts.⁴²

It follows that, even if the major constitutional questions concerning Northern Ireland do not come within its scope, the wider constitutional

³⁸ Protocol, Preamble, para 2.

³⁹ Note, however, that, on 29 April 2017, the European Council agreed that, in the event of a decision being taken on a united Ireland in accordance with the GFA, the entire territory of such a united Ireland would, in accordance with international law, be part of the EU: see D Staunton and P Leahy, ‘Brexit Summit: EU Accepts United Ireland Declaration’ *Irish Times* (29 April 2017).

⁴⁰ This echoes the language of Art 4(2) TEU.

⁴¹ Protocol Art 1(3). See also Art 4 of Council Decision (EU) 2020/135.

⁴² For a comprehensive discussion of the issues potentially arising in this regard, see A Rosas, ‘The Status in EU Law of International Agreements Concluded by EU Member States’ (2011) 35(4) *Fordham JIL* 1304–45.

significance of the Protocol should not be underestimated. It is within the framework of the Protocol that many important issues affecting Northern Ireland, including in the context of North–South co-operation, will fall to be determined in future. And within this framework – in the context of implementation, governance and dispute settlement – it is the EU institutions, rather than any individual member state such as Ireland, that will act as the primary interlocutor. The early experience with the Protocol – particularly in the context of the safeguards regime under Article 16⁴³ – offers a foretaste of some of the difficulties and sensitivities to which this changed framework may give rise.

As McCrudden has described the position, the Protocol has ‘to an extent, “Europeanised” the 1998 Agreement, meaning that upholding that Agreement has become an EU objective in the context of the WA, and no longer simply a UK–Irish objective’.⁴⁴ Just as the duties of good faith and sincere co-operation in Article 5 WA are likely to ‘play a significant role in future disputes between the UK and the EU over the application of the Protocol’,⁴⁵ the duty of sincere co-operation under Article 4(3) TEU – between the Union and Ireland as member state – is likely to take on very considerable importance in this legally and politically sensitive context. Close and continuous co-operation between the Commission and the Irish government will be essential to ensure the effective implementation of the Protocol in a manner which is consistent with the 1998 Agreement and which avoids its underlying objectives being undermined.

11.5 Conclusion

If, for the UK, Brexit has shifted EU–UK relations from the special regime of EU law to the looser bonds of international law, for Ireland, Brexit has served to reinforce and intensify the state’s membership of the EU. In doing so, it has placed Ireland’s relations with the UK within a more direct and increasingly important EU framework. In the context of Northern Ireland, this is exemplified by the Protocol, which seeks to address ‘the unique circumstances on the island of Ireland through a unique solution’. It is also reflected in the status and role of the Protocol in the Irish legal system. It is not simply that the Protocol

⁴³ See [Chapter 25](#) in this volume.

⁴⁴ See [Chapter 8](#).

⁴⁵ *Ibid.*

takes effect in Irish law as EU law, significant though this is. The Protocol has a much wider significance for Ireland in the post-Brexit era, in particular by providing a mechanism through which the long-standing arrangements in the form of the CTA and the constitutional settlement enshrined in the 1998 Agreement can be reconciled with Ireland's obligations under EU law. Legally, politically and practically, this will give the EU a greater role in the future of the peace process on the island of Ireland.

PART V

Fundamental Rights in the Protocol

Human Rights and Equality

CHRISTOPHER McCRUDDEN

12.1 Introduction

Human rights and equality issues were a critical part of the negotiation of the 1998 Belfast-Good Friday Agreement (hereafter 1998 Agreement) and contributed to the successful outcome of those negotiations. Leading up to and following the 1998 Agreement, there was a flurry of domestic legislative activity, in particular the Human Rights Act 1998, the Fair Employment and Treatment Order 1998 and the Northern Ireland Act 1998. This is no coincidence: the Agreement was intended largely to be a framework for such activity, and a statement of principle, rather than to be directly enforceable. When taken together with previous legislation on equality beginning in the 1970s, and with subsequent legislation during the 2000s, Northern Ireland now has one of the more impressive collections of human rights and equality law in Europe. It is noteworthy that all this legislation was enacted either at Westminster or by UK government ministers under powers to legislate during periods of 'direct rule', when the Assembly was suspended. This legislation was supplemented yet further with 'social' legislation (in particular in the employment and welfare fields), a degree of protection from discrimination on the basis of citizenship arising from the operation of the Common Travel Area (CTA),¹ and fitful use of public procurement 'linkages' to add extra financial weight to ensure compliance.²

Even before the 2016 Referendum had been held, concerns had been expressed that the exit of the UK from the EU could lead to a reduction in the level and intensity of these protections because EU law to a degree provided underpinnings through Treaty provisions (eg, on equal pay), the anti-discrimination directives (race, sex, age, sexual orientation, disability), the 'social' directives (part-time work, maternity/paternity, etc), political

¹ See [Chapter 14](#).

² See [Chapter 22](#).

obligations regarding the European Convention on Human Rights (ECHR), the Charter of Fundamental Rights (CFR) and the status of EU citizens (including EU citizens by virtue of being Irish citizens). Common membership of the EU also meant that a greater degree of convergence between Northern Ireland and Ireland was emerging in those areas where EU law was influential.

The Withdrawal Agreement (WA) addresses human rights and equality concerns directly and indirectly in three main ways: (i) the provisions in Part 2 WA dealing with reciprocal rights for EU citizens residing in the UK and UK citizens residing in the EU protect Irish citizens residing in Northern Ireland since such citizenship also brought with it EU citizenship;³ (ii) the provisions of Protocol Article 3 addressing the CTA provide a degree of reassurance that these arrangements are now recognized in an international agreement;⁴ and (iii) Protocol Article 2 ensures that there be no diminution of rights as a result of the UK's exit from the EU. It is this third provision that this chapter primarily considers. Protocol Article 1 provides that its express objective is the protection of the 1998 Agreement 'in all its dimensions'.

This chapter focuses on how Protocol Article 2 addresses human rights and equality issues in Northern Ireland. This chapter also describes how the TCA supplements the Protocol in several respects, addressing some issues that were left unaddressed by the Protocol, in particular issues concerning the protection of labour and social rights (in the 'level playing field' provisions), and the status of the ECHR. These will be considered briefly in order to provide a more complete map of the new architecture of human rights and equality in Northern Ireland currently in place, without attempting to be comprehensive. [Chapter 13](#) considers the role of the EU CFR.⁵

12.2 Article 2 of the Protocol

12.2.1 Application

Article 2 establishes obligations on the UK ('the United Kingdom shall ...'). The UK is bound by international law to implement the Protocol in good faith and in its entirety (Vienna Convention on the Law of Treaties (VCLT), Article 26), including Article 2. Neither Ireland nor the EU has obligations under Article 2, although Ireland

³ Chapter 16.

⁴ Chapter 14.

⁵ Chapter 13.

and the EU are obliged to facilitate the UK in carrying out its obligations generally.⁶

The ‘no diminution’ obligation is not restricted to the protection of the rights of any particular group; in particular, Article 2 is not linked to citizenship, nor is it restricted to the rights of the ‘people of Northern Ireland’. In referring back to the provisions of the 1998 Agreement, however, the scope of the protection of the rights is limited to those ‘in the community’,⁷ which is left undefined. Who, then, is included as within ‘the community’? In the other parts of the 1998 Agreement, the term ‘community’ refers to those in Northern Ireland. In this part of the Agreement, however, that interpretation is less convincing, given that this part contains obligations on the Irish government to incorporate the ECHR into Irish law, an obligation that clearly cannot be described as relating to the ‘community’ in Northern Ireland. It would appear, therefore, that the term ‘community’ in this part of the Agreement may also refer to those on the island of Ireland, with important implications for the scope of Article 2, as we shall see.

12.2.2 *Interlocking Elements*

There are three interlocking elements in Article 2: (i) the general clause (‘no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity’); (ii) the anti-discrimination clause (‘including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol’); and (iii) the provision dealing with domestic implementation requirements (including the reference to ‘dedicated mechanisms’ in Article 2(1)). In addition, these specific provisions must be seen as set in the broader general provisions of the WA and the Protocol, in particular those dealing with interpretation and enforcement, including international dispute settlement. Each of these elements will be considered in turn.

12.2.3 *General Clause*

There are three distinct elements to the general clause. First, the guarantee relates to ‘rights, safeguards or equality of opportunity . . .’. Second, it

⁶ Chapter 8.

⁷ ‘The parties affirm their commitment to the mutual respect, the civil rights and the religious liberties of everyone *in the community*.’

relates only to those rights etc in that particular part of the Agreement entitled 'Rights, Safeguards and Equality of Opportunity' ('as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity'). Third, the guarantee aims to ensure that 'no diminution . . . results from [the UK's] withdrawal from the Union . . .'. The first two issues will be considered together, before turning to consider the third.

A preliminary issue as to the coverage of the general clause arises because of the way in which the relevant part of the Agreement is drafted. The first sentence of that part reads: '1. The parties affirm their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community. Against the background of the recent history of communal conflict, the parties affirm in particular . . .'. The relevant section of the Agreement then goes on to specify the set of particularized rights protected. It is unclear whether the general clause therefore protects all 'civil rights and religious liberties' or only the particularized rights ('right of free political thought' etc). If the former, the coverage of Article 2 is potentially very broad indeed: the Oxford English Dictionary definition of civil rights includes 'the political, social, and economic rights which are recognized as the entitlement of every member of a community and which can be upheld by appeal to the law'.

If the latter, then the 'rights' specified in the relevant section of the Agreement are: the right of free political thought; the right to freedom and expression of religion; the right to pursue democratically national and political aspirations; the right to seek constitutional change by peaceful and legitimate means; the right to freely choose one's place of residence; the right not to be discriminated against; the right to equal opportunity in all social and economic activity, in both the public and the private sector, regardless of class, creed, disability, gender or ethnicity; the right to freedom from sectarian harassment; the right of women to full and equal political participation; and the right of victims to remember as well as to contribute to a changed society.

Even if the 'civil rights' protected by Article 2 are limited to the rights listed in the Agreement, the protection of Article 2 also applies to certain 'safeguards' which are outside even the broadest definition of 'civil rights'. There are four safeguards in the relevant section of the Agreement. Three are relatively straightforward: the 'need to ensure that symbols and emblems are used in a manner which promotes mutual respect rather than division'; 'the importance of respect, understanding

and tolerance in relation to linguistic diversity'; and continuing UK membership in the ECHR, combined with the provision of domestic remedies for alleged breaches of the Convention, an issue considered subsequently.

In addition to these, however, there is a further broader provision: 'Pending the devolution of powers to a new Northern Ireland Assembly, the British Government will pursue broad policies for sustained economic growth and stability in Northern Ireland and for promoting social inclusion, including in particular community development and the advancement of women in public life.' The reference to 'social inclusion' arguably refers to a broad swathe of socio-economic protections. However, the commitment is time-limited and (with the establishment of the Assembly) may be seen as having lapsed. Given these uncertainties, the role of the TCA in addressing the 'level playing field' issues of social and employment rights is of added importance.

These uncertainties aside, the restriction of Article 2 to the 'non-diminution' of rights and safeguards in the relevant part of the Agreement, and only those rights and safeguards, means that the so-called birthright provision of the Agreement (the right for the people of Northern Ireland to be British or Irish or both) is not included within the Article 2 obligation (or indeed elsewhere in the Protocol), although it is referred to in one of the Recitals to the Protocol, which means that it may be relevant to the interpretation of other provisions of the Protocol (including Article 2).

Turning now to the third element in the general clause, we have noted that the Article 2 obligation prohibits only any 'diminution [which] results from [the UK's] withdrawal from the Union . . .'. Two main issues arise from this: (i) what elements of EU law (up to the end of the transition period) provided legal underpinnings to the rights protected in the relevant section of the Agreement (the Preamble to the Protocol refers to EU law's 'supporting framework') and (ii) when would any future diminution 'result from' the UK's exit?

It is not hard to visualize situations in which a rule of EU law would have enabled or facilitated the enforcement of 1998 Agreement rights obligations and in which that EU rule has been abrogated and not replaced after Brexit. So far as is known, however, there was no systematic mapping exercise undertaken of precisely what elements of EU law (up to the end of the transition period) provided legal underpinnings to the relevant 1998 Agreement rights and safeguards, and no official list has yet

been published by official bodies in either the EU or the UK. It is clear that such a list would need to consider the full range of substantive Treaty articles, regulations, directives and provisions of the CFR that provided a 'supporting framework' for each of the 1998 Agreement rights and safeguards. 'Underpinning' thus refers to the substantive rules of EU law, but it also refers to the *procedural* and *remedial* rules of EU law that ensure or facilitate the full and efficient application and enforcement of the 1998 Agreement rights in Northern Ireland, for example the right to secure damages for breach of a rule by the state, and the right to have legislation suspended if it is held to be contrary to the Protocol.

When would any future diminution 'result from' the UK's exit? The appropriate question is whether *but for* the UK's exit that diminution would have been able to occur, legally. If the answer is negative, then Article 2's non-diminution obligation applies. This will be a mixed question of law and fact in each case. Unless, over time, all divergences end up being attributed back to Brexit as a matter of course, which seems unlikely, this aspect of the Article 2 obligation renders the protection accorded a wasting asset, since the longer any diminution is from the date of exit, the more difficult it may be to establish that *but for* that exit the UK would not have been in a position to reduce the level of protection provided.

A more particular question relates to the application of Article 2 to the continuing status of the ECHR in Northern Ireland. Would it be a breach of Article 2 for the UK to withdraw from the Convention? In my view it would not because of the 'supporting framework' criterion. Although we have seen that it is included as one of the 'safeguards' in the relevant section of the Agreement, we cannot say that the UK's membership in the Convention is underpinned by EU *law*, only by a political commitment. Given the limits of Article 2 in this respect, the provisions of the TCA concerning the status of the ECHR in UK law generally become of central importance. Two examples illustrate the method required in applying the general clause of Article 2.

12.2.3.1 Example 1: EU Citizens' Eligibility to Vote in District Council Elections

The first example concerns the eligibility to vote and to stand for election in Northern Ireland. The franchise for district council elections in Northern Ireland is to be found in the Elected Authorities (Northern Ireland) Act 1989 (as amended), section 1. This provides that British or Commonwealth citizens, citizens of the Republic of Ireland and citizens

of other European Union (EU) countries are eligible to vote, in all cases provided they are aged eighteen or over on polling day, have been resident in Northern Ireland during the whole of the three-month period prior to the election, are registered to vote and are not otherwise legally excluded from voting. What if a future UK parliament deprived EU citizens resident in Northern Ireland of the right to vote in district council elections?

Several issues would need to be considered in determining whether this would amount to a breach of Article 2. First, it seems clear that three particular rights specified in the relevant part of the 1998 Agreement are engaged, viz 'the right to pursue democratically national and political aspirations', the 'right to seek constitutional change by peaceful and legitimate means' and the 'right of women to full and equal political participation'. Second, the right in question was underpinned by identifiable EU law that was in force in Northern Ireland during the relevant period. Article 8b.1 of the Treaty establishing the European Community (as amended by Title II of the Treaty on European Union) introduced a right to vote in 'municipal' elections by EU citizens resident in another member state. Two EU directives subsequently spelled out the detailed arrangements necessary to operationalize this right.⁸

Taken together, these establish voting rights and the right to stand for election for resident EU citizens in 'municipal' elections in the member states. EU citizens' rights to vote and to stand as a candidate under EU law are restricted to 'municipal' elections, which in Northern Ireland means district council elections.⁹ Furthermore, in the context of the implementation of the relevant Treaty provisions and directives¹⁰ identified, several provisions of the CFR apply: Article 11 Freedom of expression and information; Article 12 Freedom of assembly and of association; and, in particular, Article 40 Right to vote and to stand as a candidate at municipal elections. Finally, *but for* the UK's exit that right would still have to be provided for in Northern Ireland law. Any 'diminution' of that

⁸ Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals; and Council Directive 2013/19/EU of 13 May 2013 adapting Directive 94/80/EC laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals.

⁹ Art 2 Council Directive 94/80/EC of 19 December 1994, and Annex to Council Directive 2013/19/EU of 13 May 2013.

¹⁰ Art 51 CFR.

right would have been contrary to EU law, if the UK had still been a member state of the EU.

12.2.3.2 Example 2: EU Citizens Resident in Ireland Seeking to Reside in Northern Ireland

In our second example, that there is an EU citizen who is not also an Irish citizen lawfully resident and working in Ireland. This person now wishes to take up employment in Northern Ireland. The provisions of Part 2 WA will not enable her to do so; nor will the provisions of the CTA, since she is not an Irish citizen. The UK authorities refuse her application to work in Northern Ireland. Prior to Brexit, under EU law, she could have relied on her free movement rights to work in Northern Ireland. Can she successfully argue that Article 2 prevents this diminution of rights?

Certain aspects of this case are clear: she had a Union law-based right which she now does not have. Although the right to free movement is an EU citizenship right found in EU law, the relevant part of the 1998 Agreement also protects 'the right to freely choose one's place of residence'. That appears broad enough to cover circumstances where the UK prevents someone who would have had the right to choose to reside in Northern Ireland before Brexit based on EU rights and is now no longer able to do so because of UK withdrawal.

The diminution of that right resulted from the UK's withdrawal (using the 'but for' test). The 'no diminution' obligation applies to the UK government, which is now refusing her entry to work. Article 2 is only binding on the UK, so Article 2 would not help a Northern Ireland-resident EU citizen cross the border in the other direction. So Article 2 would apply only, potentially, to travellers going North, not the reverse. It would not constrain the EU or Ireland.

The key question then becomes whether the person seeking to use Article 2 is within 'the community' to which this part of the 1998 Agreement applies. There appear to be three possible interpretations: a narrow reading (it's only the people in Northern Ireland); a broader reading (it's all the people in Ireland and (possibly) the UK); and the broadest reading (it's all people in the EU, or possibly the whole world). The broadest reading is unconvincing, but so too is the narrowest reading.

As suggested above, 'community' in other parts of the 1998 Agreement refers to those in Northern Ireland (such as in Strand 1, and Policing), but in the human rights, etc section that is not so clear, given that there is a part of that section devoted to the protection of

human rights in the South (the responsibilities of the Irish government, which was inserted at the behest of the unionist negotiators). Ironically, this seems to imply that the ‘community’ in that section has been expanded to include at least those in the South, given that the reference to the ‘community’ prefaces all the parts of that section, not just the parts dealing with Northern Ireland. If so, that would indeed mean that non-Irish/British residents of Ireland would continue to enjoy the right to reside in Northern Ireland as before Brexit, as a result of Article 2.

12.2.4 *Anti-discrimination Clause*

The second element in Article 2, the anti-discrimination clause, needs separate treatment. It provides that there shall be ‘no diminution of . . . equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity . . ., including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol . . .’. The directives included are restricted to what EU law considers the key ‘anti-discrimination’ directives.

The description of the directives listed as constituting ‘Union law’ has considerable significance. This is because Article 4(3) WA stipulates that the provisions of the Agreement referring to ‘Union law or to concepts or provisions thereof’ shall be ‘interpreted and applied in accordance with the methods and general principles of Union law’. This means, for example, that the interpretation of what the directives require must be undertaken taking into account all of the interpretative elements that the Court of Justice of the European Union (CJEU) would apply, including the general principles of EU law and, where relevant, the CFR, since the CJEU may draw upon the CFR if required to rule upon the meaning of the directives. Article 13(2) of the Protocol places no temporal limitations on this obligation. Northern Ireland courts would, therefore, also be required to follow post-transition CJEU case law by reason of that provision.

We have seen that the designated EU law listed in Annex 1 includes only the substantive *anti-discrimination* directives. The drafters of the Protocol have relied, therefore, on a distinction between the anti-discrimination directives (included in Annex 1) and directives that address broader issues of equality of opportunity and social policy (not included in Annex 1), such as the Part-Time Work Directive, the

Maternity and Parental Leave Directive and the Pregnancy Directive. This does not mean, however, that these additional directives are irrelevant to the operation of Article 2 because, although they are not listed in the Annex, they do constitute ‘underpinnings’ to the protection of equality of opportunity and are thus to be considered in the application of the general clause.

Article 2 provides: ‘The United Kingdom shall ensure that no diminution of . . . equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union . . .’ The Agreement’s listed rights include the ‘right to equal opportunity in all social and economic activity, in both the public and private sectors, regardless of class, creed, disability, gender or ethnicity’. The Part-Time Work Directive, the Victims Directive, the Maternity and Parental Leave Directive, the Pregnant Workers Directive and specific EU measures aimed at protecting the rights of persons with disabilities are measures that underpinned this right in Northern Ireland law, and thus any diminution from the level of protection accorded by these provisions will run contrary to the general clause of Article 2, even though it will not run contrary to the provisions of the anti-discrimination clause.

12.2.5 *International Governance Arrangements*

The governance of Article 2 may be set out only briefly here because the compliance mechanisms applying to Article 2 are set in the context of the Protocol as a whole. Unusually, as regards trade agreements generally, the same provisions for international interpretation and enforcement apply to Article 2 as apply to customs, trade and regulatory issues. The Specialised Committee on Ireland–Northern Ireland and the Joint Committee (JC), discussed in [Chapter 4](#), also apply to Article 2. (A potentially significant difference, however, is that two independent public bodies in Northern Ireland, the Northern Ireland Human Rights Commission (NIHRC) and the Equality Commission for Northern Ireland (ECNI), have a role in providing information on the implementation of Article 2 to the Specialised Committee.) Likewise, the international arbitration panel, discussed in [Chapter 5](#), is empowered to determine violations of Article 2 in the event of a dispute arising which cannot be settled otherwise, with the CJEU having final jurisdiction over determining any issue of EU law. The ultimate sanction for violation of Article 2, as with the other provisions

of the Protocol, is suspension of the WA as a whole, except for provisions dealing with citizens' rights.

12.2.6 *Domestic Governance Arrangements*

The requirements for the domestic implementation of Article 2 differ, however, from those that apply to the Single Market and Customs provisions of the Protocol, in three particular respects. First, the Northern Ireland Assembly 'consent principle' does not apply to Article 2, so even if the Assembly were to vote to terminate the Protocol, it would apply only to Articles 5 to 12, not Article 2. Second, the ability (and, in the case of decisions by the court of law resort, the obligation) of the domestic courts to refer issues of EU law to the CJEU under the preliminary reference procedure does not apply to Article 2 issues. Third, there is an important role for the NIHRC and the ECNI in overseeing the domestic implementation of Article 2, a role that has no equivalent with regard to the other provisions of the Protocol and is an important part of the domestic 'dedicated mechanism' required by Protocol Article 2(1). A role for these Commissions is recognized in Protocol Article 2(2), but the details are set out in the European Union (Withdrawal Agreement) Act 2020 (EUWAA).¹¹ This provides for both Commissions to have the powers to monitor implementation, to have standing for taking judicial review in its own name, and to have the ability to support judicial review by other parties. This has been accompanied by increased staff and additional funding from government to support these activities.

Section 7A of the European Union (Withdrawal) Act 2018 (as amended) (EUWA) also applies to Article 2, as it does to the whole of the Protocol. As a result, Article 2 applies to both the Westminster Parliament and the UK government. In addition, there is specific provision regarding the obligations of the devolved institutions of government in Northern Ireland. As regards Article 2, the primary obligations include legislating in a manner that is consistent with the Protocol's provisions on rights,¹² and tracking changes in EU law.¹³ If the Assembly/Executive refuses to introduce tracking of changes, the Secretary of State is empowered to override that refusal and legislate directly. If both the

¹¹ EUWAA 2020, Schedule 3.

¹² Art 2 of the Protocol; and NI Act 1998, ss 6(2)(ca) and 24(1)(aa).

¹³ Art 13 of the Protocol and NI Act 1998, s 26.

Assembly and the Secretary of State were to refuse to legislate, judicial review would be almost certain.

12.2.7 *Direct Effect*

As with other provisions of the WA and the Protocol, there is room for debate as to whether and, if so, how far Article 2(1) has ‘direct effect’. ‘Direct effect’ has two somewhat different meanings: (i) that a legal rule must be applied by a national court, even in the absence of implementing measures, against all parties; and (ii) that natural and legal persons are able to rely directly on the rule in domestic UK courts to their benefit. Article 4(1) WA states that provisions of ‘Union law’ made applicable by the Agreement ‘shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States’. Article 4(1) continues: ‘Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law’, the test for which is whether the provision is ‘clear, precise and unconditional’.

It may be necessary to distinguish between the direct effect of the general clause and the anti-discrimination clause. Of the two, the anti-discrimination clause most directly engages Article 4(1) WA, given that Annex 1 specifically refers to ‘Union law’, in the form of the anti-discrimination directives. The anti-discrimination directives have consistently been held to have vertical direct effect, and so it would appear that at least the anti-discrimination clause (together with the Annex) is directly effective against the UK. As regards the direct effect of the general clause, there is more room for debate because it is arguably less clear and precise than the anti-discrimination clause, and so on its wording it is arguable that it does not meet the threshold for direct effect in EU law. Because of this uncertainty, ministerial statements in the House of Lords and the UK government’s Explainer on Article 2¹⁴ take on an added importance. Both in a statement in the House of Lords¹⁵ and

¹⁴ ‘Information about the UK Government’s Commitment to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What Does It Mean and How Will It Be Implemented?’ (7 August 2020) www.gov.uk/government/publications/protocol-on-irelandnorthern-ireland-article-2.

¹⁵ Lord Duncan of Springbank (Northern Ireland Office Minister):

The Government also considers that Article 2(1) of the Protocol is capable of direct effect and that individuals will therefore be able to rely directly on

in its Explainer on Article 2,¹⁶ the UK government accepted the direct effect of Article 2 as a whole. Given the importance of such statements as indicative of the understanding of the WA,¹⁷ under the VCLT's approach to interpretation, such statements are likely to prove determinative.

Should this not prove to be the case, then the issue arises as to whether the *Francovich* rule (state liability in damages for the incorrect adaptation of national law) applies in the event of a breach of Article 2's general clause. The difficulty here is that such damages appear to have been abolished specifically by EUWA 2018.¹⁸ The issue is whether, despite this, state liability in damages remains available in Northern Ireland. We have seen that the Protocol protects certain rights from diminution, and that those rights have, in part at least, been underpinned by Union law. Thus far, we have been concerned with substantive EU law, but we should also include EU procedural and remedial law, including the *Francovich* rule, which underpins the substantive rights. These substantive rights would be much less well protected if the *Francovich* rule were no longer to apply. The substantive rights would be 'diminished' if the procedural and remedial dimensions of the right were taken away. The 'no diminution' obligation applies not only to the substantive rights but also to the procedural and remedial dimensions of those rights, including the *Francovich* rule, a position that is supported by the judgment of the European Free Trade Association (EFTA) Court in an analogous case.¹⁹ Since the Protocol requires this, section 7A of the 2018 Act overrides the prohibition on *Francovich* damages in the rest of the UK. The effect of the 'no diminution' rule is to create a *lex specialis* as an exception to the general principle of 'no *Francovich* damages' in the EUWA.

12.3 Trade and Cooperation Agreement

There are two main sets of provisions of the TCA which need to be taken into account in reaching a balanced judgment on the degree of protection

this article before the domestic courts. Individuals will be able to bring proceedings independently or, where the case meets certain criteria, with the assistance of the Northern Ireland Human Rights Commission or the Equality Commission for Northern Ireland.

(WA, 28 January 2020, www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2020-01-14/HL404/)

¹⁶ '... individuals will also be able to bring challenges to the Article 2(1) commitment directly before the domestic courts' Explainer, para 29.

¹⁷ See [Chapter 7](#).

¹⁸ See [Chapter 9](#).

¹⁹ Case E-9/97 *Sveinsbjörnsdóttir* [1998] EFTA Court Reports 95 (para 48).

accorded to rights in Northern Ireland following the departure of the UK from the Union, namely the so-called level playing field provisions and the human rights provisions.²⁰ Though quite modestly, these provisions partially address the failure of the Protocol to address labour and social rights explicitly, and the role of the ECHR in Northern Ireland. It is important to note, however, that, unlike the provisions of the Protocol, these provisions are specifically stated not to be directly effective.²¹

12.3.1 *Level Playing Field Provisions*

These provisions were designed to ensure fair competition between the EU and the UK, and include commitments not to regress from labour, social, environmental and climate standards. These restrictions are unlikely to prove constraining, except in quite special circumstances. Article 6.2 provides only that '[a] Party shall not weaken or reduce, in a manner affecting trade or investment between the Parties, its labour and social levels of protection below the levels in place at the end of the transition period, including by failing to effectively enforce its law and standards'. So, too, either side may take 'rebalancing measures' if material impacts on trade or investment arise as a result of significant divergence. Article 8.3 appears to apply all the International Labour Organization (ILO) Conventions that the UK and the member states of the Union have respectively ratified, as well as the provisions of the European Social Charter that, as members of the Council of Europe, the member states of the Union and the UK have accepted, but the obligation is weaker than it may appear; each party only 'commits to implementing' these provisions, which falls considerably short of their being obligated to comply with them.

12.3.2 *Human Rights Provisions*

There are two main sets of human rights provisions: the general rules on human rights found in Articles 763 and 771, together with Article 772, and the special rules on human rights in the criminal justice context detailed in Article 524.

²⁰ For the sake of completeness, Art 285: Environmental, social and labour considerations provides a degree of protection for procurement linkages in Northern Ireland. See further [Chapter 22](#).

²¹ Note, however, the caveat in [Chapter 3](#) that these provisions may be regarded as directly effective under UK domestic law.

As a result of the general rules, the parties 'shall continue to uphold the shared values and principles of democracy, the rule of law, and respect for human rights, which underpin their domestic and international policies. In that regard, the Parties reaffirm their respect for the Universal Declaration of Human Rights and the international human rights treaties to which they are parties.' This provision on human rights is described as constituting 'essential elements of the partnership established by this Agreement'. If either party considers that there has been a serious and substantial failure by the other party to fulfil any of the obligations that are described as essential elements, it may decide to terminate or suspend the operation of the Agreement or any supplementing agreement in whole or in part, subject to a delay to allow for negotiations between the parties to take place, and to the measures being proportionate. The significant limitation on the applicability of these provisions is that 'for a situation to constitute a serious and substantial failure to fulfil any of the obligations described as essential elements . . . , its gravity and nature would have to be of an exceptional sort that threatens peace and security or that has international repercussions'.

The special rules on human rights in the criminal justice context appear somewhat more robust. The co-operation in the criminal justice context is said to be 'based on the Parties' and member states' longstanding respect for democracy, the rule of law and the protection of fundamental rights and freedoms of individuals, including as set out in the Universal Declaration of Human Rights and in the ECHR, and on the importance of giving effect to the rights and freedoms in that Convention domestically'. This constitutes the first time in either the WA or the TCA that the ECHR is mentioned specifically, and its domestic implementation.

As well as being more specific than the general provisions discussed previously, these specific provisions are also subject to a broader compliance regime. Each party 'may at any moment terminate [the criminal justice co-operation measures] by written notification' for breach of these protections. There is no requirement that the breach be of the exceptional sort required for a breach of the general human rights obligations, and it is clear that withdrawal from the Convention and certain specified Protocols (1, 6 and 13) is itself sufficient to justify termination of this part of the TCA. Where there are 'serious and systemic deficiencies' by a Party regarding 'the protection of fundamental rights or the principle of the rule of law', the other Party may also suspend (rather than terminate) this Part of the TCA.

12.4 Conclusion

Given the relative weakness of the human rights provisions of the TCA, Article 2 of the Protocol is likely to take on increased significance, but how far it will prove effective remains to be seen. On the one hand, Article 2 might come to be seen as less than the sum of its parts, or at least less than it first appears. On the other hand, Article 2 could become the foundation of a unique dispensation for Northern Ireland. Neither of these assessments is likely to be borne out in practice; it is more likely that it could come to be seen in practice as of limited application, but of surprisingly significant depth when it does apply. At the time of writing, at least one case is pending that may begin to indicate how the courts will consider Article 2 in the future.²²

²² *In the Matter of an Application by SPUC Pro-Life Ltd* (due to be heard in the Northern Ireland High Court in October 2021, involving the application of Article 2 in support of a claim of disability discrimination in abortion). This case is discussed in 'Update: Developments from July 2021 to September 2021' at the front of this book.

The Charter of Fundamental Rights

SIR BERNARD McCLOSKEY

13.1 Introduction

The law of unintended consequences specializes in conundrums and anomalies. The Charter of Fundamental Rights of the European Union (CFR) was singled out for special, targeted attention in the UK domestic Brexit legislation.¹ The evident intention of the UK government – abrupt and permanent extinction of the CFR from UK law – was unmistakable. The European Union (Withdrawal) Act 2018 (EUWA 2018) repealed the European Communities Act 1972, the measure of primary legislation whereby the UK acceded to the EU, while converting existing EU law into domestic law, subject to specified exceptions. The CFR is one of the most striking of these exceptions, by virtue of section 5(4) EUWA 2018, which provides: ‘The Charter of Fundamental Rights is not part of domestic law on or after exit day.’ Thus, the CFR, it seemed, ceased to form part of domestic UK law overnight, permanently and without more. But the story does not end there. The multiple components of the Brexit legal architecture, not less than complex, having been finalized and activated, it is not clear that this apparent intention has been achieved. If it was not, was this by accident or by design?

13.2 The DNA of the CFR

Human rights development in EU law has been the product of evolution, not revolution: a gentle, orderly and judge-led process which, viewed in retrospect, appears a natural progression. It is nonetheless remarkable given that human rights did not feature in the Treaties in their original incarnation. There was no bill of rights and nothing equivalent thereto. The founding fathers were enlightened and ambitious, but cautiously so.

¹ For an overview of this legislation, see [Chapters 3 and 9](#).

The Lisbon reforms of 2009, which made the CFR enforceable EU law, effected a significant transformation of the EU landscape, with a greater emphasis on human rights protection in the Treaties than ever before. The CFR represented the culmination of several decades' work of the Court of Justice of the European Union (CJEU) and its predecessor (the European Court of Justice (ECJ)) during which active, imaginative and penetrating judicial interpretation and application of EU law had discovered and proclaimed fundamental rights,² initially through the conduit of 'general principles' considered to be inherent in the Treaties and subsequently by explicit recognition in the Treaties themselves. Article 6(3) of the Treaty on European Union (TEU) provides that fundamental rights shall constitute general principles of EU law. It proclaims that 'fundamental rights' consist of those rights guaranteed by the European Convention of Human Rights and Fundamental Freedoms (ECHR), together with rights embedded in the constitutional traditions common to the member states.³

The CFR represents both the vindication and the codification of the jurisprudence of the CJEU, which from its earliest days developed the cornerstone principles of equal treatment, non-discrimination, transparency, legitimate expectations and the legal recognition and protection of other fundamental rights and freedoms. The fundamental difference between the pre-CFR and post-CFR eras is that the rights of EU citizens and others residing on EU territory are now proclaimed and codified visibly and unambiguously in a model which is transparent, unequivocal and dynamic. These rights are more concrete, tangible and accessible than ever before. Constituting one of the three dominant instruments of governance of the EU, the CFR is a legally binding bill of rights, resembling the catalogues of rights to be found in the constitutions of most EU member states. Upon its adoption, a new era in the EU legal order dawned.

13.3 The CFR's Preamble

The Preamble to the CFR is illuminating and instructive. It reveals its diverse origins and sources of inspiration, as well as proclaiming its rationale and aims. It recalls the post-war resolution of the peoples of Europe 'to share a peaceful future based on common values'. It draws on

² In the best common law tradition!

³ See also Art 6(1).

the ‘spiritual and moral heritage of the Union’, which is founded on the ‘indivisible, universal values of human dignity, freedom, equality and solidarity’. Its most important statement, arguably, is the reaffirmation that the Union is ‘based on the principles of democracy and the rule of law’.

Through the creation of the twin mechanisms of Union citizenship and an area of freedom, security and justice, the EU ‘places the individual at the heart of its activities’. The Preamble emphasizes, on the one hand, the common values of the member states and, on the other, the respect to be accorded to ‘the diversity of the cultures and traditions of the peoples of Europe’, their national identities and how they are governed at national, regional and local levels. Furthermore, the Preamble explicitly recognizes the principle of subsidiarity, while emphasizing that ‘it is necessary to strengthen the protection of fundamental rights’, which derive from ‘the constitutional traditions and international obligations common to the Member States, the [ECHR], the Social Charters adopted by the Union and by the Council of Europe and the case law of the Court of Justice of the European Union and of the European Court of Human Rights’. The CFR’s close affinity with Article 6(3) TEU in this respect is evident.

13.4 Has the CFR Really Disappeared from the UK Legal System?

The answer to this question is no. It is at first blush a surprising answer, given the terms of section 5(4) EUWA 2018. Explaining why this is so requires a two-part analysis. I examine first, in this section, what the status of the CFR is in UK law in areas other than those covered by the Protocol. In Section 13.5, I turn to the position under the Protocol.

As regards the status of the CFR in UK law generally after Brexit, its continuing and future potential to influence domestic UK law arises in several ways. First, the following transitional provisions gave the CFR a limited degree of prospective effect after exit day. The CFR continues to operate, albeit on a short-term basis, insofar as relevant to any proceedings begun, but not finally determined, before a UK court or tribunal prior to exit day.⁴ A court will be able to disapply legislation or quash a relevant act where a challenge relates to something predating exit day and is made within a three-year limitation period.⁵ Any pre-exit day

⁴ EUWA 2018 Sch 8, para 39(3).

⁵ *Ibid*, para 39(5).

court decisions quashing an act or decision or disapplying a provision of pre-exit secondary legislation on the ground of incompatibility with one of the general principles of EU law will continue to have effect.⁶

Second, and more importantly, the UK's post-Brexit retreat from EU law will not be abrupt. EU law will continue to form part of domestic UK law as 'retained-EU law'.⁷ In particular, certain of the existing rights codified under the CFR will be retained in UK domestic law, such as relating to anti-discrimination rights. Unless and until 'retained-EU law' is repealed, it remains in full force, and repeal is likely to be a gradual, incremental process. Indeed, the complete repeal of retained EU law is unlikely to prove either viable or desirable. The CFR will remain influential in the interpretation of all aspects of this retained EU law which it affects. It will also exert an influence via all retained CJEU jurisprudence in which it features. Courts and tribunals are also specifically empowered to have regard, and give effect, to post-exit day CJEU judgments which do not depart from pre-exit day CJEU judgments.⁸ These may include CFR-related decisions.

Third, the CFR could conceivably make a formal or official reappearance in the event of the exercise of the statutory ministerial power to act so as to prevent, remedy or mitigate any failure of retained EU law to operate effectively or any other deficiency.⁹ The same observation applies to the separate power to make transitional arrangements by secondary legislation.¹⁰

Fourth, the relationship between the CFR and the CJEU's 'fundamental rights' jurisprudence deriving from EU general principles provides a potentially rich harvest of possibilities for continuing CFR influence. Any fundamental rights or principles under EU law which exist irrespective of the CFR (surely a blurred dividing line?) will be retained in UK domestic law. This gives rise to the possibility of resort to the CFR's 'Explanations' and to CFR jurisprudence (whether that of the CJEU or the UK courts) provided that the CFR's rights identified and recognized express a fundamental right or principle existing irrespective of the CFR. While this may give rise to an untidy and uncertain dichotomy, the significance of this provision is that the CFR is a codifying instrument containing at least some provisions deriving from preceding CJEU

⁶ EUWA 2018 Sch 1, para 2 and Sch 8, para 39(3).

⁷ EUWA 2018, ss 5(5), 6 and 7.

⁸ *Ibid*, s 6(1)(a) and (2).

⁹ *Ibid*, s 7.

¹⁰ *Ibid*, s 23(6) and Sch 8, Pts 3 and 4.

'fundamental rights' case law. This assessment is fortified by the specific provision in the EUWA 2018 that 'references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles'.¹¹ It follows that certain aspects of CJEU jurisprudence with a specific focus on the CFR may continue to exert significant influence in the UK following exit day.

13.5 The CFR, the CJEU and the ECtHR

The ECHR belongs to the realm of the Council of Europe (COE), an international organization separate from the EU and governed by its own rules, norms, systems and procedures. Its members include the UK. Continued UK membership of the COE is not at present under threat; nor is the UK's accession to the ECHR, although this has often been mooted in the recent past. Unless or until it is significantly weakened, the Human Rights Act 1998 (HRA) should remain a powerful conduit through which the ECHR and the jurisprudence of the European Court of Human Rights (ECtHR) continue as a significant presence in UK law.

In the search for factors which may provide an effective foil to the foreseeable post-Brexit human rights protection backward slide in the UK, attention may turn to the increasing alignment of the CJEU and the ECtHR. This belongs to a context where the EU en bloc is still committed to acceding to the ECHR.¹² There has been a progressively discernible jurisprudential dialogue between these two courts.¹³ The 'constitutional traditions common to the Member States', a familiar phrase, has increasing resonance in this context. This 'cross-pollination' seems merely logical given the strong association linking ECHR rights, the CFR and the general principles of EU law.¹⁴ Thus, post-Brexit, it is foreseeable that both the CFR and the general principles of EU law, particularly insofar as these have been absorbed within the ECHR and the Strasbourg jurisprudence, will continue to have *indirect* influence

¹¹ *Ibid.*, s 5(5).

¹² See, eg, www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights.

¹³ See, eg, www.coe.int/en/web/dlapil/-/eu-accession-to-the-echr-how-to-square-the-circle-.

¹⁴ This is readily identifiable in CJEU decisions such as *Case C-411/10, NS v SSSHD* [2012] 2 CMLR 9, and ECtHR decisions such as *MSS v Belgium and Greece*, Application no 30696/09 [2011] 53 EHRR 2.

in the UK legal system. This will occur in a context where it is the declared philosophy of the ECtHR to treat the ECHR as a living instrument.¹⁵ While the concern must be that this influence may be weak, it is also worth recalling that, through judicial resourcefulness prior to the HRA, important provisions of the ECHR achieved recognition in the UK.¹⁶ There will thus be scope for the CFR to influence the development of the common law by judges, particularly on account of its links with the ECHR.

13.6 The Protocol and the CFR

In this section, I shall consider the status of the CFR in the UK in areas covered by the Protocol, one of the intricacies of the legal arrangements giving effect to Brexit. Northern Ireland finds itself in a unique situation being the only part of the UK which, post-Brexit, shares a land border with an EU member state, namely Ireland. All citizens of Northern Ireland are British nationals. Many, by virtue of their place of birth or otherwise, are also nationals of Ireland. This entitles them to hold an Irish passport. The members of this group, being Irish nationals, are EU citizens entitled *in principle* to all of the associated rights and benefits.¹⁷ The Protocol forms part of the suite of international agreements between the EU and the UK. By virtue of the Protocol, considered in tandem with the 1998 Agreement, an international treaty to which the UK is party, it would appear that those residing in Northern Ireland, whether Irish citizens or not, have the benefit of a range of protected rights greater than those enjoyed post-Brexit by those resident in other parts of the UK.¹⁸ The effect and nuances of this will be a matter for future assessment, particularly through judicial decisions.

What is clear is that one of the most striking effects of the Protocol for the population of Northern Ireland is that, via a series of interconnected provisions in the European Union (Withdrawal Agreement) Act 2020 (EUWAA 2020) and the Withdrawal Agreement (WA), including the definition of ‘Union law’ in Article 2 WA, considered in conjunction with a series of provisions within the Protocol,¹⁹ there is substantial provision for the continued application of specified aspects of ‘Union law’ in

¹⁵ Eg, *Tyrer v UK*, Application no 5856/72, 25 April 1978, para 31.

¹⁶ Eg, *R (Smith and others) v The Ministry of Defence* [1996] 1 ALL ER 257.

¹⁷ See [Chapter 1](#).

¹⁸ See [Chapter 12](#).

¹⁹ Especially Arts 2, 5 and 7–11.

Northern Ireland. From this starting point, it would appear that the UK is continuing to implement certain aspects of Union law post-Brexit, *and* is obliged to do so.

But how does this relate to the status of the CFR? The indelible starting point must be confronted: by Article 51, the CFR applies only when a member state is acting within the scope of EU law, as interpreted in a series of important decisions of the CJEU.²⁰ In general, the UK's institutions will, of course, no longer be doing so. However, bearing in mind Article 51 of the CFR, and notwithstanding section 5(4) EUWA 2018, the CFR – via the Protocol – has achieved a level of survival in respect of Northern Ireland extending beyond the situations and respects identified above in Section 13.5.

The explanation of the foregoing proposition requires a careful examination of several further provisions of the WA, two in particular. The first is Article 4(1): 'The provisions . . . of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States.' Insofar as the WA (which includes, of course, the Protocol) entails the implementation of Union law, the CFR will apply, by virtue of Article 51.

The second is Article 4(2) WA: 'The United Kingdom shall ensure compliance with paragraph (1), including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation.' This is, in domestic legal terms, an intrusive provision and a potentially far-reaching one. However, it is enshrined only in the WA, an international treaty. It is not mirrored specifically in either EUWA 2018 or EUWAA 2020. Since it is a provision of international law that has not been specifically incorporated into UK law, the UK dualist theory applies. Thus, are its efficacy and enforcement confined to the realms of politics, diplomacy, municipal elections and, possibly, international courts? The answer, again, appears to be no. EUWAA 2020 is designed to give effect in UK domestic law to the WA. By 2020, EUWA 2018 was no longer capable of giving adequate effect in domestic law to all aspects of Brexit. EUWAA 2020, with its associated amendments of EUWA 2018, was an essential statutory measure, required to reflect the radically changed Brexit landscape which materialized post-2018. Crucially, section 7A EUWA 2018

²⁰ Eg, *Fransson v Sweden*, C 617/10, Judgment of the Court (Grand Chamber) 26 February 2013.

(introduced by s 5 of EUWAA 2020) provides in material part that '(1) Subsection (2) applies to – . . . the Ireland/Northern Ireland Protocol'. The critical parts of section 7A are subsections (2) and (3).²¹ Albeit by a somewhat cumbersome drafting route, section 7A appears to subject all measures of UK legislation to all rights (etc) and all remedies (etc) referable to the WA, to give effect thereto in UK domestic law and to require their enforcement in legal proceedings in that jurisdiction.

Given that the CFR has a clearly identifiable degree of survival under the WA, and having regard to the indisputable relationship between the WA and EUWAA 2020, the operation of the CFR with regard to issues arising under the WA (and, hence, the Protocol) seems clearly arguable. Although there is a discernible tension between sections 5(4) and 7A EUWA 2018, the exercise of reading section 5(4) EUWA 2018 in the context of the jigsaw of other provisions highlighted above reveals that the demise of the CFR has not been achieved. Ironically, given the intricacies involved, the CFR could conceivably receive greater attention in the UK, via the Protocol, than ever before. (Of course, while I have outlined certain indications pointing towards an interpretation which dilutes the superficially uncompromising language of section 5(4), full adversarial argument and authoritative judicial construction in an appropriate case will be required.)

13.7 Measuring the Loss When the CFR Does Not Apply Directly

Where the CFR does not apply in the UK post-Brexit, its repeal will have two predictable impacts on the legal protection of rights. First, as the rights protected by the CFR are more extensive than those enshrined in the ECHR (protected in domestic law via the HRA), human rights protection seems destined to diminish across the UK as a whole. The HRA survives (for the moment), continuing to be a major source of directly effective human rights protection in the UK. However, as the CFR is of demonstrably greater reach than the ECHR, where the former no longer applies UK citizens will not have the protection of the CFR's *additional* rights, the *soi-disant* 'added value'. These include, in particular: the specific rights of the child;²² the array of social protections contained in Title IV;²³ freedom to conduct a business;²⁴ the strong anti-discrimination provisions;²⁵

²¹ Examined in detail in [Chapters 3, 9 and 10](#).

²² Art 24.

²³ Arts 27 to 38.

²⁴ Art 16.

²⁵ Art 21.

freedom of the arts and sciences;²⁶ a right of conscientious objection;²⁷ freedom to choose an occupation;²⁸ a right to asylum and against *refoulement*;²⁹ a right to data protection;³⁰ the prohibition against human trafficking;³¹ a right to marry not restricted to different-sex couples;³² the right to physical and mental integrity;³³ and a guarantee of human dignity.³⁴ This is an impressive list indeed of deceased rights.³⁵

Second, while some of the CFR's additional rights and protections are, as we have seen, recognized in certain measures of UK domestic law (eg, data protection and protection from human trafficking) or in the ECtHR jurisprudence (eg, certain types of physical and mental integrity), others are likely to evaporate, a particular and worrying illustration being the more expansive rights of the child. Furthermore, to enshrine 'parallel' rights in UK domestic law may not benefit from the expansion and fortification of the CFR which, historically, have emerged from the progressive interpretation of the CJEU. Furthermore, future EU legislative measures of expansion and fortification will not apply in the UK.

Third, the abolition of the CFR will give rise to a significant limitation in the matter of available judicial remedies for human rights violations. Under the scheme of the HRA, if a provision of primary legislation cannot be read and given effect in a manner compatible with the Convention rights, the court is empowered to make a declaration of incompatibility.³⁶ This remedial order does not affect the validity, continuing operation or enforcement of the impugned statutory provision. As regards secondary legislation, a judicial order of striking down or setting aside is possible.³⁷ In contrast, as the CFR had the status of supreme EU law in the UK legal system, it had to prevail over any conflicting UK law. Thus, a judicial decision, reflected in an appropriate remedy, that a measure of UK law was incompatible with the CFR would

²⁶ Art 13.

²⁷ Art 10(2).

²⁸ Art 15.

²⁹ Art 18.

³⁰ Art 8.

³¹ Art 5(3).

³² Art 9.

³³ Art 3(1).

³⁴ Art 1.

³⁵ See, eg, *Benkharbouche v Embassy of the Republic of Sudan* [2013] UKEAT 0401_12_0410, [2013] IRLR 91, [2014] 1 CMLR 40, [2013] IRLR 918, [2014] ICR 169.

³⁶ HRA s 4(2).

³⁷ Eg, *R (Miller) v Prime Minister* [2019] UKSC 41 at [69].

nullify the relevant UK law immediately. Where the CFR does not apply, this will no longer be possible.

More generally, the UK's retreat from the CFR is likely to have a negative impact on the culture of human rights protection in the UK. It is beyond plausible dispute that, even where there is theoretically strong human rights protection in the laws of any nation, the mindset of its citizens, invariably shaped to some extent by the general culture and philosophy promoted by the government of the day, elected by a majority of voters, is an essential tool in ensuring effective rights protection in practice. It seems highly likely that the removal of the CFR from large parts of UK law will have a negative impact in this respect. This could prove to be the most damaging consequence of all.

The progressive evaporation of the CFR must also be seen in the context of what appears to be a general decline in the UK's rule-of-law culture. Protection of the rule of law is a critical component of, and support for, the protection of human rights. Yet there are already legitimate worries about the present and future rule-of-law culture in the UK, with at least four reasons to be concerned, at the time of writing. First, several decisions of the UK courts on Brexit-related issues have provoked a vitriolic outcry against the judiciary, one of unparalleled proportions in modern-day Britain, in which senior government figures were prominent. Second, the government, following the latest of these decisions, which it comprehensively lost, quickly announced that there would be a fundamental judicial review (which has now been completed).³⁸ Despite the review recommending only minimal changes, the government announced that it would nevertheless be proceeding with more radical 'reforms' aimed at limiting judicial review in the future.³⁹ Third, in December 2020, the government announced a review of the HRA, with terms of reference seemingly indicating a desire to reduce protections in various respects.⁴⁰ Fourth, the UK Internal Market Bill, published in September 2020, contained a provision⁴¹ (subsequently withdrawn

³⁸ See Ministry of Justice, *Judicial Review Reform*, 18 March 2021 (www.gov.uk/government/consultations/judicial-review-reform).

³⁹ House of Commons library, *Judicial Review Reform* article, published 1 April 2021 (<https://commonslibrary.parliament.uk/judicial-review-reform/>).

⁴⁰ See Hansard of 7 December 2020 (<https://hansard.parliament.uk/commons/2020-12-07/debates/20120741000012/IndependentHumanRightsActReview>) and the Ministry of Justice publication of 7 December 2020 relating to the HRA Review (www.gov.uk/guidance/independent-human-rights-act-review).

⁴¹ Clauses 42 and 43.

because of opposition in the House of Lords) which equipped government with powers to breach international law, including the WA.

13.8 Conclusion

Pre-Brexit, the CFR was something of a sleeping beauty in the UK legal system. Post-Brexit, will it experience an unexpected and perhaps unintended reawakening? It seems unlikely that the CFR will evaporate entirely from UK law, whether because of its influence in the context of 'retained EU law' or because of its importance in respect of the Protocol, or both. Intriguingly, the CFR could conceivably be of greater future influence in the UK than it was pre-Brexit. But is it destined to fade or flourish? The extent of the CFR's post-Brexit influence in the UK will depend significantly on three factors. The first is the innovation and creativity of UK lawyers and judges, which were especially evident as regards the ECHR in the pre-HRA era of the 1980s and 1990s. The second is the extent to which disputes that eventually arise for adjudication before the CJEU and the international arbitration panel are decided in part by reference to the CFR. The third is the future rule-of-law culture in the UK in which the CFR will be attempting to operate. Effective human rights protection, particularly in a country which has no written constitution, will be heavily dependent on a strong rule-of-law-culture. What the future holds for this culture in the UK is uncertain, but it is a matter of legitimate concern, not least because of the cold climate in which the CFR will operate in those situations where it applies. To change the metaphor, there are signs that the CFR will find itself swimming in murky waters, ever willing but maybe floundering.

PART VI

Citizenship and Free Movement of Persons
in the Protocol

The Common Travel Area

IMELDA MAHER

14.1 Introduction

The Common Travel Area (CTA) is an arrangement among the UK, the Crown Dependencies (the Bailiwick of Jersey, the Bailiwick of Guernsey and the Isle of Man) and Ireland by which British and Irish citizens can move freely and reside in either jurisdiction and enjoy associated rights and privileges, including the right to work, study and vote in certain elections, as well as to access social welfare benefits and health services. These arrangements have been disrupted by Brexit even though these arrangements long preceded Ireland's and the UK's membership of the EU.

The retention of the CTA was largely uncontroversial for either state or for the EU when the UK chose to leave the EU. Nonetheless, Brexit has had two major effects: first, it heightened its visibility as it received considerable political and media attention in the early stages of the Brexit negotiations; second, Brexit crystallized the CTA through formalizing it while both governments and the EU have allowed for its continued development. Thus, the CTA has moved from being a highly informal arrangement to becoming a cluster of laws, with an intergovernmental Memorandum of Understanding (MOU) and the Protocol and legislation most notably found in the Brexit statutes of Ireland and the UK.¹ It is a distinct legal arrangement, recognized by and connected to but operating separately from the Withdrawal Agreement (WA) and the Trade and Cooperation Agreement (TCA) which should insulate it to some degree from concerns surrounding the Protocol.

¹ Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (UK); Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (Ireland).

14.2 The CTA Pre-Brexit

The CTA emerged over time and almost by default following the creation of the Irish state in 1922. Irish citizens were not classified as aliens under the UK British Nationality Act 1948,² and in Ireland a Statutory Instrument exempted British citizens from the Aliens Act 1935, with it remaining in place after the Immigration Act 2004.³ Citizens from either state were not subject to routine immigration controls and enjoyed extensive rights and privileges in the other state; so, in effect, there were no additional formalities for citizens from either state moving to live and work in the host state.⁴ This largely informal arrangement was disrupted only during the Second World War, being renewed by an exchange of letters between the governments shortly thereafter.⁵ The CTA seemed to work well for migrant citizens from both states, being largely invisible.

The first formal recognition of this arrangement was, ironically, in the 1999 EU Treaty of Amsterdam. Article 2 of what is now Protocol 20 noted that ‘the United Kingdom and Ireland could continue to make arrangements between themselves relating to the movement of persons between their territories (“the Common Travel Area”)’. The CTA was exempt from the application of those EU laws giving effect to Europe without Frontiers (Schengen) as it was itself an area without frontiers for the two islands. The exemption was justified by both geography and

² See also s 2(1) Ireland Act 1949, s 1(3) and now s 3Za Immigration Act 1971, introduced by s 2 Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020. For those entering the UK from Ireland who are not Irish citizens, see the Immigration (Control of Entry through Republic of Ireland) Order 1972. For detailed operational guidance, see the Home Office memorandum for staff, ‘The Common Travel Area v. 8’, 5 January 2021.

³ See now Aliens (Amendment) (No 2) Order, 1999 SI No 24/1999. See also s 4 of the 2004 Act and ss 11 and 12, as amended by s 114 Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020, and see Chapter 11 in this volume.

⁴ B Ryan, ‘The Common Travel Area between Britain and Ireland’ (2001) 64 *Modern Law Review* 855; I Maher, ‘Crossing the Irish Law Border after Brexit: The Common Travel Area and the Challenge of Trade’ (2018) *Irish Yearbook of International Law* 51; G Butler and G Barrett, ‘Europe’s “Other” Open-Border Zone: The Common Travel Area under the Shadow of Brexit’ (2018) 20 *Cambridge Yearbook of European Legal Studies BELS* 252.

⁵ E Meehan, ‘The Origins of the Common Travel Area between Ireland and the United Kingdom and Its Fate in an Era of Governmental Concern about Undocumented Migration and International Terrorism’, European Migration Network (Ireland) and Economic and Social Research Institute Research Conference on Documenting Irregular Migration (Dublin, 8 December 2011). S de Mars, CRG Murray, A O’Donoghue and B Warwick, ‘Discussion Paper on the Common Travel Area’, Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission 2018, 22.

politics, given that the 1998 Agreement was only one year old at that stage and the demilitarization of the land border between Northern Ireland and Ireland was being effected.⁶

14.3 Brexit and the CTA

14.3.1 *The Protocol*

Echoing Protocol 20 of the Treaty on the Functioning of the European Union (TFEU), Article 3(1) of the Northern Ireland Protocol notes that the two states can continue to make arrangements under the CTA, subject to two related caveats. First, both states must fully respect the rights of natural persons conferred by EU law and second, the UK has to ensure that the CTA can apply without affecting the obligations Ireland has under EU law, in particular in relation to free movement to, from and within Ireland for EU citizens and their family members, irrespective of nationality.⁷ Subject to this caveat, it will be possible for British citizens coming to Ireland to enjoy more expansive rights than those of EU citizens living in Ireland. This retains the status quo, as British and Irish citizens have always had privileges that went further than those of other EU citizens whom they hosted. The difference is that British citizens are now third-country nationals under EU law and that the EU in the WA accepts the logic that led to Protocol 20 TFEU and the British/Irish exemption from Schengen. Ireland will remain outside Schengen, choosing an area without frontiers with the UK instead. This means that Irish, as well as British, citizens will be subject to passport controls on entry to other EU members.

14.3.2 *The CTA Memorandum of Understanding*

One key question for the UK–EU negotiations leading to the WA was to determine what encompassed the CTA.⁸ This question did not arise so starkly at the time of the Amsterdam Treaty, but, given the need to determine relations with the UK as a third country, the EU needed to

⁶ E Fahey, ‘Swimming in a Sea of Law: Reflections on Water Borders, Irish (British) Euro Relations and Opting-Out and Opting-In after the Treaty of Lisbon’ (2010) 47(3) *Common Market Law Review* 673.

⁷ Art 3(2) Protocol.

⁸ Common Travel Area Information Note from Ireland to the Article 50 Working Group 15 March 2017.

know what it was acknowledging. To gain greater recognition for the CTA, it had to be formalized. This led to the MOU in May 2019 between Ireland and the UK.⁹ The MOU states that it builds on the ‘excellent and highly valued’ co-operation that already exists under the CTA.¹⁰ Both governments published a joint statement alongside the MOU asserting their mutual commitment to maintaining the CTA in all circumstances.¹¹ The scope and limitations of these expansive statements can then be seen in the remainder of the MOU and the fact that it expressly says that it is not legally binding.¹²

The MOU clarified that the CTA consists of two elements. First (see Section 14.3.3 for the second), the CTA itself is concerned with the ability to move freely.¹³ It was this ability to cross borders that came to the fore when negotiations began on Brexit, as the issue of how the border for goods was to be secured between the UK and the EU had to be determined. The CTA ensures no routine migration controls for Irish citizens at UK borders, although there may be checks for certain purposes,¹⁴ and passengers are required to produce ID when passing through Irish airports.¹⁵ There are no border posts at the land border with Northern Ireland, seen as an essential underpinning for, and consequence of, the 1998 Agreement. It is an invisible border.¹⁶ These aspects of free

⁹ The CTA also extends to the Crown Dependencies (Isle of Man, Guernsey and Jersey); see Home Office memorandum for staff (n 2) 7. S de Mars and CRG Murray, ‘With or Without EU? The Common Travel Area After Brexit’ (2020) 21 *German Law Journal* 815. Art 2.

¹¹ Joint statement of 8 May 2019 between the UK government and the government of Ireland on the CTA. The CTA has been restricted by Covid-19 with both states requiring, at times, a specific Covid negative test prior to travel and quarantine, subject to limited exceptions between GB and Ireland. Different rules apply for Wales and Scotland, raising interesting questions as to the scope of the CTA under devolution in the UK. There were no limitations on travel across the land border on the island of Ireland.

¹² Art 17.

¹³ Arts 3 and 6 Memorandum of Understanding between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland concerning the Common Travel Area and Associated Reciprocal Rights and Privileges, May 8 2019; s 3ZA Immigration Act 1971.

¹⁴ In the UK, under s 3ZA(1)(3) Immigration Act 1971, an Irish citizen can be excluded where that is conducive to the public good.

¹⁵ Art 3 Aliens (Amendment) (No 3) Order 1997 which allows checks at Irish borders on those coming from the UK. And when building a new terminal in Dublin airport, no provision was made for arrivals from the CTA.

¹⁶ UK Government, ‘Northern Ireland and Ireland’, Position Paper (16 August 2017); Maher (n 4) 7; C Gormley-Heenan and A Aughey, ‘Northern Ireland and Brexit: Three Effects on “the Border in the Mind”’ (2017) 19(3) *British Journal of Politics and International Relations* 497, 499.

movement are referred to only obliquely in legislation in both jurisdictions, however, and neither jurisdiction confers a positive right in these respects. Hence in the UK statute, Irish citizens do not require leave to enter or remain in the UK, and in the Irish statute British citizens are not included in the definition of alien, or, more recently, non-national.¹⁷ It is no wonder that Hogan J (as he then was) referred to the CTA as requiring ‘legal archaeology’.¹⁸

14.3.3 *The Memorandum of Understanding: Rights and Privileges*

The second, and significant, aspect of the MOU is its clarification of the extensive reciprocal rights and privileges for British and Irish citizens in each territory which both governments state are of immense importance to them and, notably, will continue to evolve over time.¹⁹ Thus, the MOU, while formalizing arrangements, suggests both durability and flexible evolution. This future evolution was also allowed for under the Protocol, concluded six months later. These newly codified rights and privileges show the extent to which the CTA is not just concerned with travel across borders. As they are reciprocal, they should not be changed unilaterally, although they do not map exactly onto each other – a product in part of scattered legal bases and variation in legal frameworks as between the two states.²⁰ Both governments commit to taking any necessary steps to ensure provision of these rights and privileges and clarity around their availability for citizens and service providers, up to and including legislation or other bilateral agreements.²¹

The key reciprocal rights and privileges set out in the MOU are, first, the right to reside, a right which the two governments are to ensure that they continue to provide for in statute. The UK government did this in 2020; the Irish legislation remains more oblique: British citizens are not classified as non-nationals.²²

¹⁷ In the UK, s 3Za Immigration Act 1971 and in Ireland, ss 11 and 12 Immigration Act 2004, as amended.

¹⁸ *Pachero v Minister for Justice* [2011] IEHC 491.

¹⁹ Arts 4, 7–13 MOU.

²⁰ De Mars and Murray (n 9) 820. The UK had reviewed the CTA unilaterally in 2008, suggesting either that 2008 was an aberration or that this statement has more of an aspirational than binding quality. On the 2008 reforms, see Fahey (n 6) 680.

²¹ Arts 14 and 15 MOU.

²² Ss 3ZA and 9 Immigration Act 1971 (as amended) and ss 11 and 12 Immigration Act 2004 (as amended).

Second, the rights to work and to be self-employed are protected. As Irish and British citizens are regarded as settled in their host state, all that is required is proof of citizenship in order to secure a British national insurance number or an Irish personal public service number and to take up employment or set up a business. No special permissions are required. A more complex question is the mutual recognition of qualifications.²³ Both governments commit to comprehensive measures allowing for such recognition in line with national law.²⁴ Urgent calls for an overarching bilateral agreement or programme have not yet led to action.²⁵ Instead, with 182 regulated professions and regulation of them delegated, this is a slow and complex process.²⁶ In many instances, the relevant professional body needs to act; for example, the Law Societies of Ireland and England and Wales reinstated prior mutual recognition arrangements (governed by EU law), allowing admission of their respective solicitors without the need to take qualifying examinations.²⁷

Third, the right to health care is protected: citizens resident in the host state have the right to access emergency, routine and planned (specialized) publicly funded health services on the same basis as citizens of that state.²⁸ The two governments signed an additional MOU in December 2020 recognizing that health care would be available irrespective of citizenship, an MOU being necessary given that EU cross-border health care for residents would no longer be available.²⁹ The MOU addresses posted workers, frontier workers, students, state reimbursement arrangements and data protection.

²³ The quality assurance bodies for higher education in both states (QQI and QAA) renewed their MOU on information sharing and mutual understanding of quality and reputation of higher education in Ireland and the UK, December 2018.

²⁴ Art 8 CTA MOU. See now: 'Update: Developments from July 2021 to September 2021' at the front of this book.

²⁵ A Isaac, 'UK and Ireland Urged to Recognize Professional Qualifications Post-Brexit' (10 February 2021) www.politico.eu/article/uk-and-irish-governments-urged-to-guarantee-professional-qualifications/.

²⁶ In Ireland at least, see the Professional Human Resources Body, CIPD Practical Guide to Brexit, www.cipd.ie/news-resources/practical-guidance/guides/brexit-faqs#89311.

²⁷ 'Law Society Offers Open Access to Irish Roll, Post-Brexit', *Law Society Gazette*, 1 April 2021.

²⁸ Art 9 MOU given effect in Ireland by Part 2, Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 and related statutory instruments.

²⁹ MOU concerning Common Travel Area Healthcare Arrangements (in recognition of Residency-Based Health Systems), 18 December 2020. The TCA includes British citizens in emergency health-care arrangements when on a temporary stay in the EU with the British government issuing a Global Health Insurance Card.

Fourth, the right to social protection is provided for. This is one of the very few areas under the CTA where the governments concluded a number of (binding) agreements, most recently in 2019.³⁰ It sets out a principle of equality of treatment for the citizens of both states and their families. It lists the main benefits and allowances available in both jurisdictions, including any amendments to them in the future, while expressly excluding any rights or benefits arising under EU law, underlining the fact that the CTA exists in parallel to Irish rights and obligations as an EU member state.

Fifth, the right to housing is addressed: the CTA gives a right of access to social housing, including supported housing and homeless assistance, on the same basis as citizens of the host state.³¹

The principle of equality of treatment also applies in the realm of education, the sixth area mentioned in the MOU.³² It extends beyond access to all levels of education and training to associated student support, on a reciprocal basis.³³ The UK has left the ERASMUS scheme for students to study at another EU university for part of their degree.³⁴ The Irish government has offered to extend the scheme to all Northern Irish students (whether or not they are Irish citizens)³⁵ with discussions ongoing with Irish higher education institutions as to how best to implement this commitment.

Finally, the CTA confers political rights, particularly important in Northern Ireland as those who choose to identify as Irish under the 1998 Agreement can exercise the right of franchise on the same basis as those who identify as British. Citizens resident in either host state can register to vote in both parliamentary and local elections on the same basis as citizens of that state.³⁶

³⁰ Art 10 MOU on the CTA; Convention on Social Security 1 February 2019.

³¹ Art 11 MOU on the CTA. In the UK see the Persons Subject to Immigration Control (Housing Authority Accommodation and Homelessness) Order 2000 SI 2000/706 which includes those covered by the CTA in social housing support and assistance.

³² Art 12 MOU on the CTA, with a July 2021 MOU on Education (for which, see 'Update: Developments from July 2021 to September 2021' at the front of this book).

³³ In Ireland, see the Student Support Act 2011 (as amended), in particular s 14. In the UK, see the Education (Student Fees, Awards and Support) (Amendment) Regulations 2021 SI 2021/127.

³⁴ Introducing instead the Turing scheme: see Department of Education and Gavin Williamson MP, 'New Turing Scheme to Support Thousands of Students to Study and Work Abroad', Press Release, 26 December 2020.

³⁵ M Devine, 'NI Students Could Be Able to Avail of Erasmus Scheme in September' *Belfast Telegraph* (15 March 2021). See further 'Update: Developments from July 2021 to September 2021' at the front of this book.

³⁶ Art 13 CTA MOU, the UK Representation of the People Act 1983 and the Irish Electoral Act 1992. The change in Irish law arose out of the 1998 Agreement as voting rights had not been reciprocal prior to that.

Thus, the scope of the CTA extends far beyond the freedom to travel. It encapsulates a significant number of social rights and the right to vote. While the MOU and the Social Security Convention have codified these arrangements, the underlying legislation remains scattered and can be either extended or reduced. The CTA remains fundamentally a pragmatic arrangement, albeit one now framed with an explicit and shared commitment by both governments to its importance. At the same time, it is not framed in terms of fundamental rights, it is legally scattered and it is limited to Irish and British citizens.³⁷

14.3.4 CTA Governance and Visas

Under the MOU, there is an oversight committee of officials that is to meet at least annually.³⁸ This complements the CTA Forum on Immigration Matters, which co-ordinates on visa and migration by citizens of other states. The Forum, consisting of senior officials from both states, meets at least twice a year, reporting to respective ministers on an ongoing basis.³⁹ Its operational and policy sub-groups share information on operation and enforcement and drive implementation of the programme of work on rendering secure external borders.⁴⁰ The operation of these bodies remains largely opaque.⁴¹ Each state enforces the other's terms and conditions for entry for other citizens and works closely on protecting their borders.⁴² While there is close collaboration on border controls, the arguably greater significance of the CTA for the Irish government means that it has been seen to align itself with UK policy.⁴³ The states have a common visa policy for Indian and Chinese

³⁷ Although the Convention on Social Security extends to family members. On citizenship rights, see [Chapter 15](#) in this volume.

³⁸ Art 16.

³⁹ Joint Ministerial Statement on Co-operation on Measures to Secure the External Common Travel Area Border, 20 December 2011. Art 7.

⁴⁰ Art 7, Ministerial answer to Parliamentary Question in the Dáil, 15 November 2016, PQ 56, Frances Fitzgerald TD. The Forum is co-chaired by the heads of the UK Border Agency, the Home Department, and the Irish Naturalisation and Immigration Service (INIS) of the Department of Justice.

⁴¹ Compare for example, with the bodies set up and meeting under the Protocol. See [Chapter 4](#) in this volume.

⁴² Joint Ministerial Statement. For the UK, see Immigration (Control of Entry through Republic of Ireland) Order 1972 (as amended) and the Home Office memo to staff (n 2) 31, 40 and 59. For Ireland, see Aliens (Amendment No 3) Order 1997.

⁴³ See de Mars and Murray (n 9) 817.

citizens and their separate visa policies are broadly consistent.⁴⁴ The lack of formality at the border can catch the unwary non-Irish or non-British citizen moving between the two states, especially across the invisible land border.⁴⁵

14.4 Conclusion

The issue of borders has grown more significant as Brexit emphasizes the external borders between the EU and the UK. Brexit drew attention to the CTA and its continuation was relatively uncontroversial. It is an exception to new constraints on free movement of people between the EU and the UK, allowing British and Irish citizens to move freely and to live and work in each state. The greatest source of concern is the land border which, following the 1998 Agreement, has become largely invisible, or, at least, frictionless.⁴⁶ The total number of person border crossings is around 110 million annually, with 15 main crossings on the 500 km border.⁴⁷ The frequency of border crossings (both land and air) highlights the strong basis for continuing this arrangement defined more by pragmatism than by law.

The CTA goes far beyond movement across borders, however. It is primarily concerned with facilitating citizens from the two states living and working in each state on a more-or-less equal basis. The earnest commitment of both governments to the significance of the CTA set out in the MOU is undermined by the fact that the MOU itself is not legally binding and by the complexity of the domestic legal rules in both states underpinning it. Nonetheless, the MOU does provide greater clarity as to

⁴⁴ SI 473/2014 Immigration Act 2004 (Visas) Orders 2014 (for Ireland). For the UK, see Home Office memo to staff (n 2) 31; T McGuinness and M Gower, 'The Common Travel Area, and the Special Status of Irish Nationals in UK Law', House of Commons Library Briefing Paper No 7661 (9 June 2017); Maher (n 4) 62.

⁴⁵ *Kweder v Minister for Justice* [1996] 1 IR 381; *Pachero v Minister for Justice* [2011] IEHC 491; G Butler, 'Not a "Real" Common Travel Area: Pachero v. Minister for Justice and Equality' (2015) 54 *Irish Jurist* 155.

⁴⁶ Maher (n 4) 69.

⁴⁷ More than 112,000 British citizens live in Ireland (2.5 per cent of the population of Ireland) while about 380,000 people born in Ireland live in the UK, of which 38,000 live in Northern Ireland. See generally Central Statistics Office, 'Brexit-Ireland and the UK in Numbers' (December 2016) (Ireland); UK Office for National Statistics, 'Living Abroad: Dynamics of Migration between the UK and Ireland' (17 September 2017) 15. Because those born in Northern Ireland can claim citizenship, it is more complicated to calculate numbers with the UK statistics referring to those born in Ireland while Irish figures tend to refer to Irish citizens. Maher (n 4) 53.

the CTA principles and core rights and privileges. As a discrete, long-standing pragmatic arrangement between the two states that is 100 years old next year, the CTA is relatively robust and is likely to survive the political and legal challenges currently surrounding the borders between the EU and the UK.

Citizenship and Identity in Northern Ireland

CRG MURRAY

15.1 Introduction

Brexit, in some accounts, does not change the 1998 Agreement's citizenship provisions. The people of Northern Ireland remain able 'to identify themselves and be accepted as Irish or British, or both, as they may so choose'.¹ It does not alter the obligation on the UK government to maintain rigorous impartiality between these identities in Northern Ireland's governance.² On a deeper account, however, questions of identity in Northern Ireland are central to the idea of Brexit and have profoundly shaped the reality of Brexit. Within the Northern Ireland context, the Democratic Unionist Party (DUP)'s case for Brexit in the 2016 referendum campaign was unabashedly about restoring UK sovereignty, in the expectation that the UK 'taking back control' of law-making competences from the EU would intensify Northern Ireland's distinctiveness from Ireland, and that this divergence would hamper any future moves towards unification. Opposition to Brexit put the case that such an outcome would inevitably destabilize the 1998 settlement. This opposition to Brexit was not entirely determined by identity during the referendum campaign; politicians and commentators across Northern Ireland's political spectrum identified the threat Brexit posed to the North–South connections which had done so much to secure nationalist support for the 1998 arrangements. The Ulster Unionist Party's then-leader was, moreover, prescient in flagging up the compromises which these obligations would entail for the realization of Brexit.³ This chapter considers the relationship between the Protocol and issues of identity.

¹ 1998 Agreement, Art 1(vi).

² *Ibid*, Art 1(v).

³ Northern Ireland Affairs Committee, *Northern Ireland and the EU Referendum* (2016) HC 48, para 78.

15.2 The Intertwining of Identity and Brexit

The shape of Brexit came to be determined by the UK government's efforts to make its plans fit with the 'letter and spirit' of the 1998 Agreement, at least once it accepted that EU law underpinned a range of aspects of North–South co-operation and provided the legal basis for a range of rights and equality protections within Northern Ireland.⁴ The Brexit negotiations over trade moved through multiple phases, with then prime minister Theresa May's UK-wide backstop giving way to Prime Minister Boris Johnson's deal which provided for Northern Ireland remaining within the EU Single Market for goods. These negotiations, accompanied by UK government paeans to the 'precious Union'⁵ and Irish government's concerns to preserve the 'invisible' land border,⁶ ratcheted up tensions around Brexit in Northern Ireland. Moving into Brexit's implementation phase, denunciations of a supposedly unionist UK government implementing a 'nationalist' deal have been added to this mix, transforming most discussions over Brexit's impacts upon Northern Ireland into a zero-sum question about which identity in Northern Ireland can be said to have won.⁷

In addressing how Brexit has affected citizenship and identity within Northern Ireland, this chapter thus tackles a combination of issues which have resulted from Brexit and those which have been pushed to the fore by the way in which Brexit debates have been conceptualized in identity terms in Northern Ireland. First, this chapter explores how Brexit debates have become entangled with questions over the 1998 Agreement's citizenship provisions. Second, beyond the question of the choice of a national identity, if a large section of society in Northern Ireland identifies as Irish, and thus retains EU citizenship, how does Brexit threaten the rights associated with holding EU citizenship? Having examined these challenges, the chapter explores how they have been addressed both within and beyond the formal Brexit deal.

⁴ EU Commission, 'Communication from the Commission to the European Council (Article 50) on the State of Progress of the Negotiations with the United Kingdom under Article 50 of the Treaty on European Union', COM(2017) 847, 08.12.2017, p 9.

⁵ M Edwards, 'May: Brexit Deal Must Protect "Precious Union" with Northern Ireland' *Belfast Telegraph* (14 May 2018).

⁶ C Kelpie, 'Coveney Reveals His Plan for Invisible Border with North' *Irish Independent* (23 June 2017).

⁷ V Bogdanor, 'There Is a Solution to the Irish Border Problem' *The Telegraph* (5 February 2021).

15.3 The Birthright of the People of Northern Ireland

Under the 1998 Agreement, the people of Northern Ireland are able to choose whether they assert British or Irish identity, or both. This was not a particularly contentious element of the negotiations leading to the 1998 Agreement, given that Irish law had long permitted people born in Northern Ireland to claim Irish citizenship⁸ and successive UK governments had accepted this entitlement.⁹ Irish and UK government officials drew up the conditions for the exercise of this 'birthright'.¹⁰ The lack of contention around these arrangements meant that there was no clear consensus over whether they were intended to merely confirm the UK's acceptance of Ireland's extraterritorial assertion of nationality law or were instead intended to decouple nationality law from statehood in the Northern Ireland context. The framing of these provisions in the 1998 Agreement, moreover, potentially supported the more expansive interpretation and, against the backdrop of Brexit debates, concerns intensified over the implications for UK nationality law of these 'birthright' provisions.

The British Nationality Act 1981 ensures that anyone born in Northern Ireland to a parent who is settled or is a British citizen automatically becomes a British citizen.¹¹ It was not altered in light of the 1998 Agreement. The people of Northern Ireland can thus identify as Irish and can assert their entitlement to Irish citizenship, but if they do, they will be treated in domestic law as dual citizens unless they also take steps to renounce British citizenship. Questions over whether this sufficed for the implementation of the 1998 Agreement were latent for years because the assertion of these different categories of citizenship did not result in operative distinctions between people with these different statuses. In 2012, however, the UK government excluded British citizens who held dual nationality with another EU state from availing themselves of EU law's residency rules for third-country national family members of EU citizens.¹² Because the people of Northern Ireland were automatically

⁸ See Irish Nationality and Citizenship Act 1956, s 7(1), and prior to that the *Re Logue* [1933] 67 ILTR 253 interpretation of the Constitution of the Irish Free State (Saorstát Eireann).

⁹ See A Harvey, 'British or Irish or Both?' (2020) 34 *Journal of Immigration Asylum and Nationality Law* 216, 225.

¹⁰ Above (n 1), Annex 2 Declaration.

¹¹ British Nationality Act 1981 (UK), ss 1(1) and 50(2).

¹² Immigration (European Economic Area) (Amendment) Regulations 2012 (SI 2012/1547) (UK). This change followed the CJEU ruling in Case C-434/09 *McCarthy v Secretary of State for the Home Department* [2011] ECR I-03375.

presumed to be British citizens, this change meant that they could no longer circumvent minimum income requirements for securing the residency of family members by asserting their Irish citizenship, unless they also renounced their British citizenship.¹³

The years following this change saw a pronounced increase in the number of people in Northern Ireland renouncing their British citizenship, leading the UK government to accept that these rules incentivized some in Northern Ireland to renounce British citizenship.¹⁴ This recognition, however, came only after Emma DeSouza forced the issue onto the agenda when these rules impacted upon the ability of her spouse, Jake, a United States citizen, to secure residency documents. The DeSouzas did not, as others in their circumstances had done, simply renounce Ms DeSouza's underlying British citizenship but alleged that its automatic imposition under the British Nationality Act was a breach of the 1998 Agreement's birthright provisions.¹⁵

The Upper Tribunal, however, rejected this challenge on the basis that the 1998 Agreement, as an unincorporated treaty, could not affect the interpretation of the British Nationality Act 1981.¹⁶ It furthermore concluded that the Agreement 'does not, in fact, involve giving the concept of self-identification the meaning for which the claimant argues', justifying this conclusion on the basis that, if that meaning had been intended, the Agreement would have been much more explicit about the impact of its terms.¹⁷ This is best regarded as *obiter dicta*, as there was little need for the Tribunal to step into this territory given that it had already determined to give no weight to the Agreement as an unincorporated treaty.

This has not prevented further litigation on the impact of the 1998 Agreement's birthright provision on UK nationality law, notably Irish citizen Lisa Smith's challenge against her exclusion from the UK on the basis of her connections with Islamic State. In response to Smith's preliminary claims to dual nationality based on her father being Belfast-born, the Special Immigration Appeals Commission ruled that it would be discriminatory for the Home Secretary to deny her this entitlement on

¹³ The current minimum income threshold is an annual income of £18,600; Immigration Rules (UK) HC 395, Appendix FM-SE.

¹⁴ B Lewis MP, *Hansard*, HC, WA471, 15 January 2020.

¹⁵ See S de Mars and C Murray, 'With or Without EU? The Common Travel Area after Brexit' (2020) 21 *German Law Journal* 815, 823–24.

¹⁶ *Secretary of State for the Home Department v Jake Parker De Souza* [2019] UKUT 355, para 28.

¹⁷ *Ibid*, para 39.

the basis that Smith's parents were not married when she was born. The Commission nonetheless maintained that the obligation on someone claiming to have entitlement to British citizenship to take an oath and pledge of allegiance 'is not inconsistent with the rights of those who wish to identify as Irish' under the 1998 Agreement.¹⁸ Smith's eagerness to assert dual nationality to prevent exclusion highlights how different claimants are drawing upon very different accounts of how nationality law works in the context of Northern Ireland.

15.4 Brexit and 'EU Rights, Opportunities and Benefits'

The instability in understandings of the 1998 Agreement's citizenship provisions exacerbated tensions and confusions around Brexit and identity. The entitlement of the people of Northern Ireland to Irish, and therefore EU, citizenship would continue post-Brexit, but for long periods within the Brexit negotiations there was very little clarity as to what this would mean in practice. The 2017 UK–EU Joint Report, for example, included promises about the continuation of EU citizenship rights for Irish citizens living in Northern Ireland after Brexit.¹⁹

Airy pledges to 'examine' the continuation of these 'EU rights, opportunities and benefits' soon ran into practical challenges. EU citizenship, put simply, means much less when someone is resident outside the EU member states, and the EU was not about to restructure understandings of EU citizenship and EU law rights to accommodate Northern Ireland. Commitments to working on arrangements for protecting the 'EU rights, opportunities and benefits' of those people of Northern Ireland who had asserted their Irish citizenship might have appeared to reflect commitments to non-diminution of 1998 Agreement rights. If special protections were created for this particular group, however, this would collide with another 1998 Agreement principle, that of parity of esteem for those asserting British and Irish identities in Northern Ireland. Singling out a particular group of EU citizens in Northern Ireland for these protections would also run into issues of discrimination under EU law.

¹⁸ *Smith v Secretary of State for the Home Department* (2021) SC/169/2020, para 49.

¹⁹ *Joint Report from the Negotiators of the European Union and the United Kingdom Government on Progress during Phase 1 of Negotiations under Article 50 TEU on the United Kingdom's Orderly Withdrawal from the European Union* (8 December 2017) para 52.

These difficulties highlight that both the EU and the UK struggled to accommodate Brexit within the strictures of the 1998 Agreement. The broad terms of the 2017 UK–EU Joint Report’s commitment would be reflected in the Preamble to the Protocol, which states that it will operate ‘without prejudice to the rights, opportunities and identity that come with citizenship of the Union for the people of Northern Ireland who choose to assert their right to Irish citizenship’. In operative terms, however, Protocol Article 2 provided for more limited commitments to maintain the operation of only those elements of EU law in Northern Ireland which could be shown to underpin the ‘Rights, Safeguards and Equality of Opportunity’ section of the 1998 Agreement, which does not cover the ‘birthright’ guarantee.²⁰

Nor does the EU settlement scheme operating under the terms of the Withdrawal Agreement (WA) apply to dual nationals with British citizenship.²¹ The people of Northern Ireland therefore did not have the opportunity to register under the scheme to protect the ‘rights, opportunities and benefits’ associated with EU citizenship unless they had taken active steps to renounce their underlying British citizenship. Irish citizens outwith the people of Northern Ireland, who enjoy entitlements associated with the Common Travel Area (CTA), were long discouraged from applying under the scheme.²² Multiple classes of rights holder were thus created by the WA and UK government policy, and the associated difficulties of administering the different rights and entitlements, which are linked to subtle differences of status, are likely to emerge over the years to come.

15.5 Mitigations

If the apparent promise of the Joint Committee report was far from being realized in the WA’s terms, the Protocol’s aspiration in its Preamble to protect EU-law related ‘rights, opportunities and benefits’ continued to shape the aftermath of Brexit. Some of these issues would be addressed as part of the future relationship negotiations, leading to the Trade and Cooperation Agreement (TCA). But others would not be, and, as

²⁰ See [Chapter 12](#).

²¹ UK Home Office, *EU Settlement Scheme: EU, Other EEA and Swiss Citizens and Their Family Members* (version 11, April 2021) p 14.

²² Its potential importance for their family residency rights was recognized only belatedly by a Home Office minister; Baroness Williams of Trafford, *Hansard*, HL, vol 805, col 629 (7 September 2020).

negotiations towards the TCA went down to the wire in December 2020, Ireland was preparing to step in with unilateral measures to safeguard against sudden shortfalls.²³

Two high-profile concerns regarding the people of Northern Ireland's EU 'rights, opportunities and benefits' which remained unclear before the conclusion of the TCA were the post-Brexit operation of the European Health Insurance Card (EHIC) and that of the Erasmus+ scheme. The former issue was settled as part of the TCA;²⁴ the people of Northern Ireland would appear to have comparable entitlements using the UK's new Global Health Insurance Card when travelling to EU member states to those they had enjoyed under EHIC.²⁵ The UK government did not, however, reach an agreement with the EU regarding the continuation of the Erasmus+ scheme. Ireland has thus committed to put in place arrangements and funding for students at Northern Ireland higher education institutions to register temporarily with institutions in Ireland to allow them to continue to use Erasmus+.²⁶

Ian Paisley Jr's unapologetic 'fill-your-boots' response to Ireland's preparations regarding EHIC and Erasmus+ was to ask the Northern Ireland Secretary, '[i]s there anything else we can get the Irish Government to pay for ...?'.²⁷ This was, of course, to miss the point of these developments. They were driven by a specific imperative to address an expected shortfall in EU 'rights, opportunities and benefits' for the people of Northern Ireland arising because of Brexit. Given that there is no EU citizenship connection to people of Northern Ireland who identify solely as British, it is appropriate that such issues be addressed by unilateral or bilateral action by the Irish and UK governments. These developments are thus primarily shaped by concerns to ensure non-diminution of rights, but also demonstrate the influence of other 1998 Agreement principles. That the Irish government never suggested a scheme applicable only to Irish citizens studying at Northern Ireland institutions

²³ See L Varadkar TD, Dáil Debates, 17 September 2019, p 15.

²⁴ See [Chapter 14](#).

²⁵ Trade and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the European Union and the European Atomic Energy Community of the other part (1 May 2021) CP 426, Protocol on Social Security Coordination, Art SSC.15-20. A person of Northern Ireland who has formally renounced British citizenship can, as an EU citizen resident in the UK, continue to apply for an EHIC card if they avail themselves of the EU settlement scheme.

²⁶ S Harris TD, Dáil Debates, 13 January 2021, WA 1097/21.

²⁷ Northern Ireland Affairs Committee, *Oral Evidence: Work of the Secretary of State for Northern Ireland* (20 January 2021) HC 264, Q11 3.

demonstrates the underlying impact of ‘parity of esteem’.²⁸ These 1998 Agreement principles, in combination, are shaping these mitigations of Brexit’s impacts on Northern Ireland.

Their influence is also evident in the ultimate defusal of the *DeSouza* litigation. The UK government promised a response under the *New Decade, New Approach* deal which paved the way to restarting power-sharing government in Northern Ireland in January 2020.²⁹ Thereafter, the *DeSouzas*’ appeal against the Upper Tribunal’s decision was withdrawn after the UK government announced changes to Appendix EU of the immigration rules.³⁰ Under these changes, between 24 August 2020 and the end of the EU settlement scheme in 30 June 2021, ‘third-country’ family members of someone who met the 1998 Agreement definition of a person of Northern Ireland may apply for residence in the UK under the same terms as individuals eligible to do so under the settlement scheme.

For Austen Morgan, the UK government, despite its success before the Upper Tribunal, ‘behaved like a loser’ in this response.³¹ The amendment to Appendix EU is not, however, a response that gives any ground on the automatic ascription of British citizenship under the British Nationality Act 1981. Indeed, the UK government has reasserted that it ‘is of the firm view that UK nationality law is consistent with its obligations under the Belfast Agreement obligations and the ECHR [European Convention on Human Rights]’.³² That conclusion is, at least, questionable given that the costs for persons of Northern Ireland of £372 to renounce their underlying British citizenship constrain their ability to make, and ‘be accepted’ in, their citizenship choices.³³ The mitigation introduced following *New*

²⁸ Ireland’s responses are also shaped by its EU law obligations; the proposed replacement for the EHIC card would have extended to EU citizens resident in Northern Ireland to ensure that they were not disadvantaged on grounds of nationality. See S de Mars, C Murray, A O’Donoghue and B Warwick, *Continuing EU Citizenship ‘Rights, Opportunities and Benefits’ in Northern Ireland after Brexit* (Irish Human Rights and Equality Commission/Northern Ireland Human Rights Commission 2020) 52–53.

²⁹ *New Decade, New Approach* (January 2020) Annex A, paras 13–15.

³⁰ Statement of Changes in Immigration Rules (14 May 2020) CP 232.

³¹ Written Evidence to the Northern Ireland Affairs Committee’s Citizenship and Passport Processes in Northern Ireland Inquiry (February 2021) para 40.

³² Written Evidence to the Northern Ireland Affairs Committee’s Citizenship and Passport Processes in Northern Ireland Inquiry (March 2021) p 3.

³³ See A Harvey, *A Legal Analysis of Incorporating into UK Law the Birthright Commitment under the Belfast (Good Friday) Agreement 1998* (Irish Human Rights and Equality Commission/Northern Ireland Human Rights Commission 2020) p 46.

Decade, New Approach does nothing in the medium to long term to address these concerns over the implementation of the birthright following *DeSouza*.

It instead addresses the distinct issue of the holders of some citizenship statuses within the people of Northern Ireland being advantaged over others. Persons of Northern Ireland who are dual citizens are not enabled to take part in the EU settlement scheme; their ‘third-country’ family members can instead establish residency rights as if they were related to someone covered by the settlement scheme. This approach appears to be derived from the EU settlement scheme provisions adopted to address people with EU rights derived from the CJEU’s *Lounes* judgment.³⁴ It did not restore the British citizenship of anyone who had previously taken steps to renounce it to secure residency rights for a family member, and the provision expired with the EU settlement scheme. It is thus unlikely to benefit more than a handful of people. But it did give the concept of the ‘person of Northern Ireland’ temporary significance within UK immigration law, which could be drawn upon again.³⁵ Such an approach, entirely removed from the EU-law basis of the residency rights at issue, reads equality of treatment obligations into the operation of the birthright.³⁶

This approach also has implications for the shape of citizenship should Irish (re)unification come to pass. Under the 1998 Agreement, the ability of the people of Northern Ireland ‘to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland’.³⁷ The ongoing commitment within the 1998 Agreement is, thus, to facilitate entitlements to dual citizenship; it is not to protect the right to be Irish or British or both. Given the reception to the *DeSouzas*’ claims by UK institutions, there would seem to be little basis for opposing a future Irish government imposing underlying Irish citizenship on people born within the territory of the state after (re)unification to parents who are, or who are entitled to

³⁴ C-165/16 *Lounes v Secretary of State for the Home Department* (2017) EU:C:2017/862. See also above (n 21), p 18.

³⁵ See B Ryan, ‘Recognition after All: Irish Citizens in Post-Brexit Immigration Law’ (2020) 34 *Journal of Immigration Asylum and Nationality Law* 284, 301.

³⁶ From 1998 onwards the UK government should have recognized that the Agreement posed challenges for any applications of law, including residency rights under EU law, which advantaged parts of the people of Northern Ireland over others on nationality grounds.

³⁷ Above (n 1), Art 1(vi).

be, Irish citizens.³⁸ As for renunciation, although Irish law provides for renunciation of citizenship with no associated fees, this presently applies only to adults not ordinarily resident within the state.³⁹

15.6 No Petty People

In 1925, WB Yeats thundered in the Seanad that the Anglo-Irish were ‘no petty people’, as divorce was abolished and with it, for him, the hope that the Irish Free State would protect interests beyond those promoted by the Catholic Church.⁴⁰ The people of Northern Ireland, by contrast, can scarcely be described as a people at all. Yet the 1998 Agreement accepted this formula and, moreover, imbued this people with citizenship rights and a level of constituent power unique within the UK’s constitutional order (although how the group was defined was not necessarily the same in both instances).

There was a hope that, with decades of stable governance, rebuilt institutions and effective support for ‘parity of esteem’ from civil society that a people of Northern Ireland could develop after the 1998 Agreement.⁴¹ And there are many more people in Northern Ireland today who do not connect their identity primarily to the constitutional question over Northern Ireland’s status than there were in the late 1990s.⁴² The 1998 Agreement threw the ball over the wall and expected that society in Northern Ireland would follow suit. But it was no more possible for the ending of legal impediments upon women to bring about gender equality in and of itself than for the 1998 Agreement to be the sole, or even main, vehicle of change in Northern Ireland. Its transformative potential had to be nurtured. Instead, vacillation over the legacy of the conflict and over whether measures promoting the Irish language should be introduced has been pushing identity to the fore in Northern Ireland’s politics, a development which Brexit has exacerbated.

³⁸ Constitution of Ireland/Bunreacht na hÉireann, Art 9.2. Imposing Irish citizenship on living people of Northern Ireland without consent would be a different proposition, and would raise Art 8 ECHR issues, even if existing case law on citizenship and Art 8 is more developed with regard to denial and renunciation.

³⁹ Irish Nationality and Citizenship Act 1956 (Ireland), s 21(1).

⁴⁰ Seanad Éireann Debates, 11 June 1925, Speech #82.

⁴¹ See C Murray, ‘The Constitutional Significance of the People of Northern Ireland’ in O Doyle, A McHarg and J Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom: Constitutions under Pressure* (Cambridge University Press 2021) 108, 119.

⁴² See K Hayward and C McManus, ‘Neither/Nor: The Rejection of Unionist and Nationalist Identities in Post-Agreement Northern Ireland’ (2019) 43 *Capital & Class* 139.

15.7 Conclusion

Brexit found Northern Ireland in a state of destabilized governance and in the midst of a process of societal transformation. Divisions that had been papered over by the peace process were reopened by this zero-sum play for a pure UK sovereignty. The tortured process of realizing Brexit, in which issues around Northern Ireland repeatedly came to the fore, inevitably exacerbated tensions over identity within Northern Ireland's populace. To this inevitable shock have been added distortions and obfuscation about what the Brexit outcomes agreed by the UK government mean for Northern Ireland.⁴³ All of these developments have worked to reassert core identities. And yet, through it all, individuals and civil society in Northern Ireland have been able to influence the negotiations and harness the principles underpinning the 1998 Agreement to resolve some of Brexit's immediate challenges around citizenship.⁴⁴ Maybe the people of Northern Ireland can indeed claim to be no petty people.

⁴³ Arts 4 and 5 of the Protocol involve a remarkable sleight of hand, compounded by the UK government's efforts to downplay the significance of barriers to trade in between Great Britain and Northern Ireland; C Murray and C Rice, 'Into the Unknown: Implementing the Protocol on Ireland/Northern Ireland' (2020) 15 *Journal of Cross-Border Studies in Ireland* 17, 20–21.

⁴⁴ See S de Mars and A O'Donoghue, 'Beyond Matryoshka Governance in the Twenty-First Century: The Curious Case of Northern Ireland' in O Doyle, A McHarg and J Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom: Constitutions under Pressure* (Cambridge University Press 2021) 64, 66.

Citizenship beyond Irish and British

TOBIAS LOCK

16.1 Introduction

Protocol Article 3 provides that the UK and Ireland ‘may continue to make arrangements between themselves relating to the movement of persons between their territories (the “Common Travel Area”), while fully respecting the rights of natural persons conferred by Union law’. We saw in [Chapter 14](#) that the Common Travel Area (CTA) gives British and Irish citizens certain rights and privileges in each other’s state; that a Memorandum of Understanding between the UK and Irish governments of 2019 reiterates its key features; and that the continued operation of the CTA constitutes a central plank of the policy behind the Protocol.

However, the CTA has only ever been a ‘common’ travel area for British and Irish citizens.¹ The ‘New (Northern) Irish’, that is, persons resident on the island of Ireland who are not Irish or British citizens, are excluded from its benefits. This is no small group of people. According to estimates by Ireland’s Central Statistics Office, in 2020 there were 644,400 non-Irish nationals living in Ireland out of a total population of 4.98 million (approximately 12.9 per cent). Of these, 116,900 were UK nationals and 344,000 (non-Irish) EU nationals. The remaining 183,500 were classed as coming from the ‘rest of the world’.² According to Oxford University’s Migration Observatory, there were 53,867 non-UK or non-Irish citizens living in Northern Ireland in 2011.³ Given an overall population of the island of Ireland of around 6.8 million, this means

¹ The special status of Irish citizens in the UK and British citizens in Ireland is reflected in British nationality and Irish immigration law respectively; see B Ryan, ‘The Common Travel Area between Britain and Ireland’ (2001) 64 *Modern Law Review* 855, 859–62.

² Central Statistics Office, Population and Migration Estimates, released 20 August 2020, www.cso.ie/en/releasesandpublications/er/pme/populationandmigrationestimatesapril2020/.

³ Migration Observatory, Northern Ireland: Census Profile, 26 June 2014, <https://migrationobservatory.ox.ac.uk/resources/briefings/northern-ireland-census-profile/>.

that around 10 per cent of the population of the island can be categorized as New (Northern) Irish.

Many New (Northern) Irish enjoy EU citizenship rights either because they are EU citizens or because they enjoy derived rights as family members of EU citizens, that is, they enjoy the same rights as the EU citizen whom they are accompanying or joining.⁴ This meant that, until the end of the transition period on 31 December 2020, they were in a largely equivalent position in both Ireland and Northern Ireland to Irish and British citizens.⁵ In fact, except for the right to vote in national elections and the right to travel without carrying a passport,⁶ EU citizenship rights went further than those granted by the CTA. Importantly, the CTA does not give rights to family members who are not British or Irish nationals. Furthermore, CTA rights are not directly effective or accompanied by anything like the primacy of EU law so that their enforceability hinges on their implementation in the domestic laws of the UK and Ireland. Additionally, British and Irish citizens resident in the other jurisdiction could rely on EU citizenship rights in addition to their rights under the CTA. Hence, during the UK's membership of the EU, EU citizenship rights bolstered the CTA rights of Irish and British citizens while giving EU nationals (almost) the same rights. The legacy of the UK's EU membership means that there is now a Byzantine web of rules determining who is entitled to cross the invisible and purportedly open border on the island and for what purpose, and who is not.

This chapter shows, however, that the situation has worsened for EU citizens and their third-country family members resident in both Ireland and Northern Ireland. Since the end of the Brexit transition period, many of these New (Northern) Irish are encountering new hurdles when crossing the Ireland–Northern Ireland border. This suggests that current CTA arrangements are unfit for the practical realities of life on the island of Ireland, where short-term visits to the other jurisdiction – social or work-related, to receive services or buy goods, or simply to transit

⁴ According to Arts 6(2) and 7(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L157/77 (the Citizens' Rights Directive (CRD)).

⁵ Citizens of Norway, Liechtenstein, Iceland (EEA citizens) and Switzerland and their family members enjoy similar rights. References to 'EU citizens' should be understood as including them *mutatis mutandis*.

⁶ The latter is not expressly guaranteed in the Memorandum of Understanding, but it is practised, except for persons arriving at Irish airports, where ID checks are carried out on anyone arriving.

through the other jurisdiction in a car or on a public bus – are a daily occurrence for many and an occasional occurrence for most.

16.2 EU Citizens Resident in Ireland

The TCA does not contain a mobility chapter, as originally suggested by the EU.⁷ Hence, social visits by EU citizens resident in Ireland to Northern Ireland are subject to UK immigration rules. UK immigration rules currently class EU citizens as non-visa nationals who are permitted to visit the UK for up to six months.⁸ There are two main differences to the pre-Brexit situation. First, EU citizens no longer have a right to enter Northern Ireland; admission to Northern Ireland is now at the discretion of the UK authorities. This also means that refusal to admit EU citizens or their expulsion is based on UK law only. Second, EU citizens are now required to carry a valid passport when entering Northern Ireland, which is a change from the pre-Brexit situation when they were able to use their national ID card.⁹ This is particularly tricky in the context of crossings from Ireland to Northern Ireland as EU citizens residing in Ireland are entitled to enter Ireland – and subsequently reside there if the conditions of the Citizens' Rights Directive (CRD) are fulfilled¹⁰ – with a national ID card only.

EU citizens who reside in Ireland, but work in Northern Ireland, retain their status as frontier workers by virtue of Article 10 of the WA if they were frontier workers when the transition period ended. They retain their rights of entry and exit as before.¹¹ However, frontier workers lose this status if they cease working in Northern Ireland, unless they become unemployed and continue to look for work there.¹² By contrast to the situation before Brexit, those taking up frontier work after the end of the transition period now need to apply for a UK work visa to do so. The

⁷ Draft text of the Agreement on the New Partnership with the United Kingdom, UKTF (2020) 14.

⁸ UK Immigration Rules, Appendix: Visitor.

⁹ It is difficult to estimate how many EU citizens are resident in Ireland relying only on their national ID card, but it is likely that there will be some. For instance, the German federal government revealed that in 2007 there were only about 28.2 million German passports in circulation, whereas Germany had a population of more than 80 million at the time, suggesting that many Germans only ever use an ID card to travel; Bundestag, DS 16/5507.

¹⁰ Arts 6 or 7 CRD (n 4).

¹¹ Art 24(3) WA.

¹² See Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020.

same would be true for a former frontier worker, who may take up a position in Ireland and then may want to work in Northern Ireland again, since frontier workers' rights are not guaranteed for a prolonged period of time, as would be the case with permanent residence, which is only lost after five years of absence.

The situation is more complex where short-term business visits to Northern Ireland by EU citizens resident and working in Ireland are concerned. During the UK's EU membership, EU citizens had a right to enter Northern Ireland to work as self-employed or employed persons. They were also entitled to provide services either as a service provider in their own right or as posted workers, without much impediment.¹³ The lack of a mobility chapter in the TCA results in a substantial restriction of the possible activities that EU citizens resident in Ireland are permitted to undertake in Northern Ireland. It contains only basic provisions for the entry and temporary stay of EU and UK citizens for business purposes, which are reminiscent of those found in other EU free trade agreements, such as the EU–Canada Comprehensive Economic and Trade Agreement (CETA).¹⁴ Yet, as the following discussion shows, these temporary work visits are strictly circumscribed and thus in stark contrast to the free movement regime under EU law.

The TCA distinguishes five categories of persons entitled to stay temporarily in the UK:¹⁵

- a) 'business visitors for establishment purposes', that is, where the EU citizen is posted to set up a subsidiary in Northern Ireland;
- b) 'contractual service suppliers', that is, where an EU citizen – who must be employed by a legal person in Ireland – is posted to Northern Ireland to supply services to a final consumer under a contract not exceeding twelve months, but only if the EU citizen has worked for the legal person for at least one year prior and possesses at least three years' professional experience;
- c) 'independent professionals', who may perform services in Northern Ireland only if they have six years' professional experience, and

¹³ See Art 56 TFEU and Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1996] OJ L18/1.

¹⁴ EU–Canada Comprehensive Economic and Trade Agreement, Chapter 10, <https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>.

¹⁵ Arts 140–43 TCA.

- a university degree or equivalent qualification and the professional qualifications required in Northern Ireland to carry out the activity;
- d) 'intra-corporate transferees', who must have worked for the legal person posting them for at least twelve months prior¹⁶ and must be managers, specialists or trainee employees;
 - e) 'short-term business visitors', who are permitted only to attend meetings and consultations; conduct research and design; conduct marketing research; attend training seminars; attend trade fairs and exhibitions; engage in the sale or purchase of goods or services; perform after-sales or after-lease services; and oversee commercial transactions.¹⁷

The UK immigration rules list additional permitted activities that visitors are allowed to undertake.¹⁸

This does not, however, reflect the integrated nature of the economies of Ireland and Northern Ireland, where services are provided across the border on a daily basis. For instance, an EU citizen resident in Ireland working for a construction company in Ireland that carries out work in Northern Ireland may not qualify as a 'contractual service supplier' because they may not have the relevant three years' experience or they may not have worked for their employer for more than twelve months, or indeed the contract the employer is fulfilling may be for a duration of more than twelve months. Equally, an EU citizen working as a self-employed construction worker might not qualify as an 'independent professional' as they may not be considered a 'professional' with a university degree or equivalent qualification.

These restrictions on non-Irish EU citizens could turn out to be problematic for EU citizens seeking work in Ireland, given that no such restrictions on cross-border work are in place for Irish citizens employed by the same company. Hence, there is an incentive for employers that are active in the supply of cross-border services to employ Irish citizens rather than EU citizens. This causes frictions with Article 45 of the Treaty on the Functioning of the European Union (TFEU), which prohibits nationality discrimination of workers and which – at least as far as the discrimination angle is concerned – has horizontal direct effect, that is, it is binding on private employers.¹⁹

¹⁶ Six months in the case of managers.

¹⁷ Annex 21 TCA.

¹⁸ UK Immigration Rules Appendix Visitor: Permitted Activities, www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-visitor-permitted-activities.

¹⁹ Case C-281/98 *Angonese* ECLI:EU:C:2000:296; confirmed in Case C-94/07 *Raccanelli* ECLI:EU:C:2008:425.

16.3 EU Citizens in Northern Ireland

The situation differs for EU citizens resident in Northern Ireland. As EU citizens they have a right to enter Ireland and stay there for up to three months without any further requirements.²⁰ Hence, short-term visits for pleasure or for work are unproblematic. However, when performing work in Ireland they are not able to rely on the freedom to provide services provisions in Articles 56–62 TFEU as neither they (nor their employer) are normally ‘established in a Member State other than that of the person for whom the services are intended’. They are thus solely reliant on their rights as EU citizens and the non-discrimination provision in Article 18 TFEU.

Their right of re-entry into Northern Ireland depends on their immigration status in the UK. If they arrived in the UK after 31 December 2020, this is determined by UK immigration law only. If they arrived before that date and have applied for either settled or pre-settled status, their right of re-entry is determined by the WA as well as (the partly more generous) UK immigration rules. They have a right to enter the UK and may do so with their national ID card up until 31 December 2025.²¹ After that they will need to be in possession of a passport.

If they have acquired permanent residence – or settled status in UK immigration law parlance – they may be absent from the UK for up to five years before losing that status.²² Hence, even extended work assignments in Ireland would not lead to a loss of status. The situation is different for those EU citizens who have not yet accumulated the necessary five years of residence in the UK in order to qualify for settled status. They are granted only pre-settled status, which they can lose in cases of prolonged absences. Continuity of residence is not affected by temporary absences of up to six months in any twelve-month period.²³ Additionally, one temporary absence of up to twelve months is also permissible for important reasons, such as posting to another state.

16.4 Third-Country Nationals Resident in Ireland

Third-country nationals, that is, those who are neither EU citizens nor UK citizens, have always encountered immigration hurdles when crossing the

²⁰ Arts 6 and 7 CRD.

²¹ Art 14 WA.

²² Art 15(3) WA.

²³ Art 16(3) CRD, to which Art 15(2) WA refers.

border on the island of Ireland. For those who have no family links to EU citizens, Brexit makes no difference. If resident in Ireland, they must comply with UK immigration law when entering Northern Ireland. The Short-Stay Visa Waiver Programme, which results in the mutual recognition between Ireland and the UK of certain short-stay visas issued to citizens of sixteen countries, does not have an equivalent for holders of long-term visas. Hence, a third-country national who is a resident of Ireland must apply for a UK visa before crossing the border to Northern Ireland, unless the third-country national is visa-exempt due to their citizenship.

For family members of EU citizens, by contrast, Brexit resulted in a worsening of their situation. The CRD grants family members of EU citizens certain privileges when accompanying or joining that EU citizen while travelling in the EU. They have a right to enter another member state,²⁴ that is, up until the end of the transition period, they had a right to enter Northern Ireland. If they needed a visa, that visa had to be granted, that is, the UK had no discretion in that regard.²⁵ If they were in possession of a residence card issued in accordance with the CRD,²⁶ they were exempt from any visa requirements.²⁷ This would typically be the case for family members of non-Irish EU citizens resident in Ireland as well as for family members of Irish citizens who had previously exercised their right to free movement and returned to Ireland.²⁸ Additionally, while third-country family members of Irish citizens not in possession of a CRD-compliant residence card could be required to obtain a visa, that visa had to be issued as soon as possible and free of charge.²⁹

No such rights exist for family members of EU citizens under the WA or the TCA. Equally, no provision is made for third-country national family members of Irish or British citizens in the Memorandum of

²⁴ Art 5(1) CRD.

²⁵ Case C-503/03 *Commission v Spain* ECLI:EU:C:2006:74, para 42.

²⁶ Art 10 CRD.

²⁷ This exemption applied to the UK despite its opt-out from Schengen; see Case C-202/13 *McCarthy and Others* ECLI:EU:C:2014:2450. It is (still) unclear whether this visa exemption applies only when the third-country national is accompanying or joining the EU citizen or also when they are travelling alone; see Elspeth Guild, Steve Peers and Jonathan Tomkin, *The EU Citizenship Directive: A Commentary* (2nd edn, Oxford University Press 2019) 107.

²⁸ Using the so-called Surinder Singh route, see Case C-370/90 *Surinder Singh* ECLI:EU:C:1992:296.

²⁹ Art 5(2) CRD. See further Case C-459/99 *MRAX* ECLI:EU:C:2002:461, para 60.

Understanding on the CTA, confirming that the CTA protects only British and Irish citizens. Hence, the rights of entry of third-country national family members for social visits to Northern Ireland are determined by UK immigration law only. Depending on their citizenship, they may be visa-exempt or they may have to apply for a short-term visa to visit Northern Ireland.

The TCA's provisions on short-term work visits apply only to 'natural persons of the other Party',³⁰ which means that they must have the nationality of an EU member state. Again, this constitutes a worsening of the legal situation for third-country nationals lawfully resident in Ireland compared with the situation before Brexit took effect. According to the case law of the Court of Justice of the European Union (CJEU), the freedom to provide services covers the right to post workers who are third-country nationals to another member state without the need to apply for a work permit for these workers.³¹ This option now no longer exists, unless each third-country national obtains the relevant UK visa.

Family members receive a brief mention in the TCA in the context of intra-corporate transferees,³² obliging both the EU and the UK to allow their entry and temporary stay, but these commitments do not have direct effect and need to be implemented by the parties to the TCA first. Again, this constitutes a reduction in rights as previously they would have been entitled to accompany their EU citizen family member as a matter of a directly effective right.

16.5 Third-Country Nationals Resident in Northern Ireland

Ireland is the only EU member state not bound by Regulation 2018/1806 listing the third countries whose nationals must be in possession of visas. Hence, Irish immigration law autonomously determines the third-country nationals who are visa-exempt and those who must be in possession of a visa. As mentioned previously, there is no parallel programme for long-term residents to the Short-Stay Visa Waiver Programme operated jointly by the UK and Ireland.

³⁰ Arts 140–45 TCA.

³¹ Case C-43/93 *Vander Elst* ECLI:EU:C:1994:310. It is therefore not surprising that Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1996] OJ L18/1 is not limited to the posting of EU citizens.

³² Annex 23 TCA.

Hence, third-country nationals resident in Northern Ireland, who are not visa exempt, may apply for a so-called 'short stay C-visa', which is valid for ninety days, but only for a single entry into Ireland. For most permanent residents of Northern Ireland, a multi-journey visa, which allows for multiple entries into Ireland, is therefore the better option. This may be issued for a period of up to five years. Certain nationalities are exempt from having to pay the visa fee for this type of visa. However, as with most visa applications, the applicant has no right to be issued either visa.

If the third-country national is a family member of a (non-Irish) EU citizen, they have a right to enter Ireland if they are accompanying the EU national or joining them.³³ They do not have that right when travelling alone and must – unless exempt due to their nationality – apply for a visa before crossing the border. The WA stipulates that family members of EU nationals resident in the UK continue to enjoy their rights as family members. This means in particular that they may acquire a right of permanent residence after five years of continuous residence as a family member.³⁴ By contrast with the legal situation before the end of the transition period, they are no longer issued with a CRD-compliant residence card;³⁵ instead, they are given an 'EU Settlement Scheme Residence Card' (EUSS Residence Card), which entitles them to enter the UK. However, much like the EU/EEA (European Economic Area) residence card, that does not entitle them to travel visa-free within the EU when not accompanying or joining an EU citizen. Additionally, they may be required to obtain a visa for entering Ireland even if in possession of an EUSS Residence Card and accompanying their family member.³⁶ By contrast to other third-country nationals, however, they have a right to be granted a visa when accompanying or joining their EU citizen family member and that visa has to be granted for free.

The situation is more difficult where family members of Irish nationals who are resident in Northern Ireland are concerned.³⁷ The beneficiaries of EU citizenship law are those 'Union citizens who move to or reside in a Member State other than that of which they are a national'.³⁸ Since the UK is no longer a member state, EU citizenship law no longer applies to Irish citizens in Northern Ireland. Hence, the family member of an Irish citizen resident in Northern Ireland accompanying them on a trip to

³³ Art 5 CRD.

³⁴ Art 15 WA.

³⁵ Under Art 10 CRD.

³⁶ The card does not entitle them to the right contained in Art 5(2) CRD.

³⁷ On this in more detail see [Chapter 15](#).

³⁸ Art 3 CRD.

Ireland is not entitled to right of entry under the CRD. Hence, entry of family members of Irish citizens from Northern Ireland to Ireland is determined by Irish law only. The same goes for family members of British nationals in Northern Ireland given that they are no longer classed as family members of an EU citizen when entering Ireland.

16.6 Conclusion

By granting free movement rights only to Irish and British citizens, the CTA falls short of its own ambition of being a 'common' travel area on the island of Ireland. While the exclusion of the growing cohort of New (Northern) Irish is not in itself a new development, the consequences of Brexit mean that the number of those for whom short-term visits across the border on the island of Ireland have become more difficult, or indeed impossible in some cases, has grown considerably in that it now includes EU citizens and their family members.

The CTA's blindness towards family members – while historically explicable due to the very low numbers of non-British or Irish citizens resident on the island of Ireland in 1922³⁹ – is particularly remarkable. The CJEU has long recognized that obstacles to the movement of family members constitute obstacles to the movement of those entitled to move.⁴⁰

The limitations of the CTA are particularly evident on the island of Ireland, which contains the only international land border within the CTA. The post-Brexit restrictions on the ability of New (Northern) Irish to cross that border show that the arrangements in the Protocol and the CTA do not retain the status quo. The border may continue to appear open, but for an increasing number of New (Northern) Irish it is not. The consequences are not confined to inconveniences, such as not being able to go on shopping trips across the border; they are potentially much further reaching and contradict broader EU law aspirations of non-discrimination. Employers engaged in cross-border trade in Ireland may well decide not to hire EU citizens if they fear that those EU citizens cannot lawfully provide services in Northern Ireland.

³⁹ Ryan (n 1) 871–74.

⁴⁰ Starting with *Surinder Singh* (n 28); expanded upon in Case C-60/00 *Carpenter* ECLI:EU:C:2002:434, para 38; *MRAX*, para 53; *Commission v Spain* (n 25) para 41; the preamble of the CRD considers the extension of the right of free movement to family members of EU citizens a corollary of its exercise in 'freedom and dignity'.

PART VII

Goods, Customs and the Single Market in the Protocol

The Irish Sea Customs Border

ANNA JERZEWSKA

17.1 Introduction

This chapter provides an overview of how the Irish Sea customs border established under the Protocol functions in practice and what impact this new border has on companies trading between Great Britain (GB) and Northern Ireland.¹ Given the ‘unique circumstances on the island of Ireland’,² the border dividing Ireland and the UK was always going to be unlike any other border. The Irish Sea border, established under the Protocol, is a result of an imperfect compromise – an attempt to consolidate a range of requirements which, to a large extent, were contradictory.

17.2 Dilemmas

The need to respect the 1998 Agreement meant that introduction of a hard border with infrastructure and border checks between Northern Ireland and Ireland was impossible. The border needed to be as invisible and frictionless as possible. While various proposals were being put forward, in 2019 the Alternative Arrangements Commission³ was charged by the UK government with exploring the moving of border formalities away from the border. Unsurprisingly, the proposed solutions proved to be insufficient. At the end of the day, borders introduce friction, formalities and infrastructure. This is required in order for them to be able to fulfil their function. And, in this case, the new customs border was going to be the EU’s and the UK’s external border.

¹ This chapter relates primarily to customs, which is only one part of the border process. Other chapters (6, 18–22) consider the implications of the ‘regulatory border’.

² Protocol Preamble.

³ The Alternative Arrangements Commission was an independent commission established by Prosperity UK and chaired by Conservative MPs Nicky Morgan and Greg Hands. The Commission’s final report provided a range of alternative border arrangements for Northern Ireland. The report and the website have since been removed.

For the EU, one of the priority was protecting the EU's internal market, ensuring that the goods entering Ireland are subject to the same rules and procedures as goods entering via any other EU border – and that meant controls. At the same time, from the UK's perspective, there was a requirement to ensure that Northern Ireland will remain an integral part of the UK's territory. One of the key points for the UK was the need to protect its internal market, and the integrity of its customs territory, by ensuring unfettered access from Northern Ireland to GB.

It was also clear that the 'hardness' of the new border would depend on the type of the future relationship between the UK and the EU. In the simplest terms, the harder the Brexit option, the harder the border would have to be. The Political Declaration published in October 2019 together with the Withdrawal Agreement (WA) confirmed what was becoming increasingly evident – that the UK would seek to sign a free trade agreement with the EU. It then became clear that, wherever the border was situated, certain formalities and processes would need to be put in place on that border. With all the above points in mind, it was going to be a highly bespoke border – there were no off-the-shelf solutions as borders like this simply do not exist.

17.3 The Protocol's Approach

On the surface, the Protocol managed to square the circle. It introduced a border between Northern Ireland and GB, going down the Irish Sea. As described in earlier chapters, Northern Ireland stayed in the UK's customs territory but continued applying the EU's customs legislation as well as the EU's Common External Tariff for goods entering Northern Ireland, unless they are for use and consumption there. It allowed Northern Ireland to remain an integral part of the UK's customs territory and provided unfettered access for goods from Northern Ireland to GB. It also protected the EU's internal market by introducing customs formalities for goods entering Northern Ireland. In brief, it introduced a hybrid solution that at first glance managed to square the circle.

However, that perception was possible only because the Protocol provided a high-level legal framework for the solutions and left out the practical aspects of implementation and technical details. Crucial decisions that were bound to be technically challenging and politically sensitive were delegated to the newly formed Joint Committee (JC)⁴ and

⁴ See [Chapter 4](#).

postponed to a later point in time. Key aspects of customs arrangements were to be decided by the JC and, in certain areas, were also to be determined by the UK government. This had significant implications for the ability of UK and Northern Irish stakeholders to prepare for the upcoming changes: despite the fact that the text of the Protocol was published, many crucial points around the operation of the new border remained unknown until late 2020.

Practical implementation aside, the Protocol created an unprecedented outcome. As discussed in earlier chapters, it created a situation where different customs and regulatory principles were to govern two parts of, at least *de jure*, the same customs territory: Northern Ireland and GB. It created a situation where there is a *de facto* customs and regulatory border going through the territory of the UK's customs territory. What is in place is a most unusual, asymmetric and one-sided border: asymmetric as it does not work the same way for movements in both directions; and one-sided as the customs formalities are applied on only one side of the border.

17.4 Movements from Northern Ireland to GB: Unfettered Access

According to Protocol Article 6(1), 'nothing in this Protocol shall prevent the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to other parts of the United Kingdom'. Goods from Northern Ireland are able to enter GB without any customs or border formalities. Only a small number of controlled goods is subject to formalities when entering GB from Northern Ireland.⁵

On the one hand, the unfettered access for goods from Northern Ireland was necessary if Northern Ireland was to stay part of the UK's customs territory. Protocol Article 6(4) states: 'Nothing in this Protocol shall affect the law of the United Kingdom regulating the placing on the market in other parts of the United Kingdom of goods from Northern Ireland that comply with or benefit from technical regulations, assessments, registrations, certificates, approvals or authorizations governed by provisions of Union law referred to in Annex 2 to this Protocol.'

⁵ Export declarations may be required for movement of goods from Northern Ireland into GB based on international obligations. One example would be goods covered by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Goods held under a customs special procedure in Northern Ireland would also require an export declaration.

On the other hand, goods to be placed on the market in Northern Ireland need to comply with EU regulation, while goods produced in the rest of the UK do not. If, at some point, the two sets of rules were to diverge substantially, this could pose a problem. Goods produced in Northern Ireland according to the EU's regulations would still have unfettered access to the UK market. Would the same be the case for goods produced under the same rules in other parts of the EU? It would be difficult for the UK to argue that goods produced in the EU would need to meet UK rules to enter the UK's market, while Northern Ireland goods would not have to meet these conditions. At the same time, Northern Ireland products can benefit from UK trade agreements with other third countries while (at least in principle) they are not eligible for preferential treatment under the EU deals.

Unfettered access to GB raises further questions. For example, what constitutes a Northern Ireland product and, more importantly, how can we verify it as such? Article 6(2) states that the Protocol aims to facilitate trade between Northern Ireland and GB 'in accordance with applicable legislation and taking into account their respective regulatory regimes as well as the implementation thereof'. The JC is responsible for reviewing this part and ensuring that controls at the ports and airports of Northern Ireland are kept to a minimum.

According to the government's guidance, unfettered access is granted to qualifying Northern Ireland goods.⁶ Goods arriving in Northern Ireland from the rest of the EU do not qualify for unfettered access 'if they are moved through Northern Ireland into Great Britain for an avoidance purpose'. However, there is no mechanism to verify or enforce these rules. The guidance mentions that a long-term regime qualifying which businesses can be considered established in Northern Ireland will be determined in 2021. In June 2021, this was still to be published 'in due course'.

In practice, with a lack of formalities and controls for goods entering GB from Northern Ireland, the issue of trans-shipment from the EU is a considerable risk, especially in cases where there is an incentive resulting from a difference in applied trade policy measures such as customs duties or anti-dumping duties. It is likely that, in addition to the new long-term qualifying regime, some form of control of which

⁶ For guidance on moving qualifying goods from Northern Ireland to the rest of the UK, see www.gov.uk/guidance/moving-qualifying-goods-from-northern-ireland-to-the-rest-of-the-uk.

goods have unfettered access to GB from Northern Ireland will need to be introduced.

17.5 Movements from GB to Northern Ireland: Tariffs or No Tariffs?

Given that the EU's customs legislation, the Union Customs Code (UCC), applies to Northern Ireland, goods entering Northern Ireland are, as a result, subject to certain customs and border formalities.⁷ However, the formalities have only been introduced on the side of the border that is governed by the UCC. Normally, when a good is traded internationally, there are export formalities and import formalities. An export declaration needs to be submitted to export a product from one territory and an import declaration to import it into another.

This is not the case when it comes to the Irish Sea border. Goods are not 'exported' from GB. After all, at least on paper, it is the same customs territory. They are, however, 'imported' into Northern Ireland as required by the UCC. What this means in practice is that traders importing into Northern Ireland are required to submit customs paperwork and comply with border procedures. This includes a pre-notification and a customs declaration together with any other documents and formalities that may be necessary for their particular product (eg, health certificates for goods subject to SPS controls). GB traders exporting goods to Northern Ireland are not required to submit an export declaration or to complete other formalities.

This creates a new administrative burden for Northern Ireland traders which will be explored further in the later part of this chapter. But what about tariffs? If the goods enter Northern Ireland, formally a part of the UK's customs territory, are they subject to the EU's Common External Tariff? Protocol Article 5(2) states: '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.' In this, slightly confusing, way, the idea of goods 'at risk' has been introduced. Goods entering Northern Ireland are not subject to customs duties unless

⁷ 'The UK's Approach to the Northern Ireland Protocol' Command Paper, published 20 May 2020, outlines the UK government's position on the implementation of the Protocol including which checks and formalities are applied on the Irish Sea border.

they are considered at risk of entering the EU market via Northern Ireland and Ireland. Protocol Article 5(2) makes it clear that goods will be considered at risk unless:

- (i) they are not subject to further commercial processing in Northern Ireland (which indicates that goods subject to commercial processing would automatically be considered at risk), or
- (ii) they fulfil criteria that were to be determined by the Joint Committee.

Determining the criteria for goods at risk was one of the crucial decisions that were delegated to the JC. It was also one of the elements of the Protocol that was likely to significantly impact Northern Ireland's traders. This was perhaps the most technically difficult and at the same time the most crucial part of the implementation of the Protocol. It required the final destination of the product to be determined and declared at the time of import into Northern Ireland, which is far from the usual practice. Normally, it is the origin of the product, where it was made and processed, that is declared to customs. With the exception of certain special customs procedures that suspend customs duties, the destination of the product, once it has been imported, is of little relevance to customs authorities.

Another issue is that the final destination of products cannot be verified at the time of import. What guarantee do the customs authorities have that the product will end up in the market declared at the time of importation of the goods into Northern Ireland? What if the Northern Ireland importer was to sell the product to another local company who then decided to sell it to a company in Ireland? Can Northern Ireland importers guarantee that their products are not at risk of entering Ireland and thus the EU market?

Working out how to determine goods 'at risk' required an innovative approach. As described in the author's UK Trade Policy Observatory (UKTPO) blog, there was a delicate balance to be struck between actually being able to track the goods entering the EU market and limiting the amount of additional administrative burden for businesses.⁸ The author proposed three ways of determining the final destination of the products at the time of import with a varying degree of burden for the private sector:

- (i) by tariff line, which would entail an in-depth analysis of existing trade flows, in order to assess which goods are likely to enter the EU

⁸ A Jerzevska, 'Determining Goods at Risk' *UKTPO (UK Trade Policy Observatory)* (14 January 2020) <https://blogs.sussex.ac.uk/uktpo/2020/01/14/determining-goods-at-risk/>.

market, although, in the absence of available trade data on tariff line level, such analysis would be difficult to conduct;

- (ii) by product or shipment, which would entail the importer having to submit a declaration regarding the final destination, at the time of import, similar to the current origin statement, and would require appropriate controls to be introduced to reduce any incentives to transgress; or
- (iii) by company, which would require authorized companies to provide documentary evidence post-importation to demonstrate where the goods ended up, although, while feasible in principle, this would be more difficult for smaller companies because of the additional costs and complexities that it would involve.

The JC's decision did not embrace any of these options entirely; rather, it used a hybrid approach. The decision of the JC on determining goods at risk was published on 17 December 2020, less than two weeks before the Irish Sea border was brought into effect.⁹ Article 2 of the Decision specified that goods would not be considered subject to commercial processing, and as such considered at risk, if the importer had an annual turnover of less than £500,000 or if the processing in Northern Ireland was for the purpose of:

- (i) the sale of food to an end-consumer in the UK;
- (ii) construction, where the processed goods form a permanent part of a structure that is constructed and located in Northern Ireland by the importer;
- (iii) direct provision to the recipient of health or care services by the importer in Northern Ireland;
- (iv) not-for-profit activities in Northern Ireland, where there is no subsequent sale of the processed good by the importer; or
- (v) the final use of animal feed on premises located in Northern Ireland by the importer.

Article 3 further clarified that the goods would also not be considered at risk if the 'duty payable according to the Union Common Customs Tariff is equal to zero', or when the importer has been authorized to bring goods into

⁹ Decision No 4/2020 of the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 17 December 2020 on the determination of goods not at risk [2020/2248], https://ec.europa.eu/info/sites/default/files/decision-4-determination-goods-not-risk_en.pdf.

Northern Ireland for sale to or final use by end-consumers in Northern Ireland. Such authorizations would be granted by the UK government.¹⁰

Returning to the earlier question, how would a Northern Ireland importer know whether their goods were subject to tariffs? The Decision of the JC was subsequently supplemented by guidance from the UK government which attempted to simplify the above conditions. It explained that goods would not be subject to tariffs based either (i) on the applicable duties or (ii) on whether the trader was authorized. Goods would not be considered 'at risk' based on applicable duties when the applicable EU duty was zero (including under the Trade and Cooperation Agreement (TCA)) and, if the goods were going to be further processed, provided they met additional requirements listed in the guidance.¹¹ On 15 December 2020, the UK government announced the UK Trader Scheme – a scheme for qualifying businesses to self-declare that their goods entering Northern Ireland were to remain in Northern Ireland.¹²

With only two weeks left before the Irish Sea border became operational, companies were given little time to understand what qualifying means and whether or not their products would meet the 'not at risk' criteria. Given the lack of sufficient time to even process the applications, companies were asked to self-certify and were given provisional authorizations until their applications could be reviewed. Companies were asked to ensure that they were eligible and had sufficient evidence to provide in the short amount of time available and without much support.

Finally, if goods do not meet any of these criteria and are still considered 'at risk', the Protocol provides one more option. Article 5(6) specifies that the UK may reimburse or waive the duties or 'compensate undertakings to offset the impact' (provided this is in accordance with the EU's state aid rules). Towards the end of December 2020, the UK government provided the first details of this wavier scheme. Companies may claim reimbursement or waiver of duties up to a maximum of €200,000 of aid over three tax years.¹³ In order to take advantage of this option, companies are required to declare it on a customs declaration at the time of import and to submit

¹⁰ Art 5(1) of the Decision. Additional rules were put in place for goods entering Northern Ireland from outside the UK and the EU.

¹¹ www.gov.uk/guidance/check-if-you-can-declare-goods-you-bring-into-northern-ireland-not-at-risk-of-moving-to-the-eu#processing.

¹² UK Trader Scheme launched to support businesses moving goods from Great Britain to Northern Ireland press release, December 2020, www.gov.uk/government/news/uk-trader-scheme-launched-to-support-businesses-moving-goods-from-great-britain-to-northern-ireland.

¹³ In accordance with state aid rules.

additional paperwork. At the time of writing, it is possible to apply for the waiver only at the time of import (with retrospective claims potentially being possible at a later date). It is also currently not possible to claim duties on goods entering Northern Ireland from countries outside the UK and the EU or when a business is involved in the production of agricultural products or fishery and aquaculture.

If all of the above sounds confusing, that is because it is. What did not help was the fact that the guidance provided to simplify the legal language of the Protocol and the JC's Decision was often written in a way that was difficult for traders to follow. For example: 'Goods which are subject to commercial processing, where the additional requirements to declare these goods "not at risk" are not met, cannot be declared "not at risk", and are therefore automatically "at risk".'¹⁴ The reason behind this confusion, uncertainty and opacity seems clear: the decisions necessary to implement the Protocol were made at the very last minute. As a result, the interpretation and the guidance supporting these decisions were produced and published weeks, and sometimes only days, before the Irish Sea border was implemented. A particular piece of guidance relating to the Irish Sea border was published on 31 December 2020.¹⁵

The guidance felt rushed and unclear. Traders were given less than two weeks to familiarize themselves and adapt to new rules over the December holiday period and with only a few working days left before the end of the year. Some of the schemes and guidance documents were not available until well into 2021. At the beginning of June 2021, some elements of the guidance were still awaited.¹⁶ All this demonstrates how last-minute the delivery of this border was. In addition, the new guidance regarding the Irish Sea border was made available at the same time as the text of the TCA between the EU and the UK was published. It was

¹⁴ www.gov.uk/guidance/check-if-you-can-declare-goods-you-bring-into-northern-ireland-not-at-risk-of-moving-to-the-eu.

¹⁵ For guidance on sending parcels to and from Northern Ireland, see www.gov.uk/guidance/sending-parcels-between-great-britain-and-northern-ireland.

¹⁶ Another example could be the Trader Support Service (TSS). The TSS programme was introduced by the UK government to mitigate the lack of sufficient number of customs agents and to support the submission of import declarations into Northern Ireland. The tender for this system was conducted less than four months before the system was due to go live. As a result of a last-minute delivery of the system and the significant difficulties in hiring a number of customs experts to support the scheme at the last minute, traders have experienced a range of problems with the service since January 2021. In the author's experience of working with private sector companies, many have reported being given contradictory advice when contacting the TSS team on different days.

difficult enough for experienced customs practitioners to keep on top of the newly published texts and guidance in the second half of December, let alone for smaller Northern Ireland companies with little or no experience in customs and international trade.

17.6 Impact on Traders

The challenges and the uncertainty faced by traders in Northern Ireland in the months around the end of the transition period were unparalleled. It was impossible for any company to be fully ready for January 2021 as rules and procedures were being worked out as days progressed, with every new import and every new issue.

But, apart from tariffs, why was adjusting to the new rules so challenging? Just how much of an inconvenience are the new customs border formalities? And, more importantly, were the difficulties and the additional burden only temporary or were these issues that traders in Northern Ireland would have to deal with well into the future?

While often referred to as 'just a form', customs and border formalities have significantly changed how companies trade. In the first instance, a pre-notification needs to be submitted when goods are imported into Northern Ireland. In response to increasing concerns regarding the threat of terrorism and the safety of international supply chains, many territories introduced a requirement for a safety and security pre-notification. While these forms are submitted electronically and by carriers and other logistics providers, traders are asked to provide information required for the form in advance of importation.

Traders themselves are responsible for declaring imports to customs authorities. This is done by submitting a customs declaration. A customs declaration is a way for customs authorities to collect a range of information about the traded product and the companies involved in the process. This information is used for a number of purposes including calculating tariffs, determining whether goods can benefit from reduced tariffs under a trade deal, calculating import value added tax (VAT) and applying a range of other trade policy measures. It is also used for compliance monitoring purposes.

In the majority of cases, companies do not submit customs declarations themselves. A third-party provider, such as a customs broker, shipping agent or freight forwarder, submits the declaration and liaises with customs authorities on the company's behalf. Companies importing into Northern Ireland also have an option to use the free, government-sponsored Trader Support Service (TSS). Yet, even then, it is the

company that needs to provide customs data that is submitted via a customs declaration and, more importantly, it is the company that is legally liable for the correctness of this data.

Providing and collecting customs data is the most time-consuming part of the customs process for most companies. According to the United Nations Conference on Trade and Development (UNCTAD), an average cross-border transaction involves up to 30 different parties and around 40 documents with about 200 data elements, most of which need to be re-entered into several systems.¹⁷ These figures cover other types of documentation necessary for trading goods internationally, not only customs, for example financial documentation that would enable the company to provide a financial guarantee for customs debt. However, a customs declaration itself has more than fifty data fields. Some of the data elements seem relatively straightforward, for example information about the importer or exporter. However, even such information has clear legal implications – who is liable for any debt? Furthermore, some data elements require an understanding of complex customs rules.

All products on the customs declaration need to be allocated a correct Harmonized System (HS) commodity code.¹⁸ Customs value needs to be established. This is done in accordance with strict international customs rules. Declaring goods under an incorrect commodity code or customs value might lead to an incorrect amount of duty and import VAT being collected. This might, in turn, lead to non-compliance, penalties and audits. The origin of goods needs to be determined. All this data needs to be collected, verified and entered into different systems.

A common belief is that each company has all the information necessary to complete a customs declaration easily available. This is not necessarily the case. Unless a company is importing or exporting, it would not have gone through the lengthy and difficult process of classifying its products. Furthermore, the information needed to classify, determine the value and origin of goods is often not held in the same place within the company. While this sounds simple to address, it often is not. Many companies, even larger and experienced importers and exporters, spend a considerable amount of time collecting, analysing, preparing and maintaining customs

¹⁷ For more information, see www.wto.org/english/thewto_e/minist_e/mc9_e/brief_tradfa_e.htm.

¹⁸ The Harmonized System (HS) Classification, also called the HS Nomenclature, is the World Customs Organization's Harmonized Commodity Description and Coding System. It is an international customs classification system which allocates a unique six-digit HS code to each group of products. Each imported product has to have a commodity code.

data. While there are many customs IT solutions on the market, their uptake is not very widespread; in many companies, classification and origin calculations, for example, are still done manually.

Providing customs data to the authorities, or even to a customs broker, requires ongoing work. The team needs to monitor and update the data on a continuing, or at least periodic, basis. The UK's HM Revenue and Customs (HMRC) has assessed the amount of time required to prepare a customs declaration.¹⁹ For high-volume traders submitting their own declarations, HMRC's research suggests that one hour, forty-five minutes is needed per declaration.²⁰ For high-volume traders using a customs broker to submit declarations, HMRC has estimated that one hour is necessary per declaration in order to prepare the needed information. This all requires additional resources, additional time and effort – and, as a result, ends up being an additional burden and cost for Northern Ireland companies that import goods from what is technically part of the same customs territory. If the Northern Ireland importer is not using the TSS service, there is also an additional cost: customs brokers charge fees for submitting import declarations on behalf of their customers.

17.7 Conclusion

The new Irish Sea border represents a profound shift in the way in which trade between GB and Northern Ireland is done. What, until January 2021, was an internal movement of goods subsequently became an actual import. The impact this will have on the volume and nature of trade between Northern Ireland and the rest of the UK, as well as on the existing supply chains, remains to be seen. In July 2021, the UK government proposed a radical renegotiation of the Protocol which, if accepted, would have resulted in many of the fundamental elements of the Protocol discussed in this chapter being changed. However, the UK's proposals in this respect were immediately rejected by the Commission.²¹

¹⁹ HMRC, 'Impact Assessment for the Movement of Goods if the UK Leaves the EU without a Deal' (3rd edn, 2019) www.gov.uk/government/publications/hmrc-impact-assessment-for-the-movement-of-goods-if-the-uk-leaves-the-eu-without-a-deal/hmrc-impact-assessment-for-the-movement-of-goods-if-the-uk-leaves-the-eu-without-a-deal-third-edition.

²⁰ *Ibid.*

²¹ HM Government, *Northern Ireland Protocol: The Way Forward* (CP 502, July 2021). These proposals are discussed in more detail in 'Update: Developments from July 2021 to September 2021' at the front of this book.

Competition

VINCENT JG POWER SC

18.1 Introduction

The Withdrawal Agreement (WA) provided that EU competition law would continue to apply to Northern Ireland (as well as the rest of the UK) during the transition period (ie, up to and including 31 December 2020).¹ The WA (including the Protocol) was otherwise silent as to how competition law would apply in Northern Ireland (as well as the rest of the UK) in the longer term after the transition period specified in the WA had ended (what might be termed ‘full Brexit’). This was in contrast with state aid law where the Protocol legislated for the continued application post-full Brexit of EU state aid rules to the extent that trade in Northern Ireland was affected by the Protocol² after the transition period ended or, more accurately, as long as the Protocol was applicable and contained the provision on state aid.³ It was not until the Trade and Cooperation Agreement (TCA) that the EU and the UK agreed on how competition law would apply to both the EU and the UK (including Northern Ireland) post-full Brexit. This chapter examines how the TCA provides for competition law to apply and operate in this new era. It begins with an overview and then discusses various aspects of the topic including, in particular, how competition law is different in Northern Ireland after the WA and the TCA.

¹ WA Arts 126–132 (in particular, Art 127(1)).

² See Protocol Art 10(1). See George Peretz’s incisive analysis of state aid in the context of the Protocol in [Chapter 19](#).

³ Protocol Art 10. See also Protocol Art 18 and, in particular, Art 18(1) which provides that Arts 5–10 of the Protocol could be disapplied by virtue of the ‘democratic consent’ mechanism in Art 18 of the Protocol.

18.2 The TCA and Competition Law Generally

There is hardly a mention of competition in the WA;⁴ there are no substantive competition law provisions in the WA, and there is no mention at all of ‘competition’ in the Protocol. Surprisingly, perhaps, competition did not even get a mention in the ‘other areas of North–South cooperation’ enumerated in Protocol Article 11, while a topic such as ‘sport’ is included.

In contrast to the WA, the TCA has several references to competition. However, despite these mentions, the five articles in the TCA dealing specifically with competition are less radical than the thirteen articles dealing with ‘state aid’ law or, as the TCA characterizes it, ‘subsidy control’ law.⁵ These thirteen articles, though applicable to both parties, in effect require the UK to set up a new aid/subsidy regime, while the articles dealing with competition law largely reflect the pre-existing competition regimes at the EU and Northern Ireland/UK levels. There will therefore be less impact for Northern Ireland in terms of competition law than in terms of state aid/subsidy law. This is because it is still UK competition law (albeit influenced by the TCA) which applies in Northern Ireland⁶ but, by contrast, there is the possibility of two state aid/subsidy regimes in Northern Ireland comprising: (a) the EU state aid law regime (ie, an external legal regime) to Northern Ireland (due to the Protocol); and (b) a new set of rules on subsidy control (due to the TCA). While not as radical or as significant as the area of state aid/subsidy, there are some significant provisions relating to competition in Title XI of the TCA,⁷ which deals with, among other matters,⁸ the key rules relating to competition (in addition to subsidy control).

⁴ The word ‘competition’ appeared in contexts other than substantive competition law (eg, procurement law (WA Art 76(1)(a) and (3)) and in the context of procedural competition law (eg, Art 92(1)(b), Art 92(3)(c)(ii) and Art 95(2)).

⁵ See the title to ch 3 of Title XI (ie, ‘Subsidy Control’) and the TCA Arts 363–75.

⁶ EU competition law applies to conduct in Northern Ireland post-full Brexit in the same way that EU competition law applies to anywhere else in the world that is outside the EU (ie, it may well apply to the extent that the conduct has effects in the EU).

⁷ That is, Title XI which is entitled ‘Level Playing Field for Open and Fair Competition and Sustainable Development’.

⁸ There are nine chapters in Title XI, titled: ch 1 ‘General Provisions’; ch 2 ‘Competition Policy’; ch 3 ‘Subsidy Control’; ch 4 ‘State-Owned Enterprises, Enterprises Granted Special Rights or Privileges and Designated Monopolies’; ch 5 ‘Taxation’; ch 6 ‘Labour and Social Standards’; ch 7 ‘Environment and Climate’; ch 8 ‘Other Instruments for Trade and Sustainable Development’; ch 9 ‘Horizontal and Institutional Provisions’. The taxation

Before turning to Title XI, it is useful to recall two recitals to the TCA which are relevant to the debate on competition. The ninth recital recognizes that there is a need for ‘an ambitious, wide-ranging and balanced economic partnership to be underpinned by a level playing field for open and fair competition and sustainable development, through effective and robust frameworks for subsidies and competition and a commitment to uphold their respective high levels of protection in the areas of labour and social standards, environment, the fight against climate change, and taxation’. This therefore positions ‘competition’ with a range of unusual bed-fellows (labour and social standards, environment, as well as the fight against climate change) while traditionally in EU law, competition has been seen either in splendid isolation or in conjunction with state aid, taxation or perhaps intellectual property. The sixteenth recital to the TCA is specific. It notes that ‘cooperation and trade between the Parties in these areas should be based on fair competition in energy markets and non-discriminatory access to networks’.⁹

18.3 TCA Title XI: The ‘Level Playing Field’

Apart from those somewhat hortatory and political recitals, there is more substance in Title XI of Heading One of Part 2 of the TCA. Title XI is entitled ‘Level Playing Field for Open and Fair Competition and Sustainable Development’. This title immediately demonstrates how the traditionally pure topic of ‘competition’ has been mixed in with ‘sustainable development’. The title also demonstrates how the word ‘fair’ has been added to ‘competition’ despite EU competition law being traditionally more interested in ‘free’ competition rather than ‘fair’ competition.¹⁰

chapter deals with issues such as ‘good governance’ (TCA Art 383) and ‘taxation standards’ (TCA Art 384) so it is less relevant to this chapter on competition. Interestingly, there are references to tax contained in the provisions on subsidies (eg, TCA Arts 363(2)(a) and 369(2)).

⁹ In this context, the term ‘the parties’ refers to the EU and the UK.

¹⁰ The use of the word ‘fair’ to describe the form of competition which is regulated is noteworthy. While fairness or unfairness is mentioned in Art 102 TFEU, the concept of ‘fairness’ has not been as prominent in modern competition law as many non-competition lawyers may imagine. While it has been mentioned in some speeches by the incumbent European Commissioner for Competition, Margarethe Vestager, it is not a key part of EU competition law. Indeed, as Barry Hawk has put it so graphically in his book *Antitrust and Competition Laws* (Juris 2020) 163, ‘in the current era [of US antitrust

18.3.1 *Competition and the 'Level Playing Field'*

Chapter 1 of the Title provides that the EU and the UK recognize that trade and investment between the EU and the UK under the TCA require conditions that ensure (a) a level playing field for open and fair competition between the parties, with the need for 'fair' competition becoming all the greater as divergence occurs; and (b) that trade and investment take place in a manner conducive to sustainable development.¹¹ The parties 'affirm their common understanding that their economic relationship can only deliver benefits in a mutually satisfactory way if the commitments relating to a level playing field for open and fair competition stand the test of time, by preventing distortions of trade or investment, and by contributing to sustainable development'.¹² This mention of 'sustainable development' is historically unusual in the context of competition.¹³ It becomes even more unusual by virtue of the fact that each party reaffirms, in the same context of provisions relating to competition, its ambition of achieving economy-wide climate neutrality by 2050.¹⁴ The Title is, therefore, positioning competition in a far wider arena than it has ever appeared in the EU treaties. There are also references in the Title to concepts such as the environment,¹⁵ human health¹⁶ and labour conditions.¹⁷ How competition interacts with those other concepts when these provisions of the TCA are interpreted is unclear.

Significantly, the parties have decided that the purpose of Title XI is *not* to harmonize the standards of the EU and the UK: 'the Parties recognise that the purpose of [the] Title is not to harmonise the standards of the Parties. The Parties are determined to maintain and

law] . . . , to more economics-minded observers, "fairness" is the embarrassing relative at the antitrust wedding'. What part the concept of 'fair' will play in the interpretation and operation of the TCA is uncertain.

¹¹ TCA Art 355. TCA Art 355(2) provides that the EU and the UK 'recognise that sustainable development encompasses economic development, social development and environmental protection, all three being interdependent and mutually reinforcing, and affirm their commitment to promoting the development of international trade and investment in a way that contributes to the objective of sustainable development'.

¹² TCA Art 355(4).

¹³ On the topic, see Simon Holmes, Dirk Middelschulte and Martijn Snoep (eds), *Competition Law, Climate Change & Environmental Sustainability* (Concurrences 2021).

¹⁴ TCA Art 355(3).

¹⁵ TCA Art 356(1).

¹⁶ TCA Art 356(1).

¹⁷ TCA Art 356(3).

improve their respective high standards in the areas covered by [the] Title.¹⁸ This will mean that the historical convergence of competition law between the UK and Ireland brought about in the context of a shared membership of the EU over the last five decades will be replaced by divergence. Indeed, there is a built-in mechanism for divergence¹⁹ and this divergence could manifest at both EU and UK levels (eg, the Digital Markets Act and the Penrose Report/‘Hipster’ competition, respectively).

18.3.2 *Competition Policy*

Chapter 2 of Title XI, entitled ‘Competition Policy’, is more familiar territory to competition lawyers. The parties recognize the importance of free and undistorted competition in their trade and investment relations and acknowledge that anti-competitive business practices can distort the proper functioning of markets and undermine the benefits of trade liberalization.²⁰ To implement these principles, the parties each agree to ‘maintain’ a competition law regime which ‘effectively addresses’ the three main forms of anti-competitive behaviour: (a) anti-competitive arrangements between ‘economic actors’, decisions by associations of ‘economic actors’ and concerted practices which have as their object or effect the prevention, restriction or distortion of competition; (b) abuse by one or more ‘economic actors’ of a dominant position; and (c) for the UK, mergers or acquisitions and, for the EU, concentrations, between ‘economic actors’ which have ‘significant anti-competitive effects’.

One cannot help but think that many of these provisions in **Chapter 2** are ‘old wine in new bottles’, designed to give the impression that the UK negotiators had broken free from the EU terminology and rulebook. An ‘undertaking’ in Northern Ireland, for the purposes of EU or UK competition law, will now be called, for the purposes of the TCA, an ‘economic actor’. The concept of ‘significant anticompetitive effects’, in the context of mergers, acquisitions and concentrations in Northern Ireland, is probably not much different from ‘substantial lessening of competition’ for UK competition law purposes or ‘significant impediment to effective competition’ for EU competition law

¹⁸ TCA Art 355(4).

¹⁹ TCA Art 359(3).

²⁰ TCA Art 358(1).

purposes. These are very largely the same concepts but with new names.

The ultimate impact for Northern Ireland of [Chapter 2](#) of the Title is that the UK must maintain in Northern Ireland (and in the rest of the UK) an effective competition law regime which addresses the three main issues of competition law (ie, anti-competitive arrangements, abuse of dominance and mergers/acquisitions/concentrations). The regime will apply irrespective of the nationality or ownership status of the economic actors involved.²¹ Of course, while the UK will address the three main issues of competition law, it does not have to address them in exactly the same way as the EU does.

18.3.3 *Electricity and Gas*

It is well known that, by virtue of Article 9 of the Protocol, certain provisions of the EU law relating to wholesale electricity markets²² apply to (and in) the UK in respect of Northern Ireland. There are also provisions in the TCA relating to competition in the electricity and gas markets.²³ These are specialist provisions, but some of the key principles are that: (a) with the objective of ensuring fair competition, each party must ensure that its regulatory framework for the production, generation, transmission, distribution or supply of electricity or natural gas is non-discriminatory with regard to rules, fees and treatment;²⁴ (b) each party must ensure that customers are free to choose, or switch to, the electricity or natural gas supplier of their choice within their respective retail markets in accordance with the applicable laws and regulations;²⁵ and (c) each party has the right to regulate in order to achieve legitimate public policy goals based on objective and non-discriminatory criteria.²⁶ There are also specialist provisions on the wholesale electricity and gas markets²⁷ (including rules on market abuse in those markets²⁸). The wholesale electricity provisions in the TCA should be read in conjunction with Article 9 of

²¹ TCA Art 359(2).

²² Namely, those listed in Annex 4 to the Protocol.

²³ See TCA Arts 303–10.

²⁴ TCA Art 303(1).

²⁵ TCA Art 303(2).

²⁶ TCA Art 303(4).

²⁷ TCA Art 304.

²⁸ TCA Art 305.

the Protocol, which deals with the ‘Single Electricity Market’ on the island of Ireland.

18.3.4 *State-Owned Enterprises, Enterprises Granted Special Rights or Privileges and Designated Monopolies*

Chapter 4 of Title XI deals with state-owned enterprises, enterprises granted special rights or privileges and designated monopolies. The chapter applies to many (but not all²⁹) so-called covered entities,³⁰ at all levels of government, engaged in commercial activities, but if a covered entity engages in both commercial and non-commercial activities, only the commercial activities are covered by the chapter. In essence, the chapter involves its own rules and the invocation of arrangements adopted by the Organisation for Economic Co-operation and Development (OECD).³¹ Moreover, the chapter has some provisions which are pertinent in the context of competition, notably Article 380, which provides for non-discriminatory treatment by the parties of covered entities and that such covered entities would ordinarily act in accordance with commercial considerations. Ultimately, the provisions are somewhat sparse and general; it is possible (but not inevitable) that they could be augmented in subsequent supplemental agreements.

18.4 Institutional Dimensions

18.4.1 *Level Playing Field Committee*

There exists a ‘Trade Specialised Committee on Level Playing Field for Open and Fair Competition and Sustainable Development’ to address the matters in Title XI of Heading One of Part 2 and Annex 27.³² However, there is no overarching competition agency applying to the EU and the UK (including Northern Ireland). Instead, and not surprisingly, each of the parties will continue to have its own institutional machinery relating to competition.

²⁹ See, eg, TCA Arts 376(2) and 376(3).

³⁰ See TCA Art 376(1)(d) which provides that a ‘covered entity’ means: (i) a designated monopoly; (ii) an enterprise granted special rights or privileges; or (iii) a state-owned enterprise.

³¹ Eg, in TCA, each party commits in Art 381(1) to ‘respect and make best use of relevant international standards including the OECD Guidelines on Corporate Governance of State-Owned Enterprises’.

³² Annex 27 deals with energy and environmental subsidies.

18.4.2 *Enforcement and Co-operation on Competition Issues*

At one level, there ought to be no difference in the enforcement of competition law in that there must be enforcement³³ with an operationally independent authority (or authorities) competent to enforce effectively competition law³⁴ in a transparent and non-discriminatory manner, respecting the principles of procedural fairness (including the rights of defence) irrespective of the nationality or ownership status of those subject to competition law.³⁵

The EU and the UK have agreed in the TCA that there will be co-operation between them in the field of competition law.³⁶ The parties are committed to co-operation between their respective competition authorities with regard to developments in competition policy and enforcement activities.³⁷ Both sides have agreed to endeavour to co-operate and co-ordinate, with respect to their enforcement activities concerning the same or related conduct or transactions, where doing so is possible and appropriate.³⁸ The European Commission and the competition authorities of the member states, on the one side, and the UK's competition authority or authorities (including those relating to Northern Ireland), on the other side, may exchange information to the extent permitted by each party's law.³⁹ To implement this objective of co-operation, the EU and the UK may (but do not have to) enter into a separate agreement on co-operation and co-ordination among the European Commission, the competition authorities of the member states and the UK's competition authority or authorities, which may include conditions for the exchange and use of confidential information.

The TCA's provisions on co-operation on competition are both soft and limited. There are already indications that the UK's Competition and Markets Authority (CMA) will flex its muscles more post-full Brexit both nationally and internationally,⁴⁰ so this could be important in the context

³³ TCA Art 360(1).

³⁴ TCA Art 360(2).

³⁵ TCA Art 360(3).

³⁶ TCA Art 361.

³⁷ TCA Art 361(1).

³⁸ TCA Art 361(2).

³⁹ TCA Art 361(3).

⁴⁰ Eg, 'CMA joins global partners to consider approach on pharma mergers', press release issued by the CMA on 16 March 2021, www.gov.uk/government/news/cma-joins-global-partners-to-consider-approach-on-pharma-mergers.

of Northern Ireland. It would be useful if there were greater co-operation among the EU, Ireland and the UK relating to competition in Northern Ireland, so one hopes that such co-operation agreements will be adopted both quickly and thoroughly.

18.4.3 *Democratic Consent Mechanism*

Were the democratic consent process in Article 18 of the Protocol to result in Article 10 of the Protocol ceasing to apply in Northern Ireland, then one would have a situation where the competition law provisions of the TCA would continue to apply but the rules in the TCA on state subsidies would have even greater force and relevance for Northern Ireland because the EU state aid rules would no longer apply. This would mean that the TCA would have much greater significance as far as concerns competition in Northern Ireland.

18.5 What Will Be Different?

It is trite but true that competition law in Northern Ireland post-full Brexit will not be the same as before, despite the WA and the TCA. While there will be (at least for some time) a degree of continuity in terms of EU state aid law,⁴¹ this will not necessarily be such when it comes to competition law in terms of the rules and/or the results of proceedings. While the TCA provides that the UK will have competition laws relating to anti-competitive arrangements, abuse of dominance and mergers or acquisitions, this does not mean that the rules themselves will be the same in Northern Ireland as in Ireland or any other EU member state.

The TCA obliges the parties to have effective competition laws, but it does not oblige the parties to have the same rules or outcomes. It is quite possible that the UK will adopt some policies and preferences (eg, protection of small businesses, promotion of innovation, promotion of UK industry and protection of certain interests) which will change the nature of competition law in Northern Ireland leading to further divergence between competition law in Northern Ireland and that in the EU. The TCA expressly allows some of that to occur.

Divergence between Northern Ireland and the EU (including its member states) is likely to increase rather than diminish. There will be certain policies (eg, the 'internal or single market imperative' which is important

⁴¹ As a result of Protocol Art 10.

in EU competition law) that now have little or no relevance for Northern Ireland and the courts or competition agencies there.⁴² In so far as there is a gradual ongoing convergence of the substantive and procedural rules on competition law across the EU, the UK (including Northern Ireland) is now no longer part of that process. This means that compliance costs for undertakings (or economic actors) and associations of undertakings (or economic actors) will grow over time as they will have to comply with two different competition regimes which will no longer be in such close harmony – this could manifest itself in additional investigations at the UK level alongside the EU ones. Parallel investigations could lead to parallel appeals with different timetables, standards, approaches and outcomes.

Important adaptations in EU competition law (eg, the Modernisation Regulation,⁴³ the Damages Directive⁴⁴ and the ECN+ Directive⁴⁵) will all be largely irrelevant to the internal competition law of Northern Ireland. It will therefore become less easy, for example, to claim damages in the courts in Northern Ireland for breaches of EU competition law – but damages for breach of UK competition law remain available. Although the EU Merger Regulation (EUMR)⁴⁶ was never of enormous practical significance in Northern Ireland, there is now even less chance that Northern Irish businesses will benefit from the ‘one-stop shop’ under the EUMR whereby the European Commission (rather than the EU member state competition agencies) adjudicates on concentration control.⁴⁷

⁴² It would be relevant in the context of EU state aid law for so long as Protocol Art 10 applies.

⁴³ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty OJ L 1, 4.1.2003, pp 1–25, ELI: <http://data.europa.eu/eli/reg/2003/1/oj>.

⁴⁴ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union OJ L 349, 5.12.2014, pp 1–19, ELI: <http://data.europa.eu/eli/dir/2014/104/oj>.

⁴⁵ Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market OJ L 11, 14.1.2019, pp 3–33, ELI: <http://data.europa.eu/eli/dir/2019/1/oj>.

⁴⁶ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings OJ L 24, 29.1.2004, pp 1–22.

⁴⁷ Since UK turnover (including Northern Irish turnover) no longer counts for the purposes of the Union dimension within the meaning of the EUMR. See reg. 139/2004, Art 1. The UK's CMA would adjudicate on mergers and acquisitions in Northern Ireland.

Cross-border investigations will be more complicated because the CMA in Northern Ireland will no longer be as closely aligned with the Competition and Consumer Protection Commission (CCPC) in Ireland or the European Commission at the EU level. While the CMA, the CCPC and the European Commission will continue to meet and interact through the wider International Competition Network (ICN), they will no longer all be part of the tighter European Competition Network (ECN). One particular feature of EU cross-border investigations – the Article 22 investigation – has disappeared. Article 22 of the Modernisation Regulation⁴⁸ provides for investigations to be undertaken by one EU member state's national competition agency on behalf of, and in conjunction with, a counterparty agency in *another* EU member state. Such a facility is no longer ordinarily possible in regard to Northern Ireland.

Given the introduction of new rules and new concepts in the TCA, there will also be more novel and preliminary issues (eg, the new concepts in the TCA) needing to be addressed in litigation than would be the case without these new rules and concepts. The settled law relating to the comparable EU rules and concepts may be a good authority, but each new rule and concept could well be tested in the courts, leading to more delays and costs for litigants. Article 4(1) of the TCA provides that the provisions of the Agreement and any supplementing agreement shall be interpreted in good faith in accordance with their ordinary meaning in their context and in light of the object and purpose of the agreement in accordance with customary rules of interpretation of public international law, including those codified in the 1969 Vienna Convention on the Law of Treaties.⁴⁹ This means that, in so far as the TCA applies to competition in Northern Ireland, there will be a difference in approach to the way in which the EU treaties are interpreted. Interpretation matters. Interpretation of the competition provisions of the TCA will no longer have the benefit of any of the usual EU influences, which could lead to different approaches and outcomes for competition laws as contemplated by the TCA and in EU or UK law.

In one important respect, however, EU competition law will continue to apply to Northern Ireland in the way in which it does today. EU competition law will apply to trade in goods or services in Northern Ireland in so far as there is an effect on trade between EU member states in the same way as EU competition law would apply to any 'third

⁴⁸ OJ L 1, 4.1.2003, pp 1–25.

⁴⁹ https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

country'. The fact that EU competition law could still apply to (mis) conduct in Northern Ireland, and that the European Commission is able to impose fines on undertakings and associations of undertakings for breaching EU competition law, will probably come as a surprise to many in Northern Ireland. And when it applies, it will be more complex. While trade or commerce between Ireland and Northern Ireland might still trigger the application of EU competition law, for example, it will not do so as simply as it would have done before full Brexit.⁵⁰

The continuing application of EU competition law to the UK as a third country also adds yet further 'red tape' and complications to the plethora of new laws and regimes that now apply. Not only is the UK competition law regime applicable in Northern Ireland, but there is also EU competition law (in so far as it would apply to any third country), EU state aid law provided for in the Protocol, and now the competition and state subsidy regimes in the TCA. The TCA regimes are not independent or separate legal regimes; they are frameworks or rules by which the competition and state subsidy regimes in Northern Ireland must be designed and operated.

As a result, there will be plenty of opportunity for more complication, complexity, controversy and even, sadly, some confrontation (particularly concerning UK–EU trade). The relative absence of such disputes to date may not be an accurate basis for predicting the future. The frictions and fissures which are likely to occur could have been delayed because of the postponement of the entry into force of several trade and customs-related aspects of the Protocol, changed trading patterns by hauliers and the Covid-19 crisis. Even so, there are early indications that there is already friction due to (or, at least, blamed on) these arrangements.⁵¹

18.6 Conclusions

The WA and the Protocol are somewhat silent on the longer-term operation and application of competition law in Northern Ireland post-full

⁵⁰ Eg, Commission Decision 89/205/EEC of 21 December 1988 relating to a proceeding under Article 86 of the EEC Treaty (IV/31.851 – Magill TV Guide/ITP, BBC and RTÉ), OJ L 078, 21/03/1989 pp 0043–0051 (<http://data.europa.eu/eli/dec/1989/205/oj>) where sales in Northern Ireland of the RTÉ Guide (published in Ireland) triggered the effect on intra-EU trade but that is no longer the case. Article 86 of the EEC Treaty is now largely TFEU Art 102.

⁵¹ While few could rationally blame the provisions on competition law and policy, these provisions are part of the wide legal regimes embodied in the WA (including the Protocol) and the TCA.

Brexit – whether that be EU or UK competition law. This is in contrast with EU state aid law which the Protocol provides will apply in respect of measures which affect trade covered by the Protocol between the EU and the UK.

The case for legislating for state aid law to apply under the Protocol was strong because of the way in which Northern Ireland would have special advantages in terms of trade with the EU but still be part of the UK's customs territory⁵² and the possible destabilizing effect of UK (or, indeed, EU member state) state aid on trade. However, one could see private (rather than state) breaches of competition law (whether relating to anti-competitive arrangements or abuse of dominance or both) having similar negative effects on trade. In practice, the negotiators of the Protocol probably feared the possibility of a damaging intervention in the marketplace by the UK in terms of state aid more than the intervention of undertakings and associations of undertakings; as a result, the Protocol addressed state aid but not competition law, except in the limited way discussed.

The broader issue of competition law needed to be addressed as part of the TCA. Undoubtedly, the TCA does this in a unique way. Traditionally, competition has been seen in EU law either in splendid isolation or in conjunction with state aid, taxation or perhaps intellectual property. The TCA, however, has positioned 'competition' within a range of unusual bed-fellows (including labour and social standards, the environment, and the fight against climate change). It will be interesting to see how the provisions in the TCA will eventually be interpreted in this context. Given the approach to the interpretation of the TCA⁵³ and the absence of the EU's internal market imperative, it is possible that competition could be given a lesser role than has been the case in the past or in an EU context. Could, for example, the provisions on 'competition' be given less significance and importance than, say, 'sustainable development'? The future of competition law in Northern Ireland is not only uncertain; it also looks to be very different. The historical convergence of competition law between Northern Ireland (and the rest of the UK) and the EU member states (including Ireland) brought about through shared EU membership will now be replaced by divergence to a greater or lesser extent.

⁵² Protocol Art 4.

⁵³ TCA Art 4(1).

State Aid

GEORGE PERETZ QC

19.1 Introduction

The EU state aid rules date from the very earliest development of what was to become the European Union: predecessor provisions were to be found in the Treaty establishing the European Coal and Steel Community (1951),¹ and the provisions in the Treaty on the Functioning of the European Union (TFEU) are substantially unchanged from the Treaty of Rome (1957).² They have been regarded from the outset as foundational provisions: the fundamental aim of reducing barriers to trade between member states would produce politically unacceptable results if the reduction of barriers to trade exposed domestic producers in one state to the risk of being undercut by subsidized imports from another state. Since European states have tended to spend a relatively high proportion of national income, and to intervene relatively extensively in the economy, the risk of distortive subsidies of that kind has always been high.

The EU state aid rules have the following important features. The concept of ‘state aid’ is defined widely to include all forms of public financing, including reduced charges, guarantees or loans at favourable rates, tax waivers, many exemptions from tax as well as classic handouts of cash. The European Commission has wide powers to declare aid to be permitted (or ‘compatible with the internal market’) on broad public policy grounds set out in Article 107(2) and (3) TFEU. Critically, Article 108(3) TFEU prohibits member states from implementing any measure that amounts to state aid unless and until it has been notified to, and cleared by, the Commission: and aid implemented in breach of that rule is unlawful, with both the Commission and national courts having the

¹ Treaty establishing the European Coal and Steel Community (1951), Arts 4, 54 and 95.

² Treaty establishing the European Economic Community (1957), Arts 87–89.

power to order repayment of any such aid and (in the case of a national court) damages to third parties affected by the unlawful aid.

That structure gives the Commission a powerful role at the heart of the regime: it is the arbiter (subject only to judicial review by the EU courts) of what state aid is permissible. State aid not approved by it is unlawful, and it is able to order member states to recover unlawful aid, subject only to the possibility of judicial review by the General Court and the Court of Justice of the European Union (CJEU).

The severity of that regime is tempered by ‘block exemptions’ (regulations that define certain categories of aid that is automatically regarded as cleared without being notified), but the drafting of those regulations is under the Commission’s control.

19.2 Background to Protocol Article 10

Against that background, it was inevitable that the EU’s agreement to, in effect, barrier-free trade in goods between Northern Ireland and the EU would be conditional on the application of strict subsidy control rules to measures that could affect that trade. Absent such rules, it would have been possible for subsidized goods circulating in Northern Ireland to enter the EU across the legally and physically undefended Ireland–Northern Ireland border. Member states subject to the disciplines of the state aid rules were never going to accept that there could be territory effectively within the EU internal market that was not subject to those rules.

Accordingly, in the draft Withdrawal Agreement (WA) negotiated in November 2018 under the government of Prime Minister May, the draft Protocol contained, first, at Article 12, a provision in the same terms as what is now Article 10.³ For the May government, that provision was unproblematic because it had by that stage essentially decided that EU state aid rules would in any event continue to apply to the whole of the UK after Brexit; indeed, Part 4 of Annex 4 to that draft Protocol contained provisions applying to GB that would, absent other arrangements agreed before the end of the transitional period, have extended the EU state aid rules to GB, though with a UK independent authority taking the role played by the Commission in the EU, subject to various forms of oversight by the Commission.⁴

³ https://ec.europa.eu/info/sites/default/files/draft_withdrawal_agreement_0.pdf.

⁴ For an analysis of those provisions, see G Peretz, ‘State Aid and the Withdrawal Agreement: Key Points’ (3 December 2018), <https://uksala.org/state-aid-and-the-withdrawal-agreement-key-points/>.

As discussed previously,⁵ the government of Prime Minister Johnson that took office in July 2019 reverted to the ‘Northern Ireland only’ arrangements that had originally been the EU’s suggested approach to the problems posed by Brexit in the island of Ireland and included in its initial public draft of February 2018.⁶ It was also clear – in state aid as elsewhere – that the UK government would not commit in a withdrawal agreement to remain under any obligations to align to EU rules, outside Northern Ireland. The EU’s insistence on maintaining what was previously Article 12 as what is now Article 10 was therefore unsurprising. What was surprising was that the Johnson government accepted the retention of that Article without, it appears, appreciating its implications for the UK as a whole.

19.3 Terms of Article 10

Like much of the Protocol, Article 10(1) does not offer a lazy reader⁷ much clue as to its meaning or purpose. It provides: ‘The provisions of Union law listed in Annex 5 to this Protocol 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.’ It is only when the diligent reader turns to Annex 5 that she can begin to understand what this provision is about. Annex 5 contains the whole corpus of EU state aid law, starting with the TFEU provisions and then running through EU secondary legislation (procedural rules and block exemptions) as well as ‘soft legislation’ such as Commission communications and guidance on the meaning of key concepts of state aid law and as to its policy approach to the exercise of its powers under the state aid rules.

When the diligent reader then begins to look at the text of Article 10(1), she will note that, subject to the critical final phrase of Article 10(1), its effect is to apply Annex 5 – that is, the whole corpus of EU state aid law – to ‘the United Kingdom’. Being diligent, she will also note that Article 10 does not (in contrast to, say, Protocol Article 5(3)) restrict itself to ‘the United Kingdom in respect of Northern Ireland’; she will therefore

⁵ See Chapter 1.

⁶ Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (February 2018), https://ec.europa.eu/info/sites/default/files/draft_withdrawal_agreement.pdf.

⁷ Possible examples will no doubt occur to many readers of this chapter.

conclude, correctly, that it applies to GB as well as to Northern Ireland. Moreover, by Article 13(3) and (4), future EU legislation (including soft legislation) in the field of state aid will be imported into Annex 5 and will thus have effect in ‘the United Kingdom’.

When the diligent reader considers the matter, she will see that that result makes sense, given the EU’s concerns as set out above. Northern Ireland is closely integrated economically with GB: the Protocol itself refers to its having an ‘integral place in the United Kingdom’s internal market’.⁸ From the point of view of protecting the EU internal market, it would make little sense to limit the scope of the Article to measures taken by the devolved government of Northern Ireland or to measures benefiting businesses ‘based in’ Northern Ireland (however those might be defined).

The diligent reader will further note that Protocol Article 12(4) provides that, in relation to Article 10, all the EU’s institutions – including the Commission and the CJEU – have the same powers in relation to the UK and persons within it as they do under EU law, and that under Article 12(5) the exercise of those powers has the same legal effects in the UK (all of it) as it does in the EU (a provision translated into domestic law by section 7A of the EU (Withdrawal) Act 2018 (EUWA 2018)). As described above, those powers are very extensive.

At that point, the diligent reader – who, let us assume, is concerned to minimize the extent to which the UK is bound by EU law after Brexit – will turn with some anxiety to the wording in the last phrase of Article 10(1) – ‘in respect of measures which affect that trade between Northern Ireland and the Union which is subject to this Protocol’ – which by this point she will have worked out is the crux of the provision.

There are three concepts in that critical phrase in Article 10(1). The first concept is that of a ‘measure’, but it fails to confine the application of EU state aid rules at all, since a ‘measure’ is simply anything to which the state aid rules may apply; it is wording used in Article 108(3) TFEU (which prohibits a member state from putting a ‘proposed measure’ that falls within the scope of the state aid rules into effect until the Commission has decided whether the measure is compatible with the internal market).

The next concept to consider (in logical order) is the concept of ‘that trade between Northern Ireland and the [EU] which is subject to this Protocol’. That raises the question of what trade between Northern Ireland and the EU is subject to the Protocol: to which the answer would appear to lie in those provisions of the Protocol that regulate

⁸ Protocol Art 6(2).

trade between Northern Ireland and the EU. In that regard, one should note Article 5(3) (applying the Union customs code to Northern Ireland), Article 5(5) (applying Articles 30⁹ and 110¹⁰ TFEU and prohibiting quantitative restrictions on EU–Northern Ireland imports and exports) and Article 9 (applying EU rules on the wholesale electricity market to Northern Ireland). The upshot is that the trade that is ‘subject to the Protocol’ is trade in goods and wholesale electricity (covered by the Union customs code and Articles 30 and 110 TFEU, as well as Article 34 TFEU – the prohibition on quantitative restrictions on goods, which also covers electricity¹¹).

Finally, what does ‘affect’ mean? It is on the meaning and application of that verb that the bulk of the difficulties and tensions in Article 10 turns. But before considering it, we should look at what happened after the Protocol was concluded.

19.4 UK Government’s Conduct in Relation to Article 10 during the Transition Period

The implications of the Johnson government’s agreement to Article 10 – and in particular its potential impact on subsidy control right across the UK – were rapidly picked up by commentators with expertise in the area, including ones generally sympathetic to the Johnson government’s aims in the area of subsidy control.¹² On 3 April 2020, the Chairman of the House of Lords EU Internal Market Sub-committee, which had taken considerable evidence on the issue, wrote to the relevant minister that it was ‘troubling that no one we heard from thought that the UK Government had a clear understanding of what state aid provisions it had signed up to in the Protocol, and that the regions and devolved nations we heard from were not clear on how the Protocol might affect them’. She then asked: ‘How is the UK Government working now to ensure that the UK-wide implications of the Protocol in a state aid context are fully understood?’¹³ The responding minister failed to

⁹ Free movement of goods.

¹⁰ Prohibition of discriminatory taxation as between domestic goods and goods produced in other EU member states.

¹¹ See Case C-158/94 *Commission v Italy* ECLI:EU:C:1997:500, at [17].

¹² See James Webber, ‘All Change? UK State Aid Law after Brexit: Whose Law? Whose Courts?’ https://uksala.org/wp-content/uploads/2020/02/PROOF-COPY-A_New_Subsidy_Control_Regime_for_the_UK.pdf, pp 12–13.

¹³ <https://uksala.org/wp-content/uploads/2020/04/Level-Playing-Field-and-state-aid-letter-to-BEIS-FINAL-002.pdf>, para 56.

grapple with the issue, confining himself to an anodyne reference to meetings of the Joint Committee (JC).¹⁴

On 9 September 2020, however, it became clear that the Johnson government had indeed taken note of the points being made. As discussed elsewhere in this book, the UK Internal Market Bill published on that day¹⁵ proposed to give ministers the power to breach the WA by making regulations that would limit the effect and scope of the Protocol in UK domestic law. At the heart of that proposal was clause 43, headed ‘Regulations about Article 10 of the Northern Ireland Protocol’. That clause would have given ministers powers to ‘interpret’ Article 10, or to ‘disapply’ or ‘modify’ its effect. These powers were not, as clause 45 made clear, to be limited by any incompatibility with international law (that is to say, including incompatibility with the UK’s obligations under the Protocol, agreed by that same government less than a year previously).

To make matters worse, from the EU’s point of view, the UK government chose to announce on the same day that it proposed to remove all EU state aid law from the scope of ‘retained EU law’ (EU law that would continue to have effect, as UK law, after the end of the transition period) and, for the moment, put nothing in its place apart from ‘guidance’, with a promise to consult later on whether anything further was appropriate.¹⁶

As related elsewhere in this book, clause 43 and other clauses involving breaches of the Protocol were rejected by the House of Lords and ultimately abandoned. But, as part of the process of that abandonment, the Johnson government negotiated with the EU, in the context of the JC, ‘unilateral declarations’ on Article 10(1).¹⁷ The EU declaration (of which a UK declaration ‘took note’) stated:

When applying Art. 107 TFEU to situations referred to in Art. 10(1) of the Protocol, the European Commission will have due regard to Northern

¹⁴ Letter from Paul Scully MP to Baroness Donaghy of 15 May 2020, <https://committees.parliament.uk/publications/1381/documents/12714/default/>, p 5.

¹⁵ <https://publications.parliament.uk/pa/bills/cbill/58-01/0177/20177.pdf>.

¹⁶ ‘Government Sets Out Plans for New Approach to Subsidy Control’, 9 September 2020, www.gov.uk/government/news/government-sets-out-plans-for-new-approach-to-subsidy-control.

¹⁷ ‘Unilateral Declarations by the European Union and the United Kingdom of Great Britain and Northern Ireland in the Withdrawal Agreement Joint Committee on Article 10(1) of the Protocol’, 17 December 2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/946286/Unilateral_declarations_by_the_European_Union_and_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_in_the_Withdrawal_Agreement_Joint_Committee_on_Article_10_1_of_the_Protocol.pdf.

Ireland's integral place in the United Kingdom's internal market. The European Union underlines that, in any event, an effect on trade between Northern Ireland and the Union which is subject to this Protocol cannot be merely hypothetical, presumed, or without a genuine and direct link to Northern Ireland. It must be established why the measure is liable to have such an effect on trade between Northern Ireland and the Union, based on the real foreseeable effects of the measure.

As will be noted, that declaration concentrated on precisely the term 'affect/effect' that this chapter earlier identified as the crux issue in determining the scope of Article 10. Its own effect, so far as it has any, is analysed below, but to the extent that anyone may have believed that it represented any common approach between the two sides to the question of how the crux issue of 'effect on trade' should be approached, any such belief could not have survived the competing guidance on that question issued over the following few weeks by the UK government and by the Commission.

Before turning to that issue, however, it is important to note that in the Trade and Cooperation Agreement (TCA), of 24 December 2020, the UK government consented, in [Chapter 3](#) of Part 2, Title XI, to maintain in the UK after the end of transition a domestic subsidy control regime with legal force. However, that agreement left Protocol Article 10 entirely in place.

In June 2021, the UK government introduced a Subsidy Control Bill to Parliament.¹⁸ That Bill will establish a UK subsidy control regime, the essence of which is the placing of a duty on all granting authorities to grant subsidies only where they are satisfied that 'subsidy control principles' are complied with. Those principles are set out in Schedule 1 to the Bill and are largely drawn from the TCA, with the addition of a principle that subsidies should not distort competition or investment within the UK. The Bill will also prohibit certain kinds of subsidy – essentially those required by the TCA to be prohibited (such as export subsidies, unlimited guarantees, and aid to ailing and insolvent enterprises in the absence of a credible restructuring plan). Compliance with those prohibitions and with duty to apply the principles is secured by a transparency regime (a requirement to put details of all subsidies on a central public database), the possibility (mandatory in some cases) of referring proposed or granted subsidies to the Competition and Markets Authority for a non-binding report, and the right of interested third parties and the UK Secretary of State to challenge any granting decision in judicial review proceedings before the Competition Appeal Tribunal.

¹⁸ <https://publications.parliament.uk/pa/bills/cbill/58-02/0135/210135.pdf>.

The consequence is that, after transition, the UK now has two entirely separate subsidy control regimes: at present, the one required under the TCA,¹⁹ to be replaced in due course by the regime set out in the Bill, and Protocol Article 10. The Bill provides that those two regimes are to be mutually exclusive, in that any measure that has been ‘given in accordance with Article 10’ will be excluded from the UK regime.²⁰ In practice, a large proportion of subsidy measures in Northern Ireland will fall under Article 10 and therefore will be excluded from the UK subsidy control regime, but where Article 10 does not apply (for example, in cases where subsidies benefit only services suppliers with no goods element), the UK regime will apply.

19.5 Crux Issue: Effect on Trade

The phrase ‘so far as it affects trade between Member States’ forms part of the definition of state aid in Article 107(1) TFEU. It is frequently described as a ‘low threshold’, and the point made that, in many cases, what appear to be activities of local interest only have been found to give rise to such an effect.²¹ In *Eventech*,²² the CJEU summarized its case law, stating that ‘for the purpose of categorising a national measure as State aid, it is necessary, not to establish that the aid has a real effect on trade between member states and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition’.²³ It went on to state in particular that ‘when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid’. It also pointed out that a finding of effect on trade could be made even when the beneficiary of the aid did not itself carry on any intra-Community trade, since the changed pattern of internal trade might affect the ability of suppliers from other member states to penetrate the market. And it

¹⁹ The regime required by the TCA forms part of UK domestic law by virtue of section 29 of the EU (Future Relationship) Act 2020, which gives a form of direct effect in UK domestic law to all provisions in the TCA that require domestic implementation. A Subsidy Control Bill was promised in the May 2021 Queen’s Speech.

²⁰ Clause 48(2)(a) of the Bill as introduced.

²¹ See, eg, Kelyn Bacon QC, *European Law of State Aid*, 3rd edn (2017), para 2.153, and the cases there cited.

²² Case C-518/13 *Eventech v Parking Adjudicator* ECLI:EU:C:2015:9, [2015] 1 WLR 3881, [2015] 2 CMLR 33

²³ At paras 65–69.

emphasized that a finding of effect on trade could be made even if the aid was for a small amount, the beneficiary was small, or the market affected was local in character.

In its subsequent notice on the issue,²⁴ the Commission applied that approach to the critical phrase in Article 10(1). On that basis, it noted that aid to an undertaking that sells only a small part of its production in the EU may have an effect on trade.²⁵ Combining that point with the point (noted above) that where an aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid, the Commission concludes that an aid to a company located in Great Britain may ‘notably’ meet the ‘effect’ test if that company trades with Northern Ireland. It also states that aid to a services company could indirectly meet the effect on trade test if it indirectly benefits companies engaged in trade in goods or electricity. It concludes with three examples of where the requisite effect on trade would be ‘likely’: a tax scheme granting a direct or indirect benefit to any firm trading with Northern Ireland; incentives to the financial services industry that would allow manufacturers or electricity companies engaged in trade between Northern Ireland and the EU to access cheaper credit, thus gaining an advantage over their trading partners; and aid to a manufacturer in difficulty if its goods are available for sale in Northern Ireland.

It is evident from those examples that the Commission believes that many UK measures that are focused on GB or are UK-wide would fall within Article 10(1).

In contrast, the UK government’s guidance²⁶ on the point states that ‘the starting assumption for subsidies granted to recipients outside of Northern Ireland should be that the NI Protocol does not apply’: and though it recognizes that it could apply where ‘a UK-wide measure benefits NI companies’ or a subsidy is given to a company with a subsidiary or branch in Northern Ireland, it considers that it would be ‘highly unlikely’ to apply to a company in GB that exports only to

²⁴ ‘Notice to Stakeholders: Withdrawal of the United Kingdom and EU Rules in the Field of State Aid’, 18 January 2021, https://ec.europa.eu/info/sites/default/files/notice-stakeholders-brexite-state-aid_en.pdf.

²⁵ See Case C-142/87 *Belgium v Commission* (“*Tubemeuse*”), ECLI:EU:C:1990:125.

²⁶ Part 7 of the Department of Business, Energy and Industrial Strategy’s ‘Technical Guidance on the UK’s International Subsidy Control Commitments’, 31 December 2020, www.gov.uk/government/publications/complying-with-the-uks-international-obligations-on-subsidy-control-guidance-for-public-authorities/technical-guidance-on-the-uks-international-subsidy-control-commitments.

Northern Ireland. Further, the guidance also states that there is a ‘very strong assumption that aid to services cannot be relevant to Article 10’.

The root of that divergence appears to lie in the UK government’s different approach to the December 2020 Declaration from that of the EU. The UK guidance places considerable emphasis on that Declaration. In contrast, the Commission notice states both that the Declaration is ‘fully in line’ with CJEU case law on ‘effect on trade’ and that, in any event, it is without prejudice to the CJEU’s interpretation of that phrase.

In relation to that difference of view, it is worth noting that (unsurprisingly) nothing in the CJEU’s case law expressly allows for a ‘hypothetical [or] presumed’ effect on trade, or an effect based on anything other than a genuine or direct link to the putatively affected activities. Indeed, it is difficult to imagine that the Commission would ever proceed on a basis that admittedly relied on a hypothetical or presumed effect or on a non-genuine link, or that the CJEU would uphold it if it did. As the Commission notice points out, the effect has to be demonstrated, but the practical point is that the CJEU has accepted as ‘demonstration’ fairly sparse reasoning that shows only that the measure is ‘liable to’ affect, rather than that it actually has affected, such trade. It is therefore hard to see that the December 2020 Declaration adds anything to, or subtracts anything from, CJEU case law on the ‘effect on trade’ in Article 107(1) TFEU (even if the Commission had authority to bind the Court of Justice).

Behind that, however, lies a deeper issue. Is it right to assume that ‘affects . . . trade’ means the same thing in Protocol Article 10(1) as it does in Article 107(1) TFEU? The better view is that it does. Protocol Article 13(2)²⁷ provides that ‘the provisions of this Protocol referring to [EU] law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice’: given the materially identical wording (‘affect that trade between’/‘affects trade between’) in Protocol Article 10(1) and Article 107(1) TFEU, it is hard to resist the proposition that Article 10(1) is here referring to a concept of EU law. Further, that reading of the Protocol reflects the overall approach of the Protocol in applying EU law in full to Northern Ireland in the areas of goods and electricity: it is implausible that such a foundational aspect of single market law was intended to apply in any weaker way than it does in the EU.

²⁷ See also WA Art 4(3) and (4), although Protocol Art 13(2) goes further by requiring conformity with CJEU case law after the end of the transition period as well as before it.

All this leaves granting authorities and potential recipients of aid in the UK in a difficult position, if the measure falls into one of the areas where there is divergence between the Commission's approach and that of the UK government. Public authorities must, under section 48(4) of the UK Internal Market Act 2020, 'have regard to' the UK government's guidance in exercising their functions: but that obligation would not extend to following it where the authority considers that it is legally incorrect.²⁸ A further, practical difficulty is that if the view is taken that the measure is, or is likely to be, an aid falling under Protocol Article 10(1), and is not covered by an exemption, it follows that it cannot be implemented, or can be implemented only at high risk of a court injunction or a recovery order, unless previously notified to and cleared by the Commission: but such a notification to the Commission may be made only by the UK government,²⁹ which is unlikely to do so in a case where its guidance asserts that the measure is not caught by Article 10. In many cases, the parties – and in particular the beneficiary – may well decline to proceed on that basis, or even seek to approach the Commission themselves in order to obtain its view.³⁰

19.6 How Will Disputes Be Resolved?

One factor that will go into the risk assessment in such cases is that, in practice, it is the Commission's view that is likely to be decisive, subject only to the view of the CJEU. As observed above, the Commission retains, in relation to the UK as a whole, its full panoply of enforcement powers in relation to measures falling under Article 10, including recovery orders and orders to bring the measure to an end (whatever its domestic legal basis). Its decisions can be challenged only in the General Court/CJEU. If

²⁸ Note that all UK public authorities (not just the UK government) are required by WA Art 5 (and thus by s 7A of the EUWA 2018) to ensure the fulfilment of the obligations arising from the WA and to refrain from any measures that could jeopardize the fulfilment of its objectives. Those obligations would appear to preclude proceeding with a measure that the authority considered to be state aid subject to Art 10, but which is not exempt and has not been notified.

²⁹ See s 49 of the UK Internal Market Act, as well as the general principle of EU law that only central governments of a member state can make a valid notification: Joined Cases C-442 and 471/03P *P&O European Ferries v Commission* [2006] ECR I-4845 at paras 102–07.

³⁰ Such a step would not amount to a notification and could not therefore lead to a Commission clearance decision: but a Commission statement that a proposed measure would in its view be notifiable state aid under Article 10 would at least make it clear to the UK government and the parties that the risks of not notifying were very serious indeed.

a dispute is raised in a national court, the national court is likely (and on final appeal is bound, subject to the ‘acte clair’ doctrine) to refer any question as to the meaning of Article 10 to the CJEU.³¹

What if the UK considered that the CJEU had misapplied Article 10 and tried to bring the matter to arbitration under Article 170 WA? Its difficulty then would be that it would – in order to avoid a reference to the CJEU under Article 174 – have to persuade the arbitration panel that what was at issue was not a ‘question of interpretation of a concept of [EU] law’: a task that would, for reasons explained above, be difficult to discharge.

19.7 Conclusion

As noted in this chapter, one paradoxical result of the way in which the Johnson government handled the negotiation of the WA and the TCA is that, despite its general lack of enthusiasm about scrutiny of its decisions by independent or judicial bodies, it has ended up with not just one subsidy control regime governing its decisions on subsidies but two (the TCA regime, to be replaced by that of the Subsidy Control Bill, and Protocol Article 10). That is not ideal from anyone’s point of view (apart from, perhaps, subsidy control lawyers’).

There are many examples of issues under the Protocol that could give rise to serious political difficulties. But since disputes over the application of state aid law can affect the legality of critical economic decisions (taxation, rescue of important businesses), the political difficulties that could be caused by differences between the EU and the UK government approaches to Article 10 could well rank among the most serious.

In its July 2021 paper,³² the UK government suggested that the subsidy control provisions in the TCA, together with the Subsidy Control Bill, ‘provide a more than sufficient basis to guarantee that there will be no significant distortion to goods trade between the UK and [the] EU, whether from Great Britain or Northern Ireland, thus making the

³¹ At the time of writing (July 2021) there were ongoing proceedings before the Administrative Court in England and Wales in which British Sugar claimed that a decision by the Secretary of State for International Trade to reduce tariffs on certain imports of sugar by Tate & Lyle amounted to state aid in breach of Article 10 (as well as a subsidy under the TCA). No decision had been made on the case, or as to a possible reference to the CJEU, as at the time of writing.

³² HM Government, *Northern Ireland Protocol: The Way Forward* (CP 502).

existing provisions in Article 10 redundant in their current form'.³³ It went on to offer, on the basis that its proposed replacement for the Protocol was adopted, the possibility of 'enhanced processes for any subsidies on a significant scale relating directly to Northern Ireland – for example enhanced referral powers or consultation procedures for subsidies within scope, to enable EU concerns to be properly and swiftly addressed'.

There is some force in the point that, since Article 10 was drafted against a background where the UK might have decided not to have any domestic subsidy control regime at all, its terms should be reconsidered now that the UK is committed to having a domestic subsidy control regime within a framework agreed with the EU.³⁴ And, as noted above, it is distinctly unsatisfactory that the UK is, as a result of Article 10, having to operate two separate subsidy control regimes with an uncertain boundary between them. It is unfortunate that the UK government does not appear to have raised that point during the negotiations leading up to the TCA – which may well be a consequence of its maintaining the position until late in those negotiations that it would not agree to commit to a robust subsidy control regime at all. But the fact that the opportunity to make a fair point was lost at that stage does not mean that the point is not a fair one now, albeit one that may well get lost in the generally combative tone of the July 2021 paper. Unless and until some such arrangement modifying or replacing Article 10 is made, there is a very real danger that it will generate a serious crisis, for example over a Commission or court finding that a politically important UK business tax measure amounted to unlawful state aid under its terms.

³³ At para 64.

³⁴ See further George Peretz QC and James Webber, 'The UK's Proposed Revisions to Article 10 of the Northern Ireland Protocol: A Sensible Basis for Negotiation', *EU Relations Law*, <https://eurelationslaw.com/blog/the-uks-proposed-revisions-to-article-10-of-the-northern-ireland-protocol-a-sensible-basis-for-negotiation>.

Environment and Trade

MARY DOBBS AND VIVIANE GRAVEY

20.1 Introduction

As political and legal realities change, one environmental fact remains: the island of Ireland is a single biogeographical and epidemiological unit. The permeable nature of the environment, with transboundary habitats and river basins, creates the potential for positive or negative externalities by actions on either side of the border between Northern Ireland and Ireland, whether intended or accidental. Consequently, for either Northern Ireland or Ireland to achieve a high level of environmental protection requires shared objectives across the island and co-operation at all stages and levels of governance – as reflected in the 1998 Agreement.¹

The EU provided shared environmental objectives, legal frameworks and governance mechanisms. The shared (or equivalent) standards, for instance regarding sanitary and phytosanitary (SPS) measures, also facilitated the open borders between the UK and the rest of the EU. The 1998 Agreement later enhanced this and also provided for six areas of co-operation in the North–South Ministerial Council, including the environment and the closely related issue of agriculture, as well as establishing several North–South bodies, such as the Loughs Agency overseeing transboundary waters.² EU membership and the 1998 Agreement together helped facilitate open borders and promoted shared high standards and co-operative environmental governance,³ including on the island of Ireland.⁴ Brexit now changes this.

¹ A Hough, 'Brexit, the Good Friday/Belfast Agreement and the Environment: Issues Arising and Possible Solutions', report commissioned by the Environmental Pillar in conjunction with Northern Ireland Environment Link, April 2019, <https://nienviromentlink.org/cmsfiles/Brexit-GFA-report-FULL.pdf>.

² www.loughs-agency.org/about-us/.

³ As an area of shared competence, the EU permitted some divergence across the member states and therefore on the island of Ireland.

⁴ M Dobbs, 'The Challenges for the Environment across the Island' in J Mair, S McCabe, N Fowler and L Budd (eds), *Brexit and Northern Ireland – Bordering on Confusion?* (Bite-Sized Books 2019).

This chapter examines the implications of Brexit for environmental protection in Northern Ireland, focusing primarily on the Protocol but taking into account other developments in EU–UK relationships and internal UK developments. It outlines (i) the extent to which EU environmental law continues to apply in Northern Ireland, before considering (ii) the potential for regulatory divergence (impacting on both trade and the environment) and (iii) the impacts of border controls. Due to the significance of agriculture for the environment and of the Protocol for agri-food supply chains across the UK and Ireland, the chapter draws on policy examples from both environment and agriculture.

Overall, while some protection continues, it is typically linked to trade. This piecemeal approach leads to a fragmentation of Northern Ireland environmental rules and governance with profound implications for environmental protection. This is especially important in light of the poor environmental record on both sides of the border: neither Ireland nor Northern Ireland has historically been an environmental leader.⁵

20.2 Continued Compliance with EU Environmental Law?

Northern Ireland environmental law reflects a complex system of multi-level governance, from the international level to the local level. Prior to Brexit, this included a substantial swathe of EU and EU-derived environmental law, supported by strong EU governance mechanisms, alongside Northern Ireland-originating environmental law. However, following Brexit, the division has shifted and there are increased variations in the nature of environmental law within Northern Ireland.⁶

The UK introduced the concept of ‘retained’ EU law via the European Union (Withdrawal) Act 2018 (EUWA), whereby all secondary EU law applying up to the end of the transition period would remain in force in domestic law but be given a new legal foundation in UK law, aiming to avoid gaping holes in the UK statute book. However, changes were introduced, for example removal of references to other EU member states and EU institutions. This, on occasion, impacted significantly on

⁵ B Jack, ‘Environmental Law in Northern Ireland’ in S McKay and M Murray (eds), *Planning Law and Practice in Northern Ireland* (Routledge 2017) 154–55; and Case C-494/01, *Commission v Ireland* [2005] ECR I-3331, ECLI:EU:C:2005:250.

⁶ V Gravey and L Whitten, ‘The NI Protocol and the Environment: The Implications for Northern Ireland, Ireland and the UK’, Environmental Governance Island of Ireland Network Policy briefs 1/2021, March 2021, www.brexitenvironment.co.uk/research-projects/egii/.

the regulatory regime, for instance through affecting accountability or introducing potential conflicts of interest in the nature conservation regime.⁷ More fundamentally, EU governance regimes could not be replicated.⁸

However, the Protocol achieves something different for Northern Ireland. Article 5(4) provides for the continued application of EU law listed in Annex 2, including subsequent EU laws that amend or replace these laws.⁹ It also provides for the continued application of the EU governance mechanisms to these laws within Northern Ireland, for example the interpretative and enforcement roles of the Commission and the Court of Justice of the European Union (CJEU). As with EU law prior to Brexit, Annex 2 provisions take priority over any potential conflicting domestic law – including any new common frameworks that are intended to apply across the UK. Only if there is no conflict may the common frameworks operate in tandem with this EU law.

Annex 2 is extensive, but focused on trade (including product quality and competitiveness); therefore, environmental laws are typically included only where they impact on trade, rather than for their own sake.¹⁰ For instance, Annex 2 includes rules on vehicular emissions, pesticides, SPS issues, waste, animal health, food standards and labelling.¹¹ In contrast, laws regarding water quality, air pollution and nature conservation are

⁷ C Brennan and M Dobbs, 'Reality Bites: The Implications of Scrutiny-Free Environmental Law Reform in Northern Ireland after Brexit' (2019) www.brexitenvironment.co.uk/2019/03/12/scrutiny-free-environmental-law-northern-ireland/; A Jordan and B Moore, 'Regression by Default? An Analysis of Review and Revision Clauses in Retained EU Environmental Law' (2020) www.brexitenvironment.co.uk/wp-content/uploads/dlm_uploads/2020/05/BrexitenvRegressionbyDefault.pdf.

⁸ A Jordan, C Burns and V Gravey, 'Three Brexit Governance Gaps No One Is Talking About' (2017) <https://greenallianceblog.org.uk/2017/12/06/three-brexit-governance-gaps-no-one-is-talking-about/>; M Lee, 'Accountability for Environmental Standards after Brexit' (2017) 19(2) *Environmental Law Review* 89; and M Lee, 'Brexit and Environmental Protection in the United Kingdom: Governance, Accountability and Law Making' (2018) 36(3) *Journal of Energy & Natural Resources Law* 351. See later in this chapter for discussion of developments since.

⁹ Art 6 WA and Art 13 of the Protocol. Under Art 13(4), the JC may also decide that new EU laws that fall within the scope of the Protocol, but do not technically amend or replace laws listed in the Annexes, can be added to the Protocol.

¹⁰ M Dobbs, 'Northern Ireland's Agricultural Quagmire: How to Develop a Sustainable Agricultural Policy?' in I Antonopoulos, M Bell, A Cavoški and L Petetin (eds), *The Governance of Agriculture in Post-Brexit UK* (Routledge 2022).

¹¹ Several of these are areas noted as suitable for legislative (UK) common frameworks. However, Northern Ireland must comply with the EU provisions, even if this means conflicting directly with UK primary legislation.

largely omitted.¹² This is despite shared environmental challenges and, in some cases, such as the Water Framework Directive, even shared implementation between Ireland and Northern Ireland.¹³ Further, Annex 2 does not create any obligation to comply with the key EU environmental objectives and principles in the Treaty on the Functioning of the European Union (TFEU). However, the Protocol does provide for further laws to be added if the Joint Committee (JC) responsible for overseeing the Protocol decides that this is necessary – this power was used in December 2020, for example, to add the Single Use Plastics Directive¹⁴ to Annex 2.¹⁵

The Trade and Cooperation Agreement (TCA) built upon the Protocol, for example with provisions on co-operation on animal welfare, antimicrobial resistance and sustainable food systems, and targets of net-zero by 2050.¹⁶ The TCA's environmental cornerstone is Title XI on the level playing field. Article 7.2 therein introduces a limited obligation of non-regression, whereby neither the EU nor the UK may lower standards overall in a manner that impacts on trade and investment; they must both generally 'strive to increase' their respective levels of protection. However, these obligations are limited in scope, do not mandate alignment (dynamic or otherwise), and are difficult to enforce.¹⁷ Article 9.4 also provides that where substantial divergence exists (including due to increases in protection) and impacts on trade, the party impacted may take 'rebalancing measures', including unilaterally imposing tariffs. This could pressure the other party to align (upwards), but the clause is very difficult to use and of limited practical value.¹⁸

¹² Counter-examples exist, eg, the inclusion of laws on alien species and the omission of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources [1991] OJ L375/1.

¹³ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy [2000] OJ L327/1; C Brennan, M Dobbs and V Gravey, 'Out of the Frying Pan, into the Fire? Environmental Governance Vulnerabilities in Post-Brexit Northern Ireland' (2019) 21(2) *Environmental Law Review* 84.

¹⁴ Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment [2019] OJ L155/1.

¹⁵ Gravey and Whitten (n 6).

¹⁶ TCA, Part 2, Titles I and X.

¹⁷ V Gravey, 'The Brexit Deal and the Environment: Pretty Ambitious yet Pretty Irrelevant?' (16 February 2021) <http://dcubrexitinstitute.eu/2021/02/the-brexit-deal-and-the-environment/>.

¹⁸ *Ibid.*

Therefore, Northern Ireland's environmental regime encompasses (a) truly domestic law; (b) retained EU law (now slightly amended, without EU governance mechanisms and with the potential for amendments domestically in the future); (c) EU law via the Protocol (with EU governance mechanisms); and (d) limited obligations (including non-regression) related to the level playing field under the TCA.¹⁹ Many regulatory measures that used to be in the third, EU law, category are now found in the second, retained EU law, category instead, with the Protocol's Annex 2 determining the dividing line between these two categories.

20.3 Divergence and Decline?

Brexit therefore introduces the possibility of increased regulatory divergence between the EU and the UK, and also within the UK. The Protocol creates a halfway house for Northern Ireland at the intersection of two unions – at times it may be aligned to the rest of the UK, at times to the EU, and at times to neither. On the one hand, Northern Ireland must comply with EU environmental rules in Annex 2 of the Protocol, so divergence between the EU and the UK will lead to divergence between Northern Ireland and GB. On the other hand, outside Annex 2, where Northern Ireland is not bound to follow EU developments, there is a much greater risk of divergence on the island of Ireland.

This potential for divergence can arise through either action or inaction regarding standards or governance – what Jordan and Moore have called 'regression by default'.²⁰ For instance, we have seen that 'retained' EU law has been adapted to function within the UK without EU membership. Amendment of 'retained' EU law has already enabled a first wave of 'simplification', with the removal of 'review and revise' clauses that ensure that EU environmental rules keep abreast with scientific development and are frequently evaluated.²¹ Further 'simplification', or deregulation, can be expected. The UK Environment Bill proposes to grant the Northern Ireland Department of Agriculture, Environment and Rural Affairs and the minister powers to amend existing Northern Ireland environmental law, including on how water quality is to be monitored and evaluated. This, together with the absence of broad

¹⁹ Gravey and Whitten (n 6).

²⁰ Jordan and Moore (n 7).

²¹ *Ibid*; Brennan and Dobbs (n 7).

commitment to dynamic alignment, means that retained EU law within Northern Ireland may simply stagnate or indeed be hollowed out, while the EU continues to develop its regimes.

As well as divergence introduced by Northern Ireland or the EU, it is possible that the UK as a whole could introduce changes. Although the environment is a devolved matter in principle, changes could be introduced by way of various mechanisms: via the common frameworks process (although very few environmental areas have been identified as requiring common frameworks);²² via changes introduced by the UK government (with or without consent from the devolved administration), as has already taken place using the power to introduce statutory instruments under EUWA 2018; or via requirements that may be imposed resulting from new free trade agreements with non-EU states. There are also potential knock-on effects resulting from the mutual recognition principle in the Internal Market Act,²³ leading to a lowest common denominator approach regarding future policy across GB. Although it does not apply directly to the Northern Ireland market, the principle applies to any goods for use or sale in GB including from Northern Ireland.²⁴ This could create a competitive disadvantage for Northern Ireland producers, thereby incentivizing for instance a lowering in standards of production methods. A further layer of complexity arises when we consider that the Scottish government took powers to keep pace with EU environmental legislation under the Scottish Continuity Act of 2021, meaning that retained EU law may also start to diverge within GB.

However, there are some limits to the divergence possible. First, Northern Ireland (and the UK in respect of Northern Ireland) must comply with the provisions listed in Annex 2 and may not lawfully diverge from these. Environmental provisions within Annex 2, however, remain quite narrow. Second, the TCA's level playing field provisions (especially the non-regression principle and rebalancing mechanisms) may act as a disincentive to major undesirable changes and encourage some minimal upwards alignment, but remain limited in practice. Third, the UK and the EU are both signatories to numerous international

²² UK Government, 'Frameworks Analysis 2020: Breakdown of Areas of EU Law that Intersect with Devolved Competence in Scotland, Wales and Northern Ireland' (2020) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919729/Frameworks-Analysis-2020.pdf.

²³ S 2.

²⁴ Under s 11, the principle also applies to Northern Irish 'qualifying goods' in GB, but not to GB goods entering Northern Ireland.

environmental laws, thereby sharing common objectives and obligations.²⁵ However, international environmental law tends to be less specific, with lower standards (if any), and with weaker enforcement mechanisms than EU or national law.

Consequently, some limits on divergence exist, but they are few and far between in practice – divergence can be expected to increase over time, and this potential for divergence risks a decline in environmental protection within Northern Ireland, knock-on impacts outside Northern Ireland due to the permeable nature of the environment, and challenges to cross-border co-operation and governance. Northern Ireland has a dire history of environmental protection, no independent environmental agency (despite renewed commitments in 2020 to such an agency²⁶), limited resources, and increasing pressures due to issues such as Brexit and Covid-19, on top of an already worrying state of the environment. It is questionable whether there is sufficient political will independently to uphold a high level of environmental protection. Without the EU driving policy and EU governance mechanisms providing back-up enforcement, a decline seems likely, in time with impacts beyond Northern Ireland – such as water pollution in transboundary river basins, the degrading of transboundary loughs through dredging, and increased air pollution from burning coal or waste.

Crucially, whether environmental protection in Northern Ireland declines or improves, divergence in itself poses significant challenges for cross-border and all-island co-operation and co-ordination – thereby impacting on the operation of the 1998 Agreement. For instance, the Environment Bill enables significant changes to be introduced to water governance in Northern Ireland. This raises the question of what happens where both jurisdictions seek to protect a river's water quality, but they are measuring different contaminants or with varying methodology or have different understandings of what counts as 'good' status? Divergence does not prevent co-operation, but it makes it more challenging – and, beyond the Annex 2 provisions, Northern Ireland and Ireland will no longer share governance mechanisms, including on dispute resolution. Returning to the example of transboundary waters, the challenges for co-operation are

²⁵ Eg, the UN Framework Convention on Climate Change (1992), the Biodiversity Convention (1992), the Aarhus Convention (1998) and the Basel Convention on Transboundary Waste (1989).

²⁶ UK and Irish Governments, *New Decade, New Approach* (January 2020) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade__a_new_approach.pdf.

exemplified by Article 13 of the EU Water Framework Directive,²⁷ which mandates EU member states to co-ordinate with each other regarding transboundary river basins, but only to 'endeavour' to co-operate with third countries.²⁸

20.4 Border Controls and Environmental Impacts?

While border controls have some negative environmental impacts, for example infrastructure required for border control posts, and delays in transport affecting animal welfare, generally speaking they help enhance environmental protection, for example by facilitating compliance with international environmental obligations.²⁹ Further, they help ensure high standards of imports, protecting against diseases and invasive species, for example via SPS controls and requirements for compliance with specific product or process standards. Border controls become critical where there is regulatory divergence.

Any form of Brexit leads to increased border controls. The Protocol and the TCA help determine what controls and checks are required, as well as where they will operate. In light of the 1998 Agreement, the Protocol is intended to ensure no hard border on the island of Ireland and therefore no border control posts, with seemingly open trade between Northern Ireland and the EU. Further, Northern Ireland's 'integral' place within the UK is simultaneously meant to be protected, subject to upholding the Protocol. Numerous hurdles, especially in the form of non-tariff barriers, will arise;³⁰ indeed, their impacts are already beginning to be seen,³¹ despite the TCA and efforts by the JC to alleviate matters. These vary depending on the route and direction of travel – to or from Northern Ireland, directly from/to GB, or via Ireland.

²⁷ Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy, [2000] OJ L327/1.

²⁸ W Howarth, 'Brexit and the United Kingdom Water Environment' (2017) 14(3–4) *Journal for European Environmental and Planning Law* 294.

²⁹ Eg, under the Convention on International Trade on Endangered Species (1973).

³⁰ M Dobbs and L Petetin, 'Agriculture: Environmental, Food and Animal Health Standards' in H Kassin, A Jordan and S Ennis (eds), *UK Regulation after Brexit* (UK in a Changing Europe 25 February 2021) <https://ukandeu.ac.uk/wp-content/uploads/2021/02/UK-regulation-after-Brexit.pdf>, 51.

³¹ Eg, S McBride, 'System for Getting Supplies to Northern Ireland May Be Five Days from Collapse Due to Irish Sea Border, Hauliers Warn Michael Gove' (NewsLetter 9 January 2021) www.newsletter.co.uk/news/politics/system-getting-supplies-northern-ireland-may-be-five-days-collapse-due-irish-sea-border-hauliers-warn-michael-gove-3090602.

Under the Protocol, the simplest trade routes are between Northern Ireland and the EU, including Ireland. Northern Ireland goods are largely treated as EU goods and vice versa, provided they are not going beyond these jurisdictions. The limited regulatory alignment under Annex 2 facilitates this. EU member states may, however, impose measures equivalent to quantitative restrictions (including further environmental criteria) on Northern Ireland goods (exporting norms) without providing justifications.³² This encompasses requirements for instance relating to production methods or packaging.

For goods travelling from Northern Ireland to GB, although regulatory divergence between GB and Northern Ireland could lead to checks on such goods, these remain quite minimal in principle,³³ for example summary export declarations (electronic where possible) and checks to ensure compliance with the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).³⁴ Complying with EU rules implementing CITES has been particularly problematic in relation to Lough Neagh eels (Lough Neagh is the largest wild eel fishery in Europe). Traditionally, juvenile (glass) eels are imported from England, and eel meat is then later shipped to retailers across the UK and the EU. While the Protocol protects the Lough Neagh eels fishery's access to the EU market, it does not allow for exporting adult eels outside of the EU and thus to GB, as it goes against EU CITES rules.³⁵

Trade from GB into Northern Ireland is more challenging,³⁶ as the Northern Ireland border is effectively an external EU border. Non-tariff barriers and in particular the SPS checks on living organisms or products from these are critical.³⁷ Requirements on goods entering Northern Ireland from GB include pre-notification (TRACES), plant or animal

³² Art 5(5) only prohibits quantitative restrictions on such imports, without also specifying measures equivalent to quantitative restrictions or Art 34 TFEU. However, prohibitions on unjustified restrictions under WTO law continue to apply.

³³ Section 47 of the Internal Market Act prohibits authorities imposing further hurdles on Northern Ireland goods unless required. See UK Government, 'The Northern Ireland Protocol' (Command Paper, CP346, December 2020) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/950601/Northern_Ireland_Protocol_-_Command_Paper.pdf, pp 7–9.

³⁴ The EU–UK Withdrawal Agreement Explained (slides), 6 July 2020, https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/eu-uk-withdrawal-agreement_en.

³⁵ <https://committees.parliament.uk/writtenevidence/23301/pdf/>.

³⁶ See Chapter 17.

³⁷ Due to ratification of the SPS Agreement (WTO law) and also Arts 5 and 7 and Annex 2 of the Protocol.

health certificates, and entry via border control posts to facilitate inspections in a suitable venue. GB goods entering Northern Ireland must comply with EU criteria, but now without the presumption that they meet the relevant standards – instead, this must be demonstrated continuously. These requirements aim to protect the EU and Northern Ireland in the future from a potential decrease in standards or governance in GB – including through contaminated or diseased living organisms potentially brought in from other countries.

These controls and checks introduce substantial administrative burdens, costs and delays – with insufficient infrastructure or staff in Northern Ireland currently to undertake the level of checks required,³⁸ especially when the Protocol will be fully implemented.³⁹ Substantial delays raise concerns regarding perishable goods (turning to waste) and animal welfare. In April 2021, clerical errors in importation documents led to ponies being delayed at a Northern Ireland port and could have led to their return to GB (with further quarantine periods) or potentially their destruction. A Northern Ireland court ordered their release, based on considerations of animal welfare and ‘common sense’ – with the required information provided in the meantime.⁴⁰ Furthermore, the increased need for border control posts at the ports has necessitated the rapid construction of such areas, which has its own impact on the environment.

Due to limited logistical capacity, limited financial incentives, or both, some GB suppliers are no longer supplying to Northern Ireland (or to the EU)⁴¹ – with knock-on effects for downstream producers, consumers and the environment. More suppliers are expected to follow when grace periods end.⁴² With supply chains disrupted, actors downstream need to consider whether to go without or find an alternative source or good. This could provide an opportunity to rethink supply chains or purchases

³⁸ D Young, ‘Permanent Facilities for Brexit Checks at Northern Ireland Ports Will Not Be Ready “until 2023”’ *Irish Examiner* (15 April 2021), www.irishexaminer.com/news/arid-40266926.html.

³⁹ Grace periods on certain goods eased the pressure initially. J Curtis, ‘Joint Committee Decisions on the Northern Ireland Protocol’ (House of Commons Library, BP-9102, 23 December 2020) <https://researchbriefings.files.parliament.uk/documents/CBP-9102/CBP-9102.pdf>.

⁴⁰ BBC News, ‘Ponies Detained at Belfast Port over Brexit Forms to Be Released’ (22 April 2021) www.bbc.com/news/uk-northern-ireland-56850004.

⁴¹ Dobbs and Petetin (n 30); and G Moriarty, ‘Northern Ireland Protocol Is “Extremely Damaging”, DUP Minister Warns’ *Irish Times* (3 November 2020) www.irishtimes.com/news/ireland/irish-news/northern-ireland-protocol-is-extremely-damaging-dup-minister-warns-1.4399090.

⁴² McBride (n 31).

and source more environmentally friendly alternatives.⁴³ However, it might also incentivize longer supply chains, for example if it becomes easier and swifter to purchase items from distant EU states than GB.

20.5 Conclusion

The environment is one of six areas of co-operation for the North–South Ministerial Council, reflecting the importance of cross-border and all-island environmental governance. However, the Protocol's and the TCA's provisions focus on the environment only to a limited extent – in particular via Annex 2, the level playing field provisions and border controls. While these are valuable provisions, they do not equate to the level of protection provided by EU membership; divergence is likely, and border controls could also pose environmental harms.

The fragmentation of environmental law, in a jurisdiction with a long history of lack of administrative capacity and political will to act on environmental challenges, is particularly concerning. This fragmentation not only increases the workload of the administration; it also risks further politicization of environmental action, increases the likelihood of a decline in environmental governance, and makes it more complex for environmental groups to hold decision-makers accountable.

While some level of border control is necessary due to Brexit, this, along with the potential for divergence and environmental degradation, can be mitigated; technical instruments in the 1998 Agreement, the TCA, the Protocol and the Internal Market Act exist to manage divergence and facilitate co-operation. The successful use of such options depends on whether the political will exists within the UK (including Northern Ireland) and the EU (including Ireland).

⁴³ Covid-19 disrupted supply chains globally and could provide useful insights, both positive and negative. L Petetin, 'The COVID-19 Crisis: An Opportunity to Integrate Food Democracy into Post-Pandemic Food Systems' (2020) 11(S2) *European Journal of Risk Regulation* 326.

Free Movement of Services

GAVIN BARRETT

21.1 Introduction

The importance of services to modern economies, including those of Ireland, Northern Ireland and the UK, can scarcely be overstated. It seems paradoxical that most attention during the negotiation of the Brexit settlement was focused squarely on trade in goods, since the economic importance of services is far greater. The Northern Ireland services sector accounts for about 75 per cent of gross added value and 80 per cent of employment. Northern Ireland exports about £6.5 billion of services: about two-thirds of these go to the UK, but approximately £1.5 billion go to the EU, with more than £1 billion of this going to Ireland. This economic dominance of services is also reflected in the broader UK context. By 2019, service industries accounted for 80 per cent of the UK's economic output, with the UK exporting £317 billion of services to the EU and importing £217 billion worth.¹ In Ireland, too, the services industry is economically key, generating turnover of more than €217 billion. Here, too, it is by far the biggest employer, employing more than 774,000 people. From an international perspective, this is unsurprising. Services represent on average about two-thirds of the economic output in developed economies and about 70 per cent of that of the EU.²

Liberalized trade in services is more difficult to achieve than in goods, largely because trade in services is far more complex. Services exist in a variety of forms and are delivered in a variety of ways. Guaranteeing market access and establishing the principle of non-discrimination are

¹ See House of Lords European Union Committee *Beyond Brexit: Trade in Services* (HL Paper 248, March 2021) at 3 ('*Beyond Brexit*'); and Department for International Trade, *UK Trade in Numbers* (February 2020).

² See G Barrett, 'Brexit and the Free Movement of Services: Challenges and Regulatory Solutions' in F Kainer and R Repasi (eds), *Trade Relations after Brexit* (Nomos/Hart 2019) 213 at 213.

thus not sufficient to liberalize trade in services. Instead, these elements are only the start of what is needed. As Jacobsson has observed, ‘in practice, the biggest market access barriers often take the form of various authorisation, licensing or certification requirements’.³ Mutual recognition of professional qualifications and securing the free movement of persons may also be key, depending on the services being traded.

Perhaps in consequence of this, the Single European Market in services (while still managing to be the most integrated international single market in services in the world) is less integrated than that in goods. Integration even on this more limited scale involves trust by the member states, mutual scrutiny and a certain level of harmonization.⁴

In the absence of UK government willingness to tolerate such prerequisites for integration post-Brexit, it was never likely that a high level of EU–UK co-operation concerning services would emerge from the Brexit negotiations. A serious deterioration in the conditions for EU–UK cross-border provision of services was thus foreseeable – and that is exactly what has occurred, although, as shall be seen, there are mitigating factors cushioning the impact on cross-border economic relations on the island of Ireland.

There were, however, reasons for the failure to reach a better deal on services other than UK unwillingness to countenance the kinds of trade-offs in terms of, for example, regulatory alignment and free movement of persons that were needed to create agreement on a significant deal. The attitude of the EU also had a role to play: after all, negotiations on the economic conditions of an exit from the EU are, in reality, similar to those on entry to the EU – they represent less a negotiation than an imposition of the terms that the EU deems fit. EU views about the need for linkage between market freedoms and associated wariness about the dangers of British cherry-picking and, for that matter, aversion to being seen to be rewarding Brexit likely also played a role. In addition, some reticence on the EU side (for example, in the field of financial services) can fairly be attributed to commercial rivalry. Finally, the considerable time-pressure imposed by Prime Minister Boris Johnson’s government to ‘get Brexit done’ may have complicated the cause of a more comprehensive services deal.

³ J Jacobsson, *Brexit and the Professional Services Sector – What Future for UK Professionals in Europe?* (DCU Brexit Institute Working Paper 01–2020).

⁴ *Ibid.*, 10.

21.2 The Brexit Deal

Whatever the reason, in the Brexit settlement, the free movement of services is notable as a dog that didn't bark.⁵ The Withdrawal Agreement (WA) contains relatively little on services, although it did provide for the continued application of the *acquis* – including the rules on services – during the transition period.⁶ The Protocol, for its part, is hugely focused on free movement of goods (an issue that has continued to dominate political controversy in the wake of its entry into force).⁷ In contrast to its position concerning goods, Northern Ireland's place otherwise remains unequivocally aligned within the UK Single Market. Protocol Article 3 does, however, oblige the UK to ensure that the Common Travel Area (CTA) can continue to apply. This is significant regarding services in that the existence of the CTA counteracts one of the most severe restrictions on the free movement of services between the UK and Ireland as a whole, namely the restrictions on the free movement of persons.

The Trade and Cooperation Agreement (TCA) deals more extensively with services and investment,⁸ although what is left out of the TCA is as interesting as what it includes. Financial services and audio-visual services, both of major importance to the UK, are omitted, although a brief Joint Declaration⁹ does envisage a Memorandum of Understanding to establish a framework for structured regulatory co-operation on financial services. Such a memorandum was duly concluded in late March 2021.¹⁰

Even for the services covered by it, however, the TCA's offerings have proved thin fare, offering to trans-frontier service trade providers and investors merely the usual free trade agreement (FTA) market access plus national treatment commitments. This is far removed from a single

⁵ Arthur Conan Doyle, *The Memoirs of Sherlock Holmes* (Collins Classics 2016) 10.

⁶ See Art 127(1).

⁷ Six articles (Arts 4–8 and 10) focused heavily on goods. Only Arts 9 (focusing on the Single Electricity Market) and 11 (which mentioned co-operation in fields including health, transport, education and tourism) had much to do with services.

⁸ Part 2, Heading One, Title II TCA. See I Borchert and M Morita-Jaeger, *Taking Stock of the UK-EU Trade and Cooperation Agreement: Trade in Services and Digital Trade* (UK Trade Policy Observatory Briefing Paper 53, January 2021).

⁹ Joint Declaration on Financial Services Regulatory Cooperation between the European Union and the United Kingdom.

¹⁰ J Brunsden and P Foster, 'UK and EU Reach Financial Regulation Deal in Breakthrough on Cooperation' *Financial Times* (26 March 2021). A Joint UK–EU Financial Regulatory Forum was established to operate as a platform facilitating dialogue regarding financial services issues.

market in services.¹¹ Major service sectors such as professional and business services,¹² financial services, aviation and road haulage now face substantial new barriers (even if there was some effort to show ambition in the fields of telecommunications, digital trade and international maritime trade).¹³

Moreover, and crucially, the TCA's offerings are subject to an impressive (and expandable¹⁴) list of European and national reservations. This factor distinguishes trade in goods from trade in services, since it means that for Northern Ireland service providers (and other UK providers) exporting into the EU, the target market has now fragmented and they have suddenly found themselves selling into a patchwork of national markets. Fundamentally differently from the case in goods (where Northern Irish goods may move freely to the EU market and goods supplied to the EU market from Great Britain meet customs and health or veterinary requirements which are valid throughout the EU), the member state in which Northern Irish services are being sold now takes on crucial significance. For small businesses, inherently less able to absorb costs as they are,¹⁵ the very fact of fragmentation constitutes a barrier, and the complexity is even greater than first meets the eye since the reservation by each member state merely creates a *right*: in practice, reliance may or may not be made of this right.¹⁶

The TCA has been described as 'a comprehensive Canada-style free trade deal'.¹⁷ In some respects, the TCA actually improves on the EU–Canada Comprehensive Economic and Trade Agreement (CETA),¹⁸ but in many respects it does indeed resemble earlier FTAs agreed by the European Union. This is not necessarily indicative of much significance, however. Hence, for example, even if CETA contains the EU's most ambitious provisions on mutual recognition of professional qualifications,

¹¹ See further Borchert and Morita-Jaeger (n 8) 2.

¹² At least where these are heavily regulated.

¹³ Borchert and Morita-Jaeger (n 8) 2.

¹⁴ TCA Annex 19 sets out reservations currently in force. TCA Annex 20 allows both the EU and the UK to adopt new reservations in stipulated fields in the future.

¹⁵ Note evidence given by the Federation of Small Businesses to the House of Lords in this regard: see *Beyond Brexit* (n 1) 25.

¹⁶ *Ibid.*, 24.

¹⁷ Prime Minister Boris Johnson's statement on EU negotiations of 24 December 2020 quoted in S Fella et al, *The UK–EU Trade and Cooperation Agreement: Summary and Implementation* (Briefing Paper 09106, 30 December 2020), 16.

¹⁸ Thus, eg, TCA provisions on legal services go beyond earlier FTAs. See generally Part 2, Heading One, Title II, s 7 of the TCA.

it is a barely used framework, and one which stands out only because of a barren landscape at international level. Outside the ‘complex system of mutual trust and mutual spying’ that has allowed professional mutual recognition agreements to flourish within the EU,¹⁹ such agreements are almost unknown and negotiated only painfully slowly.

As regards limits on mobility of persons, the TCA establishes a mutual regime involving various categories of business visitor with varying rights to enter and reside – from (a) short-term business visitors to (b) business visitors for establishment purposes to (c) intra-corporate transferees to contractual service providers to (d) independent service providers.²⁰ Stays of varying maximum duration are permissible, depending on which category one falls into. Short-term business visitors, for example, may enter for no more than 90 days in any 180-day period. Apart from length-of-stay limits, there may also be work permit or visa requirements and even economic needs tests, depending on what national reservations have been made.²¹ The overall impact of these new restrictions can be expected to be severe: after all, business travel saw 5.6 million EU nationals visit the UK in 2019 and 4.8 million UK nationals visit the EU.²²

Securing recognition of professional qualifications has accurately been characterized as being as crucial as market access,²³ but EU-wide mutual recognition has now ended with the TCA. UK nationals are third-country nationals in the EU and now have to seek recognition for their professional qualifications through reliance on national EU member state rules.²⁴ In addition, there are limits that stem from the loss of mutual recognition of home state standards (seen in particular in the ending of passporting in the financial services sector (discussed in Section 24.4.2)). While there are ways around some of these limitations, such as, for example, establishing a business or branch within the EU which might profit from free movement rights, such remedies tend to be less open to

¹⁹ K Nicolaidis, ‘Mutual Recognition: Promise and Denial, from Sapiens to Brexit’ (2017) 70 *Current Legal Problems* 1 as quoted by Jacobsson (n 3) 12.

²⁰ See TCA Annex 21. Discussed in *Beyond Brexit* (n 1) 28 et seq.

²¹ See generally Borchert and Morita-Jaeger (n 8).

²² *Ibid.*, 27.

²³ *Ibid.*

²⁴ See European Commission, *Notice to Stakeholders; Withdrawal of the United Kingdom and EU Rules in the Field of Regulated Professions and the Recognition of Professional Qualifications* (Brussels, 21 June 2018). See also I Jozepa, *UK–EU Trade and Cooperation Agreement; Professional Qualifications* (House of Commons Briefing Paper 9172, 25 March 2021) (‘Jozepa’) at 1; and Anon, *UK–EU Trade and Cooperation Agreement: Implications for Universities* (Universities UK analysis, 22 April 2021).

small businesses. This is no small matter on the island of Ireland, given the dominance of small and medium-sized enterprises (SMEs) in both jurisdictions and given the fact that the EU tends to be the biggest trading bloc for them.²⁵

21.3 Moderating the Effect of the Brexit Services Deal in Ireland

At least four factors should, however, combine to moderate the impact of Brexit on service provision on the island of Ireland: (i) the fact that Ireland has made comparatively little use of reservations to the general provisions of the TCA; (ii) the fact that limitations on residence which would otherwise hamper the provision of services in Ireland from Northern Ireland will be removed because of the operation of the CTA; (iii) the fact that the similarity of professional regulations in Northern Ireland and Ireland eases the cross-border provision of services in both directions; and (iv) the fact that the Irish government is determined to limit the impact of Brexit, to the extent that it is able.

21.3.1 Reservations

Such national reservations as exist in Ireland appear primarily designed merely to facilitate existing provisions in Irish domestic law rather than to add to them.²⁶ However, Ireland does benefit from quite a few general reservations which modify the open-seeming nature of the EU's commitments regarding services,²⁷ and both these EU-wide reservations and the complex matrix of other national reservations²⁸ will clearly detract from Northern Irish access to the services market, something that will impinge in particular on small businesses which lack the resources to invest in clarifying the rules that apply to a given EU member state market. But the

²⁵ See Central Statistics Office, *Statistical Yearbook of Ireland*; Northern Ireland Statistics and Research Agency, *Northern Ireland Business; Activity, Size and Location: 2019*.

²⁶ Hence, eg, the Irish reservation regarding intellectual property rights, reflecting the provisions of the Trade Marks Act 1996 (see OJ L444/14 (31.12.2020) at 579–80) and the Irish reservation concerning road transport, which reflects the provisions of the Public Transport Regulation Act 2009 (*ibid*, 642–43).

²⁷ See, eg, the EU reservation allowing less favourable treatment of legal persons that have only a registered office in the EU without, however, having any effective and continuous link there (see OJ L444/14 (31.12.2020) at 560).

²⁸ See, eg, the extensive list of national reservations regarding legal services (see OJ L444/14 (31.12.2020) at 569); and regarding placement services (*ibid*, 691).

Irish market will be one in which a general EU regime is likely to apply to the maximum extent.

21.3.2 *Common Travel Area*

Restrictions on the free movement of persons flowing from Brexit can be expected to have a damaging effect on the creative industries in particular, making the organization of Europe-wide tours for Northern Irish performers nightmarishly complex, especially for performers at the beginning of their careers who may not have the resources to address twenty-seven different sets of rules. The CTA renders possible indefinite residence by Irish nationals in the UK and vice versa, and while the existence of the CTA thus does not eliminate Brexit-related difficulties for Northern Irish performers, it means at least that they will not be encountered in service provision to customers in Ireland.²⁹ The role of the CTA in counteracting difficulties at least in these islands actually goes beyond this, particularly as regards the recognition of professional qualifications.³⁰ Thus, in the context of the British Isles and Ireland, common travel arrangements are being relied on as a basis for filling lacunae created by the failure to agree more substantive free movement of services arrangements in the TCA – and lacunae relating to not just residence arrangements but qualifications, too.

21.3.3 *Similarity of Professional Regulations and Legal Structures*

In the absence of an EU-wide system of recognition of professional qualifications, the UK may find itself relying across Europe on arrangements between national regulators. UK authorities should find it easier to reach agreement with Ireland on recognizing each other's professional qualifications than with other EU jurisdictions. Discussions to this end commenced between Ireland and the UK early in 2021. Pending the more comprehensive arrangements that may result, agreements have been reached concerning architects and lawyers.³¹ The similarity of national

²⁹ On the CTA, see G Barrett and G Butler, 'Europe's "Other" Open-Border Zone: The Common Travel Area under the Shadow of Brexit' (2018) 20 *Cambridge Yearbook of European Legal Studies* 252; and I Maher, 'Crossing the Irish Law Border after Brexit: The Common Travel Area and the Challenge of Trade' (2018) *Irish Yearbook of International Law* 51.

³⁰ See Department for Business, Energy and Industrial Strategy, *Recognition of Professional Qualifications: Guidance for Regulatory Bodies* (published on the [gov.uk](https://www.gov.uk) website, 23 December 2020).

³¹ The UK Architects Registration Board has concluded a bilateral agreement with the Royal Institute of Architects of Ireland ensuring continued mutual recognition of qualifications.

legal structures – whether for enterprises or in terms of professional structures – should facilitate and accelerate mutual recognition and the establishment of enterprises or branches in both directions so as to avoid Brexit-related difficulties. And the CTA both encourages mutual cooperation to address barriers and forms a nascent institutional framework within which such cooperation may occur.

21.3.4 Irish Government Action on Services

A further factor moderating the impact of Brexit in the services field is the clear willingness on the part of the authorities in the Republic to limit the impact of Brexit. The most obvious example is in the field of educational services, where the Irish government has undertaken to finance the continued access of Northern Irish students to the Erasmus+ programme. A similar proposal to provide Northern Ireland residents with continued access to the European Health Insurance Card was not, however, accepted by the UK.³²

21.4 The Impact of Brexit on Particular Service Sectors

21.4.1 Professional Services and Brexit

One of the areas in which Brexit can be expected to have the biggest impact on cross-border service provision in Ireland is professional and business services, which are the UK's single biggest export, and of which the UK is the second largest exporter in the world.³³ The provision of these services has been subjected to a double-blow: restrictions on free movement of persons have now been introduced; and recognition of professional qualifications as between EU states and the UK has been withdrawn, recognition which was particularly important for regulated industries such as medicine, law, accountancy and architecture.³⁴

We have seen that the CTA can alleviate the first of these blows, insofar as the relationship between Northern Ireland and Ireland is concerned, by allowing the movement of professionals between the jurisdictions more easily than would otherwise be the case. Moreover, the possibility of

Beyond Brexit (n 1) 33. The Law Society of Ireland and the UK Solicitors Regulation Authority have acted similarly rapidly. O Kelly, 'Irish Solicitors Will Be Able to Work in England, Wales' *Irish Times* (1 April 2021).

³² See further in relation to both initiatives Dagmar Schiek, *Brexit and the Implementation of the Withdrawal Agreement* (DCU Brexit Institute Working Paper 9 – 2021), at 11 and 13.

³³ See *Beyond Brexit* (n 1) 21. See also Jozepa (n 24).

³⁴ Unregulated industries are less severely impacted by the new regime.

Northern Irish firms establishing an undertaking or branch in the Republic and thereby avoiding restrictions should be rendered comparatively easier in any case by similarly conceived regulations, legal structures and educational and professional qualifications between the jurisdictions. We saw, too, that the second new difficulty – recognition of qualifications – is harder to deal with, but, again, the regulatory similarity between the jurisdictions should render the mutual recognition of national qualifications by the respective regulators an easier process than would otherwise be the case. The same similarity should also render it easier for regulators to agree that Northern Irish members of regulated professions can requalify with an EU (Irish) qualification without having to undergo the entire period of training again.

Such initiatives may alleviate the negative impact of the Brexit deal on Northern Irish service providers only as regards providing services to Ireland, however, not to other EU states. There is, it should be noted, a more general mechanism which foresees pan-European mutual recognition of qualifications, but the record of such clauses in other FTAs in securing change is not good. Moreover, in the event of violations of the TCA, the new state-to-state enforcement method is more cumbersome than the pre-Brexit possibility of relying on national courts and tribunals for relief. Overall, it can be expected that small firms – which might, for example, find it harder to find the resources to establish a branch office in the EU – will be hit harder in the post-Brexit scenario than larger ones.

21.4.2 *Financial Services and Brexit*

Financial services are an important service industry, in Ireland,³⁵ in Northern Ireland³⁶ and particularly in the UK.³⁷ Notwithstanding the importance of that industry, remarkably, the TCA represents a ‘no deal’ Brexit:³⁸ the Agreement lacks any substantive provisions regarding financial services, although it was accompanied by a Joint Declaration (and later Memorandum of Understanding) which eventually generated a structure for dialogue. There is no guarantee, however, that the

³⁵ See further www.idaireland.com/doing-business-here/industry-sectors/financial-services.

³⁶ Department for the Economy, *Mapping NI's Financial Services Sector*, www.economy-ni.gov.uk/articles/mapping-nis-financial-services-sector.

³⁷ House of Commons Library, *Financial Services: Contribution to the UK Economy* (Library Note 6193, 1 February 2021).

³⁸ See N Moloney, *Financial Services under the Trade and Cooperation Agreement: Reflections on Unfinished Business for the EU and UK* (DCU Brexit Institute Working Paper 3–2021) at 2.

dialogue thereby generated will be of much significance, and expectations appear low. Key decisions, such as on equivalence, have not been forthcoming on the EU side. Financial services thus remain in a period of uncertainty.³⁹

Post-Brexit, at least, two major issues have featured in the narrative. The first is the loss of passporting (the mutual recognition of home state financial regulations) to the UK in selling financial services into the EU market and its potential replacement with the unilateral, Commission-accorded, discretionary system of equivalence (requiring, more or less, alignment with EU rules). The EU uses this legislation-based system to manage access by third countries to its financial market.⁴⁰ Any equivalence decisions in favour of the UK are likely to be accorded slowly, and will be granted only if and when it suits the EU's interests to grant them. A second, related issue has been the desire of the EU to see central counterparties move to the territory of the EU.⁴¹ At present, much euro-denominated clearing takes place in the UK, but this situation seems scarcely tenable in the near term, perhaps, as has been suggested, as much for market location reasons as for market efficiency ones.⁴²

The future trajectory of financial services provision in the UK thus remains uncertain, with the key question being whether the City of London will align itself to European standards or diverge.⁴³ The ultimate picture seems likely to emerge only gradually. There will clearly be no immediate bonfire of financial service regulations by the UK.⁴⁴ A gradual drift from full alignment may nonetheless set in, perhaps encouraged by the UK tiring of the wait for equivalence to be granted.⁴⁵ Mechanisms exist for avoiding post-Brexit restrictions on UK service providers. These include the establishment of an undertaking or branch in an EU jurisdiction, the replacement of UK service providers with Irish ones, and the redomiciling of investment products.

What effect has the changed situation had on the island of Ireland? Reflecting the uncertainty regarding the market trajectory, the existence of the possibility of establishing bases in the EU, and yet the

³⁹ *Beyond Brexit* (n 1) 12.

⁴⁰ Moloney (n 38) 3.

⁴¹ Central counterparties provide clearing services for trades in various financial products. In doing so, they take on the credit risk as between the parties to a transaction.

⁴² Moloney (n 38) 15.

⁴³ *Ibid.*, 3.

⁴⁴ Note the UK government assurance referred to in *Beyond Brexit* (n 1) 63.

⁴⁵ See P Stafford, 'UK and EU Begin Diverging on Financial Regulation after Brexit' *Financial Times* (26 March 2021).

countervailing need not to abandon the UK, a significant, if comparatively modest, level of businesses shifting to Dublin has been reported (although seemingly more from London than from Belfast to date),⁴⁶ accompanied by even more modest and little remarked-upon traffic in the other direction.⁴⁷ Some movement of business is also taking place in the direction of other financial centres such as the USA, which has secured an easier equivalence relationship with the EU.

21.4.3 *Creative Industries and Brexit*

The creative service industries, which include music and television, have been left in some cases in very considerable difficulties by Brexit, and for more than one reason. Probably the most prominent reason is the restrictions which the TCA has introduced concerning the free movement of persons, which place extraordinarily harsh restrictions on groups, particularly those seeking to build up a public profile at an early career stage by touring. The effect, except for the most well-resourced groups, has been to render touring in the EU well-nigh impossible for UK groups.⁴⁸ There is a danger of thereby stifling artistic creativity.⁴⁹ As we have seen, because of the CTA, such restrictions do not apply to UK (including Northern Irish) groups seeking to tour in Ireland. However, the Irish market is small and thus the Brexit deal's having a deleterious effect on Northern Irish musical groups seems probable. Furthermore, the impact of potential divergences between the EU and the UK on copyright protection remains unclear.

21.4.4 *Research and Education*

In the research field, the UK has opted into Horizon Europe, which is likely to have positive effects for research in Ireland as well, given the close academic links between the two jurisdictions. As has already been noted, the Irish government has agreed to finance participation on the

⁴⁶ See N Bramhill, 'Dublin Benefitting More Than Any Other EU City Due to Brexit' *Irish Central* (22 April 2021); C Gleeson, 'Dublin Most Popular City for Brexit Relocations by Financial Firms' *Irish Times* (2 March 2021); W Wright, 'Brexit Has Cost the City £1tn in Assets and 7400 Jobs So Far, Report Finds' *Evening Standard* (16 April 2021).

⁴⁷ See 'City of London Hit Worse Than Expected, Says Study' *Euractiv* (13 May 2021). See also *Beyond Brexit* (n 1) 11.

⁴⁸ The UK rejected an EU proposal of a visa waiver agreement to facilitate touring in the negotiations.

⁴⁹ A point acknowledged in *Beyond Brexit* (n 1) 8.

part of students in Northern Irish universities in the Erasmus+ scheme of student exchanges.

21.5 Conclusions

Overall, the TCA services deal was welcomed by UK business, although perhaps mostly because the alternative was no deal at all.⁵⁰ Post-Brexit, ‘the all-Ireland services market has shaky legal foundations’.⁵¹ Unlike the situation in goods, there is now a border on the island of Ireland, albeit an invisible one (that is, one which, unlike in the goods field, does not require border controls). It is, mercifully, a somewhat ‘soft’ border for several other reasons as well. First, the Single Market in services itself is less solid than that existing in goods. Second, this border can sometimes be avoided by establishing undertakings or branches on the other side of the border, or obtaining the relevant professional qualification needed there. Third, several factors should combine to moderate some of the damage done to the unified services market by Brexit. To some extent, Ireland may function as a stepping-stone for the access of Northern Irish (and UK) service providers to the Single Market by permitting establishment and mutual recognition of professional qualifications in an EU member state with the same legal and organizational culture and using the same language.

Not all damage can be undone in this way, however, and not every element of the all-island market in services formerly secured through UK–EU membership can be reconstituted by such means. Small enterprises in particular are badly placed to resist suffering economic hardship. Many implications of Brexit do not directly bear on the relationship between Northern Ireland and the Republic, but they have the capacity to impact that relationship indirectly by undermining prosperity in particular in Northern Ireland and in border areas. Moreover, any serious damage to the UK economy through the replacement of what was formerly a single market with a complex fragmented patchwork of individual national markets can be expected to have some ripple effects in the Irish economy.

Politically, the issue of services is less explosive than that of goods on the island of Ireland, since services do not threaten to function like a lever prising Northern Ireland away from economic and potentially political unity with the UK. Economically, however, services are of far greater significance, meaning that Brexit is of greater potential economic

⁵⁰ George Riddell of Ernst and Young quoted in *Beyond Brexit* (n 1) 3.

⁵¹ A phrase coined in a thread tweeted by D Henig @DavidHenigUK, 26 February 2020.

significance for Northern Ireland in the long term through threatening its access to an important unified European market for services, than for any direct negative consequences related to goods. The focus of political debate has remained squarely on the free market for goods, but if prospects for economic prosperity are hurt by Brexit, one suspects that this will be in no small measure due to damage Brexit inflicts on the most important economic sector both north and south of the border: the services industry.

Public Procurement

CATHERINE DONNELLY SC

22.1 Introduction

Public procurement is a large sector of economic activity, estimated to account annually for spending of approximately £290 billion in the UK,¹ and some €2 trillion in the EU.² Freeing this expenditure from the constraints of the public procurement regime featured in the objectives of those advocating Brexit, with Dominic Cummings, director of Vote Leave, an organization which campaigned for Britain's exit from the European Union, characterizing government procurement as 'the horror, the horror' and criticizing the EU framework as 'complex, slow and wasteful' and favouring 'large established companies with powerful political connections – true corporate looters'.³ This chapter considers the post-Brexit procurement law landscape.

While the UK procurement regime has undoubtedly changed, post-Brexit procurement remains both relatively detailed and relatively prescriptive, once the Trade and Cooperation Agreement (TCA), the position arising from the Protocol, and current UK government proposals for the future of public procurement are considered together. That said, the potential for greater flexibility in the future remains. Greater latitude clearly arises in respect of sub-threshold contracts, although increased flexibility may result in small and medium-sized enterprises (SMEs) losing important market-access opportunities. Incorporation of secondary policies – social, labour and environmental objectives – into the procurement process has previously been closely regulated by the EU due to concerns of facilitating disguised 'economic nationalism',⁴ and thus an opportunity for expanding their use

¹ UK Cabinet Office, Green Paper, *Transforming Public Procurement*, December 2020, 5.

² European Commission, Internal Market, Industry, Entrepreneurship and SMEs, https://ec.europa.eu/growth/single-market/public-procurement_en.

³ Dominic Cummings, Blog Posts, <https://dominiccummings.com/tag/procurement/>.

⁴ P Kunzlik, 'The Procurement of "Green" Energy' in S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Law* (Cambridge University Press 2009) 5.

arises post-Brexit. Early indications are that there is an interest in pursuing this opportunity.

22.2 General Framework

Post-Brexit UK public procurement is governed by three separate international agreements:

- (1) the WA, of which the Protocol is a part;
- (2) the TCA, in particular, Part 2, Heading One, Title VI and its associated Annex (which incorporates and supplements the framework of the World Trade Organization's General Procurement Agreement (GPA); and
- (3) the GPA itself, which, from 1 January 2021, the UK has been a member of in its own right.⁵

Transitional provisions facilitating legal certainty are found in the (WA),⁶ which provides that there is no change to the rules applicable to any process launched before the end of the transition period (namely, before 11.00 pm on 31 December 2020).⁷ For processes launched after this, the TCA applies, and the framework is primarily based on the provisions of the GPA,⁸ of which the EU is also a member.

The purpose of Title VI TCA is 'to guarantee each Party's suppliers access to increased opportunities to participate in public procurement procedures and to enhance the transparency of public procurement procedures'.⁹ However, there is a critical distinction in Title VI between 'covered procurement'¹⁰ and treatment 'beyond covered procurement', with the former being subject to greater regulation in the form of incorporated GPA provisions plus supplemental TCA rules.

The GPA provisions impose extensive obligations as to how procurements are to be carried out, and, while not as detailed and prescriptive as the EU regime, nonetheless introduce significant constraints of principle on UK procuring entities post-Brexit. These constraints are then

⁵ World Trade Organization, *Parties, Observers and Accessions*, www.wto.org/english/tratop_e/gproc_e/memobs_e.htm.

⁶ WA Part Three, Title VIII.

⁷ WA Arts 75 and 76. See also Art 78 on UK access to e-certis for a period not exceeding nine months after the end of the transition period.

⁸ See TCA Art 277(1) and ss B1 and B2 of TCA Annex 25.

⁹ Art 276 TCA.

¹⁰ Art 277(2) TCA.

supplemented by the TCA adding additional procuring entities to those listed in GPA Annex 1 (central government entities), GPA Annex 2 (sub-central government entities) and GPA Annex 3 (other entities); additional services to those listed in GPA Annex 5; and additional rules for covered procurement. The additional procuring entities and services are listed at section B of TCA Annex 25, while the additional rules are specified in TCA Title VI itself.

22.3 Covered Procurement

22.3.1 *Additional Procuring Entities*

The additional procuring entities to which the TCA/GPA regime applies are contracting authorities or public undertakings that operate in the gas and heat distribution sectors and that are covered by the Utilities Contracts Regulations 2016 (UCR), as well as privately owned utilities that act as a monopoly in the gas and heat distribution sectors. However, such entities are covered only insofar as the procurement is equal to or above the following thresholds: 400,000 Special Drawing Rights (SDR) for procurement of goods and services (approximately £410,000), and 5,000,000 SDR (approximately £5,148,000) for procurement of construction services.¹¹

22.3.2 *Additional Services*

There is a range of additional services covered by the TCA,¹² including (by way of example only) hotel and restaurant services,¹³ food serving services,¹⁴ telecommunication-related services¹⁵ and education services,¹⁶ although coverage is subject to specific thresholds in respect of certain of these services.¹⁷ However, several services are specifically excluded from the TCA, namely human health services,¹⁸ administrative health-care services,¹⁹ and supply services of nursing and medical personnel.²⁰

¹¹ See s B2 (1) of TCA Annex 25.

¹² See s B2 (3) of TCA Annex 25.

¹³ Central Product Classification (CPC) 641.

¹⁴ CPC 642.

¹⁵ CPC 754.

¹⁶ CPC 92.

¹⁷ See s B2 (2), Note 1 of TCA Annex 25.

¹⁸ CPC 931.

¹⁹ CPC 91122.

²⁰ CPC 87206 and CPC 87209, respectively.

22.3.3 *Additional Rules*

Article 277(1) TCA provides for the incorporation of certain provisions of the GPA.²¹ These address a range of issues²² including definitions (Article I GPA), scope of coverage (Article II GPA) and security and general exceptions (Article III GPA).

In the context of covered procurement, a general principle of equal treatment, that is, treatment no less favourable than that applicable to domestic goods, services and suppliers, is required in respect of goods, services and suppliers of the other party.²³ Meanwhile, the important Article IV.2 GPA provides that a party

shall not: a) treat a locally established supplier less favourably than another locally established supplier on the basis of the degree of foreign affiliation or ownership; or b) discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of any other Party.

Also relevant in this regard is Article XV(1) GPA, which deals with treatment of tenders and awarding contracts, and requires procuring entities to ‘receive, open and treat all tenders under procedures that guarantee the fairness and impartiality of the procurement process, and the confidentiality of tenders’.

Several aspects of the procurement process are regulated by the GPA, including transparency, open tendering, selective tendering, prevention of conflicts of interest and corruption (Article IV.4 GPA); rules of origin (Article IV.5 GPA); offsets (Article IV.6 GPA); and customs duties (Article IV.7 GPA).

Meanwhile, Article VIII sets out detailed provision on conditions for participation, including that procuring entities must evaluate the financial capacity and the ‘commercial and technical abilities of a supplier on the basis of that supplier’s business activities both inside and outside the territory of the Party of the procuring entity’²⁴ and providing for grounds for exclusion.²⁵ Article IX addresses qualification of suppliers and imposes an obligation on each party to ensure that its procuring entities

²¹ Section A of Annex 25, namely Arts I–III, IV.1.a, IV.2–IV.7, VI–XV, XVI.1–XVI.3, XVII and XVIII GPA.

²² World Trade Organization, *Revised Agreement on Government Procurement*, as amended on 30 March 2012.

²³ Art IV.1.a GPA.

²⁴ Art VIII.3 GPA.

²⁵ Art VIII.4 GPA.

make efforts to minimize differences in their qualification procedures. Technical specifications and tender documents, time periods, negotiations, limited tendering, and electronic auctions are also addressed in detail.²⁶ In particular, technical specifications must be set out ‘in terms of performance and functional requirements, rather than design or descriptive characteristics’.²⁷

Supplemental provisions include Article 280 TCA, which provides that procuring entities shall not require suppliers to submit all or part of the supporting evidence to demonstrate satisfaction of competition requirements. Article 281 TCA provides for conditions for participation, but specifically provides that requirements for prior experience cannot ‘require that the supplier has such experience in the territory of that Party’. Article 282 TCA addresses registration systems and qualification procedures. Article 283 TCA provides for selective tendering and requires, where such tendering is used, that procuring entities must address ‘invitations to submit a tender to a number of suppliers that is sufficient to ensure genuine competition without affecting the operational efficiency of the procurement system’.

Abnormally low prices are addressed in Article 284 TCA, and, notably, verification of pricing by reference to subsidies is expressly and specifically facilitated, which appears to reflect separate concerns related to control of state aid in the UK post-Brexit. Meanwhile, Article 285 TCA requires each party to ensure that the procuring entities *may* take account of environmental, labour and social considerations in procurement processes. Thus, it is compulsory for each party to ensure that a possibility of incorporation of secondary policies arises, albeit that Article 285 TCA contains no detail on how this is to be achieved.

Notices and information are also regulated and Article XVII GPA sets out provisions on communication of procurement decisions. These provisions are extensively supplemented by the TCA, including by Article 278 TCA, which makes provision for use of electronic means in procurement, requiring it to be used ‘to the widest extent practicable’, and requiring that such means be ‘non-discriminatory, [and] generally available and interoperable with the information and communication technology products in general use and [that they] shall not restrict access to the procurement procedure’. ‘Electronic publication’ is addressed in Article 279 TCA, and all notices are required to be ‘directly

²⁶ Arts XI–XIV GPA.

²⁷ Art X.2 GPA.

accessible by electronic means, free of charge, through a single point of access on the internet’.

Requirements are imposed in respect of domestic review procedures, and Article XVIII GPA requires access to timely, effective, transparent and non-discriminatory administrative or judicial review procedures. This is supplemented by Article 286 TCA, pursuant to which – and reflecting a recent concern of Court of Justice of the European Union (CJEU) case law²⁸ – where an administrative authority ‘is designated by a Party under paragraph 4 of Article XVIII of the GPA’ to undertake review, the relevant party ‘shall ensure’ that the members of the designated authority are independent, impartial and free from external influence during the term of appointment; that they are not dismissed during office unless required by provisions covering the governing body; and that the president or at least one other member of the designated authority has legal and professional qualifications equivalent to those necessary for judges, lawyers or other legal experts.

In terms of remedies, it is mandatory for each party to provide for ‘rapid interim measures to preserve the supplier’s opportunity to participate in the procurement’.²⁹ Such interim measures ‘may’ result in suspension of the procurement process or performance of the contract, and notably there is the possibility of having regard to overriding adverse consequences for the interests involved, including the public interest. Where a challenge has been submitted, it is mandatory ‘in principle’ for each party to provide for an automatic suspension, albeit that, ‘in unavoidable and duly justified circumstances, the contract can be nevertheless concluded’.³⁰ Each party ‘may’ provide a standstill period or a sufficient period to submit a challenge, which may constitute grounds for suspension of contract execution;³¹ and corrective actions ‘may include’: removal of discriminatory specifications; repetition of the procurement without changing the conditions; setting aside of a contract award decision and adoption of a new contract award decision; contract termination or declaration of ineffectiveness; adoption of other measures to remedy breach, such as an order to pay a particular sum until the

²⁸ See, eg, Case C-216/18 *LM* EU:C:2018:586; Case C-619/1 *Commission v Poland* EU:C:2019:531; Case C-64/16 *Associação Sindical dos Juízes Portugueses* EU:C:2018:117; Case C-506/04 *Wilson* EU:C:2006:587, §51; see also Case C-619/18 *Commission v Poland* EU:C:2018:1021.

²⁹ Art 286(2) TCA.

³⁰ Art 282(3) TCA.

³¹ Art 282(4) TCA.

breach has been effectively remedied; and compensation.³² While much of Article 286 TCA on remedies is discretionary, the following aspects are mandatory: independence of the reviewer; availability of rapid interim measures; and automatic suspension.

22.4 Beyond Covered Procurement

Procurement ‘beyond covered procurement’ includes the sub-threshold market, so it is critical for Irish, Northern Irish and GB SMEs. While the individual contract values may be relatively low in this sector, cumulatively the value of this business represents possibly as much as 20 per cent of the UK government’s annual spend of £290 billion on public procurement. The relevant provisions regulating ‘beyond covered procurement’ are found in the TCA and the Protocol.

22.4.1 *The TCA*

Article 287(1) TCA provides that each party must afford ‘treatment no less favourable than the most favourable treatment accorded, in like situations, to suppliers of the’ other party. There are different definitions of a ‘supplier of’ each party provided by Article 287(2) TCA. For the Union, it is ‘a legal person constituted or organised under the law of the Union or at least one of its Member States and engaged in substantive business operations’. As understood by the Union, this is equivalent to the concept of ‘effective and continuous link’ with the economy of a member state enshrined in Article 54 of the Treaty on the Functioning of the European Union (TFEU). For the UK, a legal person is an entity ‘constituted or organised under the law of the United Kingdom and engaged in substantive business operations in the territory of the United Kingdom’.

Article 288 TCA provides for national treatment of locally established suppliers, and, subject to security and general exceptions set out in GPA Article III, a measure for a party shall not result for suppliers of the other party ‘established in its territory’ in ‘treatment less favourable’ than that accorded to domestic suppliers. Simply put, this Article provides that contracting authorities in the UK must treat EU-owned suppliers established in the UK, in like situations, no less favourably than UK-owned suppliers based in the UK and vice versa. Otherwise, no principles of

³² Art 282(5) TCA.

transparency or equal treatment appear to apply for this sector. Given that the EU Treaties no longer apply in the UK, reliance can no longer be placed on a cross-border interest to engage application of the general principles of transparency and equal treatment.³³

22.4.2 *The Protocol*

The Protocol creates a partial exception to this general position, and, as noted in a UK Cabinet Office Procurement Policy Note (PPN 11/20):

EU Treaty rights relating to the free movement of goods will continue to apply in Northern Ireland beyond the end of the transition period under the terms of the Northern Ireland Protocol. This means that below threshold procurements involving the provision of goods into Northern Ireland will continue to be subject to a cross-border interest test (i.e. which may be of interest to suppliers from EU Member States including the Republic of Ireland).³⁴

This is a reference to Article 7(1) of the Protocol and means that, given the general principles of equal treatment and transparency, contracts for goods which fall outside the scope of ‘covered procurement’, such as below threshold contracts, may still need to be opened up to competition, including from potential suppliers located in other EU member states.³⁵

While Article 7(1) refers only to ‘the lawfulness of placing goods on the market in Northern Ireland’, it would seem to follow from the applicability of the Treaty provisions on free movement of goods in Northern Ireland that sub-threshold contracts for goods in Ireland must also be considered to be of cross-border interest. However, this is not clear, since such contracts will not involve ‘placing goods on the market in Northern Ireland’. The implications of this approach are also not clear. For example, if a contract tendered in Ireland is correctly categorized as a works contract with works as the ‘main purpose’,³⁶ but involves an incidental element of cross-border transfer of goods to enable the works to be performed, would this be sufficient to trigger a cross-border interest on the basis of the application of Articles 34 and 36 TFEU in Northern

³³ See, eg, Joined Cases C-147/06 *SECAP SpA* and C-148/06 *Santorso* EU:C:2008:277.

³⁴ Cabinet Office, Procurement Policy Note – Reserving Below Threshold Procurements, Action Note PPN 11/20, December 2020, p 1, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/943915/PPN_11_20_-_Reserving_Below_Threshold_Procurements.pdf.

³⁵ *Ibid*, 9.

³⁶ Case C-412/04 *Commission v Italy* EU:C:2008:102, § 47.

Ireland? Article 7(1) is not precisely worded, but it is certainly not qualified by a materiality or ‘main purpose’ threshold. Resolution of such an issue would likely require a reference to the CJEU, as provided for by Article 12(4) of the Protocol.

22.4.3 *SMEs*

While not directly addressing procurement, it is also important to note that TCA Title VII deals specifically with SMEs. The Title is not limited to procurement and Article 295 TCA refers to the objective of enhancing ‘the ability of small and medium-sized enterprises to benefit from Heading One’ (that is, trade generally). Provision is made in this title for information sharing,³⁷ including an obligation to establish or maintain a publicly accessible website for SMEs conveying information relevant to SMEs arising from Heading One, as well as information on tariffs, customs duties, excise duties, taxes and so on. The TCA also provides for SME contact points, to ensure that the needs of SMEs are taken into account when implementing Heading One, and to consider ways to strengthen co-operation on matters of relevance to SMEs.³⁸

22.4.4 *Responses*

To date, the EU Commission has had little to say on procurement ‘beyond covered procurement’ other than in its ‘Questions and Answers’ issued on 24 December 2020, in which it notes: ‘[t]he Agreement further provides for non-discrimination of EU companies established in the UK (and vice versa) for small-value procurement, i.e. below the threshold of the GPA (from EUR 139,000 to EUR 438,000, depending on the contracting entity, and EUR 5,350,000 for construction services)’. This seems to imply that, subject to the Protocol, contracting authorities in the UK, Northern Ireland and the EU may ‘reserve’ or limit sub-threshold contracts to entities ‘established’ within their jurisdictions and thereby exclude all other would-be cross-border operators from tendering for such contracts. The prohibitive cost of cross-border ‘establishment’ could effectively exclude many SMEs from competing across borders for sub-threshold contracts.

The UK government seems to share this view, and its plans for this sector are set out in PPN 11/20. Subject to the Protocol and contracts in

³⁷ Art 296 TCA.

³⁸ Art 297 TCA.

Northern Ireland involving goods, it is envisaged that procuring entities will have discretion to reserve contracts 'beyond covered procurement' for local suppliers, albeit that procuring entities may continue to invite and accept tenders from EU member states (including Ireland) if they consider that doing so will deliver better value for money. Interestingly, it is clear that procuring entities *must consider* reservation, and PPN 11/20 provides that a justification for the decision to reserve or not to reserve must be recorded in all cases. In the case of reserved contracts, contracting authorities must satisfy themselves that the tenderers have a substantive business presence in the UK and are not simply 'brass-plate' operations registered in the UK to circumvent the reservation policy.³⁹ The impact of these provisions on market access, in practical terms, will turn on the extent to which procuring entities decide to opt for protectionism.

22.5 Modifications, Rectifications and Dispute Resolution

There are no bespoke dispute-resolution mechanisms for TCA Title VI. Article 289 TCA provides for modifications and rectifications of market access commitments, according to the procedures for modifications set out in Article 290 TCA and for rectifications set out in Article 291 TCA. Article 293 TCA provides for amendment or rectification where there is agreement, while Article 294 TCA requires that the parties recognize the benefits that may arise from 'cooperating in the international promotion of the mutual liberalisation of public procurement markets' and share annual statistics on covered procurement. Where there is lack of agreement in respect of modifications and rectifications, Article 292 TCA provides that resolution can be pursued in consultations, but if agreement is not reached within sixty days, the party seeking to modify or rectify may refer the matter to dispute settlement in accordance with Title I of Part Six.

22.6 Procurement Reform in the UK

22.6.1 Amendments

Amendments have been made to the UK procurement regime by the Public Procurement (Amendment etc) (EU Exit) Regulations 2020, which mostly deal with obvious anomalies post-Brexit. For example,

³⁹ PPN 11/20 (n 34).

Regulation 73 of the Public Contracts Regulations 2016 (PCR) and equivalent provisions in the UCR and the Concession Contracts Regulations 2016 (CCR), which identify grounds of mandatory rights of termination where certain breaches of the procurement rules have occurred, no longer include the possibility of termination as a result of ‘a serious infringement of the obligations under the Treaties and the Public Contracts Directive that has been declared by the Court of Justice of the European Union in a procedure under Article 258 of TFEU’.

Another significant practical difference is that contracting authorities in the UK are now required to use Find a Tender, the new UK e-notification service replacing the Official Journal of the European Union’s Tenders Electronic Daily.⁴⁰ Regulation 84 of the PCR previously provided for the submission of certain reports to the EU Commission, and now provides for communication to the UK Cabinet Office or the relevant devolved authority. There has been a wholesale deletion of Schedule 5, which set out provisions for recognizing the qualifications of entities listed on identified trade registers within the EU member states. Regulations 89 and 90 of the PCR now also provide that duties owed to economic operators are duties owed to operators who, at the time of the procurement, were registered in a GPA state, provided always that the relevant procurement is within the scope of the GPA.

22.6.2 *Green Paper: Transforming Public Procurement*

In terms of future proposals, a consultation arising from the Green Paper on ‘Transforming Public Procurement’ closed for responses on 10 March 2021. In the Ministerial Foreword to that document, Lord Agnew stated that ‘[t]he end of the Transition Period provides an historic opportunity to overhaul our outdated public procurement regime’.⁴¹ However, this perhaps overstates the changes proposed and Albert Sanchez-Graells has commented that, ‘despite its Brexit-infused rhetoric of transformation’, the Green Paper not only ‘remains very closely pegged to the current regulatory baseline’ in adopting an ‘EU law+’ but pursues a deregulatory strategy ‘that will increase formal and substantial complexity and thus raise administrative burdens and compliance costs for all actors involved’.⁴²

⁴⁰ PPN 11/20 (n 34) 2.

⁴¹ Green Paper (n 1) 5.

⁴² Albert Sanchez-Graells, ‘The UK’s Green Paper on Post-Brexit Public Procurement Reform: Transformation or Overcomplication?’ (2021) 16 *European Procurement & Public Private Partnership Law Review* 4.

Changes proposed in the Green Paper include, inter alia:

- (1) replacing the separate regimes for public contracts, concessions, utilities, and defence and security with a single, uniform set of rules, supplemented by sector-specific aspects where required for effective operation or in the national interest;
- (2) legislating to require contracting authorities to have regard to the government's strategic priorities for public procurement in a new National Procurement Policy Statement; and
- (3) reforming the process for challenging procurement decisions to speed up the review system and make it more accessible, refocusing redress on pre-contractual measures and capping the level of damages to reduce speculative claims.⁴³

While the outcome of the public consultation and the future of public procurement in the UK are not known at the time of writing, it is of interest that regard for secondary policies – and government strategic priorities – has been highlighted. As noted in Section 22.3.3, while there is considerable scope for incorporation of secondary policies under the EU framework, such incorporation is subject to very specific and precise constraints, depending on whether it is pursued through specifications, award criteria, contract performance conditions and so on.⁴⁴ Thus, it may be that use of procurement to pursue general government strategies will be a significant feature of the new procurement landscape post-Brexit.

22.6.3 *Future Issues*

At present, all of the obligations of the TCA appear to be capable of accommodation within the existing PCR, UCR and CCR, which go further than required by the TCA, and even the new provision in Article 284 TCA on verification for subsidies could arguably be achieved through application of the current provisions on abnormally low tenders. However, potentially very difficult issues will arise if amended regulations are introduced which are not fully compliant with the requirements

⁴³ Green Paper (n 1) 7–11.

⁴⁴ See, eg, C McCrudden, *Buying Social Justice: Equality, Government Procurement and Legal Change* (Oxford University Press 2007); S Arrowsmith and P Kunzlik, *Public Procurement and Horizontal Policies in EC Law: General Principles* (Cambridge University Press 2009).

of the TCA. The effect of the TCA in domestic law would then be brought into sharp focus. Section 29 of the European Union (Future Relationship) Act 2020 (EUFRA) may provide an answer here, insofar as it suggests that domestic law ‘has effect . . . with such modifications’ as are required to implement the TCA. This may mean, as is suggested by Paul Craig,⁴⁵ that the specific provisions of the TCA may be directly invocable at the instance of disappointed tenderers, creating additional burdens for procuring entities not only to comply with national implementing regulations but also to monitor their compliance with the TCA itself.

22.7 Conclusion

Overall, as can be seen, the UK will enjoy certain new flexibilities in procurement post-Brexit, of particular importance in relation to sub-threshold contracts and secondary policies. However, the TPA/GPA framework imposes significant constraints of principle, and early indications are that procurement will continue to be quite heavily regulated. Certainly, it is not at all clear that procurement post-Brexit will be any less ‘complex’ than it was considered to have been before Brexit.

⁴⁵ See [Chapter 3](#).

PART VIII

Judicial Co-operation

Law Enforcement and Judicial Co-operation in Criminal Matters

GEMMA DAVIES

23.1 Introduction

The existence of the Common Travel Area (CTA), and its porous nature, has long required significant co-operation between police authorities in the UK and Ireland. Such co-operation predated membership of the EU. For example, the Intergovernmental Agreement on Co-operation in Criminal Justice, the Joint Cross-Border Policing Strategy and the Joint Agency Task Force all serve to enhance and develop effective co-operation between An Garda Síochána (AGS) and the Police Service of Northern Ireland (PSNI), particularly when dealing with organized and cross-jurisdictional crime.

Despite the strength of the working relationship, Brexit presented challenges for co-operation between the UK and Ireland. EU mechanisms had come to replace or complement bilateral co-operation incrementally over twenty years and facilitated or underpinned much of the co-operation enabling a quicker, more efficient and more dynamic response to crime and criminality. If the UK had left the EU without any agreement in place, this would have resulted in the UK losing participation rights in any of the measures adopted under Title V of the Treaty on the Functioning of the European Union (TFEU). This would have included the loss of a fast-track system of extradition under the European arrest warrant (EAW); quick and efficient exchange of criminal records; access to passenger name records and to rapid DNA and fingerprint matches; exchange of real-time operational information through the Second-Generation Information System (SIS II); and participation in Europol and Eurojust. Continued criminal justice co-operation was recognized as a ‘critical justice priority for Brexit negotiations’.¹

¹ House of Commons Justice Committee, Implications of Brexit for the justice system, 9th report of 2016–17.

The risks for Northern Ireland were unique. In addition to the loss of co-operation mechanisms, the process of Brexit itself could present increased crime risks depending on how the border between the UK and Ireland was managed. Increases to immigration crime, the smuggling of commodities and a potential resurgence of nationalist or unionist violence in the wake of any intensification of inter-communal tensions heightened the consequences of a 'no deal' scenario.² Although the consequences for Northern Ireland were particularly momentous, local representatives had relatively little freedom to address the issues. Despite responsibility for policing and criminal justice being devolved to the Northern Ireland Executive since 2010, the negotiation of police and judicial co-operation mechanisms with the EU was reserved to the UK government.³

Concluding the Trade and Cooperation Agreement (TCA) prevented the cliff-edge consequences that law enforcement and prosecution authorities had been preparing for since 2016. The TCA sets out comprehensive provision in Part 3 for 'Law Enforcement and Judicial Cooperation in Criminal Matters'. With such a short period until the agreement was subsequently ratified and in force, there was little time for parliamentary scrutiny. This chapter seeks to examine the detailed arrangements which will form the basis of co-operation between the UK and the EU for the foreseeable future and asks how well the provisions work for Northern Ireland and the CTA.

23.2 Extradition between the UK and Ireland

At the time of the UK's exit from the EU, the extradition relationship between the UK and Ireland was governed by the Framework Decision on the European arrest warrant (EAW).⁴ The EAW provided significant benefits for all participating countries, but these were heightened in the context of the political history of extradition between Ireland and the UK. Extradition between Ireland and Northern Ireland ceased entirely between 1928 and 1965 and was revived only subsequent to both states signing the European Convention on Extradition 1957.⁵ Through the

² Gemma Davies, 'Facilitating Cross-Border Criminal Justice Cooperation between the UK and Ireland after Brexit: "Keeping the Lights On" to Ensure the Safety of the Common Travel Area' (2020) 852 *Journal of Criminal Law* 77.

³ Devolution in Northern Ireland, 1998–2020, Briefing Paper CBP9439, February 2020.

⁴ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States 2002/584/JHA.

⁵ European Convention on Extradition, Paris, 13.XII.1957.

height of the Troubles in Northern Ireland, the extradition of politically motivated offenders from Ireland to the UK was 'by far the most politically contentious issue to have troubled the relationship between these two countries over the last twenty years or so'.⁶

The EAW enabled a fast-tracked system of surrender which was made by judicial authorities based on mutual recognition. Member states could not refuse to surrender their own nationals, had limited grounds for refusal, no double criminality requirement and no political offence exception. The EAW was an important tool for the UK and Ireland with the UK being Ireland's biggest 'trading partner'. From September 2018 to August 2019, the PSNI issued thirty-eight EAWs, twenty-six of which related to Ireland and twelve to other EU states.⁷ Conversely, the PSNI received five requests from Ireland during that period, out of a total of forty-four EAWs.⁸ Arnell and Davies demonstrated that there was 'clear evidence that over the last 17 years the EAW has smoothed the extradition waters between Ireland and the UK as both re-embraced the principle of mutual trust and recognition'.⁹

The UK's departure from the EU inevitably changed this. The need to maintain a functioning system of extradition was identified as a key priority at an early stage of the Brexit process.¹⁰ Part 3, Title VII provides for a fast-track system of extradition between the UK and EU member states, still to be known as 'surrender', which replaces the EAW and mirrors the arrangement between the EU and Iceland/Norway, as requested by the UK. Norway and Iceland are full members of Schengen, so this is an unprecedented agreement for a non-EU, non-Schengen country and demonstrates the EU's commitment to finding a way to replicate the EAW provisions as closely as possible.

The new arrangements retain many features of the EAW including the time limits and the limited grounds for mandatory refusal. An annexed

⁶ Gerard Hogan and Hilary Delany, 'Anglo-Irish Extradition Viewed from an Irish Perspective' (1993) *Public Law* 93.

⁷ Jayne McCormack, 'Brexit: Governments Agree to Replace European Arrest Warrant' (BBC News, 4 September 2019), www.bbc.co.uk/news/uk-northern-ireland-49576159.

⁸ *Ibid.*

⁹ Gemma Davies and Paul Arnell, 'Extradition between the UK and Ireland after Brexit – Understanding the Past and Present to Prepare for the Future' (2020) 85(2) *Journal of Criminal Law* 98.

¹⁰ Department of Justice and Equality, 'Report on the Operation of the European Arrest Warrant Act 2003 (as Amended) for the Year 2017', p 4, www.justice.ie/en/JELR/European_Arrest_Warrant_Annual_Report_for_2017.pdf/Files/European_Arrest_Warrant_Annual_Report_for_2017.pdf.

pro forma substantially replicates the pro forma used for EAW requests, ensuring familiarity for practitioners. Most importantly for the UK and Ireland, the system remains a judicial one and not political. There are, however, several key differences from the EAW. Article 597 provides that co-operation should be 'necessary and proportionate, taking into account the rights of the requested person and the interests of victims, having regard to the seriousness of the act, the likely penalty that would be imposed and the possibility of . . . less coercive measures'. This is similar to the proportionality bar prescribed in section 21A Extradition Act 2003 (EA 2003) which was an invention of UK extradition law not deriving from the EAW. However, proportionality in Title VII is broader than the bar in the EA 2003 since it applies to both accusation and conviction arrest warrants.

Proportionality is now an overarching principle relevant to the whole of the surrender proceedings. Section 21A of the EA 2003 is unamended and it will be for the courts to consider whether the approach to proportionality will change. There is no 'trial readiness' bar mirroring section 12A EA 2003, only oblique reference in TCA Article 597 to 'avoiding unnecessarily long periods of pre-trial detention' as a material consideration of proportionality. The English High Court has clarified that the starting point for any analysis of the provisions was the relevant domestic legislation – the EA 2003 – and not any unincorporated international agreement which was not part of UK domestic law.¹¹

There are three new grounds for refusal. First, Article 602 introduces a political offence exception. Parties may notify the Specialised Committee on Law Enforcement and Judicial Cooperation (SCLE&JC) that the general exception against refusal on the grounds that the offence may be regarded as a political offence will apply only to certain offences.¹² Neither Ireland nor the UK has, however, made such a declaration. In any event, section 13 EA 2003 already bars, as an extraneous consideration, extradition that appears to be issued for the purpose of prosecuting or punishing on account of 'political opinions'. The political offence exception is not identical to section 13 EA 2003; it relates only to offences that are clearly political in character. It is likely that the exception will cover very few cases and will not affect extradition requests to the UK from Ireland or vice versa.

¹¹ *Polakowski & others v Westminster Magistrates' Court* [2021] EWHC 53.

¹² As specified in TCA Art 602(2) which includes the offences referred to in Arts 1 and 2 of the European Convention on the Suppression of Terrorism 1977 and falling within the definition of terrorism under Annex 45 of the TCA.

Second, states may now refuse to surrender their own nationals, or agree to surrender them but only under certain conditions. Ten countries have issued such a derogation, but Ireland has not.¹³ However, there is a requirement that where a party refuses to surrender its own nationals, it must consider whether they can be prosecuted for an offence of commensurate seriousness under domestic law.

Third, dual criminality – where an offence must exist in both jurisdictions – is now required for extradition, except in defined circumstances, although this may be waived. The UK has chosen to require dual criminality in all cases at present, although Ireland has waived the requirement.¹⁴ It is open to the UK to notify the SCLE&JC that it will apply the ‘list-system’ of offences which do not require dual criminality in the future. The UK and Ireland – both common law countries – have greater alignment in relation to criminal offences than the UK has with civil law countries.¹⁵ The TCA also specifies certain rights for the accused, including the right to an interpreter and a lawyer in both the requesting and the executing state, in accordance with domestic law. There is no specific right to legal aid, as initially requested by the EU.

Surrender under Title VII is no longer underpinned by mutual recognition and trust and is instead premised on the principle of proportionality and judicial dialogue between requesting and issuing states. In an Irish High Court case, the applicant argued that, by reason of the manner in which he had conducted his defence, he was at risk of being subjected to violent assault from organized criminals in detention in the UK.¹⁶ Counsel on behalf of the respondent submitted that, as the UK had withdrawn from the EU, the principle of mutual trust and confidence between EU member states no longer applied to the UK. The UK might also in the future withdraw from the Council of Europe and also change its domestic law so as to deprive persons surrendered of the rights currently enjoyed under the European Convention on Human Rights (ECHR). The Irish Court robustly dismissed the respondent’s objections

¹³ Croatia, Finland, France, Germany, Greece, Latvia, Poland, Slovakia, Slovenia and Sweden have notified their intention to exercise an absolute bar on extradition of own nationals. Further, Austria and the Czech Republic will only extradite their own nationals to the UK with their consent. See Home Office letter to the House of Lords EU Security and Justice Sub Committee, 5 March 2021, <https://committees.parliament.uk/writtenevidence/23544/pdf/>.

¹⁴ *Ibid.*

¹⁵ Liz Heffernan, ‘Irish Criminal Trials and European Legal Culture: A Backdrop to Brexit’ (2020) 85(2) *Journal of Criminal Law* 144.

¹⁶ *Minister for Justice and Equality v Delano Demetrius Brissett* [2021] IEHC 95.

and ordered his surrender to the UK, but the case demonstrates the potential for increased challenge to surrender. How the courts will approach surrender cases outside of mutual trust and recognition has yet to be seen.

TCA Articles 607 and 608 establish various methods of transmitting an arrest warrant, the preferred method being secure transfer between judicial authorities. This works well if the location of the suspect is known. If the location of the suspect is unknown then, in the absence of UK access to SIS II, TCA Article 608(2) gives power to Interpol to facilitate transmission. However, the issuing judicial authority ‘may transmit the arrest warrant by any secure means capable of producing written records’. Ireland has only very recently linked to SIS II and so historically EAWs were always bilaterally shared. The TCA provisions allow this to continue. The UK has lost access to SIS II which allows for real-time sharing of data relating to wanted or missing persons or objects. This database was consulted almost 600 million times by UK police forces in 2019 and the impact on the PSNI will have to be monitored. AGS became fully operational with SIS II in March 2021, but SIS II rules state that ‘data processed in SIS and the related supplementary information exchanged pursuant to this Regulation shall not be transferred or made available to third countries or to international organisations’.¹⁷ Co-operation on operational information will be much more efficient if there is a co-located joint operational centre between AGS and PSNI modelled on the highly functional Nordic police co-operation.¹⁸

Legal proceedings relating to the operation of extradition between Ireland and the UK post-Brexit are still ongoing at the time of writing and could yet derail extradition.¹⁹ Ireland is subject to Protocol No 21, annexed to the TFEU which provides for the reservation of sovereignty by Ireland in respect of the Area for Security, Freedom and Justice (ASFJ). The validity of the legal basis for extradition between Ireland and the UK rests on the question (which has been referred by the Irish Supreme Court to the Court of Justice of the European Union (CJEU)) of whether the Withdrawal Agreement and/or the TCA bind Ireland insofar as those agreements relate to matters within the ASFJ. If the CJEU were to agree with the Appellant’s arguments, ‘it would have the effect of

¹⁷ Regulation (EU) 2018/1862, Art 65.

¹⁸ Davies (n 2).

¹⁹ *Hasnain Saqlain v The Governor of Cloverhill Prison & Salman Shahzad v The Governor of Mountjoy Prison* [2021] IESC 45 (unapproved judgment of Mr Justice Clarke, Chief Justice, delivered 20 July 2021) (Irish Supreme Court).

significantly watering down any protocols negotiated in respect of the ASFJ and could, indeed, have implications for any areas of competence where a Member State . . . had negotiated a retention of sovereignty by means of a protocol'.²⁰

23.3 Exchange of Information between the UK and Ireland

The TCA provides for timely exchanges of passenger name records for air travel in TCA Title III and the transfer of DNA data, fingerprint information and vehicle registration data in TCA Title II. In relation to Title II, there are provisions for an 'evaluation visit and pilot run' which may result in a commencement delay to these provisions after a nine-month initial grace period.²¹ Overall, the provisions for the exchange of data are very similar to those operating before Brexit. The UK had wanted to exchange passenger records for rail and sea travel as well, but this has not been included in the TCA. This is an area where bilateral exchange between the UK and Ireland could enhance the safety of the CTA.

Under TCA Title IX, states have a continued obligation to inform each other of criminal convictions handed down within their territory. This importantly ensures that at least one state has a complete record of all convictions no matter where they are handed down in the EU. While the UK is no longer part of the European Criminal Records Information System (ECRIS), the new provisions correspond closely with it. Exchange still happens based on a request, but the provisions do not cover exchange of information on convictions of third-country nationals, an aspect of ECRIS that the EU is seeking to expand. The time limits are not as short as with ECRIS, communication of convictions handed down in a state to the states of the convicted persons' nationality is done once a month rather than 'as soon as possible', and requests must be replied to within twenty, instead of ten, days.²² Although the UK technically loses access to ECRIS, EU states will continue to use it in their co-operation with the UK. The UK, however, 'shall be responsible for the development and operation of its own interconnection software'.²³ The UK is now using the UK's Criminal Record Information System (UKCRIS) to connect with member states' exchange software. The disruption to criminal record exchange between the UK and the EU should be minimal and,

²⁰ *Ibid* [8.2].

²¹ TCA Art 540.

²² TCA Art 649.

²³ TCA Annex 44, Art 3(3).

although the maximum time limits have increased, the UK and Ireland can aim for quicker exchange.

Previously, the UK could send a European investigation order (EIO) to countries within the EU – a legally binding request to gather evidence by a specific deadline – but this is now lost. TCA Title VIII sets out a replacement which sees the UK fall back on the Mutual Legal Assistance Convention 1959 with some supplementation.²⁴ A form for a request for mutual assistance is envisaged, but has not been agreed. This has been tasked to the SCLE&JC. In the interim, states must make requests through letters rogatory. Availability of evidence to the UK as a third party will depend on the legal situation in each member state. As Ireland has not yet joined the EIO, there is no loss of co-operation in this area. There is no mechanism in TCA Part 3 to replace the suite of Framework Decisions which facilitate transfer of custodial sentence, pre-trial bail or probation supervision between member states.²⁵ Bilateral co-operation could be explored between the UK and Ireland in this area to further facilitate free movement across the CTA.²⁶ Prisoner transfer between the UK and Ireland has been beset by legal challenge and delay in recent years and bilateral agreements could enhance the rehabilitation of offenders.²⁷

The TCA provides a framework for co-operation with Europol and Eurojust in Titles V and VI, respectively, which guarantee certain operational capability and data sharing but also reflect the fact that the UK is a third country. The extent of the relationship is not yet fleshed out and TCA Article 577 states that working arrangements complementing or implementing this Title may be made. Importantly, the UK will be able to

²⁴ European Convention on Mutual Assistance in Criminal Matters [1959] COETS 3, Strasbourg 20.IV.1959.

²⁵ Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union; Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention; Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions.

²⁶ Tim Wilson, 'Prisoner Transfer within the Irish–UK Common Travel Area (CTA) after Brexit: Human Rights between Politics and Penal Reform' 85(2) *Journal of Criminal Law* 121.

²⁷ Report of the Minister for Justice and Equality Charles Flanagan to the Houses of the Oireachtas on the operation of the Transfer of Sentenced Persons Acts 1995 and 1997 for the period 1 January 2018–31 January 2018.

assign one or more liaison officers to Europol, one liaison prosecutor with up to five assistants to Eurojust (and vice versa). These officers will be able to attend operational meetings on invitation. The UK will also be able to take part in operational analysis projects as well as attend the Europol Heads of Unit meeting as an observer and participate in Joint Investigation Teams.

23.4 Oversight and Ancillary Concerns

TCA [Part 3](#) has its own rules on dispute settlement and introduces the SCLE&JC, one of the bodies established under the umbrella of the Partnership Council. It has a role in governance of the agreement as well as in dispute resolution, and it will be central to the stability of TCA Part 3 and, one hopes, to its expansion in future years. If a mutually agreed solution to a dispute is not reached, this could lead to suspension of TCA Part 3 or some of its Titles. It will be important that Northern Ireland and the other devolved nations are represented on the Committee.

There are certain aspects of the Northern Ireland Protocol which may come into play in relation to Part 3. Protocol Article 2 ensures ‘no diminution of rights, safeguards or equality of opportunity’ as protected in the 1998 Agreement.²⁸ Protocol Article 11 states that the Protocol shall be implemented and applied ‘so as to maintain the necessary conditions for continued North–South cooperation, including in the area of . . . justice and security’. The close level of co-operation set out in TCA Part 3, the detailed data protection provisions and the similarity to pre-existing provisions ensure that there is no immediate discernible loss of rights for either UK citizens or Irish citizens. However, in the future there are certain areas which are vulnerable to such developments. Law enforcement access to personal data is an area that could see a divergence in rights protection and has already been raised as a concern in relation to the UK obtaining a data adequacy decision.

Although the European Commission adopted data adequacy decisions based on the General Data Protection Regulation (GDPR) and the Law Enforcement Directive for the UK in late June 2021, for the first time a sunset clause has been included. The decision to limit the duration of adequacy to four years reflects the European Data Protection Board’s concerns about the UK’s surveillance regime and the challenges of

²⁸ See further [Chapter 12](#).

redress in the areas of national security.²⁹ This particularly related to bulk interceptions, the use of automated processing tools, and safeguards in relation to overseas disclosure. The Civil Liberties, Justice and Home Affairs (LIBE) Committee of the European Parliament also subsequently passed a resolution urging the European Commission to address these concerns in its proposed adequacy decision. It is clear that the EU will continue to monitor the UK's data protection regime and is able to intervene at any point if it believes that the UK does not ensure an adequate level of protection. Law enforcement and security services' access to bulk personal data and its processing and retention are clearly areas of contention and possible future divergence.

Such divergences could not only threaten the continuance of the data adequacy decisions but also engage the Northern Ireland Protocol if Irish citizens were afforded greater protection of rights than British citizens. The Northern Ireland Human Rights Commission, and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland are well placed to consider the implications of the Northern Ireland Protocol for the operation of TCA Part 3. Although the courts in Northern Ireland will undoubtedly also have these aspects of the Protocol in mind, representation from Northern Ireland on the SCLE&JC and bringing criminal justice co-operation under the remit of the British–Irish Council should ensure that these important aspects of the operation of TCA Part 3 are not overlooked. It will be essential to the stability of Part 3 that the UK ensures continued alignment of data protection rules.

Part 3 is also based on respect for the protection of fundamental rights and freedoms of individuals, including participation in the ECHR, as well as the 'importance of giving effect to it domestically'.³⁰ There is a form of fast-track termination in the event of denunciation of the ECHR or one of three protocols which becomes effective on the date of denunciation.³¹ There are also clauses on suspension as distinct from termination in the case of 'serious and systemic deficiencies within one Party as regards the protection of fundamental rights or the principle of the rule of law'.³² There is no explicit reference to amending or scrapping domestic law giving effect to the ECHR as triggering termination, but these provisions

²⁹ European Data Protection Board Opinion 14/2021 and 15/2021 on the European Commission draft Implementing Decisions on the adequate protection of personal data in the United Kingdom.

³⁰ TCA Art 524.

³¹ TCA Art 692.

³² TCA Art 693.

will need to be considered carefully by the UK government during the independent review of the Human Rights Act 1998 (HRA 1998) which has not yet reported at the time of writing. The HRA 1998 is intrinsically linked to the UK's adherence to the ECHR and 'the Government's ongoing application of the ECHR is important in facilitating continued data sharing and effective extradition arrangements between the UK and Ireland'.³³

23.5 Conclusion

The TCA could never replicate the level of law enforcement and judicial co-operation the UK enjoyed as an EU member state. However, without an agreement, co-operation between the UK and the EU would have relied on outdated international instruments which would have been significantly slower and less effective. The UK and the EU have secured co-operation that is as close as conceivable in many areas, particularly in light of the UK's insistence that the CJEU play no role in overseeing any aspect of the TCA. In many respects, therefore, it represents a good working compromise. However, the loss of real-time data and the reduction of UK influence in Europol and Eurojust will have an operational impact for UK police. There are also areas where co-operation between the UK and Ireland, and in particular the PSNI and the AGS, could be enhanced through bilateral agreement. Co-operation on operational information will best be facilitated through a co-located joint operational centre for the PSNI and the AGS.

The arrangements in TCA Part 3 are complex to put into place and will require a long period of readjustment. Legal challenges have already been made to important aspects of the operation of Part 3. It will therefore be some time before the full consequences and operational reality of the TCA will be felt. A continued high level of cross-border operational co-operation is therefore more important than ever. The implementation of the Northern Ireland Protocol holds opportunities for smugglers and organized gangs on the island of Ireland. Moving criminal justice co-operation within the remit of the British–Irish Council and ensuring formal input of devolved representatives on the SCLE&JC could ensure that police and judicial co-operation on the island of Ireland has the prominence that it deserves.

³³ House of Commons, Northern Ireland Affairs Committee, 'Cross-Border Co-operation on Policing, Security and Criminal Justice after Brexit', 4th report of 2019-21 at para 115.

Jurisdiction, Choice of Law and Enforcement of Foreign Judgments

DAVID KENNY

24.1 Introduction

The experience of Brexit has shown that it is fractal in its complexity: figure out one highly complex issue and it will expose another issue, of equal complexity, beneath it. One of these – that has not received a great deal of attention in the process¹ – is private international law, or the conflict of laws: the rules that govern international private law litigation.² This body of law comprises the rules of jurisdiction (the forum of a case); choice of law (the law that should apply to resolve the dispute); and recognition and enforcement of foreign judgments. It is a sort of meta-law – a law about law, giving us guidance on the complexities of how we can get to the point where we can apply complex substantive law to resolve a complex dispute. This system of rules is notoriously complicated, but also increasingly important. As law and litigation – mirroring life – became more and more international in recent decades, so too did this area of law increase in its influence; it is a Rosetta stone by which one can determine how one's legal obligations will play out across borders.

For EU member states, these rules have come to be dominated by EU law in recent decades.³ Uniform EU rules on jurisdiction and recognition and enforcement, and choice of law in tort and contract, provided a central, stable set of rules across the entire Union,⁴ enabling certainty and predictability in civil and commercial matters. It gave individuals and businesses substantially greater certainty about the way in which international cases might affect them. This uniform European approach

¹ See Adrian Briggs, 'Brexit and Private International Law: An English Perspective' (2019) 55(2) *Rivista di diritto internazionale privato e processuale* 261.

² See generally Jonathan Hill and Máire Ní Shúilleabháin, *Clarkson & Hill's Conflict of Laws* (Oxford University Press 2016).

³ See Geert Van Calster, *European Private International Law* (3rd edn, Hart 2021) 2.

⁴ As we will see, Denmark has been an outlier and late adopter of EU conflicts measures.

was particularly beneficial for common law countries like Ireland and the UK, when many of our conflict of laws rules – particularly on choice of law in tort in Ireland⁵ and recognition and enforcement of judgments in both jurisdictions⁶ – were very out of date. They were also somewhat chauvinistic, in preferring domestic law and in asserting jurisdiction over disputes, rather than applying foreign law or deferring to foreign courts.

Since the role of EU law in this area is very significant, Brexit upturns private international law in the UK by removing, at a stroke, the most important elements of the pre-Brexit status quo in the field. Despite this, it received little attention during the Article 50 period. Save for a paper from the UK government,⁷ which was quite general, there was little comment on what would happen following Brexit. In the Withdrawal Agreement (WA), we are met with silence when it comes to private international law. The Protocol also adds nothing on this topic. There is no provision for ongoing co-operation in this area, and any arrangement between the EU and the UK on these matters will exist entirely separately from the withdrawal arrangements.

This chapter explains and maps the WA's and the Protocol's perhaps surprising silence on this crucial topic. There is an explanation for the failure to provide for any matters in respect of choice of law: the UK can, and has been able to, adopt a quick fix in domestic law, with no need for EU involvement or reciprocity, that maintains the status quo ante. Jurisdiction and recognition and enforcement of judgments, however, do not admit of any easy or comprehensive answers. It appears that the UK's best chance at minimizing disruption in this area has now been taken off the table by the EU, leaving uncertainty about the future. Time will tell how serious this problem will prove in practice.

⁵ While the UK modernized most choice of law in tort rules with the Private International Law (Miscellaneous Provisions) Act 1995, Ireland did not, and the current state of the common law rules is chronically unclear. See *Grehan v Medical Incorp. & Valley Pines* [1986] IR 528. The common law position of double actionability required that the tort be fully actionable in the forum as well as actionable in the place of the tort. See *Phillips v Eyre* (1870) LR 6 QB 1.

⁶ Both jurisdictions have declined to follow Canada in modernizing their *in personam* recognition and enforcement of judgment rules; see David Kenny, 'Re Flightlease: The "Real and Substantial Connection" Test for Recognition and Enforcement of Foreign Judgments Fails to Take Flight in Ireland' (2014) 63(1) *International and Comparative Law Quarterly* 197.

⁷ HM Government, 'Handling Civil Legal Cases That Involve EU Countries if There's No Brexit Deal', Technical Notice, 13 September 2018, www.gov.uk/government/publications/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexit-deal/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexit-deal.

24.2 The Rise of EU Conflict of Laws Rules

For many decades – and accelerating since 2001 – the landscape of private international law in EU member states has been dominated by EU law. Starting with the Brussels Convention of 1968, agreed among the six members of the (then) European Communities but not directly under the rubric of Community law, a common set of rules for jurisdiction and recognition and enforcement was established.⁸ This was primarily to enable free movement of judgments: since recognition and enforcement is largely linked to jurisdiction – we recognize and enforce those judgments the jurisdictional basis of which we endorse – jurisdiction was essentially a means to an end of making member state court judgments mobile across Europe.⁹ If we all apply the same jurisdictional rules in European cases, there should be few obstacles to recognizing and enforcing judgments across Europe. For litigants, however, jurisdiction rules are just as important, as where they will sue and be sued matters a great deal.

Ireland and the UK later joined the Brussels Convention.¹⁰ In 2001, to make the Brussels Convention rules tighter and reduce regional variance in their application, the rules were set down, in slightly amended form, in an EU Regulation: the Brussels I Regulation, adopted by all member states except Denmark (which did adopt it eventually).¹¹ When, in the first decade of its operation, several issues arose, it was recast in 2012 into the Brussels I Bis (Recast) Regulation,¹² and adopted by all member states, with Denmark opting in to the changes.

Major choice of law rules – the rules that determine what law applies to a case with a transnational element – were also eventually regulated by EU law. Choice of law in contract was regulated by the Rome Convention of 1980, which later was incorporated into EU law in almost identical

⁸ This was, and continues to be, largely for judgments *in personam* – to simplify, over people – rather than *in rem* – over things.

⁹ The Preamble to the Brussels Convention of 1968 makes it absolutely clear that the priority of the Convention is mobility of judgments. It begins: ‘Desiring to implement the provisions of Article 220 of that Treaty by virtue of which they undertook to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals . . .’

¹⁰ See domestic implementation in Ireland by way of the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act 1988 and in the UK by means of the Civil Jurisdiction and Judgments Act 1982.

¹¹ Regulation 44/2001/EC. Denmark adopted the 2001 Regulation in 2007 and the 2012 Regulation in 2015.

¹² Regulation 1215/2012/EC.

terms in the Rome I Regulation.¹³ Choice of law in most tort matters (notably not defamation¹⁴) was regulated by the Rome II Regulation,¹⁵ which had no convention predecessor, and at the time was somewhat controversial in respect of the competence of the EU to act in this area at all.¹⁶

With these measures, the vast majority of civil and commercial conflict cases were governed by EU law rules. This uniformity meant that those engaged in commercial activity in the EU were not subject to the vicissitudes of different member states' (highly varied) domestic conflict rules. In particular, the Brussels regime harmonizing jurisdiction rules at an EU level massively increased the predictability of litigation and the mobility of judgments, eliminating – for EU domiciliaries at least¹⁷ – the various and often problematic national jurisdictional rules to which they would be subject. It also ensured that irreconcilable conflicting judgments from different member states would be unlikely, since all states should be applying the same consistent set of rules. Where this was not the case, it provided for rules of priority.¹⁸

24.3 The Effect of Brexit

The UK adopted all of these EU Regulations while a member of the Union, and was a beneficiary of the legal certainty and the free movement of judgments that they enabled. With Brexit, these Regulations ceased to apply in the UK from the end of the transition period; cases started on or after 1 January 2021 would not be able to avail of the EU rules. Little attention was paid to this during the transition period or negotiations on the WA, and the WA and the Protocol are essentially silent on these issues. When it comes to the two choice of law instruments – Rome I and

¹³ Regulation 593/2008/EC.

¹⁴ See Liz Heffernan and David Kenny, 'Defamation and Privacy and the Rome II Regulation' in Peter Stone and Youseph Farah (eds), *Research Handbook on the Conflict of Laws* (Edward Elgar 2015) 315.

¹⁵ Regulation 864/2007/EC.

¹⁶ See discussion in the EU Committee of the House of Lords, 'The Rome II Regulation' HL Paper 66/2004. The subsequent competence around European citizenship included in the Treaty of Lisbon made this argument otiose, as the citizenship competence is seen to cover tort liability and other personal legal matters.

¹⁷ National jurisdiction rules persist for application to any non-EU domiciliaries and cases that fall outside the scope of the Regulation. See Art 6 Brussels I (Recast) Regulation 1215/2012/EC.

¹⁸ See Recital 21 and Arts 8 and 30 Brussels I (Recast) Regulation 1215/2012/EC.

Rome II – an easy solution is available outside the EU framework. However, with jurisdiction and recognition and enforcement, there is no such solution available, and thus there was no obvious way that the WA could have solved this problem.

The choice of law rules contained in Rome I and Rome II were not a problem because they are universal.¹⁹ They apply the same way to European domiciliaries and cases as to non-European domiciliaries and cases: these rules will apply the law of Guam just as readily as the law of Germany; neither of the parties before the court must be a domiciliary of a member state in order for the rules to apply. They apply to every case that falls within their subject matter scope, and no EU connection is needed. Intimately related to this is the fact that these rules do not require any reciprocity whatsoever: they do not require or expect that the courts of Guam apply the same conflict rules as EU states do, and from a conflict point of view, nothing turns on whether or not they do. Though the regulations are EU rules, then, they do not have to be EU rules in order to work: third states could adopt identical rules in their domestic law and have the same effects in conflict cases, even though they are outside the EU law framework.

This, essentially, is what the UK has done. In the Law Applicable to Contractual Obligations and Non-contractual Obligations (Amendment etc) (EU Exit) Regulations 2019,²⁰ the UK retained, *mutatis mutandis*, both the Rome I and the Rome II Regulations as part of domestic UK law. The changes are exceptionally minor, and relate to no more than adapting the language of the Regulations to apply to the UK rather than to a member state of the EU. Therefore, Brexit effects no change on choice of law rules in the UK in practice, and the system that was present the day before the transition period ended was seamlessly replaced by, effectively, an identical system.

Jurisdiction and recognition and enforcement, however, are very different, because they are not universal: the rules apply very differently to EU and non-EU domiciliaries and cases. The whole scheme of the Brussels I Regime is founded on mutuality and reciprocity: the rules are designed to ensure that EU member states are applying the same set of jurisdictional rules to all cases involving EU domiciliaries. Member states defer jurisdiction to other member states based on the assumption that that state is also applying these same rules; the resolution of jurisdiction

¹⁹ See Art 2 Rome I Regulation 593/2008/EC; Art 3 Rome II Regulation 864/2007/EC.

²⁰ Statutory Instrument 2019 No 834.

questions is, in principle, uniform.²¹ Based on this assumption, the Regime makes recognition and enforcement of judgments of EU courts effectively automatic, with only the most limited exceptions.²² There is no need to doubt the judgment of any court of an EU member state because the soundness of its jurisdictional basis is secure, since the court has properly applied the EU rules.²³

This means that there is no scope for non-member states to join the Brussels Regime in its form as a Regulation. The process by which Regulations are automatically implemented in domestic law, which eliminates much of the discretion enjoyed by member states under prior jurisdiction rules,²⁴ was designed to work only within the EU legal order where reciprocity can be reliably expected. It also means that a non-EU state cannot simply import the rules into its domestic law. The system works only if both states that are applying the same rules *recognize* each other's application of the rules for the purposes of recognizing judgments and deferring to the other's jurisdictional claims. Applying the rules domestically without being part of the broader EU system would be meaningless, and so the solution that worked for Rome I and Rome II was simply impossible for Brussels I.

The focus on reciprocity, trust and co-operation that undergirds the Brussels Regime, and its reliance on the mechanisms of EU law in order to work, also meant that Brexit would inevitably result in the UK's exit from this framework. The only question was what could be done to minimize the impact of this. Minimizing this impact is obviously extremely important. Far more than choice of law,²⁵ jurisdiction and recognition and enforcement questions are crucial to commercial actors planning their affairs, as well as to anyone considering litigation in the UK, and they would be rendered far more uncertain by Brexit. But it was

²¹ See, eg, discussion of Clarke J in *Goshawk Dedicated Ltd v Life Receivables Ireland Ltd* [2008] IEHC 90.

²² See Arts 45–51 Brussels I (Recast) Regulation 1215/2012/EC.

²³ However, the enforcing court cannot actually be sure of this, and, indeed, even if it is sure that they have not applied the rules or have not applied them correctly, the enforcing court cannot refuse to enforce on this basis: see *Bamberski v Krombach* Case C-7/98.

²⁴ For example, the common law doctrine of *forum non conveniens* allowed common law courts to simply decline jurisdiction if it was determined that there was a better forum elsewhere; this was not permitted under Brussels. Case C-281/02, *Owusu v Jackson* [2005] ECR I-1383.

²⁵ For example, Geert Van Calster, prominent scholar and practitioner of private international law, says that no client of his has ever hesitated to enter a market because of uncertainty about choice of law in tort. See Van Calster (n 3) 294.

apparent that there is no easy solution, and the WA's and the Trade and Cooperation Agreement (TCA)'s silence on the matter – and its apparent absence from the negotiations on either agreement – meant that the UK would be left to try to find some workable arrangement outside of that framework. Though membership of the Brussels regulations would not have been something that could have been negotiated in the WA, the second-best solution – the EU supporting the UK's accession to the Lugano Convention – might have been, but was not, negotiated as part of the TCA. As we shall see, that option now appears to be off the table.

24.4 Options for the UK on Jurisdiction/Recognition and Enforcement

There were several theoretical alternatives for the UK's approach to jurisdiction after Brexit. One of these was never practically possible; one was possible but, it seems, will not happen due to the EU's unwillingness to allow it; one has borne fruit, and at least made the problem less bad.

24.4.1 *The Old Convention*

An early suggestion for how to address jurisdiction after Brexit was that the UK could, perhaps, revert to its membership of the old Brussels Convention, which persisted even after the advent of the Regulation for certain territories of member states that were not part of the Union. This would not have been a perfect solution – it is less strict than the Regulations that replaced it, and thus less predictable, and it lacks the various improvements that the 2001 and 2012 Regulations introduced. However, the UK had left the Convention upon accession to the 2001 Regulation, and could not rejoin since the Convention survived only for a limited number of territories of member states where EU law did not apply at the time that the Brussels regime transitioned to EU regulation. This option was never a viable one.

24.4.2 *The Lugano Convention*

The Lugano Convention²⁶ (first 1988, later 2007) is a Convention very similar to the Brussels Regime, designed to provide a similar set of rules

²⁶ See generally Fausto Pocar, 'The New Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters' (2008) 10 *Yearbook of Private International Law* 1.

for the EU and European Free Trade Association (EFTA) members, and other territories that had been parties to the old Convention. It replicates to a significant degree the rules in the 2001 Regulation for both jurisdiction and recognition and enforcement. Membership of the Lugano Convention would substantially bridge the gap left by the non-application of Brussels I, although it would not do so completely. Lugano does not incorporate the changes made in the 2012 Recast, including fixes for third state litigation,²⁷ the Italian Torpedo,²⁸ and even easier recognition and enforcement of judgments.²⁹ It is also less strict, with no recourse to the Court of Justice of the European Union (CJEU). But it would be the closest the UK could get to the pre-Brexit rules, and accession to it would have meant less uncertainty and disruption.

The Lugano Convention is, in principle, open to any state. However, accession to Lugano requires the consent of all contracting parties, one of which is the EU. The UK applied to accede on 8 April 2020. There is a one-year period for existing parties to decide on an application. There were various conflicting reports about what the EU might do, but on 4 May, the EU Commission recommended the rejection of the UK's application, a recommendation that is likely to be followed. The Commission's approach to the issue makes it relatively clear that the UK will never be allowed to accede to the Convention: the Convention is seen as an adjunct to the EFTA/European Economic Area (EEA), and essentially part of the legal basis of these areas and the Union's economic relations with those states which have close regulatory alignment with the EU. States outside of this framework are thus not sufficiently aligned with the EU to be members of the Convention.³⁰ Thus, although the Convention is not explicitly limited to EFTA/EEA states, the Commission's view means that, in practice, it is now and will continue to be seen to be so. Given the unwillingness of the UK to enter into close regulatory alignment of an EFTA/EEA type, it is apparent that UK membership of Lugano will not be possible as long as the UK

²⁷ See Arts 33 and 34 Brussels I (Recast) Regulation 1215/2012/EC.

²⁸ The Italian Torpedo was a litigation tactic that used the priority rules in the Brussels Regime and the lack of expedition of the Italian courts to cause long delays in cases being heard by the appropriate EU court. The Recast seeks to address this, but with some issues. See Art 31.2 Brussels I (Recast) Regulation 1215/2012/EC; David Kenny and Rosemary Hennigan, 'Choice-of-Court Agreements, the Italian Torpedo, and the Recast of the Brussels I Regime' (2015) 64(1) *International and Comparative Law Quarterly* 197.

²⁹ Arts 36–44 Brussels I (Recast) Regulation 1215/2012/EC.

³⁰ Shane McVeigh, 'EU Rejects UK Re-entry to Lugano Convention' (13 May 2021) www.carson-mcdowell.com/news-and-events/insights/eu-rejects-uk-re-entry-to-lugano-convention.

retains its current stance. It is possible, perhaps, that Northern Ireland – which does have regulatory alignment of this type – might be able to apply to join Lugano. But for the UK in general, it seems clear that the EU Commission sees the way forward as being the Hague Convention on Choice of Court Agreements.³¹

24.4.3 *The Hague Convention on Choice of Court Agreements 2005*

The best solution now available is the Hague Convention on Choice of Court Agreements. This Convention came into force in 2015 after the EU acceded to it. It also includes Israel, Mexico, Montenegro and Singapore. The Hague Convention provides for the recognition of choice of court/jurisdiction agreements that nominate one of the contracting states as the proper forum for an action arising among the parties to the agreement. The agreement must be exclusive – only the court of *one* contracting state can hear that case. Other contracting states agree to honour such an agreement by deferring to the court nominated in the agreement, and agree not to hear any action unless and until that court declines jurisdiction. A judgment given on the basis of a jurisdictional claim under the Convention should be recognized and enforced in another Convention state.

The UK is now a member of the Hague Convention in its own right. This means that exclusive jurisdiction agreements nominating the UK or an EU state will be recognized in the other, and thus any judgment that is given on foot of such an agreement from a UK or EU court will be recognized in the other place. This is no small thing, as commercial actors will usually wish to regularize jurisdiction by agreement. The nature of the requirements for such an agreement is broadly similar to Brussels I.

However, there are a number of limitations to the Hague Convention. First, it solves the problem only for jurisdiction agreements that are valid under the Convention; no other jurisdiction issues, that are not subject to agreement, are resolved. Second, it allows only for *exclusive* jurisdiction agreements; many parties wish to have more than one possible jurisdiction, or asymmetric clauses – common in finance contracts – which allows for different choices for different parties to the agreement. None of this is possible under the Convention.³² Third, there are outstanding questions about how the Convention will overlap with agreements under

³¹ Clifford Chance, 'Commission Rejects UK Application to Join Lugano' (May 2021) www.cliffordchance.com/content/dam/cliffordchance/briefings/2021/05/commission-rejects-uk-application-to-join-lugano.pdf.

³² *Ibid.*

the Brussels I Recast and whether there will be any problems with this. These issues aside, however, UK accession to the Hague Convention is an important step towards bridging the gap left by Brexit.

24.5 Conclusion

The Hague Convention is a reasonable solution for most commercial actors who will have the opportunity to make a choice of court agreement, giving some security as to both jurisdiction and enforcement. But not all cases will involve choice, and not all those subject to international litigation are savvy commercial actors. For this category of cases, with no chance of Lugano Convention accession, the situation is less rosy. If all else fails, the UK's common law rules of jurisdiction – based on service and territoriality – and its (perhaps outdated)³³ rules of recognition and enforcement will be used to decide jurisdiction. These common law rules continued to apply to non-Brussels I cases, involving non-EU domiciliaries, during the period of the UK's EU membership and will now extend to all cases not covered by the Hague Convention. These are not an optimal fallback in terms of mobility of judgments, as few other states use this approach to jurisdiction, and this may cause difficulties in invoking the exequatur process of various European courts, which are, of course, not uniform.³⁴ Ireland and Northern Ireland, having very nearly identical rules of jurisdiction and recognition and enforcement of judgments, should have fewer problems with mobility of judgments, given that recognition is so dependent on similarity of jurisdiction rules. However, UK enforcement rules may pose challenges for EU member state judgments if their jurisdiction basis does not match the narrow rules for common law enforcement. It is thus not clear that recognition and enforcement of judgments of EU member state courts in the UK, and UK judgments in the EU, will be easy if the common law rules remain the predominant approach to jurisdiction after Brexit.

³³ The rules of recognition and enforcement for judgments *in personam* are based on an old theory known as the doctrine of obligation, which does not account for twentieth-century developments in UK jurisdiction, such as service outside of jurisdiction and *forum non conveniens*. Briggs, however, defends this approach: Adrian Briggs, 'Recognition of Foreign Judgments: A Matter of Obligation' (2013) 129 *Law Quarterly Review* 87.

³⁴ For some detail on different enforcement regimes, see Clifford Chance, 'How English Judgments Will Be Enforced in the EU Post-Brexit' (May 2021) www.cliffordchance.com/content/dam/cliffordchance/briefings/2021/05/how-english-judgments-will-be-enforced-in-the-eu-post-Brexit.pdf.

PART IX

Safeguards

Safeguard Provisions

BILLY MELO ARAUJO AND STEPHEN BRITTAIN

25.1 Introduction

Safeguard provisions are a common feature of international trade agreements. They provide signatories with the means of expeditiously suspending the operation of the provisions of the agreement where their operation is causing, or threatens to cause, economic disruption. The Protocol has its very own safeguard provision in the form of Protocol Article 16 and the same provision is replicated, more or less verbatim, in the Trade and Cooperation Agreement (TCA) Article 773. In the context of the Protocol, safeguard provisions seem particularly problematic as they provide a legal mechanism through which the EU and the UK could impose trade barriers within the island of Ireland, thus defeating what is arguably the primary objective of the Protocol.

The aim of this chapter is to discuss the main features of Protocol Article 16 and Article 773 TCA. In particular, the chapter outlines the main differences between these safeguards and those safeguards inspired by the law of the World Trade Organization (WTO) that are typically included in standard trade agreements. It also explores how the distinctive features of Article 16 of the Protocol may impact the judicial review of safeguard measures. The chapter is structured as follows. First, we consider safeguards as regulated under the law of the WTO; second, we consider the safeguard provisions contained in the Protocol and the TCA; and, finally, we briefly consider the extent to which the invocation of the safeguard provisions contained in the WA and the TCA might be capable of being judicially reviewed both under the arbitration provisions of the TCA and as a matter of EU and UK law.

25.2 WTO Safeguards

The WTO safeguards regime allows WTO members temporarily to reimpose trade barriers in situations where sudden increases in imports resulting from unforeseen events cause or threaten to create injury to domestic industries. They differ from other so-called trade remedies permitted under WTO law whereby WTO members may apply trade barriers to protect domestic industries from unfair trade practices – namely dumping¹ and illegal subsidization² – adopted or originating from other parties. Safeguards differ in that they constitute responses to difficult circumstances that result from trade liberalization.

WTO safeguards are governed by Article XIX of the General Agreement on Tariffs and Trade (GATT)³ and the WTO Agreement on Safeguards (AoS).⁴ In essence, three requirements must be satisfied before this provision may be invoked to suspend the obligations of a state: (i) there must be sudden increase in imports; (ii) this increase must be due to an unforeseen development; and (iii) the increase must cause, or threaten to cause, serious injury to domestic producers.

WTO safeguards typically take the form of increased tariffs, tariff-rate quotas or quantitative restrictions. Such measures may be applied only following an investigation carried out by competent national authorities.⁵ In the context of such investigations, reasonable public notice must be given to all interested parties and appropriate means must be given to such parties to present evidence and give their views. In many jurisdictions, private applicants have the right to request authorities to initiate a safeguards investigation.⁶

¹ Agreement on the Implementation of Article VI of GATT, Antidumping Agreement, 15 April 1994, 1868 UNTS 201.

² Agreement on Subsidies and Countervailing Measures, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 UNTS 14.

³ GATT 1947: General Agreement on Tariffs and Trade, 30 October 1947, 61 Stat. pt. 5, 55 UNTS 194.

⁴ Agreement on Safeguards, Annex 1A to the Marrakesh Agreement 15 April 1994, 1869 UNTS 154.

⁵ Art 3 of the WTO Agreement on Safeguards, Annex 1A to the Marrakesh Agreement 15 April 1994, 1869 UNTS 154.

⁶ See, in the case of the UK, s 31 of the Trade Remedies (Increase in Imports Causing Serious Injury to UK Producers) (EU Exit) Regulations 2019.

25.3 Safeguards in the Context of the EU–UK Trade Relationship

The Protocol and the TCA include safeguard clauses which may usefully be subdivided into two categories. First, the TCA includes WTO-type safeguards, allowing parties to re-erect trade barriers where increased imports cause or threaten serious injury to the importing country's domestic industry.⁷ Second, and the main focus of this chapter, *sui generis* safeguard clauses are available that allow the parties to suspend their obligations where certain exceptional circumstances are present.

The first of such safeguards is found in Protocol Article 16 which allows the parties unilaterally to take appropriate safeguard measures where the application of the Protocol leads to serious economic, societal or environmental difficulties that are liable to persist; or a diversion of trade. No guidance is provided as to the form that safeguard measures should take, except that measures adopted in response to such difficulties must be restricted with regard to their scope and duration to what is 'strictly necessary' to remedy the situation.⁸ The second relevant safeguard provision, Article 773 TCA, uses fairly similar language. It allows parties to apply safeguard measures '[i]f serious economic, societal or environmental difficulties of a sectorial or regional nature, including in relation to fishing activities and their dependent communities, that are liable to persist arise'.

In addition to the substantive standards set out under Protocol Article 16 and Article 773 TCA, there are procedural requirements that must be fulfilled prior to adoption of a safeguard measure. Any party wishing to adopt a safeguard must notify its intention to do so to the other party and enter into consultations with a view to finding an agreed acceptable solution. This confers a significant amount of discretion on the parties when choosing whether to adopt safeguards. The relevant party must also refrain from adopting safeguards until one month after the date of the notification mentioned above, unless there are exceptional circumstances that justify immediate action.

Both safeguard provisions outlined here differ significantly from WTO safeguards. In terms of substantive requirements, Protocol Article 16 and

⁷ Art 32 TCA.

⁸ In July 2021, the UK government announced that it had considered invoking Article 16, setting out why it had thought such a move would be justified, but stated that it had decided not to do so at that time; see HM Government, *Northern Ireland Protocol: The Way Forward* (CP 502, July 2021), paras 28–34. This is considered further in 'Update: Developments from July 2021 to September 2021' at the front of this book.

Article 773 TCA may be applied in multiple broad factual scenarios and, seemingly, even in instances where adverse consequences of the Protocol were foreseeable. The differences in procedural requirements are also potentially significant. Whereas WTO safeguards must be adopted following an investigation carried out by relevant national authorities, there is no such obligation under Protocol Article 16 and Article 773 TCA. In short, compared to WTO safeguards, these provisions seem to confer a considerable margin of discretion on the parties.

25.4 Dispute Settlement

25.4.1 *Judicial Review under EU Law*

In the context of the EU, WTO safeguards are subject to the judicial review mechanisms established under the EU Treaties.⁹ In the absence of a special judicial procedure, the same applies to safeguard measures under Article 16 of the Protocol, with the two most probable avenues being either annulment¹⁰ or preliminary reference proceedings.¹¹ However, in both instances, private applicants will face significant obstacles in challenging safeguard measures.

An action for annulment is a judicial mechanism that allows interested parties to bring a direct action against and challenge the legality of EU acts. Under this procedure, EU safeguard measures could be reviewed on the grounds of lack of competence (eg, an EU institution uses the incorrect legal basis for an act), infringement of procedural requirements (eg, failure to explain the rationale of the action taken) or infringement of the EU Treaties or any rule relating to their application.¹² The last ground for review includes breach of binding international agreements entered into by the EU¹³ and would encompass challenges against EU safeguards for alleged breaches of substantive and procedural requirements set out under the Protocol.

However, there are several conditions that must be met by interested parties wishing to bring an action for annulment before the Court of Justice of the European Union (CJEU). First, any claim must be made within two months from the date of the publication of the measure being

⁹ E Vermulst and J Sud, 'European Union: An Imperfect and Time-Consuming System' in M Yilmaz (ed), *Domestic Judicial Review of Trade Remedies* (Cambridge University Press 2013)190.

¹⁰ Art 256(1) TFEU.

¹¹ Art 267 TFEU.

¹² Art 263(2) TFEU.

¹³ AH Türk, *Judicial Review in EU Law* (Edward Elgar 2009) 127.

challenged, its notification to the plaintiff, or its coming to the knowledge of the latter.¹⁴

Second, only EU acts that produce binding legal effects can be subject to review.¹⁵ CJEU case law has long recognized not only that WTO safeguard measures are acts that may be the subject of an action of annulment¹⁶ but also that the refusal by the European Commission to open a trade remedies investigation can be challenged by persons who filed a complaint requesting such investigation.¹⁷ Whether the refusal to apply safeguard measures under Article 16 of the Protocol would be reviewable is less clear. While CJEU case law permits the review of a decision not to open an investigation where individuals have specific procedural rights in the decision-making process,¹⁸ the same does not apply to instances where such rights do not exist.¹⁹ Given that there is no procedure available for private applicants to request the EU to open safeguard investigations or adopt a safeguard under Article 16 of the Protocol, it seems unlikely that a decision by the EU not to apply safeguards would be deemed a reviewable act.

Annulment actions may be lodged by EU institutions, EU member states, some EU bodies and natural or legal persons. The European Parliament, the Council, the Commission and EU member states²⁰ (so-called privileged applicants) may bring an action for annulment directly before the CJEU without establishing that they have an interest, since they are assumed to have an interest in ensuring compliance with EU law.²¹ For example, Ireland could file an action for annulment against an EU act applying a safeguard measure which it considers disproportionate because either its duration or its scope goes beyond what is strictly necessary to achieve its stated objective.

Annulment actions filed by natural or legal persons²² (so-called non-privileged applicants) are more problematic because of restrictive standing requirements.²³ Indeed, for such applicants, the most significant

¹⁴ Art 263(6) TFEU.

¹⁵ Art 263(1) TFEU.

¹⁶ Case C-7601 P, *Eurocoton and Others v Council* [2003] ECR I-1091.

¹⁷ *Vermuslt and Sud* (n 9) 184.

¹⁸ *Ibid.*

¹⁹ I Willems, B Natens and A Moroni, 'Hurdles to Litigating Trade Defence Measures before EU Courts' (2020) 54(6) *Journal of World Trade* 922.

²⁰ Art 263(2) TFEU.

²¹ Art 268 TFEU.

²² Art 263(4) TFEU.

²³ M Rhimes, 'The EU Courts Stand Their Ground: Why Are Standing Rules for Direct Actions so Restrictive?' (2016) 9(1) *European Journal of Legal Studies* 103.

barrier to review is the standing requirement. Unless applicants are addressed in the safeguard measure, they would have to show either that (i) they are directly concerned by a regulatory act not entailing implementing measures or that (ii) they are both directly and individually concerned by the safeguard measure.²⁴

The test of direct concern is relatively easy to satisfy since it entails demonstrating that the action taken affects the legal situation of the applicant directly and that no further implementing measures are required.²⁵ Irish firms adversely affected by the increase in barriers to trade between the EU and Northern Ireland, as a result of the EU's decision to trigger Protocol Article 16, should be able to make the case that their legal position had been affected. However, the measure being challenged would also have to be considered to be a regulatory act – that is, 'an act of general application, apart from legislative acts'.²⁶

The term regulatory act is understood to include actions adopted via a procedure other than ordinary legislative procedures set out under EU law.²⁷ This excludes acts such as EU regulations and directives but includes implementing regulations which are typically used by the EU to impose trade restrictive measures.²⁸ As an example, the European Commission's botched attempt to use Article 16 of the Protocol as a legal basis for the imposition of export restrictions on the movement of Covid-19 vaccines between the EU and Northern Ireland²⁹ would have taken the form of a Commission implementing regulation which would qualify as a regulatory act. However, in addition, a regulatory act must not entail implementing measures. If implementation is carried out by EU member states, applicants may struggle to challenge the underlying EU act. In the area of trade remedies, such as WTO safeguards, applicants have had difficulties in justifying standing because such remedies are, in practice, applied by national customs authorities.³⁰ Similar standing barriers are likely to be faced by non-privileged applicants challenging EU safeguard measures under Article 16 of the Protocol.

²⁴ Art 264(4) TFEU.

²⁵ *Ibid.*

²⁶ Case C-583/11 *P Inuit Tapiriit Kanatami and others v European Parliament and Council* EU:C:2013:625.

²⁷ *Inuit Tapiriit Kanatami*, at para 58.

²⁸ Willems, Natens and Moroni (n 19) 922.

²⁹ J Curtis, Northern Ireland Protocol: Article 16 and EU Vaccine Export Control, 3 February 2021, House of Commons Library, <https://commonslibrary.parliament.uk/northern-ireland-protocol-article-16-and-eu-vaccine-export-controls/>.

³⁰ Willems, Natens and Moroni (n 19) 923.

The condition of ‘individual concern’ requires a demonstration that the act affects the applicants by reason of certain attributes that are peculiar to them or by reason of circumstances in which they are differentiated from all other persons. The individual concern requirement has been interpreted and applied so restrictively under EU case law that it is nigh on impossible for non-privileged applicants to satisfy the standing requirements. This would certainly be the case as regards challenging safeguard measures which are by their very nature measures of general application which do not target specific individuals.

There are circumstances where the ‘individual concern’ test has been relaxed. The CJEU has found that a person may be individually concerned by an EU act where they experience economic difficulties of a serious nature as a consequence of such act. In *Extramet*,³¹ the CJEU found that an applicant was individually concerned by a regulation imposing anti-dumping duties because they were both the largest importer and the end user of the product targeted by the duties. This ruling has proved to be the exception rather than the rule in CJEU case law, however, with courts generally denying individual concern in cases where applicants have shown that they are more severely affected by an EU act than other addressees.³² CJEU case law on trade remedies has also recognized that importers and exporters may be individually concerned where they were part of the original investigation which led to the adoption of remedies (eg, producers who filed or supported the complaint) or were somehow involved in that investigation (importers or exporters whose data were used in the context of the investigation).³³ However, in the absence of any procedural rights granted to individuals in the decision-making process underpinning safeguards under Protocol Article 16, it seems unlikely that private applicants would be able to argue successfully the existence of an individual concern.

Another potential avenue for judicial review under EU law is the preliminary reference procedure.³⁴ Under this procedure, if a question concerning the validity of an EU act arises in the context of a domestic judicial dispute, the relevant domestic tribunal or court may – if a final court, must – refer the question to the CJEU. Should litigation arise at a domestic level as a consequence of the application of a safeguard measure, a preliminary reference request may be made to the CJEU.

³¹ Case C-358/89 *Extramet v Council* [1991] ECR 2501.

³² *Türk* (n 13) 91–93.

³³ *Willems, Natens and Moroni* (n 19) 924.

³⁴ Art 267 TFEU.

For example, if the EU were to decide to impose tariffs or regulatory compliance checks on goods traded between Northern Ireland and Ireland, those checks would have to be carried out by Irish customs authorities. The legality of such checks by Irish authorities could then be challenged before the competent Irish courts who could decide to refer a question concerning the validity of the safeguards to the CJEU.

One important limitation associated with the preliminary reference procedure, however, is that domestic courts have some leeway in deciding whether or not to refer a question to the CJEU.³⁵ Judicial bodies are not required to refer questions to the CJEU unless it is considered that a ruling is needed in order to resolve the domestic judicial dispute. The only judicial bodies that are required to refer questions of EU law to the CJEU are those against whose decisions there is no judicial remedy³⁶ – that is, those courts or tribunals whose rulings cannot be appealed. However, even such courts may decide against referring a preliminary question where the answer to the question will not affect the outcome of the case, where the question has previously been answered, or where the answer to the question is so obvious that no further clarification is required.³⁷

Compared to annulment proceedings, preliminary references offer a realistic path for judicial review of Protocol Article 16 safeguards for private applicants. It remains, however, fraught with difficulties. The procedure is time-consuming and applicants have little control over the procedure since the decision whether to refer or not is ultimately made by the national courts.

25.4.2 *Judicial Review under UK Law*

In addition to decisions relating to safeguards being capable of being challenged by way of proceedings before the EU courts, it is also possible that a decision by the UK government whether or not to invoke a safeguard provision in either the WA or the TCA may be capable of being challenged by way of judicial review proceedings before the UK courts. Applicants for judicial review in the UK would be required to meet the requirements as to time limits laid down in the relevant procedural rules of the jurisdiction concerned.³⁸

³⁵ A Cuyvers, 'Preliminary References under EU Law' in E Ugirashebuja, J Ruhangisa, T Ottervanger and A Cuyvers (eds), *East African Community Law* (Brill 2017) 279.

³⁶ Art 267(3) TFEU.

³⁷ Case 283/81 *CILFIT* ECLI:EU:C:1982:335, paras 10–16.

³⁸ Eg, in England and Wales, Rule 54.5. of Part 54 of the Civil Procedure Rules, in the absence of an enactment providing for a shorter time period, requires that a claim be filed

Applicants for judicial review in the UK must likewise satisfy a standing requirement. However, under UK law an applicant need only show that they have a 'sufficient interest' in order to challenge a decision. The issue of whether a particular applicant has standing is assessed 'against all the factual and legal circumstances of the case'.³⁹ While the issue of whether an applicant has standing is a jurisdictional one, which the parties are not free to dispense with by agreement,⁴⁰ the rules on standing are liberally applied by the courts. In determining whether an applicant has a sufficient interest to challenge a particular decision, consideration is given to, inter alia, the strength and importance of the grounds of challenge,⁴¹ the extent to which the personal interests of the applicant are impacted by the decision under review,⁴² and, importantly, the question of whether the proceedings raise an issue relating to the public interest in which the applicant has an interest but one which is shared by the generality of the public.⁴³ The rules of standing in UK judicial review proceedings also protect the role of campaign and interest groups in the context of public interest litigation.⁴⁴ It is therefore clear that the standing requirements for bringing judicial review proceedings under UK law are considerably more liberal than those arising under Article 264(4) TFEU.

However, even though an individual is likely to be able to satisfy the standing requirements to bring judicial review proceedings, it is somewhat unlikely that the UK courts would be willing to review the *substance* of a decision by the UK government as to whether or not to invoke the safeguard provisions under the WA and the TCA, for three reasons. First, the decision as to whether to invoke the safeguard provisions under the WA and the TCA involves the assessment of complex factual and technical issues, including whether the aspect of the Agreement which is being suspended has caused serious economic, social or environmental disruption or a diversion of trade, and the courts will review such matters only on limited grounds.⁴⁵ Second, the courts tend to be reluctant to

'(a) promptly; and (b) in any event not later than 3 months after the grounds to make the claim first arose'.

³⁹ H Woolf, J Jowell, C Donnelly and I Hare, *De Smith's Judicial Review* (8th edn, Thomson Reuters 2018) ('De Smith'), § 2-027.

⁴⁰ *Ibid.*, § 2-10.

⁴¹ *Ibid.*, § 2-31.

⁴² *Ibid.*, §§ 2-032–2-034.

⁴³ *Ibid.*, §§ 2-035–2-036.

⁴⁴ *Ibid.*, §§ 2-039–2-045.

⁴⁵ *Ibid.*, §§ 11-043–11-051.

review decisions involving the exercise of the kind of essentially political judgements⁴⁶ which would undoubtedly be involved in deciding whether to invoke a safeguard provision under the WA or the TCA. Third, and more specifically, the courts are often reluctant to interfere with decisions in the realm of international relations.⁴⁷ For all of these reasons, it seems unlikely that judicial review proceedings initiated in the UK courts challenging the substantive decision by the UK government to invoke a safeguard provision would be successful.

However, a procedural challenge to the exercise or non-exercise of a safeguard power would not necessarily give rise to such concerns. Since it would not involve a challenge to the substance of the decision to invoke or not to invoke the safeguard in question, a procedural challenge might stand a greater chance of success. For example, if the UK government were to invoke a safeguard provision without adhering to the procedural requirements of the provision invoked, as specified in the WA and the TCA, it is likely that the courts would be willing to intervene to restrain any such procedural omission. Thus, if the government were to invoke Protocol Article 16 without adhering to the procedural requirements laid down in Protocol Annex 7, such as the obligations to notify the EU of the invocation of the safeguard, to enter into consultations, and to wait one month following notification prior to taking safeguard measures, such omissions might be capable of being enforced as mandatory statutory requirements which had to be fulfilled as a precondition to the lawful exercise of the safeguard power in question.⁴⁸

25.4.3 *Judicial Review under WA*

With respect to the Protocol, there are two routes for the judicial review envisaged in the WA: (i) the arbitration mechanism established under the WA; and (ii) CJEU jurisdiction.⁴⁹

Any dispute concerning Protocol Article 16 between parties to the WA may be brought before the arbitration mechanism created under the WA. The parties must first seek to resolve a dispute amicably, via the Joint Committee, 'by entering into consultations in good faith, with the aim of

⁴⁶ *Ibid.*, §§ 1-035–1-049.

⁴⁷ *Eg, R. (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61; [2006] 1 AC 453. D McGoldrick, 'The Boundaries of Justiciability' (2010) 59 *International and Comparative Law Quarterly* 981.

⁴⁸ De Smith, §§ 5-057–5-070.

⁴⁹ See further [Chapter 5](#).

reaching a mutually agreed solution'.⁵⁰ Where no amicable solution is found, disputes may be referred to an arbitration panel which must deliver a ruling within twelve months of its establishment.⁵¹ A party that wishes the matter to be resolved with urgency – a likely scenario in the case of safeguard disputes – may make such a request to the panel. If the panel accedes to the request, it will make every effort to issue a ruling within six months.⁵²

Once delivered, the panel's ruling will be binding on both parties who must 'take any measures necessary to comply in good faith with the arbitration panel ruling'.⁵³ Where the respondent has not complied with the ruling within a reasonable period of time, the complainant can request the panel to impose temporary remedies which will take the form of either a lump sum or a penalty payment.⁵⁴ If payment is not made by the non-complying party, within a one month deadline following the determination of the remedy, the other party may temporarily suspend any part of the WA, except the citizens' rights provisions, or of any other agreement between the EU and the UK.⁵⁵ Any suspension should, however, be proportionate to the breach of the obligation concerned and only apply so long as the breach of the WA persists.⁵⁶

Protocol Article 12(4) also confers CJEU jurisdiction in relation to Protocol Article 5 (customs) and Articles 7 to 10 (technical rules, value added tax, electricity market and state aid). UK measures falling foul of these provisions can, for example, be the subject of a direct legal challenge by the European Commission before the CJEU via infringement proceedings. Article 12(4) also specifically mentions preliminary ruling procedures, which would allow domestic courts in the UK to refer questions on the validity of EU law to the ECJ.⁵⁷

Protocol Article 16 does not fall within CJEU jurisdiction, but the question arises whether the CJEU may have a role to play where the UK commits a breach of Protocol provisions that do fall within its jurisdiction and seeks to justify such breaches by reference to Protocol Article 16. In [Chapter 5](#), Wouters posits that while CJEU jurisdiction may be

⁵⁰ Art 168 WA.

⁵¹ Art 173 WA.

⁵² *Ibid.*

⁵³ Art 175 WA.

⁵⁴ Art 178 WA.

⁵⁵ Art 178(2) WA.

⁵⁶ Art 178(2) WA.

⁵⁷ Art 267 TFEU.

triggered with respect to Protocol provisions that cross-reference provisions identified in Protocol 12(4), the same does not apply to provisions that contain no such cross-references.⁵⁸ If this were so, it would have the effect of allowing the UK to evade CJEU jurisdiction by invoking Protocol 16 whenever it intended to commit breaches of Protocol Articles 5 and 7 to 10. To use a recent example, on 15 March 2021, the European Commission initiated infringement proceedings against the UK following the latter's decision to unilaterally extend grace periods allowing it to disapply certain aspects of Protocol Article 5.⁵⁹ In an alternate reality, where the UK had decided to package the unilateral extension as safeguard measure intended to avert serious economic and social difficulties, the invocation of Protocol 16 would arguably exclude the matter from the jurisdiction of the CJEU. Such outcome is, however, perfectly in line with the purpose of exclusive CJEU jurisdiction under Protocol 12(4) – that is, to protect the autonomy of the EU legal order and ensuring the uniform interpretation and application of EU law. In disputes where Protocol 16 is invoked in relation to Protocol Articles 5 and 7 to 10, the question is not whether EU law has been breached – the mere invocation of safeguards confirms that a breach of EU law has been committed – but, rather, whether the conditions for the invocation of safeguards have been met.

25.5 Conclusion

The safeguards regimes envisaged under Article 16 of the Protocol and Article 773 TCA differ from the WTO regime in terms of both their substantive and their procedural requirements. Broadly speaking, they seem to confer on the parties a considerable amount of discretion in deciding whether or not to apply safeguard measures. This has important repercussions in relation to future potential legal challenges. While there is likely to be some scope for the review of the exercise of safeguard powers, as a matter of both EU and UK law, that review under EU law is likely to be impacted by the onerous standing requirements which apply. Review in the UK is likely to be of limited effect due to the limited scope of the jurisdiction of the courts on an application for judicial review. It is also unlikely that the invocation by the UK of Protocol Article 16 would

⁵⁸ See Chapter 5.

⁵⁹ See European Commission Letter of Formal Notice of 15 March 2021, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1132.

fall within the jurisdiction of the CJEU under the WA. The cumulative effect of this is likely to be that issues concerning invocations of the safeguard provisions of the WA and the TCA will predominantly be determined politically, with the courts occupying a subsidiary position perhaps confined to ensuring that the correct procedures are adhered to in the invocation of safeguard provisions.

INDEX

- 1998 Agreement, *see* [Good Friday Agreement \(1998 Agreement\)](#)
- abnormally low tender, [273](#), [280](#)
- acquis communautaire*, [33](#), [40–41](#), [48](#), [56](#), [71](#), [258](#)
- Act of Parliament, [40](#), [126](#)
- Act of Union of 1800, [15](#), [90](#)
- Agnew, Lord, [279](#)
- agricultural products, [75](#), [215](#)
- agricultural support scheme limits, [50](#)
- agriculture
- environmental significance, [246](#)
 - exceptions under Article 10(2) of the Protocol, [77](#)
 - North–South co-operation, [12](#), [25](#), [52](#), [122](#), [245](#)
 - potential triggering of CJEU jurisdiction, [57](#)
 - provisions in the 1998 Agreement, [245](#)
 - state aid controls and, [77](#)
- air pollution, [247](#), [251](#)
- aliens, [174](#), [177](#)
- Aliens Act (1935), [174](#)
- all-island economy, [3](#)
- all-island environmental governance, [255](#)
- all-island market in services, [267](#)
- Alternative Arrangements Commission, [207](#)
- Anglo–Irish Agreement (1985), [25](#)
- animal health and welfare, [247](#), [252–54](#)
- annulment proceedings, on safeguard measures, [312–13](#), [316](#)
- anti-competitive behaviour, main forms of, [223](#)
- anti-discrimination clause, Article 2 of the Protocol, [145](#), [151–52](#), [154](#)
- Anti-discrimination Directives, [143](#), [151](#), [154](#)
- anti-dumping measures, [72](#), [210](#), [315](#)
- antimicrobial resistance, [248](#)
- anti-subsidy measures, [72](#)
- anti-terrorism, [4](#)
- antitrust, fairness in competition, [221](#)
- aquaculture, [72](#), [215](#)
- arbitration panel
- dispute settlement process, [46](#), [62–64](#), [319](#)
 - establishment requirements, [61–62](#)
 - role, [10](#)
 - sanctioning powers, [112](#)
 - VCLT and, [90](#)
- arbitration procedures, applicability to Protocol, [60–64](#), [77](#)
- arrest warrants, [288](#), [290](#), *see also* [European arrest warrant \(EAW\)](#)
- Article 16 of the Protocol
- EU's decision to trigger, [314](#)
 - invoked by UK and European Commission, [15–16](#)
 - judicial review under the WA, [318–20](#)
 - likelihood of success of individual concern applications, [315–16](#)
 - safeguard measures, [311–12](#)
 - UK's invocation, [320](#)
 - see also* [safeguard provisions](#).
- Article 2 of the Protocol. *see under* [human rights and equality](#)
- Article 50, scope of negotiations, [8–10](#)
- 'at risk' goods, [49–51](#)
- aviation, [259](#)

- backstop
 Northern Ireland, 5, 184
 UK-wide, 184
- Belfast Agreement. *see* Good Friday Agreement (1998 Agreement)
- below threshold contracts. *see* sub-threshold contracts
- Bill of Rights, 125, 160
- Bingham, Lord, 27
- 'birthright' provision of the 1998 Agreement, 29, 135, 147, 164, 185–87, 188, 191
- block exemptions, 233, 234
- border
 border crossing rules
 third-country nationals resident in Ireland, 199–201
 third-country nationals resident in Northern Ireland, 201–3
 dilemmas caused by Brexit, 207
 Ireland–Northern Ireland
 avoidance of hard border, 9, 78, 85, 95, 112, 137, 207, 252
 frequency of crossings, 181
 potential consequences of Brexit for, 5
 Northern Ireland-GB, 71–72, 74
see also Irish Sea border.
 unacceptability of a 'hard' border on the island of Ireland, 8, 11
- borders
 post-Brexit significance, 181
 potential environmental impacts, 252–55
- breach of the Protocol
 potential penalty, 111–12
 responsibility of UK government, 111
- Brexit
 border dilemmas caused by, 207
 challenges for judicial co-operation between UK and Ireland, 285–86
 challenges for peace process in Ireland, 137, 193
 choice among three objectives, 78
 citizenship provisions of the 1998 Agreement and, 183
see also identity and citizenship in Northern Ireland.
 CTA and, 175–81
 'full Brexit' terminology, 219
 impact of UK's exit from Brussels Regime, 301
 impact on EU–UK relations, 138
 principal legal instruments, 33
 undeliverability of promised benefits, 78–79
- Brexit referendum
 and its aftermath, 1–2
 concerns expressed by Northern Ireland, 143
 political wrangling at Westminster, 8
 UK's policy objectives, 4–6
- British citizenship, 12, 185–88, 190–91
- British Nationality Act (1948), 174
- British Nationality Act (1981), 185–86, 190
- British–Irish Agreement, 22–23, 25, 26, 28–29, 122–23, 135–36
- British–Irish Intergovernmental Conference, 25–26
- British–Irish Intergovernmental Council, 25, 294, 295
- broadcasting
 North–South co-operation, 12, 122
 potential triggering of CJEU jurisdiction, 57
- Brussels Convention (1968), 298, 302
- Brussels I Bis (Recast) Regulation, 298, 303, 305
- Brussels I Regulation, 299, 300–1, 304
- Budget, EU, 9
- Bunreacht na hÉireann (1937), 28
- business services, 259
- Cabinet Office, 45, 52
- Cameron, David, 1, 6
- Channel Islands, 2, 25
- Charter of Fundamental Rights (CFR), 3, 11, 159–69
 'added value' rights, 166–67
 affinity with Article 6(3) TEU, 161
 debatable role, 100

- Charter of Fundamental Rights (cont.)
 development in EU law, 159–60
 domestic status, 120
 dynamism in Northern Ireland
 law, 127
 intentions of UK domestic Brexit
 legislation towards, 159
 origins and sources of
 inspiration, 160
 position under section 5 EUWA
 2018, 122
 post-Brexit status in UK law,
 161–69
 CJEU and the ECtHR, 161, 163–64
 continuing influence, 169
 potential impact of repeal, 166–69
 under the Protocol, 164–66
 Preamble, 160–61
 scope of application, 165
 supporting framework to 1998
 Agreement rights and
 safeguards, 156
 uncertainty about future role of, 11
 children, protection under the WA, 114
 choice of law, 296–97, 298, 299–300
 CITES, 253
 citizens' rights
 CJEU's role in respect of EU
 citizens, 116
 difference between pre- and post-
 CFR eras, 160
 EU citizens, 116
 rights to vote, 149
 Joint Committee and, 47
 under the WA, 10, 107, 112, 114–16,
 153, 319
 Citizens' Rights Directive (CRD), 196,
 200, 202–3
 citizenship, 194–203
 border crossing rules
 third-country nationals resident in
 Ireland, 199–201
 third-country nationals resident in
 Northern Ireland, 201–3
 population of non-UK or non-Irish
 citizens on the island of
 Ireland, 194
 rights of 'New (Northern) Irish', 195
 rules on entry to Ireland for EU
 citizens resident in Northern
 Ireland, 199
 rules on entry to Northern Ireland
 for EU citizens resident in
 Ireland, 196
 citizenship of EU, 144, 150, 184,
 187–88, 189, 195, 202, *see also*
 EU citizens
 Civil Liberties, Justice and Home
 Affairs Committee (LIBE), 294
 civil rights
 definition, 146
 protections under Article 2 of the
 Protocol, 146
 climate change, 221
 commercial transactions, 198
 Commission enforcement, 111
 Commission of the European Union
 (the Commission), 18
 Committees of the Protocol, 44–54
 function and scope, 44
 Joint Committee, 44–51
 Joint Consultative Working Group,
 53–54
 post-transition period
 performance, 54
 Specialised Committees, 51–53
see also under individual committees.
 Common Customs Tariff, 72, 213
 Common External Tariff, 208, 211
 Common Travel Area (CTA),
 173–82
 1998 Agreement and resuscitation
 of, 3
 arrangement and function, 173
 blindness towards family
 members, 203
 Brexit and, 175–81
 Brexit Services Deal, 262
 citizenship rights under, 194–95
 continued application under the
 Protocol, 11, 175
 co-operation requirements between
 police authorities, 285
 creation and pre-Brexit situation,
 174–75
 effects of Brexit, 173

- exclusion of 'New (Northern) Irish'
 from benefits of, 194
 formal recognition, 174
 governance and visas, 180–81
 in Irish Law, 133–35
 legal basis, 133–34
 limitations, 203
 Memorandum of Understanding. *see*
 Memorandum of
 Understanding (CTA)
 movement of professionals, 263
 protection from discrimination
 and, 143
 rights and privileges conveyed
 by, 173
 rights of family members of EU
 citizens, 195, 202
 scope for tension between EU law
 and, 134
 services and rights provisions, 133
 UK obligations on continued
 application, 258
 Competition and Consumer Protection
 Commission (CCPC), 229
 Competition and Markets Authority
 (CMA), 38, 226, 229
 competition law, 219–31
 application of EU law to Northern
 Ireland pre- and post-Brexit,
 219, 229–30
 competition law generally under the
 TCA, 220–21
 continuing application of EU
 competition law to the UK as
 a third country, 230
 cross-border investigations, 229
 democratic consent mechanism, 227
 institutional dimensions, 225–30
 interpretation of treaties and, 229
 level playing field provisions (Title
 XI TCA), 221–25
 competition and the 'level playing
 field', 222–23
 competition policy, 223–24
 conceptual relationship with
 private rights, 37–38
 electricity and gas, 224–25
 environmental protection, 248
 function, 156
 rights and, 36–40
 state-owned enterprises,
 enterprises granted special
 rights or privileges and
 designated monopolies, 225
 UK implementation of private
 rights, 38–40
 likely divergence between Northern
 Ireland and the EU, 227–28
 main issues, 223
 new names for old concepts, 223
 post-Brexit differences, 227–30
 replacement of historical
 convergence by divergence, 223
 sustainable development and, 36,
 221, 222, 225, 231
 see also Trade and Cooperation
 Agreement (TCA).
 competition policy, 223–24, 226
 Comprehensive Economic and Trade
 Agreement (CETA), 197, 259
 Concession Contracts Regulations
 2016, 279
 consent principle, 24, 153
 Conservative Party, 6–7
 constitutional statutes, 109, 118, 121,
 125–27
 consumer protection, 40
 excluded from the Protocol, 71
 contracts, 197–98, 269, 272, 274, 276,
 277, 280, 296, 298, 304
 reservation 'beyond covered
 procurement' for local
 suppliers, 278
 see also sub-threshold contracts.
 Convention on International Trade in
 Endangered Species of Wild
 Fauna and Flora (CITES),
 74, 253
 coronavirus (Covid-19), 47, 57,
 135, 230
 Court of Justice of the European Union
 (CJEU), 9, 18
 annulment proceedings, 312–13
 case law on trade remedies, 315
 competence in respect of EU citizens'
 rights, 116

- (CJEU) (cont.)
- dispute settlement, 55–60
 - arbitration provisions, 62
 - controversy in role, 55
 - practical application, 58–60
 - provisions of the Protocol, 55–58
 - driving role in UK's withdrawal from the EU, 55
 - enforcement role of Protocol provisions, 77–78, 108–9
 - experience using the interpretive methodology of the VCLT, 90
 - imposition of punishment for breach of the Protocol, 112
 - influence of CFR on retained jurisprudence, 162
 - jurisdiction
 - potential triggering of, 56
 - provisions under the Protocol, 42, 120, 319–20
 - post-Brexit status in UK law, 163–64
 - preliminary reference procedure, 153, 316
 - provisions under Protocol
 - modifications to the WA, 12
 - public procurement reform in the UK, 279
 - relationship with the CFR, 160
 - requirement for UK to engage in case law, 10
 - 'sincere co-operation', application of the concept, 97
 - state aid controls and, 77
 - state aid, summary of case law, 239
 - covered procurement, 270–72, 275, 276–78
 - Covid-19, 47, 57, 135, 230
 - Crawford, James, 82
 - creative industries, 262
 - criminal law and procedure, 88, 156, 157, 285–86, 289, 294
 - Criminal Record Information System (UKCRIS), 291
 - cross-border co-operation, 50, *see also* North–South co-operation
 - Crown Dependencies, 173
 - CTA Memorandum of Understanding, *see* Memorandum of Understanding (CTA)
 - Cummings, Dominic, 269
 - customary international law, 80–81, 84, 87, 89
 - customs declarations, 73, 75, 211, 214
 - complexity, 217
 - function of, 216
 - traders' responsibilities, 217–18
 - customs duties
 - GB to Northern Ireland movement of goods, 74
 - goods entering Northern Ireland, 208
 - Union system of relief, 72
 - waiver scheme, 214–15
 - customs legislation, EU, continued
 - application in Northern Ireland, 208
 - customs territory, provisions under the Protocol, 72
 - Cyprus, 10
 - damages
 - capping level of, 280
 - claiming for breach of UK competition law, 228
 - EU law, 148
 - state aid and, 233
 - state liability (*Francovich rule*), 155
 - damages actions, 39
 - Damages Directive, 228
 - data protection and privacy, 167, 178, 293–94
 - decommissioning, addressed in 1998 Agreement, 23
 - democratic consent mechanism, 11, 14, 58, 118, 124, 126, 137, 227
 - Democratic Unionist Party (DUP), 7, 183
 - Denmark, 298
 - Department of Agriculture Environment and Rural Affairs, 249
 - DeSouza* case, 186, 190–91
 - devolution, Northern Ireland, 2, 25, 28, 120, 123, 127, 147, 153, 235, 286

- Dicey, AV, 127
- Digital Markets Act, 223
- digital trade, 259
- direct effect
- Article 2 of the Protocol, 154–55
 - conditions for, 111
 - denial in TCA, 36–38
 - discrimination and, 198
 - EU law, 77, 109, 131
 - good faith and, 100
 - human rights and, 154–55
 - intra-corporate transferees and, 201
 - meaning of, 154
 - potential operation through TCA, 33, 36
 - provisions under the WA, 41–42, 110–11, 131
 - section 7A EUWA 2018 and, 109–10
 - Union law, 110, 131
- direct rule, 143
- Directives
- anti-discrimination, 143, 151–52
 - direct effect, 154
 - social, 143
 - see also under individual directives.*
- disabilities, protections for rights of persons with, 152
- dispute resolution mechanism (DRM), 112, 113
- dispute resolution, public procurement, 278
- dispute settlement, 55–65
- arbitration procedure, 60–64
 - Commission's initiation of procedures, 16
 - controversy in the role of the CJEU, 55
 - Joint Committee and, 46, 318
 - judicial review
 - under EU law, 312–16
 - under UK law, 316–18
 - under the WA, 318–20
 - jurisdiction of the CJEU, 55–60
 - likely role of Article 5 WA, 102
 - preliminary reference procedure, 315–16
 - safeguard provisions, 312–20
- district council, 148–49
- divergence
- attributed to Brexit, 148
 - built-in mechanism for, 223
 - environmental regime, potential for and impact of, 249–52
 - likely increase, 227–28
 - potential impact, 183, 222, 251
 - regulatory regimes, 70
 - tariffs, 69
- dualism, international law, 13, 130
- dynamic alignment, 11, 13, 48, 250
- East–West dimension, 2, 23, 25, 74–76
- ECN+ Directive, 228
- education
- North–South co-operation, 12, 25, 52, 122
 - potential triggering of CJEU jurisdiction, 57
 - rights under the CTA, 133, 179
- eels, 253
- EFTA Court, 92, 95, 97–98, 101, 155
- elections
- CTA and, 173, 179, 195
 - rights of EU citizens to vote and stand, 148–49
- employment rights, 133, 147, 150, 178
- energy
- North–South co-operation, 12, 122
 - potential triggering of CJEU jurisdiction, 57
- enforcement
- by Commission, 111
 - by individuals, 110–11
- enforcement actions, 226
- enforcement of foreign judgments, 296, *see also jurisdiction/recognition and enforcement*
- environment, 221
- North–South co-operation, 12, 25, 52, 122
 - potential triggering of CJEU jurisdiction, 57
- Environment Bill (UK), 251
- environmental impact
- of border controls, 252–55
 - see also under environmental protection.*

- environmental protection, 245–55
 Brexit and the possibility of increased regulatory divergence, 249–52
 exclusions from the Protocol, 71
 impact of links to trade, 246
 level playing field provisions (Title XI TCA), 248
 Northern Ireland, continued
 compliance with EU environmental law, 246
 on the island of Ireland, 245–46
 potential negative impacts of border controls, 252–55
 provisions under the TCA, 248
 provisions under the 1998 Agreement, 245
 risk of decline in Northern Ireland, 251
- equal pay, 143
- equal treatment, 70, 114–15, 160, 272, 276
- Equality Commission for Northern Ireland (ECNI), 25, 53, 152, 153
- equality, human rights and. *see* [human rights and equality](#)
- ERASMUS, 179, 189, 263, 267
- EU citizens
 citizens' rights, 116
 classification under UK immigration rules, 196
 rights under the WA for UK residents, 144
 rules on entry to Ireland for Northern Ireland residents, 199
 rules on entry to Northern Ireland for residents of Ireland, 196
see also [non-Irish EU citizens](#).
- EU citizenship, 144, 150, 184, 187–88, 189, 195, 202
- EU Commission, 'beyond covered procurement' response, 277
- EU Common External Tariff, 208, 211
- EU competition law, adaptations in, 228
- EU Customs Code, 72, 75
- EU customs legislation, continued
 application in Northern Ireland, 208
- EU Customs Union, 11, 37
- EU Governance of the Protocol, legal structure, 33–43
- EU internal market, protecting the integrity of, 56
- EU law
 continued application in Northern Ireland, 247
 domination of private international law by, 296, 298
 general principles, 120, 127, 151, 160, 162, 163
 judicial review under, 312–16
 legal underpinnings of the 1998 Agreement, 147–48
 retained. *see* [retained EU law](#)
- EU Merger Control Regulation, 228
- EU Settlement Scheme Residence Card, 202
- EU single market, 112, *see also* [Single European Market](#)
- EU–Canada Comprehensive Economic and Trade Agreement (CETA), 197
- Eurojust, 285, 292–93, 295
- European arrest warrant (EAW), 285, 286, 287, 290
- European Arrest Warrant Framework Decision (EAW FD), 286–88
- European Coal and Steel Community (1951), 232
- European Commission
 adjudication role, 228
 attempts to impose export restrictions on movement of Covid-19 vaccines, 314
 co-operation and co-ordination agreement, 226
 data protection and, 294
 infringement proceedings against the UK, 319–20
 initiates dispute settlement procedures of Protocol, 16
 objections to UK Internal Market Bill, 15–16

- requirements with regard to UK
 - internal market, 237
- safeguard provisions and, 313
- sanctioning powers, 230
- state aid role, 232–33
- supervisory jurisdiction, 77
- European Communities Act 1972
 - (ECA), 14, 109, 121, 125, 130, 159
- European Competition Network (ECN), 229
- European Convention on Extradition (1957), 286
- European Convention on Human Rights (ECHR), 18, 25, 29, 83, 87, 88
 - continuing UK membership, 147
 - judicial co-operation and, 294–95
 - obligations on the Irish government to incorporate into Irish law, 145
 - post-Brexit status in UK law, 163–64
 - potential impact of a UK withdrawal, 148, 157
 - relationship with ‘fundamental rights’, 160
 - TCA and, 156–57
- European Court of Human Rights (ECtHR), post-Brexit status in UK law, 161, 163–64
- European Court of Justice (ECJ), 46, 319
- European Criminal Records Information System (ECRIS), 291
- European Data Protection Board (EDPB), 293
- European Economic Area (EEA), 18
 - Article 1 objectives, 95
 - comparison with Protocol provisions, 11
 - dismissal of suggestions that the UK should join, 6
 - duty of ‘sincere co-operation’ or ‘loyalty’, 92, 95, 96
 - EEA–EFTA separation agreement, 114
 - Lugano Convention and, 303
 - residents’ card, 202
- European Free Trade Association (EFTA), 18
 - EEA–EFTA separation agreement, 114
 - EFTA Court jurisprudence, 98, 101, 155
 - loyalty provision, 97
 - Lugano Convention and, 303
 - sincere co-operation and, 92, 97
 - Surveillance Authority, 101
- European Health Insurance Card (EHIC), 189, 263
- European Investigation Order (EIO), 292
- European Parliament
 - Civil Liberties, Justice and Home Affairs (LIBE) Committee, 294
 - data protection resolution, 294
 - no obligation to discuss decisions of Joint Committee, 47
 - potential annulment action, 313
- European Social Charter, 156
- European Union (EU)
 - Charter of Fundamental Rights. *see* Charter of Fundamental Rights (CFR)
 - disputes with UK concerning the Protocol, 15–16
 - policy implementation role of North–South bodies, 24
 - ‘red lines’, 9
 - role in easing tensions between the UK and Irish governments, 3–4
 - status of the 1998 Agreement, 21, 30
 - unacceptability of a ‘hard’ border on the island of Ireland, 8, 11
- European Union (Future Relationship) Act 2020 (EUFRA), 18, 33, 108, 281
 - and enforcement of rights, 33–36
- European Union (Withdrawal Agreement) Act 2020 (EUWAA 2020), 33, 107
 - amendment of EUWA 2018, 119–20
 - CFR and, 165
 - citizens’ rights and, 114

- European Union (cont.)
 contents and scope, 33
 interconnected provisions in the WA and, 164
 provisions for NIHRC and ECNI monitoring roles, 153
- European Union (Withdrawal) Act 2018 (EUWA 2018), 18
 concept of 'retained' EU law, 246
 contents and scope, 33
Francovich liability and, 155
 interplay between the NI Act 1998 and, 125–26
 Protocol and, 119–21
 provision for continued supremacy of EU retained law, 108
 repeal of ECA 1972, 159
 retained law and rights, 40–41
 section 10
 safeguarding of North–South co-operation, 122–23
 significance, 123
 section 7A
 Article 2 of the Protocol and, 153
 catch-all nature, 121
 direct effect provisions, 42
 effect of combined with Article 4(1) WA, 110, 120
 function, 14
 legal hybridity and, 121
 provisions, 120
 remedies under, 108, 166
- Europol, 285, 292–93, 295
- EU–UK Joint Report (December 2017), 133
- EU–UK Trade and Cooperation Agreement, 18
- EU–UK Withdrawal Agreement, 1, 18, *see also* *Withdrawal Agreement (WA)*
- exit day, 34, 41, 107, 159, 161, 163
- extradition, 4, 13, 285, 286–90, 295
 grounds for refusal, 288–90
- Fair Employment and Treatment Order (1998), 143
- family members
 CTA's blindness towards, 203
 of British nationals in Northern Ireland, 203
 of EU citizens, 195, 200, 202
 of Irish citizens, 200, 202–3
- financial services
 drivers of reticence on the EU side, 257
 uncertain trajectory in the UK, 265
- fisheries, inland. *see* *inland fisheries*
- fishery and aquaculture products, 72, 215
- food imports, 58
- food safety, 75
- food safety, North–South co-operation, 52
- food serving services, 271
- food standards and labelling, 247
- food, for sale in the UK, 213
- foreign judgments, enforcement of, 296, *see also* *jurisdiction/recognition and enforcement*
- Forum on Immigration Matters, 180
- Framework Convention on National Minorities, Council of Europe, 29
- Francovich liability*, 120, 123, 127, 155
- free movement of persons, non-engagement of Treaty rules, 71
- free movement of services, non-engagement of Treaty rules, 71
- free movement rights
 under the 1998 Agreement, 176
 under the CTA, 150, 176
- free trade agreements, 4, 8, 197, 208, 250, 258–59
- freedom to provide services, 199, 201
- frontier workers
 addressed by MOU, 178
 definition, 115
 pre- and post-Brexit position, 196–97
 rights under the WA, 115
- Frost, Lord, 45–46, 52, 59, 112
- fundamental rights
 Charter of Fundamental Rights, 159–69
 derivation, 161
 human rights and equality issues, 143–58

- see also* Charter of Fundamental Rights; human rights and equality.
- future relationship, 9, 128, 188, 208
negotiations, 188
TCA and enforcement of rights, 33–36
see also European Union (Future Relationship) Act 2020 (EUFRA).
- Garda Síochána, An (AGS), 4, 285, 290, 295
- gas market, 224–25, 271
- gender discrimination, 143, 146, 152
- gender equality, 192
- General Agreement on Tariffs and Trade (GATT), 310
- General Data Protection Regulation (GDPR), 293
- General Election (2017), 7
- General Election (2019), 79
- General Election (2020), 8
- general principles of EU law, 120, 127, 151, 160, 162, 163
- ‘get Brexit done’ rhetoric, 7, 79, 257
- Gibraltar, 10
- Global Health Insurance Card, 189
- good faith, 92–103
general principle of international law, 92
implications of obligations, 98–101
interpreting references to, 93
justiciability, 98
- Good Friday Agreement (1998 Agreement), 1, 21–30
alterations to application of arrangements, 22
challenges posed by the UK’s exit from the EU, 2–3
commitments on human rights and equality, 25
context and content, 22–25
continuing UK membership of ECHR and, 147
design, 23
environmental protection provisions, 245
- human rights and equality legislation facilitated by, 143–44
- implementation mechanisms, 13
- influence on the shape of Brexit, 184
- legal status
international law, 25–27
Ireland, 28–30
United Kingdom, 27–28
- legal underpinnings in EU law, 147–48
- legitimacy, 23
- ‘no diminution’ protection, 293
- North–South co-operation provisions, 122
- outline, 2
- ‘parity of esteem’ principle, 192
- potential impact of decline in environmental protection in Northern Ireland, 251
- Protocol in Irish Law and, 135–38
- rights and safeguards under Article 2 of the Protocol, 11, 23, 145–51, 152, 188
- scope of rights protection, 145
- status in the USA and the EU, 21
- structure, 23
- three-stranded approach, 23, 24–25
- goods ‘at risk’ of entering the EU, 211–12, 213, 215
- Gove, Rt Hon Michael, 45
- governance
all-island environmental governance, 255
CTA governance and visas, 180–81
domestic, 153–54
establishment of arrangements, 10, 12
EU, 33–43, 160
international, 10, 152
Ireland, 129–39
multilevel, 246
Northern Ireland, 118–28, 183
pre-Brexit, 24
role of the SCLE&JC, 293
UK, 107–17
- grace periods
Commission objects to UK extension, 101, 112

- grace periods (cont.)
 establishment of, 49
 expectations for end of, 254
 temporary effect, 76
 UK's unilateral extension, 46, 58,
 101, 320
- Great Britain, 5, 18
- Green Paper, 'Transforming Public
 Procurement', 279–80
- Guernsey, 173
- Hague Convention on Choice of Court
 Agreements (2005), 304–5
- hard border, avoidance of, 9, 78, 85, 95,
 112, 137, 207, 252
- health
 North–South co-operation, 12, 25,
 52, 122
 potential triggering of CJEU
 jurisdiction, 57
- health certificates, 211
- health services, 173
- health care, CTA and, 134, 178
- Henry VIII clause, 34
- higher education
 ERASMUS scheme, 179, 189
 North–South co-operation, 12,
 122
 potential triggering of CJEU
 jurisdiction, 57
- 'Hipster' competition, 223
- HM Revenue and Customs
 (HMRC), 218
- Hoffmann, Lord, 27
- Horizon Europe, 266
- House of Lords EU Internal Market
 Sub-committee, 236
- House of Lords European Union
 Committee, 54
- human rights
 commitments under the 1998
 Agreement, 25
 continuing UK membership of
 ECHR, 147
 criminal justice context, 157
 dependence on strong rule-of
 law-culture, 169
 evolution in EU law, 159–60
 Irish government's protection
 efforts, 29–30
 TCA and, 13
 see also European Convention on
 Human Rights (ECHR); human
 rights and equality; Northern
 Ireland Human Rights
 Commission (NIHRC).
- Human Rights Act (1998), 125, 143,
 163–64, 166–68, 295
- human rights and equality, 143–58
 Article 2 of the Protocol
 anti-discrimination clause, 145,
 151–52, 154
 application, 144–45
 direct effect, 154–55
 general clause, 145–51
 governance
 domestic, 153–54
 international, 152
 interlocking elements, 145
 primary obligations of devolved
 institutions, 153
 rights and safeguards under the
 1998 Agreement, 11, 23,
 145–51, 152, 188
 ultimate sanction for
 violation, 152
- Irish Human Rights and Equality
 Commission, 29
- provisions under the TCA, 155–57
- identity and citizenship in Northern
 Ireland, 183–93
 birthright provision of the 1998
 Agreement, 185–87
 continuation of 'EU rights,
 opportunities and benefits',
 187–88
 exacerbation of tensions by Brexit,
 183, 193
 intertwining of Brexit and, 184
 mitigating for Brexit, 188–92
 'parity of esteem' under the 1998
 Agreement, 192
 Yeats's 'no petty people' narrative,
 192, 193
- Immigration Act (2004), 174

- immigration policy, 116, 174, 180, 186, 190–91, 196, 199, 201, 286
- implementation period, 8, 108, 114, 116
- implementing legislation, 13, 14, 44, 107–9, 111–12, 136, 149, 212
- Independent Monitoring Authority (IMA), 116
- individual enforcement, 110–11
- inland fisheries
 - North–South co-operation, 12, 122
 - potential triggering of CJEU jurisdiction, 57
- intellectual property, 40, 87, 221, 231
- Intergovernmental Agreement on Co-operation in Criminal Justice, 285
- Internal Market Act, 250
- Internal Market Bill, UK government's proposal, 15
- International Bureau of the Permanent Court of Arbitration, 61
- International Competition Network (ICN), 229
- International Court of Justice, 26
- International Labour Organization Conventions, 156
- international law
 - Article 10 of the Protocol and, 237
 - EU–UK relations and, 129, 138
 - future relationship and, 128
 - 'good faith' principle, 92–93 *see also* [good faith](#).
 - Ireland's and the UK's dualist approach, 13
 - legal structures for co-operation, 122
 - public, 34, 55, 62–63, 80, 229
 - rules on treaty interpretation, 80–91
 - status of the 1998 Agreement, 25–27
 - TCA stipulation, 13, 94
 - UK Internal Market Bill and, 169
 - UK obligations, 144
 - uncertainty over UK's compliance, 16
 - see also* [private international law](#).
- International Law Commission, 86
- international maritime trade, 259
- interpretation of treaties, 80–91
 - central articles of the VCLT, 90
 - conflicts, 89–90
 - effectiveness principle (*effet utile*), 84
 - general framework of rules, 81–83
 - goal under the VCLT, 82
 - international law rules, 80–91
 - peremptory norms and other treaties, 89–90
 - roles of subsequent agreements and other rules of international law, 85–88
 - supplementary means, 89
 - TCA and WA provisions, 80–81
 - text-based starting point, 84–85
- interpreting the Protocol, 69–79
- invasive species, 252
- Ireland
 - border crossing rules for third-country nationals resident in, 199–201
 - Brexit mitigation efforts, 261–62
 - Common Travel Area arrangements, 173
 - dualist approach to international agreements, 130
 - dualist approach to international law, 13
 - exchange of information between the UK and, 291–93
 - extradition relationship between the UK and, 286–90
 - implementation approach to the WA, 13, 14
 - legal status of the 1998 Agreement, 28–30
 - population, 194
 - rules on entry for EU citizens
 - resident in Northern Ireland, 199
- Ireland–Northern Ireland Protocol, 18, *see also* [Protocol](#)
- Irish Border, 136, *see also* [border](#), [Ireland–Northern Ireland](#)
- Irish citizens residing in Northern Ireland, rights under the WA, 144
- Irish Constitution (1937), 29, 135
- Irish government
 - action on services, 263

- Irish government (cont.)
 border concerns, 184
 co-guarantorship, 27
 determination to limit the impact of
 Brexit, 261
 ERASMUS scheme and, 179,
 189, 266
 human rights and, 29, 145, 151
 Joint Committee meetings and, 47
 significance of the CTA, 180
 Irish Human Rights and Equality
 Commission, 29
 Irish language, 192
 Irish Parliament, 134
 Irish Sea border, 207–18
 background, 8
 border dilemmas caused by
 Brexit, 207
 introduction and impact under the
 Protocol, 208–9
 potential impact on Northern
 Ireland trade, 216–18
 rushed guidance on, 215–16
 TCA and, 12
 treatment of goods
 moving from GB to Northern
 Ireland, 211–16
 moving from Northern Ireland to
 GB, 209–11
 island of Ireland
 Brexit's unique challenge, 129
 cross-border co-operation, 50 *see*
also North–South co-operation.
 'equivalence' under the 1998
 Agreement, 30
 establishment of an all-island
 economy, 3
 EU membership and cross-border
 trade in goods and services,
 3–4
 Joint Committee of the Human
 Rights Commissions, 25
 population of non-UK or non-Irish
 citizens, 194
 potential for imposition of trade
 barriers within, 309
 significance of the 1998 Agreement
 for, 135–38
 Single Electricity Market, 12, 225
 unacceptability of a 'hard' border,
 8, 11
 unique circumstances, 137
 and the necessity of the Protocol,
 70–72
see also North–South co-operation.
 Isle of Man, 2, 25, 173
 Israel, 304
 Italian Torpedo, 303
 Jersey, 173
 Johnson, Boris, 5, 7, 8, 14, 37, 72, 184,
 234, 236, 257
 Joint Agency Task Force, 285
 Joint Committee, 18
 Article 2 of the Protocol and, 152
 dispute settlement and, 46, 318
 establishment, 10
 formal and informal, 44–45
 monitoring and reviewing role,
 50–51
 operation of, 47
 powers, 47–48
 remit, 48–50
 responsibilities for deciding customs
 arrangements, 208
 responsibilities under the
 Protocol, 49
 role in West-East trade
 arrangements, 73
 Joint Committee of the Human Rights
 Commissions, 25, 53
 Joint Consultative Working Group
 (JCWG), 12, 18
 function, 44
 operation of, 53–54
 Joint Cross-Border Policing
 Strategy, 285
 Joint Investigation Teams, 293
 judicial co-operation, 285–95
 challenges of Brexit, 285–86
 exchange of information between the
 UK and Ireland, 291–93
 extradition relationship between the
 UK and Ireland, 286–90
 oversight and ancillary concerns,
 293–95

- prisoner transfer, 292
- transmission of an arrest
 - warrant, 290
- judicial review
 - domestic, 39, 153, 316–18
 - EU law, 312–16
 - fundamental review of, 168
 - standing requirements under UK law, 317
 - state aid and, 233
 - under the WA, 318–20
- judiciary, Brexit-related criticisms, 168
- jurisdiction, 296–305
 - common set of rules established, 298
 - effect of Brexit on, 299–302
 - EU conflict of laws rules, 298–99
- jurisdiction/recognition and enforcement, alternative approaches for post-Brexit UK, 302–5
 - Brussels Convention, 302
 - Hague Convention on Choice of Court Agreements, 304–5
 - Lugano Convention, 302–4
- jus cogens*, 89
- justice
 - addressed in the 1998 Agreement, 23
 - criminal justice co-operation, 285, 294, 295
 - fundamental rights and, 161
 - human rights and, 156–57
 - North–South co-operation, 12, 122, 293
 - potential triggering of CJEU jurisdiction, 57
- Labour Party, 6
- labour rights, 144, 156, 221
- Law Applicable to Contractual Obligations and Non-contractual Obligations (2019), 300
- Law Enforcement Directive, 293
- legal hybridity, 118–19, 121, 127–28
- legal language of the Protocol, challenges for traders, 215
- level playing field
 - environmental standards, 248
 - function, 156
 - rights and, 36–40
 - TCA and, 13, 221–25
 - see also under* competition law; Trade and Cooperation Agreement (TCA).
- linguistic diversity, protections under Article 2 of the Protocol, 147
- litigation
 - competition law, issues needing to be addressed by, 229
 - concerning interpretation of the Single Market and customs arrangements, 12
 - DeSouza* litigation, 190
 - EU level harmonization of jurisdiction rules and, 299
 - fixes for third state litigation, 303
 - on birthright provision of the 1998 Agreement, 186
 - role of the CJEU at domestic level, 12, 315
- Lough Neagh eel fishery, 253
- Loughs Agency, 245
- loyal co-operation, duty of, 63, 92, 95, 97–98, 101, 102
- loyalists, 4, 8, 16
- loyalty, principle of, 92–93, 97
- Lugano Convention, 302–4
- Magna Carta, 125
- Maternity and Parental Leave Directive, 143, 152
- May, Theresa, 5, 6–7, 37, 72, 184, 233
- Memorandum of Understanding (CTA)
 - family members, 200
 - financial services provisions, 258
 - health care and reimbursement arrangements, 134
 - reaffirmation of the Irish and UK governments' commitment, 116, 133
 - rights and privileges, 177–80, 194
- Mexico, 304
- migrant workers, 174
- Modernisation Regulation, 228–29

- monitoring and reviewing, role of the
 - Joint Committee, 50–51
- monopolies, 225
- Montenegro, 304
- Morgan, Austen, 190
- multilevel governance, 246
- mutual recognition
 - certain short-stay visas, 200
 - EAW system, 287
 - ending of, 260, 289
 - facilitating post-Brexit, 263–65, 267
 - national qualifications, 264
 - principle of, 250
 - professional qualifications, 12, 178, 257, 259, 264, 267
- national ID card, 196, 199
- nationality-based discrimination, 186, 187, 198
- nature conservation, 247
- negotiations
 - 1998 Agreement, 13, 17, 21, 23, 27, 185
 - apparent absence of jurisdiction/enforcement rules, 302
 - Article 50, scope of, 8–10
 - decision to authorize the triggering of, 6
 - peace process, 3
 - post-Referendum negotiations, 1
- net-zero, 248
- New (Northern) Irish
 - challenges experienced by when crossing the Ireland–Northern Ireland border, 195, 203
 - definition, 194
 - EU citizenship rights, 195
 - percentage of the population on the island of Ireland, 195
- New Decade, New Approach*, 47, 190
- ‘no petty people’ narrative of WB Yeats, 192, 193
- ‘no-diminution’ commitment
 - applicability, 148, 150
 - ‘birthright’ provision and, 147, 150
 - ‘but for’ test, 148
 - protection of, 11, 144, 146
 - scope, 145, 155
 - UK commitment, 11
- non-discrimination principle, 57, 114, 160, 199, 203, 224, 225, 256, 273–74
- non-Irish EU citizens
 - potential impact of restrictions on cross-border work for, 198
 - provisions for family members, 200
- ‘non-nationals’, definition in Irish law, 134, 177
- non-regression, 248–49, 250
- non-tariff barriers, 252–53
- Northern Ireland, 25
 - anger over implementation of the Protocol, 16
 - application of EU rules to, 11
 - border crossing rules for third-country nationals resident in, 201–3
 - challenges posed by the UK’s exit from the EU, 2–3
 - citizens’ rights under the Protocol, 164
 - constitutional status, 24, 27, 137
 - continuation of single market provisions, 42
 - continued application of EU law, 247
 - continued application of the EU’s customs legislation, 208
 - democratic consent mechanism, 11
 - devolved government, 2
 - divergence from GB trade rules, 70
 - domestic legal implementation of the 1998 Agreement, 14
 - dynamic alignment under the Protocol, 48
 - environmental regime, 246–49
 - potential for and impact of divergence, 249–52
 - Equality Commission for Northern Ireland (ECNI), 25, 53, 152, 153
 - franchise for district council elections in, 148
 - impact of the Irish Sea border on traders in, 216–18
 - obligations in relation to the two constitutional orders, 118

- passport requirements for EU citizens resident in Ireland, 196, 199
- post-Brexit status, 129
- potential impact of non-application of the mutual recognition principle, 250
- power-sharing arrangements, 2, 24, 47, 190
- pre-Referendum consideration of the potential impact of a 'leave' vote on, 1–2
- public opinion on Brexit, 7
- rules on entry for EU citizens resident in Ireland, 196
- special relationship with Ireland, 129
- Troubles, 287
- value of services sector, 256–57
- voting rights in district council elections, 148–49
- Northern Ireland Act (1998), 14–15, 27–28, 30, 118, 127, 143
 - constitutional status, 125
 - interplay of EUWA 2018 with, 125–26
 - Protocol and, 121–24
- Northern Ireland Assembly, 2, 24
 - British government's policy commitments, 147
 - changes to number of members, 23
 - 'democratic consent' provisions, 58, 107, 124, 153
 - obligations of the British government, 147
 - remedy for withholding of consent, 50
 - suspension, legislation enacted by Westminster/UK government ministers during, 143
- Northern Ireland backstop, 5, 184
- Northern Ireland Civil Service, 52
- Northern Ireland Constitution, 118–19, 126–28
- Northern Ireland Executive, 22, 24, 47, 286
- Northern Ireland Human Rights Commission (NIHRC), 25, 53, 152, 153, 294
- North–South bodies, 2, 4, 12, 245
- North–South co-operation
 - constitutional significance of the Protocol for, 138
 - maintaining necessary conditions for, 11, 50, 95, 137, 293
 - provisions under the Protocol, 50, 56, 122
 - safeguarding under section 10 EUWA 2018, 122–23
 - shape of Brexit and, 184
 - six areas of agreed co-operation, 25
- North–South dimension of the 1998 Agreement, 23
- North–South Implementation Bodies, 25, 52
- North–South Ministerial Council, 24, 52, 122, 136, 245, 255
- Oireachtas, 13, 134
- onward movement, goods at risk/not at risk of, 74, 75
- Organisation for Economic Co-operation and Development (OECD), 225
- origin of goods, 213, 217
- Parliament, UK. *see* Westminster Parliament
- Partnership Council, 293
- Part-Time Work Directive, 143, 151–52
- passporting, 260, 265
- peace process in Ireland
 - challenges of Brexit for, 137, 193
 - EU's supporting role, 129, 136, 139
- Penrose Report, 223
- peremptory norms, 89
- Permanent Court of Arbitration, 61
- pesticides, 247
- petition of concern mechanism, 124, 126
- pets, 59, 113
- Police Service of Northern Ireland (PSNI), 4, 285, 287, 290, 295
- Political Declaration, 36, 85, 208
- political offence exception, 287, 288
- ponies, 254

- power-sharing, Northern Ireland, 2, 24, 47, 190
- pre-settled status, 114–15, 116
- Preamble to the Protocol, 84, 129, 147, 188
- pregnancy rights, 152
- pregnant workers, 152
- preliminary rulings procedures, 56, 319
- pre-trial detention, 288
- prisoners, addressed in the 1998 Agreement, 23
- private international law
- Brexit and, 296, 297
 - commercial disputes and, 12
 - domination by EU law, 296, 298
 - facilitation of cross-border enforcement of commercial judgments, 4
- procedural fairness, 226
- Procurement Policy Note (PPN), 276, 277
- procurement reform (UK), 269, *see under public procurement*
- professional qualifications, mutual recognition, 12, 178, 257, 259, 262–64, 267
- professional services, 259, 263–64
- prorogation of UK Parliament, 7
- Protocol
- as device to ‘get Brexit done’, 79
 - calculated ambiguity, 69
 - challenge launched by unionist politicians in NI courts, 15
 - committees, 44–54
 - see also Committees of the Protocol.*
 - constitutional significance, 137
 - content and scope, 70
 - customs territory provisions, 72
 - disputes concerning, 15–16
 - East–West trade (GB to Northern Ireland), 74–76
 - enforcement, 77–78
 - evasive terms, 72
 - future of, 16–17
 - interpreting, 69–79
 - Irish law, 129–39
 - 1998 Agreement, 135–38
 - Common Travel Area, 133–35
 - status and effect, 130–32
 - misrepresentation by the UK government, 69
 - Northern Ireland law, 118–28
 - constitutional statutes and, 125–27
 - EUWA 2018 and, 119–21
 - NI Act 1998 and, 121–24
 - objectives and impact, 118–19
 - post-Brexit significance, 139
 - provisions under Article 3 on movement of persons, 194
 - purpose, 70–72, 118–19, 137
 - reasons for existence, 70–72
 - state aid controls, 76–77
 - West–East trade (Northern Ireland to GB), 72–74
- Public Contracts Directive, 279
- public international law, 34, 55, 62–63, 80, 229
- public procurement, 269–81
- annual spending in the UK and the EU, 269
 - aspects regulated by the GPA, 272
 - ‘beyond covered procurement’, 275–78
 - potential exclusion of SMEs, 269, 277
 - provisions under the TCA, 275–76
 - reservation of contracts for local suppliers, 278
 - responses, 277–78
 - terms under the Protocol, 276–77
 - UK government plans for the SME sector, 277–78
- covered procurement, 271–75
- additional procuring entities, 271
 - additional rules, 272–75
 - additional services, 271
- general post-Brexit framework (TCA/GPA framework), 270–71, 281
- legislation facilitated by 1998 Agreement, 143
- modifications, rectifications and dispute resolution, 278

- post-Brexit flexibility, 281
- reform in the UK, 278–81
 - amendments, 278–79
 - Green Paper on ‘Transforming Public Procurement’, 279–80
 - potential issues, 280
 - tendering requirements, 279
 - termination rights, 279
- SMEs, 277
- Special Drawing Rights, 271
- World Trade Organization (WTO)’s General Procurement Agreement (GPA), 270, 272, 274, 277, 279
- Public Procurement (Amendment etc) (EU Exit) Regulations 2020, 278

- reciprocal rights, WA provisions, 144
- referendums
 - 1998 Agreement, 22
 - amendment of Irish constitution, 28–29
 - see also* **Brexit referendum**.
 - ‘regression by default’, 249
- regulatory alignment, 37, 70, 76, 253, 257, 303–4
- remedies
 - CJEU case law on trade remedies, 315
 - ensuring courts/tribunals have power to impose, 38
 - for failure by the UK to track replacement Directives, 100
 - for human rights violations, 167
 - provision under Article 2 of the Protocol, 147
 - provision under Article 5 WA, 100
 - provision under section 7A EUWA 2018, 108, 166
 - public procurement, 274–75
 - TCA specifications, 39, 274–75
 - temporary, 319
 - ‘trade remedies’ permitted under WTO law, 310, 314
- reputational damage, 79
- residency rights
 - EU citizens, 150–51
 - scope of the WA, 114
 - settled vs pre-settled status, 114–16
- retained EU law
 - adaptation and its impact, 249
 - CFR’s influence, 162, 169
 - concept of, 246
 - environmental protection, 246
 - potential for divergence within GB, 250
 - potential for modification in Northern Ireland, 120, 127
 - provisions under EUWA 2018, 14, 40–41, 108
 - UK government’s proposal to replace EU state aid law with ‘guidance’, 237
- retained-EU law, likelihood of repeal, 162
- rights
 - labour rights, 144, 156, 221
 - level playing field provisions and, 36–40
 - reciprocal rights, 144
 - self-determination rights, 24
 - social housing rights, 179
 - social protection rights, 179
 - social rights, 144, 156, 180
 - see also* **citizenship rights; civil rights; fundamental rights; human rights; human rights and equality; residency rights**.
- road haulage, 259
- Robinson* case, 27, 28, 118, 125
- Rome Convention of 1980, 298
- Rome I Regulation, 299, 300
- Rome II Regulation, 299, 300
- Royal Prerogative, 6
- rule of international law, 17, 26
- rule of law
 - basis of CFR, 161
 - decline in the UK’s culture of, 168
 - human rights and, 157, 168–69, 294
- rules of origin, 272

- safeguard provisions
 - annulment proceedings, 313, 316
 - dispute settlement, 312–20
 - EU–UK trade relationship context, 311–12

- safeguard provisions (cont.)
 invoked by both the European Commission and the UK, 15
 judicial review
 EU law, 312–16
 UK law, 316–18
 WA, 318–20
 North–South co-operation under section 10 EUWA 2018, 122–23
 potential for imposition of trade barriers within the island of Ireland, 309
 Protocol's introduction, 12
 WTO regime, 310
 comparison with, 320
 sanitary and phytosanitary controls (SPS), 11, 211, 245–47, 252–53
 Schengen system, 133, 174, 175, 287
 Scotland, 2, 5, 25, 125
 secondary policies, 269, 273, 280–81
 Second-Generation Information System (SIS II), 285
 Second World War, 174
 security
 addressed in the 1998 Agreement, 23
 fundamental rights and, 161
 North–South co-operation, 12, 122, 293
 potential triggering of CJEU jurisdiction, 57
 Šeščović, Vice President, 45–46, 112
 self-determination, rights under the 1998 Agreement, 24
 services, 256–68
 Brexit Services Deal, 258–61
 Common Travel Area and, 262
 impact on creative service industries, 266
 impact on financial services, 264–66
 impact on professional services, 263–64
 Irish government action and, 263
 Irish reservations, 261–62
 moderating the effect, 261–63
 recognition of professional qualifications and, 262, 263
 examples of cross-border provisions, 198
 importance to modern economies, 256
 reasons for the failure to reach a better deal on, 257
 single market in, 257
 value of sector in Northern Ireland, 256–57
 settled status
 and right of entry into Northern Ireland, 199
 application process, 114–15
 deadline for submitting an application, 115
 sex-based rights, 146–47
 sexual orientation, anti-discrimination, 143
 Shared Island Unit, 29
 Short-Stay Visa Waiver Programme, 200, 201
 sincere co-operation, duty of, 63, 92, 95, 97–98, 101, 102
 Singapore, 304
 Single Electricity Market, 12, 56, 225
 Single Market
 CJEU's role, 12
 continuation in Northern Ireland, 42
 for goods, 184
 Ireland as a stepping-stone for access to, 267
 maintaining the integrity of, 11, 112
 potential impact of Brexit, 267
 risk posed by goods entering Northern Ireland from outside the EU, 49
 in services, 257, 258
 UK's exit from, 37
 Single Use Plastics Directive, 248
 Smith, Lisa, 186
 social housing, rights under the CTA, 179
 social inclusion, obligations on the UK government under the 1998 Agreement, 147
 social protection, 134, 166, 179
 social rights, 144, 156, 180
 social security, 34, 115, 134, 180

- soft border, 71–72
- soft legislation, 234–35
- sovereignty, 4, 8, 23, 35, 56, 127, 183, 193
- Special European Union Programmes Body, 25
- Special Immigration Appeals Commission, 186
- Specialised Committee, 12, 18, 44, 50–52, 152, 225, 288
- Specialised Committee on Ireland–Northern Ireland (INISC), 18, 51–53
 - Article 2 of the Protocol and, 152
 - function, 44
 - JCWG’s reporting role, 53
 - operation of, 51–52
 - remit, 52–53
- Specialised Committee on Law Enforcement and Judicial Cooperation (SCLE&JC), 288, 289, 292, 293, 294, 295
- Specialised Committees, Joint Committee’s responsibilities, 48
- sport
 - North–South co-operation, 220
 - potential triggering of CJEU jurisdiction, 57
- St Andrews Agreement (2006), 22
- state aid, 232
 - Article 10 of the Protocol
 - background, 233–34
 - terms, 234–36
 - UK government’s conduct during the transition period, 236–39
 - definition, 232, 239
 - dispute resolution, 242–43
 - effects on trade as a crux issue, 238, 239–42
 - Protocol’s treatment, 76–77
 - references to in the TCA, 220
 - role of the European Commission, 232–33
- state aid rules, 70
- state liability principle, 56
- state-owned enterprises, 225
- statutory instruments, 34, 174, 250
- subsidiarity principle, recognition in the CFR, 161
- subsidy controls, 38–39, 40
- sub-threshold contracts, 269, 276–77, 281
- summary declarations, 73, 75
- supremacy of the EU law principle, 119, 127
- Supreme Court (United Kingdom), 36
- sustainable development, competition law and, 36, 221, 222, 225, 231
- ‘take back control’ rhetoric, 4–5, 183
- tariffs
 - applicability on goods moving from GB to Northern Ireland, 211, 214
 - Common Customs Tariff, 72, 213
 - Common External Tariff, 208, 211
 - divergent, 69
- telecommunications, 259
 - North–South co-operation, 12, 122
 - potential triggering of CJEU jurisdiction, 57
- terminology, choice of, 17–18
- terrorism, increasing concerns
 - regarding the threat of, 216
- third countries, exportation of goods from the Union to, 74
- third-country nationals resident in Ireland, border crossing rules for, 199–201
- third-country nationals resident in Northern Ireland, border crossing rules for, 201–3
- third-country nationals, meaning of, 175, 199
- third-country nationals, 199, 201–2, 260, 291
- Thoburn* case, 125, 126
- tort, 296–97, 299
- tourism, 2
 - North–South co-operation, 12, 25, 52, 122
 - potential triggering of CJEU jurisdiction, 57
- TRACES (TRAde Control and Expert System), 253

- trade
- environment and, 245–55
 - GB to Northern Ireland, 74–76
 - Northern Ireland to GB, 72–74
 - North–South co-operation, 52
 - potential impact of environmental controls at borders, 252–55
- Trade and Cooperation Agreement (TCA)
- Article 3 obligations, 97
 - Article 773, 309–12, 320
 - see also* safeguard provisions
- Brexit Services Deal. *see under* services
- categories of persons entitled to stay temporarily in the UK, 197–98
- comparison with CETA, 259
- competition law
- enforcement and co-operation, 226–27
 - generally, 220–21
- contents and scope, 33
- covered procurement, additional services, 271
- dispute settlement rules, 293
- environmental protection provisions, 248
- EUFRA and enforcement of rights, 33–36
- financial services provisions, 264
- human rights provisions, 155–57
- impact on creative industries, 266
- implementation, 107
- information exchange provisions
- between UK and Ireland, 291–93
- interpretation criteria, 94
- interpretation provisions, 80–81
- judicial co-operation arrangements, 286, 295
- lack of a mobility chapter, 196–97
- level playing field provisions (Title XI), 221–25
- competition and the ‘level playing field’, 222–23
 - competition policy, 223–24
 - conceptual relationship with private rights, 37–38
 - electricity and gas, 224–25
 - environmental protection, 248
 - function, 156
 - rights and, 36–40
 - state-owned enterprises, enterprises granted special rights or privileges and designated monopoly, 225
 - UK implementation of private rights, 38–40
- mobility of persons, 260
- outline, 12–13
- preamble, 84
- provisions for modifications and rectifications of market access commitments, 278
- public procurement
- ‘beyond covered procurement’, 275–76
 - framework, 270
 - incorporation of GPA provisions, 272–75
 - SMEs, 277
 - relationship with the ECHR, 88
 - rights of family members of EU citizens, 201
 - safeguard provisions, 311–12
 - services provisions, 258–60
 - short-term work provisions, 201
 - silence on jurisdiction/enforcement issues, 302
 - supplementation of Protocol by, 69
 - temporal exigency, 34
 - transmission of an arrest warrant, 290
 - UK’s and Ireland’s implementation approaches, 13, 14
- trade barriers
- potential for imposition within the island of Ireland, 309
 - under the WTO safeguards regime, 310
- trade diversion, 74
- trade remedies, 310, 313, 314–15

- trade rules covered by the Protocol, 70
- Trade Specialised Committee on Level Playing Field for Open and Fair Competition and Sustainable Development, 225
- Trader Support Service (TSS), 215–16, 218
- ‘Transforming Public Procurement’ (Green Paper), 279–80
- transition/implementation period, 8, 108, 114, 116
- transitional arrangements, 162
- transport
 - North–South co-operation, 12, 25, 52, 122
 - potential triggering of CJEU jurisdiction, 57
- travaux préparatoires*, 88
- Treaties, 14, 42, 56, 92, 111, 113, 120, 132, 134, 159–60, 276, 279, 312
 - evolution of human rights, 159
 - interpretation. *see* [interpretation of treaties](#)
- Treaty of Amsterdam (1999), 174–75
- Treaty of Rome (1957), 232
- Treaty on European Union (TEU), 9, 63, 92–97, 101–2, 160–61
- Treaty on the Functioning of the European Union (TFEU)
 - applicability to the UK under the Protocol, 120
 - application to the UK, 42, 56
 - binding nature of agreements concluded by the Union, 131
 - on breach of the Protocol, 111
 - state aid provisions, 232, 235
- trust, 3, 9, 23, 101, 103, 112, 257, 260, 287, 289–90, 301
- trusted-trader status, 51
- UK citizens residing in the EU, rights under the WA, 144
- UK government
 - application of Article 2 of the Protocol, 153
 - conduct during transition period on Article 10 of the Protocol, 236–39
- UK Internal Market Act (2020), 14, 242
- UK Internal Market Bill (UKIM), 45, 78, 168, 237
- UK internal market, protection under the Protocol, 57, 74
- UK Parliament. *see* [Westminster Parliament](#)
- UK single market, 258
- UK Trade Policy Observatory, 212
- UK Trade Scheme, 49, 214
- UK-wide backstop, 184
- Ulster Unionist Party, 183
- UN Charter, 89
- UN Security Council resolutions, 57
- Union Customs Code (UCC), 211
- ‘Union law’, 102, 151, 154, 164
- Union with Scotland Act (1706), 125
- unionist politicians, legal challenge to the Protocol, 15
- unionists, 2, 4, 8, 15–16
- United Kingdom (UK)
 - categories of persons entitled to stay in temporarily under the TCA, 197–98
 - disputes with EU concerning the Protocol, 15–16
 - dualist approach to international law, 13
 - EU commences legal proceedings against, 46
 - implementation approach to the WA, 13, 14
 - legal status of the 1998 Agreement, 27–28
 - obligations under the Protocol, 144
 - permitted activities under UK immigration rules, 198
 - policy objectives of Brexit, 4–6
 - rejection of supremacy of EU law, 110
 - unilateral declaration concerning certification of food imports into Northern Ireland, 58–60

- United Nations Conference on Trade and Development (UNCTAD), 217
- United States (US)
 status of the 1998 Agreement, 21, 30
 UK's potential for negotiation of free trade agreement with, 8
- Universal Declaration on Human Rights, 157
- Utilities Contracts Regulation (2016), 271
- vaccines, Covid-19, export restrictions, 15, 314
- VAT, 11, 50, 56, 70, 216–17
- vehicular emissions, 247
- Victims Directive, 152
- Vienna Convention on the Law of Treaties 1969 (VCLT)
 competition law and, 229
 good faith principle, 92–95
 obligations on state parties, 26
 rules of treaty interpretation, 80–91
see also interpretation of treaties.
- visas
 multi-journey visa, 202
 requirements for third-country national family members visiting Northern Ireland, 201
 rules for EU citizens visiting the UK, 196
 short stay C-visa, 202
- Vote Leave, 269
- voting rights
 CTA and, 133, 180
 district council elections, 148–49
- Wales, 2, 5, 25, 125, 178
- waste, 247, 251, 254
- Water Framework Directive, 248, 252
- water quality and pollution, 247–49, 251
- waterways, North–South co-operation, 2, 52
- welfare benefits, 115, 173
- welfare rights, CTA and, 133
- Westminster Parliament
 application of Article 2 of the Protocol, 153
 contested role in triggering EU negotiations, 6
 courts' absolutist view of powers, 127
 decisions on retention of EU law, 40
 devolution of powers, 2
 legislation enacted during the Northern Ireland Assembly suspension, 143
 legislation requirements for the WA, 107
 no obligation to discuss decisions of the Joint Committee, 47
 political wrangling, 8
 post-Brexit return to more absolutist view of powers, 127
 prorogation of, 7
- Withdrawal Agreement (WA), 1, 18
 arbitration procedures, Protocol elements subject to, 60–64, 77
- Article 5
 enforcement of rights, 109–13
 case study (letters between the Commission and the UK), 112–13
 individual, 110–11
 UK government's responsibility, 111–12
 good faith and sincere co-operation, 92–103
 interpretation approaches, 92–95
 interpreting 'good faith' reference, 93
 likely role in future UK–EU disputes over application of the Protocol, 102
 objectives of the WA and the Protocol, 96
 obligations deriving from, 97
 implications, 98–101
 'sincere co-operation' in, 101–2
 availability of the negotiating record, 89
- CFR and, 165
- citizens' rights, 116
- citizens' rights, EU citizens, 116

- comparison with the TCA, 13
- creation of multiple classes of rights holder, 188
- human rights and equality provisions, 144
- implementation into UK law, 107–9
- interpretation provisions, 80–81
- Joint Committee’s decisions having the same legal effect as, 47
- judicial review, 318–20
- location of rules of procedure for Committees of the Protocol, 44
- outline, 10–12
- overseeing body, 44
- principal conduit for incorporation of the UK’s obligations under, 108
- Protocol as ‘integral part’ of, 131
- Protocol modifications and additions, 12
- ratified by the UK, 8
- rights-based provisions under the Protocol, 41–43
- scope of Article 50 negotiations, 8–10
- silence on jurisdiction/enforcement issues, 299, 302
- status in UK law, 107–17
- supremacy, 110, 126
- UK accused of breach, 89
- UK’s and Ireland’s implementation approaches, 13, 14
- withdrawal from the EU (Article 50 TEU), 8–10
- women, 146, 149, 192
- World Trade Organization (WTO), 309
- General Procurement Agreement (GPA), 270, 272, 274, 277, 279
- safeguards regime, 310
- Yeats, WB, 192

