

Commentary on the Protocol on Ireland/Northern Ireland in the Draft Withdrawal Agreement

A 'Constitutional Conundrums: Northern Ireland, the EU and Human Rights' Project Report

Sylvia de Mars (Lecturer, Newcastle University)

Aoife O'Donoghue (Professor, Durham University)

Colin Murray (Senior Lecturer, Newcastle University)

Ben Warwick (Lecturer, University of Birmingham)

Full details of the project and further resources are available on the project website: <http://niconstitution.org/>

@niconstitution | @sylviademars | @aoifemod | @mastermanmurray | @btcwarwick

The commentary below is on the Draft Withdrawal Agreement that has been produced by the EU. The Draft largely reflects the agreements made at the conclusion of Phase One of the negotiations (when the EU and UK issued their Joint Report which agreed key issues such as citizens' rights, the NI border, and the divorce bill). The Draft, however, is aimed at putting those agreements from Phase One into hard legal terms. By producing the draft, the EU has 'seized the initiative' to an extent, but nonetheless the parties will negotiate on aspects of this text before it becomes final or binding.

In the annotations below, we mainly focus on the areas where there is potential or actual divergence from the Joint Report agreement, and mostly discuss the impacts on Ireland and Northern Ireland. This means of the very large Draft Agreement, we mostly discuss the appended Protocol relevant to Northern Ireland below (Protocol 1).



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Protocol on Ireland/Northern Ireland, The Union and the United Kingdom,

HAVING REGARD to the historic ties and enduring nature of the bilateral relationship between Ireland and the United Kingdom;

RECALLING that the United Kingdom's withdrawal from the Union presents a significant and unique challenge to the island of Ireland, and reaffirming that the achievements, benefits and commitments of the peace process will remain of paramount importance to peace, stability and reconciliation there;

RECOGNISING that it is necessary to address the unique circumstances on the island of Ireland in order to ensure the orderly withdrawal of the United Kingdom from the Union;

AFFIRMING that the Good Friday or Belfast Agreement of 10 April 1998 between the Government of the United Kingdom, the Government of Ireland and the other participants in the multi-party negotiations (the "1998 Agreement"), which is annexed to the British-Irish Agreement of the same date (the "British-Irish Agreement"), including its subsequent implementation agreements and arrangements, should be protected in all its parts;

RECALLING the commitment of the United Kingdom to protect North-South cooperation and its guarantee of avoiding a hard border, including any physical infrastructure or related checks and controls, and bearing in mind that any future arrangements must be compatible with these overarching requirements;

RECALLING that the 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 of 8 December 2017 outlines three different scenarios for protecting North-South cooperation and avoiding a hard border;

This lengthy introductory text or preamble reasserts several different texts that have previously agreed or issued by the UK and the EU, the most important of which is the Phase 1 Joint Report. It recalls the language of the UK Prime Minister's Commitments to Northern Ireland Paper (8 December 2017), the UK's Northern and Ireland Position Paper (16 August 2017), the EU's Position Paper Position Paper Transitional Arrangements in the Withdrawal Agreement (7 February 2018), EU Guiding Principles for the Dialogue on Ireland/Northern Ireland (21 December 2017).

Preambles are not legally binding, but under the Vienna Convention on the Law of Treaties 1969 Article 31.2 they can be used to decipher the object and purpose of treaties and therefore are important from an interpretation perspective. The UK has signed the Vienna Convention, as have all members of the EU. Further, as the Vienna Convention reflects customary international law, even though the EU is not a signatory it is effectively bound by its contents.

The Treaty is also not an EU Treaty but rather a treaty signed by the EU (as a legal person) and a second party, in this instance the UK as a future non-member state. The title of the draft is the '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'. However, the Agreement also has Court of Justice of the EU oversight which suggests a character as an EU 'act', as the CJEU's jurisdiction is limited by the Treaties that create it (Art 19 TEU and Art 263 TFEU) to oversight of the EU Treaties and acts of the EU institutions. The effect of CJEU oversight is however temporally limited: the Withdrawal Agreement itself is intended to be replaced by a 'future relationship' agreement, with the exception of Part 2 on citizens' rights, where the CJEU's interpretative role is capped to 8 years post-transition. Globally, then, the Withdrawal Agreement appears to have more of the characteristics of a general international law treaty than a specific EU constitutional treaty.

Several elements of the Preamble are noteworthy for the interpretation of what follows:

- The situation in Ireland is *unique* and presents *specific challenges* in the context of the peace process; it also not the same as UK's relationship with other EU states (and, by virtue of the uniqueness of this situation, the EU is foreclosing on extending similar treatment to other constituent parts of the UK, such as Scotland);
- *Good Friday/Belfast Agreement*, its subsequent implementation and agreements;

HIGHLIGHTING that discussions on the other scenarios may continue to be pursued in parallel, but that this Protocol is based on the third scenario of maintaining full alignment with those rules of the Union's internal market and the customs union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement, and that it applies unless and until an alternative arrangement implementing another scenario is agreed;

RECOGNISING that cooperation between Northern Ireland and Ireland is a central part of the 1998 Agreement and is essential for achieving reconciliation and the normalisation of relationships on the island of Ireland, and recalling the roles, functions and safeguards of the Northern Ireland Executive, the Northern Ireland Assembly, and the North-South Ministerial Council (including cross-community provisions), as set out in the 1998 Agreement;

ACKNOWLEDGING that this cooperation across the full range of political, economic, societal and agricultural contexts relies to a significant extent on common Union legal and policy frameworks, as confirmed in the joint mapping exercise conducted by the Union and the United Kingdom, and that accordingly the United Kingdom's withdrawal from the Union gives rise to substantial challenges to the maintenance and development of North-South cooperation;

MINDFUL that the rights and obligations of Ireland under the rules of the Union's internal market and customs union must be fully respected;

RECALLING the commitment of the United Kingdom to protecting and supporting continued North-South and East-West cooperation across the full range of political, economic, security, societal and agricultural contexts and frameworks of cooperation, including the continued operation of the North-South Implementation Bodies;

- The UK's *commitment* to North-South co-operation, guarantee of avoiding a *hard border* including any *physical infrastructure, checks and controls* and this must be *compatible* with the overall Withdrawal Agreement;
- The Phase 1 Joint Report envisages three scenarios which are *all* premised upon the parties' intention to protect North-South cooperation and avoid a hard border;
- Scenarios 1 & 2 can continue to be negotiated but this draft is based on scenario 3 – maintaining full alignment to support North-South cooperation, the all-island economy and the protection of the 1998 Agreement *until* an alternative scenario is agreed;
- Reconciliation and normalisation within Northern Ireland is essential including *institutional* arrangements under Good Friday/Belfast Agreement on the island;
- Ireland's EU membership must be respected;
- The UK's *commitment* to protecting and supporting North-South and East-West co-operation across the full political, economic, security, societal and agricultural context;
- Support of current and *future* common policies under Good Friday/Belfast Agreement;
- The role of *consent* in changing Northern Ireland's constitutional status;
- To create a common regulatory area *on the island* of Ireland;
- The *devolution* arrangement of Northern Ireland as an important contextual factor;
- Irish citizens in Northern Ireland, by virtue of their Union citizenship, *will continue* to enjoy, exercise and have access to rights, opportunities and benefits;
- EU law provides a *rights, safeguards and equality framework* in Northern Ireland;
- and; the Protocol can be amended or replaced by a *future agreement* between the Union and the UK be agreed which addresses the unique circumstances on the island of Ireland, including by avoiding a hard border and protecting the 1998 Agreement in all its dimensions.

The Preamble references several legal rules which are already binding on the UK, Ireland and/or the EU. These include:

1. UK & Ireland: Good Friday/Belfast Agreement including Annex 2 of the British-Irish Agreement "Declaration on the Provisions of Paragraph (vi) of Article 1 in Relation to Citizenship" which defines 'the people of Northern Ireland' as

the term 'the people of Northern Ireland' ... means, ... all persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British

AIMING to support current and future common policies and approaches between Ireland and Northern Ireland in accordance with the 1998 Agreement;

RECOGNISING the need to respect the provisions of the 1998 Agreement regarding the constitutional status of Northern Ireland and the principle of consent;

DESIRING to create a common regulatory area on the island of Ireland in order to safeguard North-South cooperation, the all-island economy, and protect the 1998 Agreement;

HAVING REGARD to the devolution arrangements between the United Kingdom and Northern Ireland in relation to the common regulatory area;

RECOGNISING that Irish citizens in Northern Ireland, by virtue of their Union citizenship, will continue to enjoy, exercise and have access to rights, opportunities and benefits, and that this Protocol should respect and be 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 as defined in Annex 2 of the British-Irish Agreement "Declaration on the Provisions of Paragraph (vi) of Article 1 in Relation to Citizenship";

NOTING that Union law has provided a supporting framework to the provisions on Rights, Safeguards and Equality of Opportunity of the 1998 Agreement;

UNDERLINING that part or all of this Protocol may cease to apply should a future agreement between the Union and the United Kingdom be agreed which addresses the unique circumstances on the island of Ireland, including by avoiding a hard border and protecting the 1998 Agreement in all its dimensions;

citizen, an Irish citizen or is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence.

This definition of the 'people of Northern Ireland' operates with specific regard of the right to choose an identity in Northern Ireland; it

... recognise[s] the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right 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.

However, this does not add much clarity to who exactly are the people of Northern Ireland. The Annex appears to include those born in Northern Ireland where one parent is Irish, British or has a right to reside in Northern Ireland. This includes other EU citizens as well as non-EU citizen parents.

Yet, it appears from the definition that such individuals would not have to reside in Northern Ireland to be one of 'the people of Northern Ireland' – they only have to be born on the territory under the conditions above. As well as affording benefits to some groups and not others within Northern Ireland (e.g. EU or non-EU nationals in NI without permanent residency), this definition will allow those born NI who have since moved away from the country to reassert their Irish (and EU) or UK rights into the future.

2. Article 50 Treaty of the European Union. This is the basis on which the withdrawal process is proceeding.
3. Ireland's continued membership of the European Union and its binding EU and constitutional obligations inherent in its membership. This language is centred on two elements. First, Ireland rights stemming from *and* obligations to the internal market. Second, (presumably the UK's) respect of Ireland's obligations to the EU (and by default Ireland's constitutional provisions on EU membership).
4. Ireland's constitutional and statutory extension of citizenship to those born in Northern Ireland under Irish *Nationality and Citizenship Acts* 1956 to 2004 and Article 9.2 of the Irish Constitution.

HAVE AGREED UPON the following provisions, which shall be annexed to 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 ("Withdrawal Agreement"):

5. The UK's constitutional structure and in particular Devolution. This would be an oblique reference to the Northern Ireland Act 1998.

The Preamble also references several political commitments made by the UK with regard to Northern Ireland (stemming from Paragraph 48 of the Joint Report on the Withdrawal Agreement from the EU negotiators and the UK Government):

1. The UK's commitment to protect North-South cooperation, its guarantee of avoiding a hard border, including any physical infrastructure or related checks and controls, and that future arrangements must be compatible with these requirements;
2. The UK's commitment to protect and support North-South and East-West cooperation across political, economic, security, societal and agricultural contexts and frameworks of cooperation such as North-South Implementation Bodies

Finally, the Protocol will cease to operate if a future agreement between the EU and UK addresses the circumstances on the island, avoids a hard border and manages to protect all elements of the 1998 Agreement.

Chapter I Rights of individuals

Article 1 Rights of individuals

1. The United Kingdom shall ensure that no diminution of rights, safeguards and 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, including in the area of protection against discrimination as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.

2. The United Kingdom shall continue to facilitate the related work of the institutions and bodies pursuant to the 1998 Agreement, including 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.

This article confirms the UK’s commitments as existing under the Good Friday/Belfast Agreement, which were also re-emphasised in the Joint Report on Phase 1 of the Article 50 negotiations. The Rights, Safeguards and Equality of Opportunity provisions of the Agreement crucially set out the base line requirement that the UK incorporate the ECHR into Northern Ireland law. This provision therefore requires the continuation of the Human Rights Act 1998 (or at least equivalent measures) insofar as it covers Northern Ireland.

Chapter II Movement of persons

Article 2 Common Travel Area

1. The United Kingdom 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.

2. The United Kingdom shall ensure that the Common Travel Area and associated rights and privileges can continue to operate without affecting the obligations of Ireland under Union law, in particular with respect to free movement for Union citizens and their family members, irrespective of their nationality, to, from and within Ireland.

This section re-iterates the continuation of the Common Travel Area (CTA). The CTA dates from 1952. The CTA allows easy travel between the UK, Ireland, the Channel Islands and the Isle of Man, alongside other benefits for individuals from these countries and territories traveling within this area. The openness of travel between the UK and Ireland dates from 1922, when the Free State enforced the same travel restrictions as the UK. Following the Second World War, the UK’s 1949 Ireland Act formalised the special relationship by declaring that Ireland, although no longer a dominion territory, is not treated in domestic law as a “foreign country”.

The language in Chapter II is permissive as it extends an existing exception to EU law that allows the CTA to operate (Protocol 20 to the Treaty on the Functioning of the European Union (TFEU)).

The second clause is couched in the language of the preamble regarding respect for Ireland’s rights and obligations as an EU member. It places the onus on the UK to ensure that the CTA does not interfere with Ireland’s EU obligations generally as well as

	<p>specifically regarding EU citizens and their families free movement rights to, from and within Ireland.</p> <p>This prevents Ireland’s borders becoming <i>de facto</i> UK borders in order to maintain the CTA. Ireland remains outside of the Schengen passport-free zone, but any additional procedural or substantive interferences with the free movement of EU citizens which the UK would seek that Ireland adopt regarding EU citizens to maintain aspects of UK immigration policy would be in violation of Article 2(2).</p>
<p>Chapter III Common regulatory area</p> <p><i>Article 3 Establishment of a common regulatory area</i></p> <p>A common regulatory area comprising the Union and the United Kingdom in respect of Northern Ireland is hereby established. The common regulatory area shall constitute an area without internal borders in which the free movement of goods is ensured and North-South cooperation protected in accordance with this Chapter.</p>	<p>Chapter III sets the core terms of option 3 from the Phase 1 Joint Report. The common regulatory area would be between the EU and Northern Ireland with two purposes, ensuring free movement of goods and protecting North-South co-operation. It can be highlighted here that the Joint Report discussed option 3 as relating to ‘full alignment’ between the UK and the EU, rather than Northern Ireland and the EU. Opinions differ on whether mentioning ‘in respect of Northern Ireland’ change that commitment substantively; Great Britain can, in the Chapter III scenario, also align with Northern Ireland, which would extend the scope of the common regulatory area. This, however, is a matter of UK law – and the EU draft arguably can be read as avoiding commenting on what it would otherwise treat as a ‘wholly internal situation’, falling outside the scope of EU law.</p> <p>Free movement of persons is covered by the CTA with EU specific rights extended through Irish citizenship for the ‘people of Northern Ireland’ as laid out in Chapter I & II.</p> <p>The extent of the regulatory alignment includes Articles 4, 5, 6, 7, 8 and 9 as set out below and includes goods, agriculture, fishing, electricity, environment, state aid.</p> <p>Other areas of North-South co-operation that require particular conditions to continue to operate include health, transport, education and tourism, as well as energy, telecommunications, broadcasting, inland fisheries, justice and security, higher education and sport. All will need to see degrees of regulatory alignment, an issue discussed in more detail below.</p>

Article 4 Free movement of goods

1. The provisions of Union law on goods listed in Annex 2.1 to this Protocol shall apply to and in the United Kingdom in respect of Northern Ireland.

2. Customs legislation as defined in point (2) of Article 5 of Regulation (EU) No 952/2013 of the European Parliament and of the Council¹³⁸ as well as other provisions of Union law providing for customs controls of specific goods or for specific purposes listed in Annex 3 to this Protocol shall apply to and in the United Kingdom in respect of Northern Ireland. The territory of Northern Ireland, excluding the territorial waters of the United Kingdom (the "territory of Northern Ireland"), shall be considered to be part of the customs territory of the Union.

3. Customs duties on imports and exports, and any charges having equivalent effect, shall be prohibited between the Union and the United Kingdom in respect of Northern Ireland. This prohibition shall also apply to customs duties of a fiscal nature.

4. Quantitative restrictions on imports and exports and all measures having equivalent effect shall be prohibited between the Union and the United Kingdom in respect of Northern Ireland.

5. The Union and the United Kingdom in respect of Northern Ireland shall not impose, directly or indirectly, on the products of the other party any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. Furthermore, the Union and the United Kingdom in respect of Northern Ireland shall not impose on the products of the other party any internal taxation of such a nature as to afford indirect protection to other products.

6. Paragraph 4 shall be without prejudice to the possibility for the United Kingdom, a Member State or the Union to take measures to prohibit or restrict the making available on its market of a good, or a

Annex 2.1 has not been published and this will provide the specific detail on regulatory alignment.

This article has several implications for a much-discussed East-West border (i.e. a potential separation between the UK mainland and NI). The common regulatory area proposed for NI allows it to benefit from the advantages of being inside the EU tent, but as Great Britain has not shown a desire to be inside the EU tent in the same manner, it will not benefit unless it voluntarily adopts identical regulations in all stated areas.

As such, between NI and GB, there could be customs checks, customs charges, and restrictions on the number of imports and exports. No such barriers could exist, according to this draft agreement, between NI and the EU. The Draft Protocol does not cover the December 2017 UK Government commitment to prevent East-West barriers, as this is an internal UK matter. The December 2017 commitment stems from an agreement between the DUP and the UK Government, but it is worth noting that the Act of Union 1800 still applies as between NI and GB (Article 6 of which provides the basis of what is, essentially, a common market between the parts of the UK; "All articles the produce or manufacture of either country, not herein-after enumerated as subject to specific duties, shall be imported into each country from the other, duty free").

Of particular interest is Article 4(2), which excludes the territorial waters of the United Kingdom from the 'territory' that will be part of the customs territory of the Union. This has to be placed in the context of the current definitions pertaining to the 'customs territory' of the EU Customs Union – which includes all 'Member State' territorial waters. The [consequence](#) of this is that all fish caught in the territorial waters of a Member State are treated as being EU customs goods, which can move freely throughout the EU. Until the future relationship between the UK and the EU is agreed upon, it is not clear if fish caught in the UK territorial waters will be treated as EU customs goods or as UK customs goods. The UK Government has nonetheless expressed a desire to retake control of the UK's territorial water and not 'share' these with the EU, which this provision caters to.

category of goods, where and to the extent permitted by Union law. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Union and Northern Ireland.

7. For the purposes of the customs legislation and the provisions of Union law listed in Annex 2.2 to this Protocol, the United Kingdom customs authorities competent for the territory of Northern Ireland shall be considered as customs authorities within the meaning of point (1) of Article 5 of Regulation (EU) No 952/2013. By way of derogation from Section 7 of Chapter 2 of Title I of Regulation (EU) No 952/2013, customs controls as defined in point (3) of Article 5 of that Regulation shall be carried out jointly by the Union and the United Kingdom customs authorities competent for the territory of Northern Ireland. The Union and the United Kingdom shall determine the practical arrangements for carrying out such controls in accordance with paragraph 10.

8. The provisions of Union law on value added tax listed in Annex 2.3 to this Protocol concerning goods shall apply to and in the United Kingdom in respect of Northern Ireland. 9. The provisions of Union law on excise duties listed in Annex 2.4 to this Protocol shall apply to and in the United Kingdom in respect of Northern Ireland.

10. Specific arrangements for the proper implementation of this Article shall be determined by the Joint Committee, upon proposal from the Specialised Committee. Those specific arrangements may, as appropriate, include a mechanism for revenue collection and distribution.

<p><i>Article 5 Agriculture and fisheries</i></p> <p>1. The provisions of Union law on sanitary and phytosanitary rules listed in Annex 2.5 to this Protocol shall apply to and in the United Kingdom in respect of Northern Ireland.</p> <p>2. The provisions of Union law on the production and marketing of agricultural and fisheries products listed in Annex 2.6 to this Protocol shall apply to and in the United Kingdom in respect of Northern Ireland.</p>	<p>Articles 5, 6 and 7 introduce the additional protocols which will detail the extent of regulatory alignment necessary for Option 3 of the Joint Phase 1 Report to become operational.</p> <p>Annex 2.5, 2.7 and 2.8 have not been published.</p> <p>Agricultural alignment and specifically sanitary and phytosanitary (SPS) measures are essential to the Agricultural and agri-food markets on the island as production often requires products to transverse the border several times. It is not clear to what extent the technical regulations and SPS measures the EU applies generally will apply to Northern Ireland; the Annex suggests that rather than the entire SPS and technical regulations <i>acquis</i>, the EU is willing to indicate specific EU rules that cover ‘all-island’ agriculture and require compliance with those alone.</p>
<p><i>Article 6 Single electricity market</i></p> <p>The provisions of Union law governing wholesale electricity markets listed in Annex 2.7 to this Protocol shall apply to and in the United Kingdom in respect of Northern Ireland.</p>	<p>The electricity market on the island of Ireland fully integrated in 2007. The integration is part of a broader EU initiative to integrate electricity markets. A Memorandum of Understanding between the UK and Ireland 2006 sets up the legal structures to support the integration. The market must comply with EU competition and environmental law, which in turn means that Northern Ireland will continue to comply in full with the relevant EU laws. Again, given the mention of specific legislation to be set out in an Annex, it seems likely that this will not be the entire EU environmental <i>acquis</i>, but rather specific EU rules that affect the wholesale electricity market.</p>
<p><i>Article 7 Environment</i></p> <p>The provisions of Union law for environmental protection concerning the control of the import into, export out of, release into, or transport within the Union of substances or material, or plant or animal species, listed in Annex 2.8 to this Protocol shall apply to and in the United Kingdom in respect of Northern Ireland.</p>	<p>This article should be considered in the broader context of international environmental law, including CITES (the Convention on International Trade in Endangered Species of Wild Fauna and Flora, of which the UK, the EU and member states are parties), the United Nations Framework Convention on Climate Change including the Paris Convention (again, the UK, the EU and all Member States are signatories) and relevant WTO obligations. Customary international environmental law such as the precautionary principle and the polluter pays principle will also be relevant – but again, mention of the Annex suggests that this provision will not cover the entire EU environmental law <i>acquis</i>.</p>
<p><i>Article 8 Other areas of North-South cooperation</i></p> <p>1. Consistent with the arrangements set out in Articles 4 to 7 of this Protocol, and in full respect of Union law, this Protocol shall be</p>	<p>Article 8 sets out the terms of continued co-operation not including full regulatory alignment in specific areas not covered in Articles 4 – 7 above: environment, health, agriculture, transport, education and tourism, as well as energy, telecommunications, broadcasting, inland fisheries, justice and security, higher education and sport. Alignment</p>

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 energy, telecommunications, broadcasting, inland fisheries, justice and security, higher education and sport. In full respect of Union law, the United Kingdom and Ireland may continue to make new arrangements building on the provisions of the 1998 Agreement in other areas of North-South cooperation on the island of Ireland.

2. 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, including on recommendation from the Specialised Committee, make appropriate recommendations to the Union and the United Kingdom in this respect.

is required so far as to maintain the necessary conditions for continued North-South co-operation – again reflecting that the EU is not expecting Northern Ireland to adopt the entire EU acquis.

Article 8(1) refers to the UK and Ireland continuing to make new arrangements that build on the Good Friday/Belfast Agreement relating to North-South co-operation but that this must be done in accordance with EU law. The Good Friday/Belfast Agreement's provisions are not problematic in terms of their compliance with EU law (albeit, as mentioned above, the CTA does require a specific exception to operate). The 1998 Agreement's active provisions do not specifically refer to EU law, though EU legal infrastructure provided a background of cooperation between the UK and Ireland. Therefore further cooperative steps under the 1998 Agreement's terms are possible, provided that (as Article 8 requires) they conform to the requirements of EU law.

First, Article 8(1) appears to set the context for maintaining existing co-operation under the 1998 Agreement, as this *could* trigger a violation of EU law post-Brexit if there is a failure to fulfil either of the three options for cooperation in the Phase 1 Report.

Second, Article 8(1) suggests that any future deepening of North-South co-operation must ensure compliance with EU law. This language reflects the Preamble's concern for the need for the Agreement to respect for Ireland's rights and obligations as an EU member state. The language is permissive, which suggests that the EU (and ultimately, the CJEU, as the interpreter of EU law) will decide whether any future deepening of co-operation is in line with EU law.

Third, Article 8(2) gives the Joint Committee the power to review and issue recommendations on the basis of a recommendation of the Specialised Committee for the island of Ireland. The ability of the Joint Committee to review the extent to which the Protocol maintains the conditions for North-South co-operation potentially requires that Committee to interpret the 1998 Agreement and subsequent agreements such as St. Andrews in light of the meaning of North-South co-operation. The legal basis for such activity is, however, unclear.

<p><i>Article 9 State aid</i></p> <p>The provisions of Union law on aids granted by States listed in Annex 2.9 to this Protocol shall apply to the United Kingdom in respect of Northern Ireland. For the purposes of those provisions, "in respect of Northern Ireland" means that only measures that affect trade between the territory of Northern Ireland and the Union shall be considered as aid within the meaning of Article 107(1) TFEU.</p>	<p>Like earlier articles in the Protocol, there is an expectation that Northern Ireland will continue to comply with EU state aid laws, albeit only insofar as 'aid' is granted that affects trade between the EU and Northern Ireland. 'Measures that affect trade between Member States', which this provision reflects, have been defined as being any products or services that can <i>potentially</i> be traded. An example of state aid granted that was deemed to not affect trade between Member States was, for instance, seen in the construction of an assisted living facility. These kind of projects can therefore be granted government subsidies in Northern Ireland without falling foul of the EU rules, but anything 'tradeable' will not be exempt from the EU rules. The as-yet unpublished Annex will specify the specific features of the EU state aid regime which the Protocol will require to be fully aligned between Northern Ireland and the EU.</p>
<p>Chapter IV Institutional provisions</p> <p><i>Article 10 Specialised Committee</i></p> <p>1. The Specialised Committee on issues related to the island of Ireland established by Article 158 of the Withdrawal Agreement ("Specialised Committee") shall be composed of representatives from the Union and the United Kingdom.</p> <p>2. The Specialised Committee shall</p> <ul style="list-style-type: none"> (a) facilitate the implementation and application of this Protocol; (b) examine proposals from the North-South Ministerial Council, and North-South Implementation bodies set up under the 1998 Agreement concerning the implementation and application of this Protocol; (c) discuss any point of relevance to this Protocol giving rise to a difficulty and raised by the Union or the United Kingdom; (d) make recommendations to the Joint Committee as regards the functioning of this Protocol. 	<p>The mechanism established for the monitoring of the Protocol is somewhat limited. An island of Ireland Specialised Committee is established alongside committees on citizens' rights, separation provisions, Sovereign Base Areas, and financial provisions. The work of the island of Ireland Specialised Committee would be supplemented by oversight of EU organs if a Common Regulatory Area was to result (Article 11).</p> <p>However, on its own, the Specialised Committee seems limited. It can receive reports from the North-South Ministerial Committee which was established by the Good Friday Agreement and it can make its own investigations and recommendations. Ultimately, however, it sits beneath the UK-EU Joint Committee which is to be established to manage relations between the two parties. Irish issues will therefore be subject to the effectiveness and politics of that main Committee. Indeed, the main Joint Committee can choose to dissolve the Specialised Committee (main Draft Agreement, article 157(5)c).</p> <p>The island of Ireland Specialised Committee also lacks the powers and independence given to the UK independent Authority that will monitor citizens' rights. Similar stature and independence for the island of Ireland body is warranted given the sensitivities and apparent conflicts of interest that the UK might have in monitoring the implementation of the Protocol.</p> <p>It is also not clear what level of representative will be appointed to the Specialised Committee on either the UK or the EU side (only that they should have 'appropriate expertise with respect to the issues under discussion'). This means the Committee could be made up of relatively low-level civil servants, but notwithstanding this fact would have</p>

	<p>considerable potential to impact upon policy. It also appears that Ireland itself will not have representation on the island of Ireland Specialised Committee (except via EU representatives).</p>
<p><i>Article 11 Supervision and enforcement</i></p> <p>1. As regards Chapter III, 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 jurisdiction as provided for in the Treaties in this respect.</p> <p>2. Acts of the institutions, bodies, offices, and agencies adopted in accordance with paragraph 1 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.</p>	<p>In relation to a Common Regulatory Area on the island of Ireland, the EU institutions would have continuing authority over the UK and its individuals (to the extent allowed by EU law). The Court of Justice of the European Union would have judicial oversight over the exercise of those powers in the entirety of the UK. This is necessary if NI is inside a Common Regulatory Area, as there would need to be EU governance over that area to preserve its integrity and operation. Not all legislation that relates to the functioning of the Common Regulatory Area will be produced in Northern Ireland, given the UK's constitutional arrangements.</p> <p>Article 11(2) is a basic consistency provision, requiring that any rules stemming from the EU in light of this Protocol are applied to the UK in the same manner as to EU member states.</p>
<p>Chapter V General and final provisions</p> <p><i>Article 12 Common provisions</i></p> <p>1. The following provisions of the Withdrawal Agreement shall apply to this Protocol:</p> <p>(a) Article 2, the first subparagraph of Article 4(1) and Article 4(2) and (3), Article 5(2) and (3) and Article 6;</p> <p>(b) Articles 100 and 104, Article 105(1), Articles 111, 115, 116 and 117 in respect of activities of the Union pursuant to this Protocol;</p> <p>(c) Part Six, without prejudice to Article 11 of this Protocol.</p> <p>For the purposes of this Protocol, any reference to the United Kingdom in those provisions of the Withdrawal Agreement shall be read as referring to the United Kingdom or the United Kingdom in respect of Northern Ireland, as the case may be.</p>	<p>The provisions that are referred to from the main Withdrawal Agreement are in summary:</p> <ul style="list-style-type: none"> - Definitions; - Where EU law is applied in the UK, it should be applied in the same manner as in the EU; - The UK will ensure this consistent interpretation through domestic legislation; - EU general principles will be used in interpreting EU laws; - Provision to modify references to 'Member States' in EU law to include the UK in certain required respects; - Protections afforded to and restrictions upon officials, official communications, and members of the EU institutions are extended to post-Brexit UK; - Obligations of professional secrecy and discretion will continue; - Access to documents of the Union bodies will continue in the transition period and as needed by the Withdrawal Agreement after then; - On the institutions that are created or affected by the Agreement including provisions on the CJEU, a new UK independent authority, a new UK-EEU joint committee, specialized committees on issues such as citizens' rights and the island of Ireland, and dispute settlement procedures;

2. The provisions of this Protocol referring to Union law or 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.

3. Where this Protocol makes reference to a Union act, and where that act is amended or replaced after the entry into force of the Withdrawal Agreement, the reference to that act shall be read as referring to it as amended or replaced.

The Joint Committee shall periodically revise the relevant references in this Protocol upon proposal from the Specialised Committee set up under this Protocol.

4. By way of derogation from point (a) of paragraph 1 of this Article and from Article 6 of the Withdrawal Agreement, representatives or experts of the United Kingdom or experts designated by the United Kingdom may, upon invitation and on a case-by-case basis, exceptionally attend meetings or parts of meetings of the committees referred to in Article 3(2) of Regulation (EU) No 182/2011 of the European Parliament and of the Council, of Commission expert groups, of other similar entities, or of bodies, offices or agencies where and when representatives or experts of the Member States or experts designated by Member States take part, provided that one of the following conditions is fulfilled:

(a) the discussion concerns individual acts to be addressed during the period of application of this Protocol to the United Kingdom or to natural or legal persons residing or established in the United Kingdom;

(b) the presence of the United Kingdom is necessary and in the interest of the Union, in particular for the effective implementation of Union law made applicable by this Protocol.

- The Protocol on Ireland/Northern Ireland enters into force at the end of the transition period (except for the specialized committee which is set up when the Withdrawal Agreement is signed).

Article 12(3) gives the Protocol a degree of dynamism, as it will constantly update by reference to new EU law as it is passed in the future. There is not a significant substantive impact from this as the EU law referred to in the Protocol is relatively minimal – as noted above, it covers aspects of the EU *acquis* that will enable the avoidance of a ‘hard border’ and North-South cooperation alone.

It is not surprising that UK representatives and experts will not ordinarily attend meetings of many EU institutions after Brexit (noted in the main Withdrawal Agreement at art 6). However, and again underscoring the accommodations made by the EU with regard to the NI situation, an exception is proposed in Article 12(4), to allow UK experts or representatives to attend by invitation if an EU body is discussing UK residents, action under this Protocol, or where the UK’s participation is needed by the EU.

Beyond the purely functional reasons for allowing this exception this is also a nod to the EU’s self-image as a meeting place and a broker for UK and Irish representatives during the worst years of the NI conflict.

<p>During such meetings or parts of meetings, the representatives or experts of the United Kingdom or experts designated by it shall have no voting rights and their presence shall be limited to the specific agenda items that fulfil the conditions set out in point (a) or (b).</p> <p>5. Authorities of the United Kingdom shall not act as leading authority for risk assessments, examinations, approvals and authorisation procedures provided for in Union law made applicable by this Protocol.</p> <p>6. The provisions of Union law on the protection of personal data referred to in Article 66 of the Withdrawal Agreement shall apply in respect of personal data processed in the United Kingdom on the basis of this Protocol.</p> <p>7. Articles 346 and 347 TFEU shall apply to this Protocol as regards measures taken by a Member State or by the United Kingdom in respect of Northern Ireland.</p>	<p>Article 12(7) sets out provisions of general EU law that preserve states' rights not to disclose state secrets if doing so would harm their interests, and to continue the manufacture and sale of arms as they see necessary (TFEU, article 346), and the protection of the internal market in the event of serious internal conflict or a war (TFEU, article 347).</p> <p>This is would legally allow the Protocol to be circumvented by the EU to protect state secrets or protect the internal market if a serious conflict broke out involving the UK. This is a highly interesting inclusion, especially as it has been included in the Protocol on NI, and not in the main Withdrawal Agreement. It provides a legal basis for the EU's protection of itself from the effects of a conflict situation centred upon NI.</p>
<p><i>Article 13 Safeguards</i></p> <p>1. If the application of this Protocol leads to serious economic, societal or environmental difficulties able to persist, the Union or the United Kingdom may unilaterally take appropriate measures. Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Protocol.</p> <p>2. If a safeguard measure taken by the Union or the United Kingdom, as the case may be, in accordance with paragraph 1 creates an imbalance between the rights and obligations under this Protocol, the Union or the United Kingdom, as the case may be, may take such proportionate rebalancing measures as are strictly necessary to</p>	<p>This is a basic derogation provision of a type often seen in international treaties (especially human rights treaties). It allows the Union or the UK to depart from the requirements in the Protocol if 'serious' and persisting 'economic, societal or environmental difficulties' occur. As such, the terms of Article 13 closely comport to Articles 112 and 113 of the EEA Agreement, which cover 'Safeguard Measures' (the so-called "Emergency Brake"). These allow the parties to unilaterally take 'appropriate measures' if serious economic, societal or environmental difficulties of a sectoral or regional nature arise as a result of some feature of the operation of the EEA and are liable to persist.</p> <p>Departures from the Protocol are only permitted to the extent that they are necessary to resolve the specific difficulty in question. For example, if a substantial collapse of the NI economy was caused by the Protocol the UK or EU could intervene in ways that would ordinarily be a breach of the Protocol's terms. Any intervention would have to be directed towards the economic difficulties (therefore prohibiting Trojan-horse measures) and could only be as broad and for as long as the difficulties required.</p>

<p>remedy the imbalance. Priority shall be given to such measures as will least disturb the functioning of this Protocol.</p> <p>3. Safeguard and rebalancing measures taken in accordance with paragraphs 1 and 2 shall be governed by the procedures and dispute settlement arrangements set out in Annex 3 to this Protocol.</p>	<p>Even when such a measure is taken, the other party (the UK or EU) can make reciprocal arrangements to keep the Protocol a balanced agreement. For example, if, in response to a serious societal difficulty, the UK limited the rights of Irish citizens in NI, the EU might respond by proportionately stopping a benefit for UK citizens in the EU, or stopping an EU funding stream that had persisted into the UK.</p>
<p><i>Article 14 Protection of financial interests</i></p> <p>The Union and the United Kingdom shall counter fraud and any other illegal activities affecting the financial interests of the Union or of the United Kingdom in respect of Northern Ireland.</p>	<p>This provision is perhaps a signal that although the EU is keen to respect the special position of NI, it is still mindful of the potential that protections for the region and an open border could pave the way for increased fraud and smuggling. It operates as a response to the oft-repeated trope amongst Brexiteers that the EU or Ireland would be the parties imposing border restrictions by recognising the shared commitment of the EU and UK towards tackling such illegal activities.</p>
<p><i>Article 15 Subsequent agreement</i></p> <p>Should a subsequent agreement between the Union and the United Kingdom which allows addressing the unique circumstances on the island of Ireland, avoiding a hard border and protecting the 1998 Agreement in all its dimensions, become applicable after the entry into force of the Withdrawal Agreement, this Protocol shall not apply or shall cease to apply, as the case may be, in whole or in part, from the date of entry into force of such subsequent agreement and in accordance with that agreement.</p>	<p>This provision can be read as either an abundance of caution from the drafters of the Protocol, or as a conciliatory political move towards the UK. Even without this provision it would be clear that a subsequent agreement accepted by all parties could displace (some of) the terms of this Protocol. There is utility in this article indicating that any subsequent agreement has to address the unique circumstances of the island of Ireland. However, it can mainly be read as an indication that this is a workable starting point for the UK-EU relationship that can protect Ireland and throws down a gauntlet to the interested parties (and particularly the UK) to find a better agreed position that can secure these minimum protections.</p>
<p><i>Article 16 Annexes</i></p> <p>Annexes 1 to 3 shall form an integral part of this Protocol.</p>	<p>The Annexes are yet to be published but will be on i) discrimination, ii) a common regulatory area (and the various aspects of it), and iii) dispute resolution. These Annexes will be vital to the operation of provisions of the Draft Agreement (for example, how SPS rules will operate in cross-border trade on the island of Ireland).</p>