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LEGAL QUARTERLY

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Special Supplementary Issue:
Northern Ireland's Legal Order after Brexit

Guest editor: Colin R G Murray

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Northern Ireland's legal order after Brexit

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A CONSTITUTIONAL CHALLENGE

Since the conclusion of the Belfast/Good Friday Agreement 1998,[1] Northern Ireland has maintained a complex multi-level governance order, sustained by an engaged electorate and an active civil society.[2] That this order has frequently been dysfunctional should hardly be surprising; it was never going to be easy to provide a counterpoint to dominant and simplified accounts of statehood amid the legacy of protracted conflict, but it nonetheless continues to provide the basis for a political order which is not dominated by political violence.[3] The challenges inherent in maintaining functional governance in Northern Ireland, generating repeated efforts to fine-tune the post-1998 governance arrangements, should have meant that Northern Ireland was an ongoing priority for policy and law-makers, but the June 2016 referendum on United Kingdom (UK) membership of the European Union (EU) was called with little thought of how Brexit would affect these arrangements.

Northern Ireland has dominated the withdrawal negotiations and the aftermath of the UK's withdrawal from the EU not because a majority of its voters opposed Brexit in the 2016 referendum, but because of the way in which EU law had become intertwined in Northern Ireland's governance arrangements after 1998. The comparison with Scotland is illustrative. In December 2016, before the UK Government entered negotiations over withdrawal from the EU, the Scottish Government was advocating 'differentiated solutions for Scotland' if the UK Government sought looser post-Brexit connections with the EU

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* Professor of Law and Democracy, Newcastle University. Paper updated and hyperlinks last accessed on 13 December 2022.

1 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes) (1998) 2114 UNTS 473.

2 *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [11] (Lord Bingham).

3 See S de Mars and A O'Donoghue, 'Beyond Matryoshka governance in the 21st century: the curious case of Northern Ireland' in A McHarg, O Doyle and J Murkens, *The Brexit Challenge for Ireland and the United Kingdom: Constitutions Under Pressure* (Cambridge University Press 2021) 64.

than European Economic Area membership.[4] But it could not draw on a legal source comparable to the 1998 Agreement to justify such differentiation, and it instead relied explicitly on the fact that 'a large majority in Scotland voted to remain' to justify Scotland remaining part of Europe's Single Market.[5] Whereas the UK Government faced down the Scottish Government's claims,[6] it increasingly found itself making far-reaching commitments to tailor a Brexit policy which protected all aspects of the 1998 Agreement 'in full'.[7] For all that there is some 'commonality' in the UK's devolution arrangements,[8] this distinct basis of Northern Ireland's governance order matters. The negotiation of Brexit had to take account of the 1998 treaty and the referendums which endorsed it,[9] as well as the complexities of managing the land border and its sensitivities for the peace process (issues highlighted by Arlene Foster and Martin McGuinness in the immediate aftermath of the 2016 vote).[10]

The struggles to reconcile Northern Ireland's withdrawal from the EU as part of the UK with the existing commitments made with regard to its constitutional arrangements proved particularly intractable. This was in large part because, going into Brexit, so few policy-makers appreciated the distinct nature of its governance order and, indeed, its potential ungovernability, should simplified conceptions of statehood, national and parliamentary sovereignty be imposed upon it. Others appreciated this governance challenge but found solutions to it unpalatable given their desired outcomes for Brexit. The Withdrawal Agreement's Protocol on Ireland and Northern Ireland[11] emerged from protracted negotiations as an attempt to preserve certain elements of EU law which were significant to the arrangements which had developed since 1998, but that fix, by its nature, means that Northern Ireland has left the EU on different terms from the rest of the UK.

In terms of constitutional perspectives, some parties in Northern Ireland, invested in the special constitutional arrangements for the polity in 1998, remain alienated by Brexit's upheaval in those arrangements, whereas others, at best ambivalent to the post-1998

4 Scottish Government, Scotland's Place in Europe (2016) 26.

5 Ibid para 1.

6 See M Keating, 'Taking back control? Brexit and the territorial constitution of the United Kingdom' (2022) 29 Journal of European Public Policy 491.

7 T May, Belfast Speech (20 July 2018).

8 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [128].

9 C Murray, 'The constitutional significance of the people of Northern Ireland' in McHarg et al (n 3 above) 108, 123.

10 A Foster and M McGuinness to T May (10 August 2016).

11 Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union (30 January 2020).

arrangements, came to regard any distinct arrangements for Northern Ireland as a wedge between it and Great Britain. The operation of the composite governance order that both the UK and the EU have established, moreover, generates distinct challenges. EU law and domestic law continue to interact in wide-ranging areas of Northern Ireland's legal order, and the processes of transposing EU law and managing clashes of norms are only beginning to take shape. These challenges are observable in the new Brexit-implementation phase of litigation before the UK courts and the emergent international legal disputes between the EU and UK. The collection of articles which make up this special edition thus explores the challenges of making this new set of multi-level governance arrangements work for Northern Ireland. Together they unpack the composite arrangements resultant from the deep alignment between Northern Ireland and the EU Single Market under the Withdrawal Agreement and the Protocol's human rights and equality protections.

This special edition aims to address a particular window in which the UK and EU are attempting to manage their relations post-Brexit, and Northern Ireland finds itself in a governance crisis centred upon the Protocol's operation. The edition therefore builds on a considerable body of scholarship on the fraught negotiation of Northern Ireland's place in the Brexit deal[12] and on the interpretation of the relevant terms of the Withdrawal Agreement.[13] Although by no means comprehensive, the collection explores a range of different ways in which the Northern Ireland legal order has become increasingly distinct post-Brexit and considers how these developments will continue to influence EU and UK law and policy-making. Thanks are due to all of the contributors to this collection who had to assemble their contributions in the knowledge that this is a subject matter which seems to be constantly in flux or at risk of being completely upended amid the policy shifts of three different UK premierships during the writing process. Special thanks are also due to Mark Flear and Marie Selwood for processing this collection so speedily in an effort to ensure that it was not overtaken by events whilst in production.

12 See K Hayward, *What Do We Know and What Should We Do about the Irish Border?* (Sage 2021); S de Mars, C Murray, A O'Donoghue and B Warwick, *Bordering Two Unions: Northern Ireland and Brexit* (Policy Press 2018) and M Murphy and J Evershed, *A Troubled Constitutional Future: Northern Ireland after Brexit* (Agenda 2022).

13 See the edited collection C McCrudden (ed), *The Law and Practice of the Ireland–Northern Ireland Protocol* (Cambridge University Press 2022); F Fabbrini (ed), *The Law and Politics of Brexit: volume IV The Protocol on Ireland/Northern Ireland* (Oxford University Press 2022); and T Lieflander, M Kellerbauer and E Dimitriu-Segnana (eds), *The UK–EU Withdrawal Agreement: A Commentary* (Oxford University Press 2021).

THE SPECIAL EDITION

There are five substantive contributions to this special edition. In the first, I set the scene for the collection by examining how the Protocol in its current iteration compares to the 'backstop' arrangements designed during Theresa May's premiership. This comparison enables an assessment of how the operationalisation of Brexit would have differed under the backstop, and the article explores whether the UK Government could go about unpicking the backstop as successive administrations have with the Protocol. It also defines the nature of the unfolding challenge of making the Protocol work in practice by exploring the shortcomings of its arrangements, efforts to address them, and the latest crisis point of the Northern Ireland Protocol Bill. This draft legislation saw the UK Government pledge not to reform the Protocol but to upend its arrangements, heedless of the consequences of such an approach for relations with the EU, for the UK economy amid the likelihood of trade retaliation and for the stability of Northern Ireland. The collapse of Liz Truss's administration provides a potential opportunity for UK–EU relations to be reset, but the siren call of a more comprehensive post-Brexit break with the EU continues to exert a powerful hold over large sections of the Conservative Party, limiting Rishi Sunak's room for manoeuvre.

The next article examines a particular set of implementation challenges in depth. Lisa Claire Whitten considers the rules which keep Northern Ireland aligned with the EU Single Market in goods. These rules are nothing if not innovative; the EU has sub-contracted the management of part of its external goods border to a non-member state, and Northern Ireland law must as a result continue to align with a range of EU rules on goods movements and product standards as they develop. The UK Government, for its part, leant into territorial divides within its own constitutional order to adopt these arrangements, thereby twisting the rules for the UK's post-Brexit internal market around Northern Ireland's special place in the Brexit deal. Whitten's article explores what dynamic alignment means in these circumstances, the burdens it places upon law-making for Northern Ireland and whether it can function as intended given the challenges to the legitimacy of EU rules continuing to operate in Northern Ireland law when Northern Ireland has little say over relevant EU law-making.

The Protocol's alignment requirements, however, go beyond rules applicable to goods. As Eleni Frantziou and Sarah Craig highlight, they are if anything more complicated in the context of the Protocol's rights and equality arrangements. Article 2 of the Protocol sets up variable alignment requirements, with Northern Ireland law being required to maintain full alignment with a number of EU equality directives as they develop (and with the possibility of more measures being added

to this list), alongside a broader obligation that there be no post-Brexit diminution of the EU law's protections, as they existed at the end of the transition period, insofar as they can be shown to underpin aspects of the 1998 Agreement's rights and equality commitments. As Frantziou and Craig illustrate, these arrangements do not simply require that law and policy-makers responsible for Northern Ireland track a broad range of EU legislative developments (as with the rules for the Single Market applicable to goods), they also require Northern Ireland law to be responsive to developments in the case law of the Court of Justice of the European Union. Northern Ireland's institutions are again obliged to continue to make select aspects of EU law operate, in full or in part, without the ability to consider how other parts of the UK are adapting to these rule changes.

If the operationalisation of the Protocol thereby presents considerable legal challenges for Northern Ireland's governance order, notwithstanding the political furore surrounding its terms, the Protocol is also the focal point of ongoing tensions between the EU and the UK. Billy Melo Araujo explores the competing legal bases on which the UK Government seeks to justify its unilateral action which would otherwise be in breach of the Protocol's terms and why the doctrine of necessity is seemingly being advanced without reference to article 16, the safeguard clause built into the Protocol. This contribution highlights both the weakness of this approach in terms of the limits to the doctrine of necessity, but also how article 16 cannot supply the basis for measures as far-reaching as the Northern Ireland Protocol Bill. The dubious basis for the UK Government's arguments raises significant issues for the future of the Protocol; even if a negotiated settlement to the current dispute is reached, the arrangements can never stabilise and offer a platform for business in Northern Ireland if the UK and the EU cannot cooperate effectively with regard to its terms.

The final article in the special edition, by Sylvia de Mars and Charlotte O'Brien, illustrates how the Protocol interacts with other elements of the Brexit settlement to affect the lives of people in the community in Northern Ireland after Brexit. The Withdrawal Agreement's arrangements applicable to the thousands of frontier workers on the island of Ireland are not to be found in the Protocol, but they interact with it and aspects of the Trade and Cooperation Agreement to provide a complex, but in important regards incomplete, set of protections. Much of this speaks to the underdeveloped nature of rules regarding frontier workers in EU law. The operation of the rules applicable to Northern Ireland after Brexit therefore shine a light on shortcomings in EU law, and their operation in the years ahead is not simply an introverted effort to make this system work for Northern Ireland, but a process with important lessons for the EU legal order.

THE ROAD AHEAD

This special edition is intended to be a rallying cry rather than some sort of capstone on the debates over the Protocol. It is, indeed, becoming ever more challenging to maintain a general account of how Brexit impacts upon the law of Northern Ireland. In short, as the UK and EU diverge post-Brexit and the Protocol continues to operate, at least in part, Northern Ireland becomes a space where these legal orders overlap and are obliged to interlock. A constitutional experiment is underway as to how such a framework can function in adverse circumstances, with the EU and UK at loggerheads. Not only does a comparatively small polity require considerable and continuing attention from the EU, operating as a continent-spanning supranational body, to make complex arrangements work in practice, these arrangements must work in the face of ongoing opposition from the UK Government and Unionists within Northern Ireland. All of this resultant difficulty with making the Protocol work, however, should nonetheless have been expected. This sort of complex legal arrangement does not arise in circumstances of neat alignment between nationhood and territorial state. The world is not full of free cities, joint sovereignty arrangements or other efforts to depart from or rethink statehood, and where they have existed, they have often been short-lived.[14] The Protocol is likewise a measure which reframes how aspects of statehood apply to a polity riven by competing constitutional aspirations.

In such circumstances, the unsettlement of Northern Ireland's governance arrangements is all too predictable. Such a complex governance order, irrespective of the precise nature of the arrangements which were adopted on Brexit, requires constant attention and no small measure of goodwill to function. The Protocol has, in practice, received little of either. The point has been reached at which the people of Northern Ireland generally know only what they want to know about the Protocol. An opinion survey published in October 2022 as part of the ESRC's Post-Brexit Governance NI project saw that almost three-quarters of respondents consider that they have a 'good understanding' of the Protocol, but it also identified that these respondents are most likely to trust information about the Protocol received from the political parties that they support.[15] When people in Northern Ireland discuss the Protocol they are thus generally filtering it through a prism of the opinions of parties which wish to present it as being destructive of Northern Ireland's place in the UK (with that being understood

14 See Y Blank, 'Localism in the new global legal order' (2006) 47 Harvard International Law Journal 263.

15 D Phinnemore, K Hayward and L Whitten, 'Testing the Temperature 6: what do voters in Northern Ireland think about the Protocol on Ireland/Northern Ireland?' (Post-Brexit Governance NI, 2022).

simultaneously as a positive and a negative by different parties) and those who regard it as being a necessary set of compromises to protect Northern Ireland's distinct governance arrangements post-1998. In other words, the workings of the Protocol are becoming increasingly divorced from public understandings of it. In those circumstances, radical changes to the Protocol are likely to alienate larger sections of the electorate than they stand to bring on board.

And yet radical changes promising to sweep away the problems with the Protocol dominate the political agenda. The debates which have convulsed UK–EU relations have largely been about the existence or wholesale replacement of the Protocol, with far less attention having been invested in how to improve its functioning in practice. For the EU's part, episodes such as the suggestion of triggering article 16 over vaccine movements and the delays to resolving issues such as the application of steel tariffs to Northern Ireland speak to the difficulties a supranational body faces in terms of maintaining its focus on a small polity. Such focus is, however, undoubtedly required to make the Protocol work. For the UK Government, tirades and legislative forays against the Protocol have become bound up in the struggles of successive Conservative Governments to present how Brexit has changed the governance of the UK in a way that satisfies the project's loudest backers. If it is to function effectively, however, the Protocol must be accepted as an iterative process, not a constitutional end point. Its arrangements must be adaptable and must prioritise the needs of the complex polity they serve. The articles highlight some of the most significant aspects of Northern Ireland's post-Brexit interrelationship with the UK and EU legal orders and attempt to navigate some of the more significant challenges that lie ahead.

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From oven-ready to indigestible: the Protocol on Ireland/Northern Ireland

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ABSTRACT

Boris Johnson repeatedly presented the EU/UK Withdrawal Agreement to the UK electorate as an 'oven-ready' deal amid campaigning for the December 2019 general election. Subsequent events, however, have illustrated just how much of the deal remained to be worked out before the Protocol on Ireland/Northern Ireland could actually be put on the table in the way Johnson sold the dish to the electorate, and the degree to which its implementation (the spell in the microwave, as Johnson extended his metaphor) would be contingent upon the progress of the EU/UK Future Relationship negotiations. This article examines the fissures which rapidly emerged between the UK and the EU over significant elements of the Protocol, and whether Johnson's deal was inherently more unstable than the deal negotiated by his predecessor Theresa May. It explores how these profound divisions over its terms prevented the implementation of the Protocol as drafted and what might be left of the Protocol in the wake of the Northern Ireland Protocol Bill.

Keywords: Brexit; EU/UK Withdrawal Agreement; Northern Ireland; implementation; enforcement.

INTRODUCTION

Whereas the autumn of 2019 saw Boris Johnson renegotiate the EU–UK Withdrawal Agreement's Protocol on Ireland/Northern Ireland (PINI)[1] at the eleventh hour, by the autumn of 2020 his Government had embarked upon the first of its efforts to strip out 'unworkable' parts of that same Protocol, efforts which have outlasted his premiership. The Protocol having been the centrepiece of his 2019 election campaign, Downing Street set about distancing Johnson from the compromises inherent in his deal, on the basis that '[i]t was agreed

* Professor of Law and Democracy, Newcastle University. With thanks to Aoife O'Donoghue (Queen's University Belfast), Sylvia de Mars (Newcastle University), Christopher McCrudden (Queen's University Belfast) and Niall Robb (Queen's University Belfast) for their advice and encouragement regarding this article. Paper updated and hyperlinks last accessed on 13 December 2022.

1 Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union (30 January 2020).

at pace at the most challenging political circumstances to deliver on a clear political decision of the British people'.[2] In the words of David Frost, Johnson's Chief Negotiator and subsequent cabinet colleague, Theresa May had 'blinked first' in negotiations, leaving Johnson to pick up the pieces. This accusation drew an angry repost from one of May's senior advisors that her Government had been responsible for 95 per cent the finalised deal, a suggestion which might, ironically, have helped Johnson's efforts to deflect responsibility.[3]

This article addresses two of the questions which have emerged from this imbroglio. The first is the extent to which Johnson's Government was responsible for a significant change to the Withdrawal Agreement's Protocol on Ireland/Northern Ireland, rather than some not-so-subtle rebranding of the politically toxic notion of a 'backstop' arrangement for the consumption of Eurosceptic MPs. It compares the Johnson Protocol's trade arrangements for Northern Ireland with how the May Protocol's backstop would have operated, an arrangement which her advisers maintain 'was as close as it would get to something that tried to respect all perspectives on threading the needle of Brexit and the Good Friday Agreement'.[4] In doing so, it highlights the changes which resulted from the diplomatic manoeuvrings in the early months of Johnson's premiership and their impact on the workability of the Protocol. Second, having explored the nature of Johnson's deal, this article details how the resultant arrangements came under sustained pressure when efforts were made towards their implementation. It explores why the Protocol's terms applicable to customs declarations, to the processing of goods movements, to the risk of onward movement of goods into the EU Single Market and to the application of state aid rules became anathema to the UK Government. This combination of intractable issues poses the question of whether any amount of mitigation of the Protocol's terms will ever provide a stable basis for managing Northern Ireland's post-Brexit governance.

BACK TO FRONT (STOP)

From May to Johnson

The main shifts between the May and Johnson deals relate to the trading arrangements regarding goods and product standards which

2 E O'Toole, 'Downing Street officials admit last year's Brexit deal was signed in a rush' *The National* (9 September 2020).

3 J Eglot, 'UK's chief Brexit negotiator has "brass neck", says former May aide' *The Guardian* (London 6 September 2020).

4 UK in a Changing Europe, Brexit Witness: Joanna Penn (Brexit Witness Archive nd) 20.

would be applicable to Northern Ireland after Brexit. Their respective deals are conditioned by the EU's proposals for managing trade in goods in Northern Ireland post-Brexit.[5] Once the UK and EU had agreed in principle that special arrangements would be made to avoid trade barriers on the land border between Ireland and Northern Ireland in December 2017, in March 2018 the EU Commission produced backstop proposals by which Northern Ireland would be subject to separate post-Brexit trading and product rules from the remainder of the UK if other measures for maintaining an open land border could not be put in place (either through a Future Relationship Agreement or the development and deployment of open-border technology).[6] These proposals provoked an outraged response from Northern Ireland's largest Unionist party, the Democratic Unionist Party (DUP), as they would carry with them the likelihood of trade barriers between Northern Ireland and the rest of the UK. Reliant upon the DUP for her Commons majority, Theresa May asserted that the EU's proposals for Northern Ireland represented a compromise of the UK's 'constitutional integrity' that no UK Prime Minister could contemplate.[7] Her challenge became finding a basis for an agreement which would square the UK Government's December 2017 commitments with its pledges to Unionism.

Theresa May's deal with the EU, published in November 2018, reconceived of the backstop as an arrangement with implications for the whole of the UK, and not just Northern Ireland, if at the end of the transition/implementation period either a deal on the future UK–EU relationship sufficient to ensure an 'invisible' border on the island of Ireland had not been reached, or if alternate arrangements preventing a need for border checks between Ireland and Northern Ireland had not been developed. This version of the backstop would have ensured that Northern Ireland would align with the EU in terms of both customs and the Single Market's regulatory arrangements for goods, and that the UK as a whole would align in terms of customs processes. It provided for what was characterised as a swimming-pool model for UK–EU relations post Brexit; Northern Ireland would be in the deep end in terms of its alignment with the rules of the EU Single Market for goods, and Great Britain would be in the shallower end, and

5 See C McCrudden, 'Introduction' in C McCrudden (ed), *The Law and Practice of the Ireland–Northern Ireland Protocol* (Cambridge University Press 2022) 1, 5.

6 EU Commission, Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, TF50 (2018) 35, PINI, para 4. See K Hayward, '"Flexible and imaginative": the EU's accommodation of Northern Ireland in the UK–EU Withdrawal Agreement' (2021) 58 International Studies 201.

7 Theresa May MP, HC Deb 28 February 2018, vol 636, col 824.

would thereafter be able to diverge further in the future. This room for manoeuvre proved unacceptable to many Northern Ireland Unionists; they could see the connections holding Northern Ireland and Great Britain together becoming more attenuated once the new trading arrangements bedded in. Notwithstanding their prominent repetition of Unionist concerns, of greater significance to many Eurosceptics within the Conservative Party was that a Withdrawal Agreement which would default to arrangements enmeshing the whole of the UK in a customs union with the EU would fail to provide for a sufficiently clear separation of the UK from the EU; 'we may find ourselves legally obliged to be stuck in a customs union without end'.[8] Not only did they successfully resist parliamentary approval for her deal, but May was forced to resign in May 2019.

If May's deal was at least an effort to address the UK Government's conflicting commitments, the Johnson deal rests upon a legal sleight of hand. Under it, the UK as a whole would leave the EU Customs Union, but Northern Ireland would continue to apply customs arrangements and tariffs which align exactly with those of the EU and remains bound by Single Market rules with regard to goods. Under article 4, Northern Ireland would formally be part of the UK customs territory, paying lip-service to Johnson's insistence that a 'sovereign united country must have a single customs territory'.[9] For all practical purposes, however, article 5 ensures that, from the end of the Brexit transition/implementation period, Northern Ireland will be treated as if it were legally part of the EU's Customs Union and Single Market for goods. This brings with it further contradictions. In requiring that Northern Ireland applies the Union Customs Code, including arrangements whereby goods leaving Northern Ireland for Great Britain, and thereby leaving the reach of the EU Single Market, article 5 means that these movements would have to be subject to an exit summary declaration and its associated costs.[10] This sits uneasily alongside article 6 of the Protocol, which states that '[n]othing in this Protocol shall prevent the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to other parts of the United Kingdom's internal market', and Boris Johnson's glib assertions that any such paperwork could be thrown in the bin did little to provide clarity. The Protocol therefore treats Northern Ireland as though it was part of the Single Market for the purposes of trade in goods, maintaining dynamic alignment between Northern Ireland law and some 300

8 Edward Leigh MP, HC Deb 21 February 2019, vol 654, col 1692.

9 Reuters, 'PM Johnson: no Irish border posts, but will need checks somewhere' (1 October 2019).

10 EU Regulation 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast), art 271.

pieces of EU law.[11] The Withdrawal Agreement Act 2020 allows for this legislative task to be undertaken either through Westminster or the Northern Ireland Assembly. This approach to dynamic alignment largely overlaps with the backstop's proposed arrangements that Northern Ireland law would remain aligned with EU law on goods, sanitary and phytosanitary (SPS) controls, value-added tax (VAT) and state aid, which would have placed the jurisdiction in the deep end of the alignment swimming pool.[12]

The Johnson Protocol, moreover, left much to be determined in the Withdrawal Agreement's Joint Committee, including the question of whether goods being shipped from Great Britain to Ireland were 'at risk' of onward movement into the EU, necessitating checks. Under the Protocol, the EU Commission has the capacity to oversee the UK's implementation of these commitments (including EU state aid rules) and to mount enforcement actions where it believes these rules are being breached.[13] The Court of Justice of the European Union (CJEU), moreover, retains jurisdiction over disputes under the trade and goods regulation elements of the Protocol,[14] and the UK's domestic courts are obliged to follow relevant CJEU jurisprudence insofar as it is relevant to the application of EU law under the Protocol.[15] Private actors are therefore able to rely upon these Protocol commitments in litigation even where the Commission does not pursue potential breaches.[16] This package was not a resurrection of a form of Northern Ireland-only backstop; it was much more opaque in terms of how it would actually operate in practice, but gave the EU control over key mechanisms for managing this process, such as the risks posed to its Single Market by goods movements. It was also, explicitly, not an 'insurance' option; for the EU it represented a shift 'from the logic of a backstop to a permanent solution'.[17]

All of these terms carried with them the potential for friction as moves were made to implement the Protocol. For the DUP, these arrangements created an even more obvious fissure in the Union than the terms of Theresa May's deal that they had worked so assiduously to

11 See L C Whitten in this edition: NILQ 73(S2) 37–64.

12 Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (25 November 2018) PINI, art 6, 8 and 9, 12.

13 Withdrawal Agreement (n 1 above) PINI, art 12(4)–(5).

14 Ibid PINI, art 12(4).

15 Ibid PINI, art 13(2). This is a more extensive obligation than provided under the Withdrawal Agreement (n 1 above) art 4.

16 European Union (Withdrawal Agreement) Act 2020, s 5, inserting European Union (Withdrawal) Act 2018, s 7A.

17 UK in a Changing Europe, Brexit Witness: Stefaan de Rynck (Brexit Witness Archive 1 & 15 March 2021) 29.

undermine. Unlike the backstop, which was avowed to be a last resort, these arrangements were to take effect immediately at the conclusion of the Withdrawal Agreement's implementation/transition period and could last indefinitely. This sort of ploy has long characterised the UK's relationship with the Europe Project. The European Communities Act 1972, after all, was deliberately unclear as to the degree to which parliamentary and national sovereignty were abridged by the UK's membership of the then-European Economic Community (EEC). Indeed, section 2 of the Act was so opaque on the transfer of law-making authority over specific competences to the EEC that it took the UK's domestic courts the best part of two decades to unpack the resultant hierarchy between EU law and measures enacted by Westminster. The feat of conjuration necessary to persuade Parliament to pass the Withdrawal Agreement was beyond Theresa May. The EU had closely observed how ineffectively she had presented the economic benefits of the Agreement she had struck to Parliament, and the way any concessions that they did make in the form of assurances that the backstop was not a trap, significant in terms of any future 'good faith' arguments over its application, got sucked into a narrative that 'there is no ultimate unilateral right out of this arrangement'.[18]

There had to be a dreaded backstop before it could be made to disappear, and given that she was so closely associated with backstop arrangements which would cover the whole of the UK, May was never going to be able to distract from their being reconstituted. And given that arrangements covering the whole of the UK had become bound up in her account of what was necessary to safeguard the integrity of the UK, there was no evidence that she could support such a shift. Given that Johnson's disappearing act was so brazen, the audience, predominantly the Eurosceptic wing of the Conservative party,[19] had to desperately want to believe the backstop had indeed disappeared. And as for the distraction necessary to grab that audience's attention, this was provided by the consent arrangements involving the Northern Ireland Assembly which Michel Barnier described as the 'democratic cornerstone' of the revamped Protocol.[20] Although May had sought this insertion into the deal, imploring EU leaders that 'the EU has to make a choice too' if it is to secure a deal,[21] the EU was

18 Geoffrey Cox MP, HC Deb 12 March 2019, vol 656, col 188.

19 The efforts to disguise the Protocol's impact were notably unsuccessful in Northern Ireland; see D Henig, 'Balancing regulation, devolution, and trade: a global issue rendered acute in Northern Ireland' (2021) 16 Journal of Cross Border Studies in Ireland 177, 189.

20 S Fleming, J Brunsden and M Khan, 'No 10's concessions in race to break Brexit deadlock' *Financial Times* (London 17 October 2019).

21 T May, PM speech in Grimsby (*Gov.uk* 8 March 2019).

never going to entrust such a concession to a Prime Minister whose administration was evidently tottering and who had no credibility with this audience.[22] This concession, constrained though it undoubtedly was by the requirement of cross-community support in the Assembly to end the Protocol's trade terms, was thus made to Johnson instead of May, in the knowledge that he had chutzpah to spare to perform this feat. The backstop covering the whole of the UK was gone. And, with a UK electorate weary of the saga of Brexit and eager for the relief of the 'oven-ready' deal Johnson promised, the 2019 general election was long over before attention turned to the extent of the up-front arrangements for Northern Ireland which had replaced it.

Storing up trouble

That Johnson's version of the Northern Ireland Protocol was ever accepted by Parliament is thus much more about how it was sold, particularly in the December 2019 general election campaign which generated Johnson's sizeable Commons majority, than about its quality as a legal instrument, given that its trade and product arrangements amounted to a jumble of opaque and apparently contradictory provisions which ultimately proved unimplementable in its agreed form. These difficulties open up the counterfactual discussion, in light of the series of crises which have befallen Johnson's Protocol, as to whether Theresa May's version of the deal would have provided a more stable platform for Northern Ireland after Brexit.

From the DUP there has been little remorse over the role it played in rendering May's deal unacceptable to Parliament, even if this paved the way to the Johnson Protocol. Indeed, for Nigel Dodds her deal led to the same end point, if by a slightly more circuitous route:

> The May backstop contained a regulatory border in the Irish Sea in exactly the same way as the protocol. Mrs May said that the rest of the UK would just tag along and keep its laws in step with the EU. That was not legally enforceable under the treaty and, politically, the Tory party would never have accepted such a scenario, as was demonstrated in the many rejections of her backstop by her own party. Likewise, the May backstop had Northern Ireland in EU customs union rules with a temporary add-on of Great Britain being tacked on. That would never have survived under May's successor, even if it had squeaked through her own party.[23]

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22 Interviews with key EU Brexit negotiators also indicate that it was only after Johnson took office that the UK Government presented a legal scheme for the consent mechanism; de Rynck (n 17 above) 29.

23 S Breen, 'DUP rejects suggestion party should have agreed to Theresa May's backstop' *Belfast Telegraph* (21 January 2021).

The first of these claims relates to product standards, and, for all that at-border customs checks were prevented under May's backstop arrangements, there remained considerable scope for regulatory divergence between Great Britain and the EU Single Market rules which would be applicable to Northern Ireland after Brexit. The outline document on the EU–UK Future Relationship which accompanied May's deal recognised that the negotiations would encompass a 'spectrum of different outcomes',[24] leaving unstated that only complete alignment between Great Britain and the EU would altogether negate the need for checks on movements between Great Britain and Northern Ireland. Given that the sentiment of the Conservative Party was so opposed to maintaining deep regulatory alignment between Great Britain and the EU, in Dodds' reckoning there was no possibility of an agreement on the Future Relationship which would avoid the creation of new regulatory barriers affecting Northern Ireland.

May's Protocol, therefore, would have been subject to many of the same pressure points as Johnson's rework, had it been agreed by the UK Parliament and had the UK Government subsequently become determined to disrupt its operation. Indeed, the opportunity to agree and thereafter unpick a deal which he would have had no ownership over must have appealed to Johnson, given that he voted with the Government when it attempted to gain acceptance for May's Protocol on 29 March 2019, after the Prime Minister had indicated that she would resign even in the event that her deal was passed.[25] May's Protocol, however, could have slowed efforts towards this end, given that only deep regulatory alignment for the UK as a whole would have prevented the backstop from coming into effect. Johnson would openly recognise this in his own negotiations with the EU:

> [T]he backstop acted as a bridge to a proposed future relationship with the EU in which the UK would be closely integrated with EU customs arrangements and would align with EU law in many areas. That proposed future relationship is not the goal of the current UK Government.[26]

Particular elements of the backstop, such as customs alignment, would have also negated concerns over the need for construction of new customs infrastructure at ports covering movements between Great Britain and Northern Ireland which lingered throughout the Future Relationship negotiations. The backstop was, taken as a whole, clearer in the terms of its operation than the Johnson Protocol; it would come

24 Department for Exiting the European Union, Political Declaration Setting out the Framework for the Future Relationship between the European Union and the United Kingdom (25 November 2018) para 28.

25 F Elliot, 'May vows to resign' *The Times* (London 28 March 2019).

26 Boris Johnson, Open Letter to Jean-Claude Juncker (2 October 2019).

into effect, if necessitated by the absence of a technological solution, to cover any shortfall regarding goods movements resultant from the Future Relationship negotiations. It would not have depended on the simultaneous negotiation of 'at risk' goods before the Joint Committee and the terms of the Future Relationship, the latter on a truncated timeframe given the delays in ratifying the Withdrawal Agreement. This lack of disguise, however, made the backstop a more difficult sell; its operation was intelligible on the face of its terms. As it was, there would be no concerted effort towards making the Protocol work and to engage in collaborative troubleshooting of issues as they inevitably arose as new trading rules took effect. Instead, the UK Government's efforts towards unpicking the 2019 deal have unfolded in several phases.

AND THEN IT FELL APART

Recrimination

In the early months of 2020, Brexit was far from done. The operation of article 5 of the Protocol still needed to be determined through the Withdrawal Agreement's committee processes, alongside the Future Relationship negotiations. The outcome of both of these processes would determine how the Protocol would function in practice. The shine, moreover, was beginning to wear off Johnson's 'brilliant'[27] deal, as more attention was given to the extent of the concessions that the UK Government had made to the EU. Johnson's Government thus found itself under considerable pressure from within the Conservative Party to wrap up the Future Relationship negotiations by the end of 2020, notwithstanding the exigencies of the Covid-19 pandemic response.[28] It also gave an early indication of the extent to which it did not regard the Protocol's terms as fixed in the *New Decade, New Approach* deal to restart power-sharing in Northern Ireland, in which it highlighted its 'aim to negotiate with the European Union additional flexibilities and sensible practical measures across all aspects of the Protocol that are supported by business groups in Northern Ireland and maximise the free flow of trade'.[29] Ministers might have insisted that Future Relationship negotiations 'will be undertaken without prejudice and with full respect to the Northern Ireland protocol',[30]

27 'General Election 2019: Johnson insists no NI–GB goods checks after Brexit' (*BBC News* 8 December 2019).

28 See 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, 22.

29 New Decade, New Approach (8 January 2020) 48.

30 Michael Gove MP, HC Deb 27 February 2020, vol 672, col 469.

but the two processes would become increasingly connected. The UK Government thus set about laying the groundwork for the coming confrontation with the EU. Geoffrey Cox, as Attorney General, might have been supportive of Brexit, but he had also demonstrated an uncomfortable willingness to draw attention to the legal limitations which the Withdrawal Agreement placed upon Government policy. His replacement by Suella Braverman would ensure that legal advice around the Withdrawal Agreement would facilitate the Government's policy objectives.

The first clashes between the EU and UK over the implementation of the deal related to the relatively innocuous subject matter of the European Commission Office in Belfast. The UK Government, notwithstanding the Protocol stating that EU representatives would have functions within Northern Ireland,[31] announced that the Commission's Office in Belfast would have to close.[32] This skirmish signalled what was to come; the UK Government, eager to deflect from the terms it had agreed in the redrafted Protocol, sought to achieve 'victories' over the EU which would provide visible symbols of Brexit taking effect. The UK Government refused to undertake any construction of new customs facilities in Northern Ireland,[33] although it did, *sotto voce*, acknowledge that the expansion of some port facilities would be necessary to handle 'agri-food checks and assurance'.[34] It justified its 'minimum possible bureaucratic consequences' approach to implementing the Protocol on the basis that the Protocol's trade provisions 'might only be temporary'.[35] These provisions, however, were not temporary; they were event-limited. And the event in question, a majority vote in the Assembly supporting their termination (to be held four years after the transition/implementation period ends), as required under article 18 of the Protocol,[36] was always likely to be a high hurdle to cross given the position of the Northern Ireland parties towards the Protocol. The argument as to how the EU would go about monitoring the implementation of the Protocol was rolled into the developing disagreements over how the Protocol was to be applied in the Joint Committee. The issue of exit declarations under the EU customs code continued to conflict with Johnson's promises concerning

31 Withdrawal Agreement (n 1 above), PINI art 12(2).

32 T Connelly, 'UK refuses EU request for Belfast office' (*RTE* 1 April 2020).

33 Cabinet Office, *The UK's Approach to the Northern Ireland Protocol* (2020) CP 226, para 32.

34 Ibid para 34.

35 Ibid para 16.

36 See G Anthony, 'The Protocol in Northern Ireland law' in McCrudden (ed) (n 5 above) 118, 124.

movement of goods from Northern Ireland to Great Britain.[37] The lack of a definition of 'at risk' goods within article 5, moreover, had been a pragmatic decision at the time of the Withdrawal Agreement; pushing this difficult question down the road and onto a technocratic body enabled the deal to be concluded and ratified. The issue, moreover, would only become live insofar as the UK did not agree regulatory alignment for Great Britain with the EU product standards. But as it became clear that Johnson's negotiating team was pushing for the broadest possible scope for regulatory divergence from the EU, these questions took on renewed significance. Under the terms of article 5 of the Protocol, however, the EU believed that it could withstand this pressure safe in the knowledge that its terms set out that all goods were presumed to be at risk of onward movement through Northern Ireland into the Single Market unless they fell within an agreed exemption.

In September 2020 the UK Government took the dramatic step, under the Internal Market Bill, of making legislative proposals which, if enacted, would conflict with some of the Protocol commitments which it had come to regret relating to exit procedures for goods moving from Northern Ireland to Great Britain and state aid.[38] The EU threatened to walk away from Future Relationship negotiations unless this threat of what the Northern Ireland Secretary admitted was a breach of the UK's commitments was lifted. At this point, however, Johnson harnessed some of the ambiguous drafting of the Protocol's terms to attempt to redirect the narrative away from his administration's willingness to breach its commitments:

> The EU is threatening to carve tariff borders across our own country, to divide our land, to change the basic facts about the economic geography of the United Kingdom and, egregiously, to ride roughshod over its own commitment under article 4 of the protocol, whereby 'Northern Ireland is part of the customs territory of the United Kingdom'.[39]

This bombast encouraged the DUP to believe that Johnson was working to 'undo some of the damage done by the withdrawal agreement',[40] but was also met by calls for 'rigorous implementation'[41] of the Protocol from Sinn Féin, the Social Democratic and Labour Party, the Alliance Party and the Green Party. Much as the latter phrase would come to be used by the DUP to present these parties as committed to a rigid approach to the Protocol without due regard to its impact on the

37 EU Committee, The Protocol on Ireland/Northern Ireland (2020) HL 66, para 150.

38 Internal Market Bill 2020, cls 42 and 43.

39 Boris Johnson MP, HC Deb 14 September 2020, vol 680, col 44.

40 Sammy Wilson MP, HC Deb 14 September 2020, vol 680, col 67.

41 D Young, 'NI Protocol must be honoured, pro-remain parties demand' *Belfast Telegraph* (7 September 2020).

ground in Northern Ireland, their joint position was a reaction against the UK Government's willingness to take unilateral action in the face of its international law commitments. In truth, no one yet knew what the practical implementation of the Protocol would involve because it was impossible to assess how it would interact with the outcome of the Future Relationship negotiations.

Rapprochement

The showdown over the Internal Market Bill was not resolved until December 2020, in the dying days of the Brexit implementation/transition period. Agreement was reached on the practical arrangements for EU officials overseeing the UK's management of the Single Market's trade boundaries, excluding export procedures for goods moving from Northern Ireland to Great Britain and over controversial aspects of the operation of the Protocol's state aid rules. With these issues addressed, the UK Government withdrew the controversial clauses from part 5 of the Internal Market Bill, which it was in any event struggling to get through the House of Lords. Both parties recognised that there was no viable way to apply EU rules regarding medicinal products at the end of the transition/implementation period without undermining the operation of public healthcare in Northern Ireland, and so an extended grace period was put in place to allow space for a legal solution to be developed. Furthermore, a series of three-to-six month grace periods were agreed with regard to the checks and documentation required to move food products and particularly chilled meat products from Great Britain to Northern Ireland. These would have been some of the most onerous checks which would have accompanied the introduction of the Protocol, with the EU closely regulating food safety and provenance within the EU market and the issue having received particular scrutiny since the 2013 horsemeat scandal.[42]

These grace periods were essential; so stark was the change in trading rules that the UK Government knew would come into effect at the end of December that a strict application of the Protocol's terms would have resulted in an unrealisable burden of checks on movements of food products between Great Britain and Northern Ireland which would have seriously disrupted trade as a whole. There was also no Joint Committee agreement to exclude broad categories of goods from being treated as being at risk of subsequent movement from Northern Ireland into the EU Single Market (beyond limited exemptions where there was no possible economic benefit, in terms of avoiding tariffs, in using Northern Ireland as a 'back door' into the Single Market). Both sides appreciated that the Protocol's terms made trade divergences

42 See C Barnard and N O'Connor, 'Runners and riders: the horsemeat scandal, EU law and multi-level enforcement' (2017) 76 Cambridge Law Journal 116.

inevitable, especially because the Trade and Co-operation Agreement (TCA) that was then being finalised would include no arrangements for ongoing UK–EU SPS alignment. The health certification and chilled meat extensions were billed by Michael Gove as a period in which processes and supply chains could be adjusted, 'to ensure that supermarkets are ready'.[43] But there remained a gulf between what Gove was presenting to Parliament as the prospect of 'limited and proportionate SPS checks'[44] and the reality of operating an EU external frontier for goods.

The Protocol has thus never been implemented as agreed; it was subject to changes to the operation of its agreed terms before they even entered effect. Even if some, and likely most, of the December 2020 adjustments could have been quietly agreed through the normal workings of the Joint Committee, the UK Government projected the narrative that such brinkmanship 'helped to concentrate minds'.[45] This proposition, however, has sustained a repetitive cycle of post-Brexit confrontations with both the UK and the EU becoming locked in an antagonistic relationship over the application of the Protocol's complex trade rules. The entry into force of the Protocol was always going to produce dislocations, but for many retailers and hauliers the first weeks of 2021 were miserable. Businesses knew the terms by which the Protocol would operate and the extent of the agreed grace periods with only a matter of days to spare before the end of the implementation/transition period.[46] For large businesses, this required a herculean process of adapting supply chains and getting accustomed to new processes for trading goods from Great Britain into Northern Ireland. Some smaller businesses concluded that, in the midst of a pandemic, trading with such a small market was not worth the required adjustment in the short term.

Within days of the Protocol taking effect the DUP was using these predictable (and predicted) trade dislocations which attended the thin post-Brexit trade deal to agitate for the UK Government triggering article 16 of the Protocol and putting in place emergency adjustments to the Protocol's operation. Then, at the end of January 2021, the UK Government seized upon the outrage generated by the EU's moves towards using article 16 to establish export controls on the notional movement of Covid-19 vaccines from the EU into Northern Ireland

43 Michael Gove MP, HC Deb 9 December 2020, vol 685, col 854.

44 Ibid col 851.

45 Committee on the Future Relationship with the European Union, *Oral Evidence: Progress of the Negotiations on the UK's Future Relationship with the EU* (17 December 2020) HC 203, Michael Gove MP, Q1112.

46 A Jerzewska, 'The Irish Sea customs border' in C McCrudden (ed) (n 5 above) 207, 209.

to present the EU Commission with a shopping list of additional adjustments to the Protocol's operation. The EU might have quickly backtracked, but it highlighted several of the challenges that it would continue to face. The Protocol obliges the EU to handle sensitive areas of law-making and law application in the Northern Ireland context, which for all its complexity is of little economic importance in the context of the entire Single Market for goods. It must do so in the face of opposition to the Protocol arrangements from the Unionist parties in Northern Ireland and from a UK Government which was not a collaborator in making these complex rules work, but a major neighbouring competitor economy set on a path of divergence. EU missteps were thus almost inevitable, as was the resultant instrumentalisation of those missteps to advance UK Government efforts to redraw the boundaries of the Protocol.

Half life

The EU's January 2021 blunder produced, for the UK Government, an entirely 'new situation' around the Protocol, characterised by 'unsettledness'.[47] Seizing on the opportunity, it announced unilateral extensions to the grace periods applicable under the Protocol which it had agreed only three months previously.[48] In other circumstances this action might have drawn questions as to the UK Government's failure to foresee that longer grace periods would be necessary, but the vaccines debacle gave the UK Government considerable political cover in pursuing its goal of stripping parts out of the Protocol. The assumption will have been that, still reeling from the vaccines debacle, the EU would either accept these adjustments or respond with token gestures. In the end, the latter would involve a stop-start enforcement action and a short-term delay to the TCA ratification process. The UK Government presented itself as having Northern Ireland's business interests at heart and would in due course brush off Commission enforcement proceedings as churlish and misguided as Unionist tensions over the Protocol rose in Northern Ireland ahead of the summer marching season.[49] The EU Commission, in an effort to restore its reputation for careful action with regard to Northern Ireland, suspended its enforcement action and invited renewed talks with the UK Government over its outstanding difficulties with the Protocol. Instead, the UK Government pivoted once again. Having been

47 European Scrutiny Committee, 'Oral evidence: the UK's new relationship with the EU' (17 May 2021) HC 122, Lord Frost, Q81.

48 Viscount Younger of Leckie, HL written Statement 811 (3 March 2021).

49 Northern Ireland Office, *Northern Ireland Protocol: The Way Forward* (2021) CP 502, para 26.

talking for months about the need to address 'teething problems'[50] and 'barnacles'[51] preventing the Protocol from working effectively, in July 2021 the UK Government sought to upend the Protocol's terms.

The Command Paper reflected a high point in Lord Frost's influence over the UK Government's approach to relations with the EU. It was premised on the position that the Protocol's impact on Northern Ireland, in terms of societal upheaval and trade dislocation, had been so detrimental that the conditions existed for the UK to undertake emergency measures on the basis of article 16 of the Protocol.[52] If the EU did not agree to a fundamental reworking of the Protocol, the Command Paper therefore indicated that the UK Government would take unilateral steps to effect a sweeping series of changes to its terms. In terms of goods movement, the proposals outlined separate arrangements for goods moving between Great Britain and Northern Ireland and for goods movements through Northern Ireland into Ireland.[53] In terms of goods production, the Paper proposed a dual regulatory regime, with businesses in Northern Ireland opting to produce goods to EU standards or the standards necessary to place goods on the UK internal market.[54] As a result of these changes, the paper proposed that VAT rules could operate on the basis of the UK system[55] and that the oversight function of the CJEU could be brought to an end.[56]

The UK Government made these demands in the knowledge that the EU had publicly repeated that it would not renegotiate the Protocol; in other words that much of this agenda was unacceptable. This paper was thus about painting the EU as intransigent. Following the launch of the Command Paper, the UK Government's arguments about the Protocol underwent a profound shift. Complaints about the Protocol's implementation, and the lack of 'immensely sensitive handling' of its operation by the EU,[57] began to be accompanied by the suggestion that the deal was inherently flawed and had been forced upon the Johnson Government by its need to secure a deal in the face of parliamentary opposition to its policy in the Autumn of 2019 and boxed in by the concessions made to the EU by Theresa May's Government. For Lord Frost, 'we inevitably still operated within the intellectual and political

50 Boris Johnson MP, HC Deb 13 January 2021, vol 687, col 290.

51 L O'Carroll, 'Brexit: Johnson says UK trying to cut "ludicrous" Northern Ireland checks' *The Guardian* (London 20 April 2021).

52 Northern Ireland Office (n 49 above) para 29.

53 Ibid para 48.

54 Ibid para 58.

55 Ibid para 54.

56 Ibid para 68

57 Lord Frost, 'Foreword' in R Crawford, *The Northern Ireland Protocol: The Origins of the Current Crisis* (Policy Exchange 2021) 7.

framework set by the Joint Report'.[58] The space for negotiation over the Protocol's operation narrowed as the UK Government's efforts seemed to be increasingly directed towards repudiation of the deal. Alongside this confrontational policy, the DUP set out its policy of escalating withdrawal from Northern Ireland's post-1998 governance arrangements in light of the Protocol's operation, feeding into the UK Government's claims of societal disruption.[59]

The Command Paper was launched in the final days before the summer recess. Westminster and Brussels emptied, and little appeared to happen. In September, the UK Government casually announced, in a written statement, the open-ended extension of the existing grace periods restricting the application of Protocol checks.[60] The Commission did not respond, in line with the Command Paper's pretext for discussions over the Protocol that the EU 'should agree a "standstill" on existing arrangements, including the operation of grace periods in force, and a freeze on existing legal actions and processes, to ensure there is room to negotiate without further cliff edges'.[61] The EU then went further and put a suite of proposals on the table to overhaul the operation of the Protocol. The matter of how EU rules would impact on the supply of medicine had effectively been parked during the protracted Protocol negotiations, with the EU agreeing an extended grace period in 2020 to allow the problem to be addressed once the supply issues were fully understood. This did not stop senior UK Government figures, led by Lord Frost, presenting the issue as a major challenge for the Protocol's operation; 'aspects that are simply unsustainable in the long-term for any Government responsible for the lives of its citizens — like having to negotiate with a third party about the distribution of medicines within the NHS'.[62] The first of the EU proposals thus compromised on the product compliance checks it would require for medicines moving from Great Britain, provided they were for use only in Northern Ireland.[63] Second, on SPS checks, the EU proposed to simplify paperwork and reduce the volume of checks for retail goods that are moving into Northern Ireland from Great Britain which will be sold in Northern Ireland. Any mode of transport from Great Britain carrying such retail goods, such as a container, would

58 Ibid 6. He has further elaborated his position that the Protocol was shaped 'by relative UK weakness and EU predominance in the Withdrawal Agreement negotiations'; Lord Frost, 'Foreword' in G Gudgin, *The Island of Ireland: Two Distinct Economies* (Policy Exchange 2022) 6.

59 J Donaldson, 'Now is the time to act' (La Mon Hotel, Belfast 9 September 2021).

60 Lord Frost, HL Written Statement 257 (6 September 2021).

61 Northern Ireland Office (n 49 above) para 77.

62 Frost (n 57 above) 7.

63 EU Commission, Protocol on Ireland and Northern Ireland – Non-Paper – Medicines (2021) para 9-25.

only have to fill in a single Export Health Certificate. Documentary checks would also be digitised. Product movements that are prohibited under EU law, such as those of sausages, could continue, but would need to satisfy EU production requirements and be accompanied by documentation. These adjustments would be subject to greater labelling requirements and enhanced monitoring, and the proposals provided for a safeguard clause if products were found to be crossing into Ireland.[64] Beyond these measures to address products covered by the grace periods, the assumption which underpinned the EU proposal was that the level of checks required by a reformed Protocol would very much depend on UK Government policy; the extent to which the UK chooses to maintain alignment with EU regulatory standards for Great Britain will determine the level of checks necessary on goods moving from Great Britain to Northern Ireland. Third, on customs checks, the EU proposed revisiting the 'at risk' of moving into the EU category of goods to reduce its scope, and reducing customs formalities for goods not deemed to be at risk of onward movement, although much of the scope of these proposals remained to be fleshed out.[65] Finally, on the issue of engagement by Northern Ireland institutions and stakeholders in the development of EU law applicable under the Protocol, the EU proposals indicate that greater deliberation is possible within the Withdrawal Agreement's structures but did not go so far as to offer pre-legislative consultation to Northern Ireland's representatives.[66] This series of proposals is based upon the premise of mitigating the Protocol as agreed, not starting over with an entirely new model for Northern Ireland's post-Brexit trade rules, and it therefore did not engage with many of the UK's priorities, such as VAT rules, state aid or the role of the CJEU.

The UK Government struggled to formulate an immediate response to this package of reforms. Indeed, having set up the pretext for triggering article 16, the axe never seemed to fall. A series of crises distracted the UK Government from bringing about this confrontation with the EU each time that it seemed on the cusp of doing so. The fallout over the Government's unsuccessful attempts to prevent the suspension of Owen Paterson for 'egregious' breaches of the MP's code of conduct[67] ate up weeks of the political agenda, to be followed

64 EU Commission, Protocol on Ireland and Northern Ireland – Non-Paper – Sanitary and Phytosanitary (SPS) Issues (2021) para 8-13.

65 EU Commission, Protocol on Ireland and Northern Ireland – Non-Paper – Customs (2021) paras 21–26.

66 EU Commission, Protocol on Ireland and Northern Ireland – Non-Paper – Engagement with Northern Ireland Stakeholders and Authorities (2021) para 9-23.

67 House of Commons Committee on Standards, 'Mr Owen Paterson' (26 October 2021) HC 797, para 212.

by the breaking of the Party-gate scandal which would overshadow the remainder of Johnson's premiership. Every time the prospect of invoking article 16 loomed, one of these distractions consumed Johnson's attention and Lord Frost was obliged to inform Parliament that the Government was going to let negotiations run for a further 'short number of weeks'.[68] And then, in February 2022, the looming war clouds over Eastern Europe wrested the EU and the UK Government's attention away from the dreary steeples of Fermanagh and Tyrone. Not even the DUP collapsing the Northern Ireland Executive could persuade the UK Government to undermine the necessary EU–UK cooperation in the days and weeks after Russia's invasion of Ukraine. Technical talks over the Protocol stopped, on the pretext that they should not overshadow the pre-Assembly election campaigning in Northern Ireland, but also because of the need to focus energies on Ukraine. There had also been a significant change in personnel in that Lord Frost, the loudest proponent of using article 16, had resigned from his post in December 2021. In his wake, ministers concluded that notwithstanding the apparent breadth of article 16's terms, and the legal cover it potentially provided as a mechanism within the Protocol itself, the UK Government was always going to find it difficult to justify many of its Command Paper objectives as proportionate adjustments necessary to address live issues with the Protocol's operation. And, as a result, the Protocol continued to function in a sort of half-life. Paterson, Party-gate and Putin postponed the predicted reckoning, but these distractions did not sustain it in its original form. Instead, by creating a protracted crisis, these delays have extended the uncertainty around the Protocol. With the ongoing uncertainty over trade rules and product standards, it inevitably became more of a challenge to do business in Northern Ireland, and with this uncertainty any prospect of a Protocol dividend was lost.

Destruction?

In April 2022, immediately before the Northern Ireland Assembly elections, the UK Government began to flag a new approach, based around fresh legislation to deny domestic legal effect to large parts of the Protocol, with ministers giving new life to the dubious narrative that the UK had 'signed it [the Protocol] on the basis that it would be reformed', and that 'there comes a point where we say: "You haven't reformed it and therefore we are reforming it ourselves"'.[69] Having trailed this development with scant regard to the niceties ordinarily observed during an election period, the then Foreign Secretary Liz

68 Lord Frost, HL Deb 10 November 2021, vol 815, col 1720.

69 European Scrutiny Committee, 'Oral evidence: regulating after Brexit' (20 April 2022) HC 1262, J Rees-Mogg, Q26.

Truss introduced the Northern Ireland Protocol Bill to the Commons within weeks of the election results being announced.

In terms of justification, the UK Government has returned to its persistent refrain, going back to the transition/implementation period, that the Protocol must be reformed because it does not command cross-community consent within Northern Ireland. That Brexit did not command cross-community consent and that the Protocol was a painstakingly negotiated construct which attempts to mitigate some of the impacts of Brexit on Northern Ireland is left unmentioned. The precise nature of the supposed breach of the 1998 Agreement remains unclear. The UK Government explicitly accepted that the December 2020 Joint Committee amendments meant that the Protocol protects the 1998 Agreement 'in all its dimensions'[70] and has actively defended litigation against the Protocol as compliant with the 1998 Agreement.[71] Cross-community consent, under the Agreement and its implementing legislation, specifically relates to decisions within the Northern Ireland Assembly, and not to the operation of international treaties concluded by the UK Government.[72] The published summary of the Government's legal advice therefore side-stepped such claims and instead asserted that the EU has been so dogmatic in the application of the Protocol's trade and goods regulation provisions that it has undermined power-sharing.[73] This position, however, is just as difficult to sustain. It flies in the face of the consistent DUP opposition to the Johnson Protocol from the point at which it was first published.[74] The EU, moreover, has repeatedly agreed reworks to the Protocol's operation, with regard to exit declarations and state aid in December 2020, in acquiescing to the UK's grace period extensions in the summer of 2021 and in legislating for its proposed solution to the problem of medicine supply in April 2022.[75] If the Protocol is more challenging to operate in practice than some had at first hoped, this is in large part the result of the limited nature of the TCA, which saw the UK Government prioritise its capacity for divergence in Great Britain from EU food, agriculture and

70 Joint Statement by the Co-chairs of the EU–UK Joint Committee (Brussels 8 December 2020).

71 For a summary of these, successful, arguments, see: *In re Allister* [2022] NICA 15, [87].

72 Northern Ireland Act 1998, s 4(5) and s 42.

73 Foreign, Commonwealth and Development Office, 'Policy Paper: Northern Ireland Protocol Bill: UK Government Legal Position' (13 June 2022).

74 See, for example, J Donaldson MP, HC Deb 21 October 2019, vol 666, col 272.

75 Directive 2022/642/EU amending Directives 2001/20/EC and 2001/83/EC as regards derogations from certain obligations concerning certain medicinal products for human use made available in the United Kingdom in respect of Northern Ireland and in Cyprus, Ireland and Malta.

product standards. The UK Government's choices are at the root of the supposed 'peril that has emerged' for Northern Ireland.[76]

Brexit has brought with it inevitable dislocations for the Northern Ireland economy, but there remains very little hard data, as opposed to anecdote, in the public domain on the nature and extent of the supposed divergences which have specifically resulted from the Protocol, with even its detractors acknowledging that 'it is unclear how the Protocol has impacted NI's trade'.[77] Even if such data were available, this would support the use of the trade protection provision within the Protocol, article 16. Not only has there been no UK Government move to take the steps necessary to invoke article 16,[78] this provision does not have sufficient reach to support a wholesale disapplication of Protocol obligations on a permanent basis.[79] It is furthermore untenable for the UK Government to invoke the doctrine of necessity, based on a legal position that it 'has no other way of safeguarding the essential interests at stake than through the adoption of the legislative solution',[80] when its own conduct has contributed to the situation, and when it has made no effort to use the article 16 mechanism for addressing such societal concerns.[81] The UK Government's loss of interest in article 16, however, had left the DUP exposed to rival parties in the 2022 Assembly election campaign, compounding what it regarded as the betrayal of the Withdrawal Agreement. The party had become so distrustful of the UK Government's *bona fides* that it refused to reengage with power-sharing processes in Northern Ireland notwithstanding the publication of the new legislation.[82] The Bill, on its face, would appear to be everything that the DUP could ask for and more. But it is precisely because it is so far-reaching and so reliant on placing powers into the hands of ministers with limited parliamentary oversight that provokes questions over whether it is likely to make it to the statute book promptly and without extensive amendment.

At present, the EU law obligations which remain applicable to Northern Ireland under the Protocol flow directly into domestic law by the 'conduit pipe', to use the language of the UK Supreme Court

76 Legal Position (n 73 above).
77 Gudgin (n 58 above) 71.
78 Withdrawal Agreement (n 1 above) PINI, annex 7.
79 B Melo Araujo, 'A contextual analysis of article 16 of the Ireland–Northern Ireland Protocol' (2022) 71 International and Comparative Law Quarterly 531, 556–557.
80 Legal Position (n 73 above).
81 B Melo Araujo in this volume: NILQ 73(S1) 89–119.
82 'NI Protocol: Government urges DUP to return to Stormont "as soon as possible"' (*BBC News* 14 June 2022).

in *Miller*,[83] of section 7A of the European Union (Withdrawal) Act 2018. Clause 2 of the new Bill excludes a swathe of Protocol provisions from the scope of section 7A, in effect cutting the pipe. It is supported by clause 3, which excludes any interpretation of law in light of the Withdrawal Agreement, restricting the effect of section 7C of the 2018 Act. These changes do not, of themselves, absolve the UK of its international obligations.[84] The EU can continue to take action against the UK for this breach of the Withdrawal Agreement.[85] But it severs the connection between these Protocol obligations and domestic law. The Protocol provisions directly excluded from the operation of section 7A include all of its provisions relating to the movement of goods (including customs),[86] the regulation of goods,[87] state aid rules,[88] and the CJEU's enforcement role.[89] In each of these regards, ministers are given far-reaching powers to make new domestic law, enabling the UK Government to substitute its own scheme in place of the Protocol's rules. Clause 22 confirms that ministers can make regulations under this Act to make any provision which could be made by an Act of Parliament. The supposed limitation to this power, repeated throughout the Bill, is that the regulations are such that the minister 'considers appropriate' in connection with the Protocol, the broader Withdrawal Agreement or this legislation. This amounts to little by way of a constraint, with one Committee concluding with regard to these delegate powers that 'it seems wholly inappropriate for this to be done by means of subordinate legislation, particularly where that legislation is capable in certain circumstances of only requiring the negative procedure'.[90] It is, for example, very different from section 8C of the 2018 Act, which also gives ministers power to make such regulations as they 'consider … appropriate', but where the purpose must be connected to the implementation of the Protocol. Powers expressed in the same terms faced the most strenuous opposition on grounds of side-lining Parliament in the context of undermining the UK's international law commitments when they were included in the Internal Market Bill as proposed, and there is no reason to think that the House of Lords will be any more receptive to them in the current context.

83 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [65].

84 Vienna Convention on the Law of Treaties 1969 (1980) 1155 UNTS 331, art 27.

85 For an exploration of the limits of such rebalancing measures, see Melo Araujo (n 79 above) 558–562.

86 Northern Ireland Protocol Bill 2022, cl 4.

87 Ibid cl 8.

88 Ibid cl 12.

89 Ibid cl 13.

90 Delegated Powers and Regulatory Reform Committee, 'Northern Ireland Protocol Bill' (2022) HL 40, para 60.

Clause 15 of the Bill purports to protect the operation of the Protocol's provisions on human rights and equality, the Common Travel Area and north–south co-operation.[91] Ministers do not gain the power to add these provisions to the Bill's stated exclusions from the operation of section 7A. The Protocol's human rights and equality commitments, moreover, rely upon the operation of CJEU jurisprudence which explains how the relevant EU law functions.[92] Thus, when clause 14 of the Bill sets out broad exclusions to domestic courts drawing, within the terms of article 13(2) of the Protocol, on CJEU jurisprudence or general principles of EU law, it does so only with regard to excluded provisions. This seeks to insulate the UK Government from accusations that it is undermining these significant, but hitherto uncontroversial, arrangements. But these safeguards are far from watertight and appear to be undercut by general provisions. Clause 22, for example, defines the power to make regulations provided in multiple parts of the Bill and affirms that they can be used to modify the operation of section 7A of the 2018 Act. Although article 2 cannot be excluded by ministers in its entirety, aspects of its operation could therefore be side-lined through, for example, the promulgation of regulations related to goods standards, under clause 9.[93] Clause 14, moreover, cannot be reconciled with clause 20 which asserts, without any protection for the operation of article 2, that courts and tribunals are not bound by 'any principles laid down, or any decisions made, on or after the day on which this section comes into force by the European Court'. The overriding effect of this general exclusion is to remove the obligation upon Northern Ireland's courts to interpret the provisions of the Protocol 'in conformity' with relevant CJEU case law. The Bill thus claims to protect the Protocol's human rights and equality provisions in one clause but undermines their substantive operation in others.

The Bill's explanatory notes contain a commitment, as required by the Sewell Convention, that 'the UK Government will write to the devolved administrations to seek consent to legislate in the normal

91 Withdrawal Agreement (n 1 above) PINI, arts 2, 3 and 11.

92 *In re SPUC Pro-Life Limited (Abortion)* [2022] NIQB 9, [93] (Colton J). See C Murray and C Rice, 'Beyond trade: implementing the Ireland/Northern Ireland Protocol's human rights and equalities provisions' (2021) 72 Northern Ireland Legal Quarterly 1, 21–23.

93 This issue could have been even more significant, given that the introduction of the European Accessibility Act, Directive 2019/882/EU, came too late to be covered by art 2 of the Protocol, but product accessibility standards are a significant aspect of numerous EU regulations; L Waddington, 'A disabled market: free movement of goods and services in the EU and disability accessibility' (2009) 15 European Law Journal 575. Reductions of these protections would be prevented by the art 2 'non-diminution' guarantee if its operation is not curtailed.

manner'.[94] This, of course, is a hollow commitment in the context of legislation which primarily affects Northern Ireland when Stormont is not functioning. And even if Stormont was operative, the track record of Brexit legislation establishes that the UK Government has been willing to ignore the position of the clear majority within the Northern Ireland Assembly which has expressed opposition to these moves.[95] Clause 15, moreover, does not protect the operation of the article 18 'Stormont lock' from being excluded from domestic law by ministers if there is the prospect that majority support for the Protocol's trade terms in the continuation vote due in 2024 would embarrass the Government. This might not be one of the permitted purposes for ministerial action under the Bill, but these are so broadly drawn as to effectively allow for ministers to pursue that end under a broad range of pretexts. The Protocol Bill thus stops large parts of the Protocol from functioning in Northern Ireland law. Beyond that, the Bill is skeletal. It gives ministers the power to replace these arrangements with a dual regulatory system for product standards and red/green lanes for customs, as outlined in the 2021 Command Paper and repeated in a brief policy paper which accompanied the Bill,[96] but ministers can present this or any other plan to Parliament through regulations on an 'its-this-or-chaos' basis once the Bill becomes law. The Bill, with all its red meat for Brexit's most ardent backers, did not save Boris Johnson's premiership. The need to shore up these supporters in the race to become his successor, however, meant that all Conservative Party leadership candidates accepted the Bill as a given, and provided a boon to Liz Truss, as the minister responsible for the legislation, in her successful campaign.

Reconstruction?

Even as the Bill sets up the destruction of the Protocol, however, it continues to be presented by the UK Government as being a route to negotiations, by demonstrating the seriousness of its intent.[97] This account of the Bill puts considerable weight on its negotiated settlement provision, clause 19, which acknowledges that the UK and EU could reach a new deal which modifies, supplements or replaces the Northern Ireland Protocol, in whole or part. In those circumstances ministers are enabled to make regulations to give effect to that Agreement. Furthermore, under clause 15, this can include restoring the conduit pipe between the Protocol and domestic law. The provision holds out the possibility that the whole spiralling crisis can

94 Northern Ireland Protocol Bill Explanatory Notes (2022) para 24.
95 Murray and Rice (n 92 above) 10.
96 Foreign, Commonwealth and Development Office, Policy Paper: Northern Ireland Protocol: The UK's Solution (13 June 2022).
97 Chris Heaton-Harris MP, HC Deb 7 September 2022, vol 719, col 223.

be forgotten as swiftly as a bad dream in *Dallas*. In UK constitutional terms, however, this possibility is stage-managed by ministers. Just as the UK Government has belatedly accepted more extensive trade treaty scrutiny arrangements in Parliament, including public consultations,[98] this clause pointedly excepts any reworking of the Protocol from them. If, as with previous accommodations with the EU over the Protocol, any deal takes the form of an interpretive understanding, this would also sidestep the treaty scrutiny processes under the Constitutional Reform and Governance Act 2010. Under this Bill, Parliament will be giving ministers the power to make regulations to give effect to any deal reached with the EU, with MPs being presented with a one-off vote on arrangements that they can do little to influence.

If this is all a negotiation tactic, it is undoubtedly a high-stakes approach. The publication of the Bill is, of itself, incompatible with the UK's obligations to act in good faith to give effect to the Withdrawal Agreement[99] and has thus prompted the EU to reinitiate suspended enforcement proceedings, alongside fresh proceedings on a raft of protocol breaches, and to take retaliatory steps to exclude the UK from Horizon 2020. These proposals go to the core of the Protocol, and the UK cannot expect to escape such commitments without consequence. Claims the Protocol is 'clearly undermining' Good Friday Agreement obligations,[100] without ever articulating specific conflicts between the Protocol and the 1998 Agreement, do not help its cause in negotiations.

In reality, the similarity between the goods-movement elements of the EU's October 2021 proposals and the UK Government's plans disguises the fundamental difference in the two positions. The EU is able to countenance different channels for goods moving to Northern Ireland and those moving through Northern Ireland into the Single Market because such measures can be managed by agreement in the Joint Committee on the application of article 5 of the Protocol. Beyond that proposal, the UK Government's plan is not to reform the Protocol's application, but to scrap it and replace it with very different rules. Clause 19 is thus not an invitation to negotiation, it is an ultimatum, and its timing is conditioned by how the UK Government has approached the UK's divergence from the EU since Brexit. At present, the Protocol

98 Lord Grimstone of Boscobel to Baroness Hayter (19 May 2022).

99 Withdrawal Agreement (n 1 above) art 5.

100 M Ellis, Address to the Inaugural UK–EU Parliamentary Partnership Assembly (12 May 2022). The closest one minister could come to articulating these concerns is that 'the philosophy that underpins the Good Friday Agreement is the consent of both communities'; European Affairs Committee Protocol on Ireland/Northern Ireland Sub Committee, 'Oral evidence: follow-up inquiry on the impact of the protocol on Ireland/Northern Ireland' (26 May 2022), James Cleverley MP, Q67.

(as agreed) has been manageable because of the extension of grace periods which cover food safety and because there has been little active divergence in the product rules applicable in Great Britain and under EU law; its full potential in terms of checks on goods movements has not been realised. Significant developments in UK Government policy are, however, set to have an impact notwithstanding the ongoing 'standstill position' on the Protocol's implementation.[101] The Retained EU Law (Revocation and Reform) Bill, however, sets out the UK Government's plans to diverge from a swathe of retained EU law, and the model of growth pursued by Truss's administration would have been bound to rely on pronounced divergences in product standards.[102] From this perspective, therefore, the Protocol's goods arrangements must be transformed or the UK Government will either have to curtail its own plans for divergences in product standards in Great Britain or have to face responsibility for the introduction of such divergences bringing with them new trade barriers for companies moving goods from Great Britain to Northern Ireland. UK Government ministers have attempted to downplay the issue of future standards divergence, maintaining that 'in many areas, to all intents and purposes there will be no difference', but dual regulation prevents Northern Ireland concerns from restricting the UK Government's freedom of action.[103] A dual regulatory regime is, furthermore, inherently attractive to the UK Government because, in ending the position of Northern Ireland alignment with the Single Market for goods, it addresses the divide in the UK's own internal market and removes the need for the enforcement mechanisms which accompany that status, including the CJEU's role. Such a system, however, would make it difficult for businesses and consumers in Northern Ireland to understand how product standards apply in complex supply chains. Without a 'mountain of bureaucracy',[104] the risk of leakage of goods which do not meet required standards into the EU Single Market would become all but unmanageable, thereby shifting the pressures for new barriers to trade onto the land border. In light of these realities, the question for negotiations remains how committed the UK Government is to this plan in the aftermath of Truss's disastrous premiership, and whether her successor is more willing to compromise should the most pressing issue of checks on goods movements from Great Britain be addressed.

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101 Oral evidence (n 100 above) James Cleverley MP, Q58.

102 Post-Brexit, new EU product standards are also developing, which the UK is not following; see H Benn, How to Fix the Northern Ireland Protocol (Centre for European Reform 2022) 4.

103 Oral evidence (n 100 above) James Cleverley MP, Q65.

104 Maroš Šefčovič, 'Speech on EU–UK Relations' (London 29 June 2022).

The EU's approach, by contrast, has been to attempt to mitigate specific problems with the Protocol as they arise, making considerable play of engaging with stakeholders in Northern Ireland, 'from political leaders to businesses and a cross-section of civic society', in the release of its 2021 proposals.[105] Its introduction of measures to address the supply of medicines showcases this strategy of incremental streamlining of the Protocol's operation. The form of these easements, providing a specific exception for Northern Ireland from the operation of relevant EU law, illustrates the degree of change which can be achieved without having to renegotiate the terms of the Protocol. This approach, however, has hitherto won the EU few plaudits; the medicines issue went from being a flashpoint to being forgotten with little acknowledgment of the EU's moves by the UK Government or the Protocol's detractors. Implementation of the EU's October 2021 proposals, moreover, would result in an increase in checks over the current 'standstill' position on Protocol implementation; a promised '80-percent reduction'[106] on the SPS checks required by EU law under the Protocol is not necessarily an attractive prospect when the open-ended grace periods currently apply to many of these requirements. The problem with an evidence-based approach to ameliorations of EU law's application in the Northern Ireland context becomes one of sequencing; the EU has indicated that it is receptive to improving upon the October 2021 offering on checks, but it requires more information on practical problems before it moves to address them.

This incremental approach does little to address complaints about Northern Ireland's lack of say in post-Brexit EU law-making. The negotiations around the Johnson Protocol produced article 18, which provides an overarching mechanism which can end the application of the Protocol's trade rules if a majority in the Northern Ireland Assembly believe that they are no longer in Northern Ireland's interest. This provision for regular confirmatory votes is significant; it does not exist in other contexts where the EU Single Market applies to 'rule-taker' countries outside the EU, such as the EEA countries and under the Swiss–EU bilateral agreements.[107] Critics have nonetheless maintained that the EU's approach of 'partial ameliorative measures' is unlikely to ever be acceptable to Unionists because of the 'undemocratic nature of the

105 Maroš Šefčovič, 'Speech on the Commission's proposal on bespoke arrangements to respond to the difficulties that people in Northern Ireland have been experiencing because of Brexit' (Brussels 13 October 2021).

106 Ibid.

107 See H H Fredriksen and S Ø Johansen, 'The EEA Agreement as a Jack-in-the-box in the relationship between the CJEU and the European Court of Human Rights?' (2020) 5 European Papers 707.

Protocol'.[108] What remains missing, in the EU's approach, is a more extensive account of how to involve Northern Ireland's democratic institutions and stakeholders in the EU's processes of law-making. The October 2021 proposals on Northern Ireland engagement were the most underdeveloped element of its package and fell some way short of the processes proposed under the latest Swiss–EU negotiations.[109] But if the EU's approach of incremental fixes to problems with the Protocol as they emerge is to gain acceptance in Northern Ireland, the Commission must be responsive to such issues. The delays over finding a solution to the problematic application of EU steel tariffs to Northern Ireland illustrate the problems for a supranational body in attempting to manage the complex needs of a polity which is tiny in the context of the Single Market. Once attention was focused on the issue, the delays to addressing it persisted because of EU–UK cooperation over the management of the Protocol misfiring; the Commission sought to grant exemptions to cover normal volumes of steel being supplied from Great Britain to Northern Ireland but would only act once it received the relevant data from the UK Government.[110] The absence of an EU Office in Northern Ireland, to provide a direct means of responding to Protocol implementation issues affecting individuals and companies, compounds this difficulty. Only through a highly developed system of engagement with Northern Ireland stakeholders can there be effective 'troubleshooting' of such issues.

Even after Liz Truss's brief period in Downing Street, the UK Government and EU Commission thus remained far apart in terms of their respective conceptions of workable post-Brexit trade rules for Northern Ireland. The possibility of the Lords delaying the passage of the Protocol Bill, because of its disregard for the UK's international obligations and the extraordinary powers it places in the hands of ministers, provides a window of opportunity for both sides to bridge this gap, at a time when other significant geopolitical issues demand their attention. This room for manoeuvre, however, can be overstated. The issues which dog the Protocol Bill might be strikingly similar to those which had many peers prepared to use the Parliament Act to delay the passage of the Internal Market Bill for a parliamentary session, until a deal with the EU intervened, but the chamber itself is very different. Boris Johnson's appointments, not least in his resignation honours list, have expanded the bloc of Conservative peers to the point at which it might ultimately be possible to force through the legislation. The EU,

108 Gudgin (n 58 above) 72.

109 Swiss–EU Institutional Framework Agreement (2018) arts 15 and 16.

110 A Bounds, S Fleming and P Jenkins, 'Brussels offers to reduce Northern Ireland border checks' *Financial Times* (London 12 September 2022).

moreover, neither trusts the UK Government as a negotiating partner nor its willingness to implement arrangements that are agreed. It also considers that the costs of a trade conflict started over the Protocol will fall largely upon the UK, at a time that the UK economy can ill afford it and is hardly pressed to make concessions given the parlous state of the Conservative Government post-Truss. For the UK Government's part, having botched a post-Brexit growth plan centred around a fiscal stimulus, the Conservative Party could find itself boxed into prioritising regulatory divergence from the EU. Rishi Sunak has to keep prominent Eurosceptic elements of his fractious parliamentary party on board to maintain his majority; with opinion polls against him, his control over a party is much more tenuous than that of Boris Johnson in the early months of his premiership. Moreover, having raised DUP expectations with the Protocol Bill, it will be difficult to present any compromise centred on reductions of goods checks as sufficient for them to restore power-sharing. In combination, this makes the continuation of confrontation over the Protocol, with all its negative consequences for Northern Ireland's stability, more likely than a turn towards cooperation ahead of the next UK general election.[111]

CONCLUSION

The suggestion that 95 per cent of Johnson's deal overlapped with May's misses the point; the 5 per cent which does diverge has effected the very shift, the imposition of substantial trade barriers between different parts of the UK, that May had claimed no Prime Minister could contemplate. It might be said that May was seeking to defy the gravitational pull of Northern Ireland's distinct constitutional settlement in attempting to construct an approach which was applicable, at least in part, to the whole of the UK. But she considered herself obliged to make such an effort, not only because of her reliance on DUP MPs after the 2017 election, but seemingly also because it accorded with her own account of the Union. Her efforts to downplay what Brexit would involve for Northern Ireland generated a debt to Unionist expectations that UK Government policy could not fulfil; 'special status' for Northern Ireland in relation to trade in goods might have been a feature of May's deal but it became the defining feature of Johnson's Protocol.

Johnson's deal replaced the backstop arrangements with a spaghetti of complex trade provisions and subjected the whole fragile system of power-sharing in Northern Ireland to the strain of a confirmatory vote every four years (with all of the uncertainty that brings for

111 See C Murray, 'A new period of "indirect" direct rule – the Northern Ireland (Executive Formation etc) Bill' (*UKCLA Blog* 29 November 2022).

business). What the Protocol would involve became a moving target; the more comprehensive any trade deal within the subsequent Future Relationship Agreement, the fewer checks that would be required on goods moving from Great Britain to Northern Ireland. But under the Protocol, the UK became responsible for administering these controls, come what may, at the end of the transition period. When the TCA did not provide for comprehensive alignment between the UK and the EU, then the prospect of divergences in goods standards applicable in their markets was inevitably accompanied by fetters in goods movements between Great Britain and Northern Ireland. The problem is not, therefore, that special market rules for Northern Ireland are inherently unworkable or a threat to the UK's constitutional order. Rather, successive UK Governments have never fully accepted the extent of the October 2019 commitments and have actively sought to undermine those arrangements, placing dubious reliance on some of the language in the Protocol which was supposed to make the whole package more saleable to the UK Parliament. The opportunity for reconstruction remains, but the Northern Ireland Protocol Bill takes the UK Government down the path of gutting the Protocol and attempting to put something that suits its interests in its place, in the apparent expectation that the EU and Northern Ireland's non-Unionist parties will acquiesce.

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Post-Brexit dynamism: the dynamic regulatory alignment of Northern Ireland under the Protocol on Ireland/Northern Ireland

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ABSTRACT

Post-Brexit Northern Ireland faces a dual challenge of legal dynamism and political stagnation. Although these two issues have the same origin, this article focuses on the former. Agreed as part of the UK–EU Withdrawal Agreement to address the 'unique circumstances' on the island of Ireland, the provisions of the Protocol on Ireland/Northern Ireland break with precedent in both EU external relations and in UK internal governance. For the EU, these novel provisions breach the 'indivisibility' of the 'Four Freedoms'. For the UK, the Protocol challenges the fabric of its internal market and pushes the boundaries of its territorial constitution to a new extreme. The Protocol is politically controversial; related disputes have resulted in institutional collapse in Northern Ireland and severe decline in UK–EU diplomatic relations. While any resolution of political contestation over the Protocol is still pending, it is nonetheless possible to track its legal effects so far. Focusing on provisions which relate to Northern Ireland staying aligned with aspects of EU law, this article analyses the substance of UK(NI)'s post-Brexit dynamism and its implications for the two legal orders it cross-sects.

Keywords: European Union; United Kingdom; Brexit; Ireland /Northern Ireland Protocol; dynamic regulatory alignment; EU external relations; UK differentiation; Northern Ireland politics.

INTRODUCTION

In the process of the United Kingdom (UK) withdrawal from the European Union (EU) – Brexit – the EU and the UK agreed a Protocol on Ireland/Northern Ireland (hereafter the Protocol). Under its terms, 'the United Kingdom in respect of Northern Ireland' (or UK(NI))

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is: within the UK customs territory[1] but subject to the EU customs code;[2] Northern Ireland remains in dynamic regulatory alignment with the EU Single Market in respect to goods[3] while also (at least in theory) retaining 'unfettered access'[4] to the UK internal market; individuals living in Northern Ireland are guaranteed 'no diminution' in certain rights contained in EU law;[5] and Northern Ireland remains a recipient of dedicated EU PEACE and INTERREG funding, all despite being outside the EU territory. These complex arrangements have the stated purpose of addressing the 'unique circumstances on the island of Ireland' facing Brexit.[6] The Protocol sets out arrangements for 'the United Kingdom in respect of Northern Ireland' (or UK(NI) as per its article 7) that amount to *de facto* continued participation in the EU Customs Union and EU Single Market in respect to goods. Ongoing access to the EU market in goods, on the part of Northern Ireland, from within the now third-country UK, is facilitated by and contingent upon application of and alignment with parts of the EU legal *aquis*. Such an arrangement negated the need for checks and controls on the land border between Ireland and Northern Ireland; the corollary being, however, that, under the Protocol, new checks and controls are required on goods entering Northern Ireland from outside the EU, including those travelling across the Irish Sea from Great Britain (GB).

The effective creation of an 'Irish Sea border' for the regulation of goods has been politically controversial. In Northern Ireland, many from the Unionist and Loyalist tradition perceive the new burden of checks and controls, required by the Protocol, on goods moving from Great Britain and Northern Ireland (GB–NI) as a violation of their British identity and a threat to Northern Ireland's position in the internal market of the UK. Northern Ireland is without a fully functioning government due to the refusal of the largest unionist party – the Democratic Unionist Party (DUP) – to support the election of an Assembly Speaker or the formation of an Executive as part of its protest against the Protocol and its implications for GB–NI trade. As the situation had not changed six months after the last Assembly election, the Secretary of State for Northern Ireland was under a legislative obligation to call another one. However, in a play (all too) familiar for watchers of Northern Ireland politics, the UK Government fast-tracked new legislation –

1 Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union (30 January 2020) (hereafter WA) Protocol, art 4.
2 Ibid art 5.
3 Ibid arts 5, 13.
4 Ibid art 6.
5 Ibid art 2.
6 Ibid art 1(3).

the Northern Ireland (Executive Formation etc) Act (the NI(EF) Act) 2022[7] – to postpone that obligation for a further six weeks, until 8 December, with the possibility of a further extension to 19 January 2023. At time of writing, it does not look likely that agreement will be reached between Northern Ireland political parties even by the late date in 2023. In the interim, senior officials in Northern Ireland, under the NI(EF) Act, have been granted exceptional decision-making powers, but these fall far short of what would be necessary to address some of the more difficult outstanding societal challenges facing Northern Ireland.[8] Political disputes over the Protocol have not been limited by the (recently infamous) borders of Northern Ireland. In the wake of the UK Government's introduction of draft legislation – the Northern Ireland Protocol Bill (NIP Bill) – which would, if enacted, grant UK ministers (extensive) powers to disapply provisions of the Protocol in domestic law, the EU has launched (and relaunched) infringement proceedings against the UK for non-implementation of aspects of EU law made applicable to Northern Ireland under the Protocol.

Managing the new legal dynamism of Northern Ireland, aligned as it is with a potentially evolving body of the EU *acquis* from within a post-Brexit UK intent on forging new and divergent (from the EU) regulatory paths, is a complex legal task. Doing so against a backdrop of polarisation and endemic institutional instability is an inherently difficult political task. While it is unclear when and how the political contestation that surrounds the Protocol will be resolved, it is possible to make clear some of the legal complexities created by its implementation, alongside the wider process of Brexit. Focusing on provisions, primarily in the Protocol, for the alignment of Northern Ireland to aspects of EU law, this article presents a comprehensive analysis of what that alignment has looked like, in law and policy terms, so far.

The article has three sections: the first reviews the provisions of the Protocol with a focus on those related to UK(NI) alignment with aspects of the EU *acquis*; following this, the second section gives account of what the 'dynamic regulatory alignment' of UK(NI) under the Protocol has meant, in substantive terms, between the conclusion of the text, in October 2019, and July 2022, 18 months into full implementation; looking ahead, the third section reviews some of the legislative implications of post-Brexit Northern Ireland's dual participation in the internal market of the UK and the single market of the EU for their respective legal orders to date, before considering potential implications of UK(NI)'s new dynamism in the longer-term.

7 Northern Ireland (Executive Formation etc) Act 2022, c 48.

8 For analysis, see C Murray, 'A new period of "indirect" direct rule – the Northern Ireland (Executive Formation etc) Bill' (*UKCLA Blog* 29 November 2022).

THE PROTOCOL AND ALIGNMENT

An overview of the Protocol on Ireland/Northern Ireland

As stated, in the process of UK withdrawal from the EU, the two negotiating parties agreed the Protocol which, in its own terms, sets out arrangements necessary to 'address the unique circumstances on the island of Ireland' in the context of Brexit. Those 'unique circumstances' arise from the nature and history of the winding 500km land border between Ireland and Northern Ireland[9] and from the multidimensional structure of the governing architecture set up under the 1998 Agreement that ushered in the 'post-conflict' era in which Northern Ireland still resides.[10] Against this background, implementing the kind of checks and controls that would otherwise be necessary on a border separating an EU member state and a non-EU member state would be practically and politically extremely difficult, if not actually impossible. Thus, the UK and the EU (eventually) agreed a Protocol so as: 'to maintain the necessary conditions for continued North–South cooperation, to avoid a hard border and to protect the 1998 [Belfast/Good Friday] Agreement in all its dimensions';[11] its provisions are unique.

Under the terms of the Protocol, in respect to trade, post-Brexit Northern Ireland remains part of the UK customs territory,[12] and nothing in the text prevents the UK Government from ensuring 'unfettered access' for goods moving from Northern Ireland to the rest of the UK market.[13] Yet, at the same time, the 'United Kingdom in respect of Northern Ireland' is required to apply the EU customs code,[14] EU VAT and excise rules[15] and EU technical regulations[16] on goods entering Northern Ireland from outside the EU, including from GB. This means Northern Ireland is treated as if it is formally part of the EU customs territory (notwithstanding its *de jure* position within the UK customs territory), and goods crossing the Irish Sea (particularly from GB–NI) are, by default, subject to customs procedures. Northern Ireland is, however, not part of the EU Common Commercial Policy

9 Katy Hayward, *What Do We Know and What Should We Do about the Irish Border?* (Sage 2020).

10 David Phinnemore and Katy Hayward, 'UK Withdrawal ("Brexit") and the Good Friday Agreement' (European Parliament 2017); Lisa Claire Whitten, 'Northern Ireland and Brexit: An Explanation' (Constitution Society 2021).

11 WA (n 1 above) Protocol, art 1(3).

12 Ibid art 4.

13 Ibid art 6(1).

14 Ibid art 5(3).

15 Ibid art 8.

16 Ibid art 7.

and does not, therefore, have access to trade preferences deriving from EU third-country agreements.

Alongside provisions related to customs, the Protocol sets out arrangements for the dynamic alignment of Northern Ireland with sections of the EU internal market *acquis* concerning the free movement of goods, including sanitary and phytosanitary (SPS) rules.[17] In addition, EU state aid rules are to apply 'in respect of measures which affect that trade between Northern Ireland and the [European] Union';[18] meaning that goods produced elsewhere in the UK and traded into Northern Ireland need to comply with EU state aid law.[19] Beyond measures to facilitate the continued free movement of goods (and therefore avoidance of the need for physical checks on the land border) the Protocol provides for the continued operation of the Single Electricity Market (SEM) on the island of Ireland by requiring Northern Ireland's continued alignment with relevant EU legislation on electricity and energy markets, to the extent necessary to allow the SEM to function.[20] Notably, some EU law instruments included under article 5 regarding movement of goods and article 9 regarding the SEM also cover EU environmental legislation despite alignment in this area not being an explicit focus of negotiations or the text itself.[21]

The Protocol also contains a commitment on the part of the UK to ensure that there is no diminution of rights, as a consequence of Brexit, otherwise provided for in a relevant section of the 1998 Agreement and contained in key pieces of EU law.[22] Like all other EU laws made applicable to Northern Ireland under the Protocol, the latter – EU laws on individual rights – are to apply 'as amended or replaced',[23] but separate provision is made for the enforcement of this aspect of the Protocol: alignment in respect to rights is not covered by the continued jurisdiction of the Court of Justice of the European Union (CJEU), whereas alignment in respect to customs, free movement of goods, SPS

17 Ibid art 5(4).

18 Ibid art 10(1).

19 See George Peretz and Alfred Artley, 'State aid under the Northern Ireland Protocol' (*Tax Journal* 11 May 2020); George Peretz, 'State Aid' in Christopher McCrudden (ed), *The Law and Practice of the Ireland–Northern Ireland Protocol* (Cambridge University Press 2022).

20 WA (n 1 above) Protocol, art 9, annex 4.

21 Viviane Gravey and Mary Dobbs, 'Environment and trade' in McCrudden (ed) (n 19 above); Viviane Gravey and Lisa Claire Whitten, 'The NI Protocol & the Environment: the implications for Northern Ireland, Ireland and the UK' (Environmental Governance Island of Ireland Network Policy Brief 1/2021 2022).

22 WA (n 1 above) Protocol, art 2.

23 Ibid art 13(3).

and electricity markets is covered by continued CJEU jurisdiction.[24] Notwithstanding the distinction made between articles 5, 7–10 and article 2 in respect to CJEU jurisdiction, article 13(2) of the Protocol provides that *any* EU law or concepts referred to in the Protocol shall in their 'implementation and application be interpreted in conformity with the relevant case law' of the CJEU, thus giving it a role in the application and enforcement of article 2 of the Protocol, albeit at one step removed to that afforded it in relation to provisions concerning movement of goods.

Taking all the relevant provisions together, when the text of the Protocol was concluded by the UK and EU in October 2019, it included almost 350 EU law instruments that would continue to apply (dynamically) in Northern Ireland at the end of the UK transition period and thereafter.

Alignment provisions in the Protocol on Ireland/ Northern Ireland

As already emphasised, Northern Ireland alignment with EU acts specified in the Protocol is dynamic. Under article 13(3) of the Protocol, EU acts listed in its articles and annexes are to apply 'as amended or replaced' to UK(NI). This means, in implementing the Protocol, the UK Government is obliged, according to its terms, to keep Northern Ireland aligned with any changes made to EU acts that are included in its scope. Uniquely, amendments and replacements to Protocol-applicable EU acts apply automatically, unlike in European Economic Area (EEA) states where changes are adopted through the EEA Joint Committee.

In addition to automatic updates, article 13(4) of the Protocol sets out a process by which any new EU acts that fall within the scope of its provisions and objectives can be added to its annexes and thereby made applicable in Northern Ireland. Doing so is, however, contingent on the agreement of the UK, acting together with the EU, in the Joint Committee set up to oversee the implementation of the UK–EU Withdrawal Agreement, including its Protocols. To support the Joint Committee, articles 14 and 15 of the Protocol established a Specialised Committee (SC) and a Joint Consultative Working Group (JCWG) to, respectively, consider issues related to the implementation of the Protocol and to serve as a forum for information exchange and mutual consultation between the UK and EU regarding the Protocol. Neither of these latter two bodies have decision-making powers; however, they can make recommendations or reports to the Joint Committee which does have power to make decisions based on consensus. All three dedicated oversight bodies are made up of UK and EU representatives.

24 Ibid art 12(4).

When it comes to UK(NI) alignment with EU law going forward, the tripartite institutional architecture overseeing the Protocol's implementation is important, or at least potentially so. At various points, the Protocol requires and/or enables the Joint Committee to review its implementation and operation with the possibility of making changes, including on foot of recommendations from the Specialised Committee or JCWG.

Under article 14 of the Protocol the SC can 'consider any matter of relevance'[25] to article 2 of the Protocol – on individual rights – brought to its attention by the three rights bodies – the Northern Ireland Human Rights Commission, the Equality Commission and the Joint Committee of representatives of the Human Rights Commission of Northern Ireland and Ireland – tasked with monitoring the application of that article. The SC is also to 'examine proposals' concerning the Protocol if/when any are made by the North–South Ministerial Council or North–South Implementation Bodies established under Strand Two of the 1998 Agreement.[26] On this second matter, article 11 is also relevant. Under its terms, the Protocol is to be 'implemented and applied so as to maintain the necessary conditions for continued North–South cooperation', including in a stated list of 14 areas.[27] To this end, the UK and Ireland may, under article 11(1) 'continue to make new arrangements' building on the existing provisions of the 1998 Agreement as regards North–South cooperation and, importantly, the Joint Committee is to 'keep under constant review' the extent to which the implementation and application of the Protocol does, in fact, maintain conditions necessary for North–South cooperation.[28] Read together, then, articles 11 and 14 make it possible for institutions established under Strand Two of the 1998 Agreement to request or propose, via the SC, measures to further enable North–South cooperation, including greater alignment of UK(NI) in areas of EU law not currently within the scope of the Protocol.

Alongside rights and North–South cooperation, the Protocol contains provisions regarding the bilateral UK–Ireland relationship which could, in future, act as mechanisms for increasing UK(NI) alignment. Bilateral relations are primarily addressed in article 3 which provides for the continuation and development of the Common Travel Area between the UK and Ireland, provided its operation is without

25 Ibid art 14(c).

26 Ibid art 14(b).

27 Areas listed in the text are as follows: environment; health; agriculture; transport; education; tourism; energy; telecommunications; broadcasting; inland fisheries; higher education; sport; justice; and security.

28 WA (n 1 above) Protocol, art 11(2).

affect to the obligations of the latter under EU law.[29] A relatively minor provision related to UK–Ireland relations also exists in article 8 whereby the UK 'may apply to supplies of goods taxable in Northern Ireland VAT exemptions and reduced rates that are applicable in Ireland' in accordance with those EU laws concerning VAT and excise made applicable under that article. Linked to this, the Joint Committee is tasked with 'regularly discussing' and 'reviewing' the application of article 8 while 'accounting' for 'Northern Ireland's integral place in the United Kingdom's internal market' as needed.

A final provision in the Protocol worth highlighting in respect to the possibility of increasing, or indeed decreasing, the extent of UK(NI) alignment with aspects of EU law arises from article 6(2) which states that both parties 'shall use their best endeavours to facilitate the trade between Northern Ireland and other parts of the United Kingdom' albeit in accordance with relevant legislation and the regulatory regimes of both the EU and the UK. Application of this provision is to be kept 'under constant review' by the Joint Committee which 'shall adopt appropriate recommendations' with a view to avoiding checks and controls at the ports and airports of Northern Ireland.[30]

Any initiative to change the existing scope or terms of UK(NI) alignment with EU law required under the Protocol, in accordance with its terms, including those set out above which make specific provision for doing so, could be taken forward by the Joint Committee through the article 13(4) mechanism for adding EU acts to existing annexes. Alternatively, if necessary and requested, Ireland could use a provision in the European Council Decision on the UK–EU Withdrawal Agreement to seek authorisation to conclude a new bilateral agreement with the UK for the purpose of ensuring the 'proper functioning' of the Protocol, if an area of exclusive EU competence would be affected.[31] This latter option, for an EU-authorised bilateral UK–Ireland agreement, is not limited to any specific article: it could be used to achieve the 'proper functioning' of any aspect of the Protocol.

Notwithstanding the existence of avenues for potential expansion of the scope of alignment provided for under the Protocol, at present, the contested politics surrounding its implementation are such that these are unlikely to be used in the short to medium term. As considered further in the third section, unilateral actions have, however, been taken by both the UK and the EU with the same or similar purposes to those

29 Ibid art 3(2).

30 Ibid art 6(2).

31 Council Decision (EU) 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 L29, 31 January 2020: art 4.

set out in the text of the Protocol regarding its potential development, albeit with the two parties differing on what that ought to substantively mean. Before discussing more recent (unilateral) developments regarding the implementation of the Protocol, and its future, in more detail, the next section sets out what has been happening as regards UK(NI)'s dynamic alignment with EU law under its terms so far.

DYNAMIC REGULATORY ALIGNMENT IN NORTHERN IRELAND

The Protocol puts contemporary Northern Ireland in a position of 'dynamic regulatory alignment' with a section of the EU *acquis*. While there are several legislative avenues by which the relationship established between UK(NI) and EU law by the Protocol could develop in future (see previous section), one of the most notable aspects of the current arrangement is that those EU laws made applicable under the Protocol are to apply 'as amended or replaced' to and in Northern Ireland. The automaticity of this dynamic arrangement is novel in terms of EU external relations and, importantly, is being implemented in the unique context of Northern Ireland remaining a full and integral part of the UK internal market, which is now, as a whole, in a divergent relationship with the EU single market.

Given the unprecedented nature of the Protocol arrangements, monitoring its substantive effects is both necessary and interesting. Focusing on the existing legal situation this section presents a detailed account of what the new dynamism of UK(NI) has meant in policy terms since the text was concluded in October 2019 through to July 2022, 18 months since entry into force. Throughout this period, changes arising from the alignment of UK(NI) with EU law under the Protocol have come through article 13: either from the article 13(4) option for EU acts to be added or deleted; or from the article 13(3) requirement for EU acts that already apply to do so 'as amended or replaced' in ordinary EU legislative processes. The latter legislative path – article 13(3) – accounts for a majority of changes evident to date; these fall into three broad categories:

- additions to and deletions from the annexes to the Protocol;
- repeal, replacement, and expiry of applicable EU law; and
- changes to EU legislation that implements applicable EU law.

Additions to and deletions from annexes to the Protocol

A small number of changes so far have arisen from article 13(4) of the Protocol whereby, acting together in the Joint Committee, the UK and EU can agree to add new EU acts that fall within the scope of the Protocol, or remove acts already listed.

Existing EU acts
• rules for monitoring trade between the EU and third countries in drug precursors[32] • use of indications or marks to identify the lot – or batch – to which food products belong[33] • rules on the marketing of fodder plant seed[34] • rules on the marketing of propagating material of ornamental plants[35] • rules on the marketing of vegetable propagating and planting material other than seed[36]
New EU acts (adopted after November 2018)
• bilateral safeguard clauses and other mechanisms for the temporary withdrawal of preferences in certain EU trade agreements with third countries[37] • measures to reduce the impact of certain plastic products on the environment[38] • and measures to control the introduction and import of cultural goods[39]

Figure 1: EU acts added to the Protocol under article 13(4) in December 2020

32 Council Regulation (EC) No 111/2005 of 22 December 2004 laying down rules for the monitoring of trade between the Community and third countries in drug precursors [2004] OJ L22/1.

33 Directive 2011/91/EU of the European Parliament and of the Council of 13 December 2011 on indications or marks identifying the lot to which a foodstuff belongs [2011] OJ L334/1.

34 Council Directive 66/401/EEC of 14 June 1966 on the marketing of fodder plant seed [1966] OJ 125/2298.

35 Council Directive 98/56/EC of 20 July 1998 on the marketing of propagating material of ornamental plants [1998] OJ L226/16.

36 Council Directive 2008/72/EC of 15 July 2008 on the marketing of vegetable propagating and planting material, other than seed [2008] OJ L205/28.

37 Regulation (EU) 2019/287 of the European Parliament and of the Council of 13 February 2019 implementing bilateral safeguard clauses and other mechanisms allowing for the temporary withdrawal of preferences in certain trade agreements concluded between the European Union and third countries [2019] OJ 53/1.

38 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.

39 Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods [2019] OJ L151/1.

Before the end of the transition period, in December 2020, the UK and the EU agreed to add eight EU acts to annex 2 of the Protocol and to remove two EU acts listed in the same annex. Of the eight acts added, five related to legislation that the Joint Committee decided, following review, should have been included in the original text. The three other additions were new EU acts adopted since the content of the Protocol had initially been agreed in November 2018 and which, the Joint Committee decided, fell within its scope and so were added, also to annex 2.

Two acts were removed by the Joint Committee from annex 2, these concerned CO_2 emissions standards for passenger cars and light-duty commercial vehicles.[40] Their original inclusion in the text was deemed to have been unnecessary.

Taking these additions/deletions into account, when the Protocol entered into force on 1 January 2021 at the end of the transition period, 344 EU acts were listed in its annexes. Although the Joint Committee has met on three occasions since then – 14 February 2021, 9 June 2021 and 21 February 2022 – it has not adopted any decision to add or delete any more EU acts. It is, however, worth noting that the European Commission has signalled that certain proposed legislation being considered for the EU *may* fall, in part at least, within the scope of the Protocol. For example, this includes the proposed Carbon Border Adjustment Mechanism Regulation.[41] UK and EU officials have discussed the matter, but no definitive position has yet been taken.[42]

Repeal, replacement and expiry of applicable EU law

The second category of change covers the repeal, replacement and expiry of EU acts – regulations, directives and decisions – listed in the Annexes to the Protocol. Changes in this category are the result of normal EU legislative processes and follow from the provision in article 13(3) of the Protocol stating that relevant EU acts apply as 'amended or replaced' to and in Northern Ireland.

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40 Regulation (EC) No 443/2009 of the European Parliament and of the Council of 23 April 2009 setting emission performance standards for new passenger cars as part of the Community's integrated approach to reduce CO 2 emissions from light-duty vehicles [2009] OJ L140/1; and Regulation (EU) No 510/2011 of the European Parliament and of the Council of 11 May 2011 setting emission performance standards for new light commercial vehicles as part of the Union's integrated approach to reduce CO 2 emissions from light-duty vehicles [2011] OJ L145/1.

41 Proposal for a Regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism [2021] 0214(COD).

42 European Scrutiny Committee, '10871/21: Proposal for a Regulation establishing a carbon border adjustment mechanism (41916)'.

Of the 338 EU acts originally listed in the annexes, 51 had been repealed as of 1 July 2022. Only two of these had been repealed in the previous six months. Not all of the EU acts repealed so far have, however, been directly replaced by a new piece of EU legislation. This is because several relevant changes consolidated provisions previously spread over numerous pieces of (now repealed) legislation into one or two new, more comprehensive, acts.

The 51 repealed acts have been replaced by 19 new acts. Even 18 months since the Protocol entered into force, in most instances, this dynamic alignment in large part continues to relate to changes to pieces of EU legislation that had been adopted prior to the UK's withdrawal from the EU on 31 January 2020. Of the 19 replacement acts, only six were adopted after the UK left the EU on 31 January 2020 and three since the end of the UK transition period on 1 January 2021.

In terms of coverage, 23 of the 51 repealed acts concerned controls on animal health and were replaced by two new pieces of legislation: Regulation (EU) 2016/429[43] and Commission Delegated Regulation (EU) 2020/687.[44] The former is known as the 'Animal Health Law' and the latter is a related, supplementary act. Together these two new acts incorporate and update pre-existing provisions set out in the 23 repealed acts. The changes laid down in the Animal Health Law were agreed in March 2016, before the UK's EU referendum and therefore with the UK taking full part in their adoption. The original text included transitional measures and allowed for the repeal of the earlier acts to take effect in April 2021. As a supplement to the 2016 Regulation, the Commission Delegated Regulation (EU) 2020/687 sets out measures to prevent and control the spread of certain diseases. The relevant diseases were listed in the 2016 regulation but required more specific provisions; these are laid down in the later act.

In a similar way, seven of the other repealed acts concerned EU rules on official controls and checks on food and feed, animal health and welfare standards, plant health and plant protection. These were replaced by a single overarching EU act: Regulation (EU) 2017/625, known as the

43 Regulation (EU) 2016/429 of the European Parliament and of the Council of 9 March 2016 on transmissible animal diseases and amending and repealing certain acts in the area of animal health ('Animal Health Law') [2016] PJ L84/1.

44 Commission Delegated Regulation (EU) 2020/687 of 17 December 2019 supplementing Regulation (EU) 2016/429 of the European Parliament and the Council, as regards rules for the prevention and control of certain listed diseases [2020] OJ L174/64.

'Official Controls Regulation'.[45] It incorporates and updates pre-existing provisions in the repealed acts. It was agreed in April 2017, shortly after the UK triggered article 50 announcing its intended withdrawal from the EU, and so with the UK participating in the regulation's adoption. The new regulation included transitional measures and allowed for the repeal of the earlier acts to take effect in December 2019.

Also repealed were two directives – Council Directive 93/42/EEC[46] and Council Directive 90/385/EEC[47] – concerning the production of and trade in medical devices. This had been provided for in Regulation (EU) 2017/745[48] which was already listed in annex 2 to the Protocol, so the repealed directives were not replaced directly.

In addition, two regulations concerning requirements for the use of statistics on (respectively) trade in goods between EU member states and with non-EU countries – Regulation (EC) No 638/2004[49] and Regulation (EC) No 471/2009[50] – were repealed and replaced by Regulation (EU) 2019/2152[51] on European business statistics that incorporates and updates requirements from the earlier acts. The new regulation was agreed in November 2019, when the UK was still an EU

45 Regulation (EU) 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products, amending Regulations (EC) No 999/2001, (EC) No 396/2005, (EC) No 1069/2009, (EC) No 1107/2009, (EU) No 1151/2012, (EU) No 652/2014, (EU) 2016/429 and (EU) 2016/2031 of the European Parliament and of the Council, Council Regulations (EC) No 1/2005 and (EC) No 1099/2009 and Council Directives 98/58/EC, 1999/74/EC, 2007/43/EC, 2008/119/EC and 2008/120/EC, and repealing Regulations (EC) No 854/2004 and (EC) No 882/2004 of the European Parliament and of the Council, Council Directives 89/608/EEC, 89/662/EEC, 90/425/EEC, 91/496/EEC, 96/23/EC, 96/93/EC and 97/78/EC and Council Decision 92/438/EEC (Official Controls Regulation) [2017] OJ L95/1.

46 Council Directive 93/42/EEC of 14 June 1993 concerning medical devices [1993] OJ L169/1.

47 Council Directive 90/385/EEC of 20 June 1990 on the approximation of the laws of the Member States relating to active implantable medical devices [1990] OJ L189/17.

48 Regulation (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices, amending Directive 2001/83/EC, Regulation (EC) No 178/2002 and Regulation (EC) No 1223/2009 and repealing Council Directives 90/385/EEC and 93/42/EEC [2017] OJ L117/1.

49 Regulation (EC) No 638/2004 of the European Parliament and of the Council of 31 March 2004 on Community statistics relating to the trading of goods between Member States and repealing Council Regulation (EEC) No 3330/91 [2004] OJ L102/1.

50 Regulation (EC) No 471/2009 of the European Parliament and of the Council of 6 May 2009 on Community statistics relating to external trade with non-member countries and repealing Council Regulation (EC) No 1172/95 [2009] OJ L152/23.

51 Regulation (EU) 2019/2152 of the European Parliament and of the Council of 27 November 2019 on European business statistics, repealing 10 legal acts in the field of business statistics [2019] OJ L327/1.

member state; it also included transitional measures for the scheduled repeal of earlier acts to take effect at the end of 2021.

A further 17 repealed regulations and directives originally listed in the Protocol have been replaced directly by new acts. Of these replacement acts, four concern the regulation of electricity markets and energy supplies[52] and were originally listed in annex 4, supplementing article 9 of the Protocol which makes provision for the continued operation of the SEM on the island of Ireland. These four acts were replaced by four updated acts[53] between July 2019 and December 2020. The replacement acts cover the same policy areas and implement changes agreed in June 2019 – again while the UK was still a member state of the EU.

The 13 remaining acts have been repealed and replaced directly: 11 of these were repealed in the first year of implementation, 2021, and two in the first six months of 2022; they concern:

- the approval and market surveillance of motor vehicles and related products[54] replaced by Regulation (EU) 2018/858[55] adopted in June 2018;

52 Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55; Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 [2009] OJ L211/15; Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators [2009] OJ L211/1; and Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment [2005] OJ L33/22.

53 Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU [2019] OJ L158/125; Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity [2019] OJ L158/54; Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators [2019] OJ L158/22; and Regulation (EU) 2019/941 of the European Parliament and of the Council of 5 June 2019 on risk-preparedness in the electricity sector and repealing Directive 2005/89/EC [2019] OJ L158/1.

54 Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) [2007] OJ L263/1.

55 Regulation (EU) 2018/858 of the European Parliament and of the Council of 30 May 2018 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC [2018] OJ L151/1.

- controls on cash entering or leaving the EU[56] replaced by Regulation (EU) 2018/1672[57] adopted in November 2018;
- controls on trade in goods that could be used in capital punishment or torture[58] replaced by Regulation (EU) 2019/125[59] adopted in January 2019;
- the mutual recognition of goods between member states[60] replaced by Regulation (EU) 2019/515[61] adopted in March 2019;
- controls on persistent organic pollutants[62] replaced by Regulation (EU) 2019/1021[63] adopted in June 2019;
- the marketing and use of explosives precursors[64] replaced by Regulation (EU) 2019/1148[65] adopted in July 2019;

56 Regulation (EC) No 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community [2005] OJ L309/9.

57 Regulation (EU) 2018/1672 of the European Parliament and of the Council of 23 October 2018 on controls on cash entering or leaving the Union and repealing Regulation (EC) No 1889/2005 [2018] OJ L284/6.

58 Council Regulation (EC) No 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment [2005] OJ L200/1.

59 Regulation (EU) 2019/125 of the European Parliament and of the Council of 16 January 2019 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment [2019] OJ L30/1.

60 Regulation (EC) No 764/2008 of the European Parliament and of the Council of 9 July 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No 3052/95/EC [2008] OJ L218/21.

61 Regulation (EU) 2019/515 of the European Parliament and of the Council of 19 March 2019 on the mutual recognition of goods lawfully marketed in another Member State and repealing Regulation (EC) No 764/2008 [2019] OJ L91/1.

62 Regulation (EC) No 850/2004 of the European Parliament and of the Council of 29 April 2004 on persistent organic pollutants and amending Directive 79/117/EEC [2004] OJ L158/7.

63 Regulation (EU) 2019/1021 of the European Parliament and of the Council of 20 June 2019 on persistent organic pollutants (recast) [2019] OJ L169/45.

64 Regulation (EU) No 98/2013 of the European Parliament and of the Council of 15 January 2013 on the marketing and use of explosives precursors [2013] OJ L39/1.

65 Regulation (EU) 2019/1148 of the European Parliament and of the Council of 20 June 2019 on the marketing and use of explosives precursors, amending Regulation (EC) No 1907/2006 and repealing Regulation (EU) No 98/2013 [2019] OJ L186/1.

- provisions for the conservation of fisheries and marine ecosystems[66] replaced by Regulation (EU) 2019/1241[67] adopted in July 2019;
- provisions for computerising the movement and surveillance of exercisable goods[68] replaced by Decision (EU) 2020/263[69] adopted in February 2020;
- rules on the labelling of tyres[70] replaced by Regulation 2020/740[71] adopted in June 2020;
- controls on the acquisition and possession of weapons[72] replaced by Directive (EU) 2021/555[73] adopted in April 2021; and
- the EU regime for the control of exports, transfer, brokering and transit of dual-use items[74] repealed by Regulation (EU) 2021/821[75] adopted in May 2021 but with provision for the

66 Council Regulation (EC) No 850/98 of 30 March 1998 for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms [1998] OJ L125/1.

67 Regulation (EU) 2019/1241 of the European Parliament and of the Council of 20 June 2019 on the conservation of fisheries resources and the protection of marine ecosystems through technical measures, amending Council Regulations (EC) No 1967/2006, (EC) No 1224/2009 and Regulations (EU) No 1380/2013, (EU) 2016/1139, (EU) 2018/973, (EU) 2019/472 and (EU) 2019/1022 of the European Parliament and of the Council, and repealing Council Regulations (EC) No 894/97, (EC) No 850/98, (EC) No 2549/2000, (EC) No 254/2002, (EC) No 812/2004 and (EC) No 2187/2005 [1998] OJ L198/105.

68 Decision No 1152/2003/EC of the European Parliament and of the Council of 16 June 2003 on computerising the movement and surveillance of excisable products [2003] OJ L162/5.

69 Decision (EU) 2020/263 of the European Parliament and of the Council of 15 January 2020 on computerising the movement and surveillance of excise goods (recast) [2020] OJ L58/43.

70 Regulation (EC) No 1222/2009 of the European Parliament and of the Council of 25 November 2009 on the labelling of tyres with respect to fuel efficiency and other essential parameters [2009] OJ L342/46.

71 Regulation (EU) 2020/740 of the European Parliament and of the Council of 25 May 2020 on the labelling of tyres with respect to fuel efficiency and other parameters, amending Regulation (EU) 2017/1369 and repealing Regulation (EC) No 1222/2009 [2020] OJ L177/1.

72 Council Directive 91/477/EEC of 18 June 1991 on control of the acquisition and possession of weapons [1991] OJ L256/51.

73 Directive (EU) 2021/555 of the European Parliament and of the Council of 24 March 2021 on control of the acquisition and possession of weapons [2021] OJ L115/1.

74 Council Directive 91/477/EEC of 18 June 1991 on control of the acquisition and possession of weapons [1991] OJ L256/51.

75 Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit, and transfer of dual-use items (recast) [2021] OJ L206/1.

continued application of authorisations made under the earlier act and before 9 September 2021.

Those repealed and replaced in the first six months of 2022 are:

- the EU code relating to veterinary medicinal products[76] replaced by Regulation (EU) 2019/6[77] adopted in December 2018; and
- conditions governing the preparation, placing on the market and use of medicated feeding stuffs in the EU[78] replaced by Regulation (EU) 2019/4[79] adopted in December 2018.

In addition to the 51 repealed acts, two acts originally listed in the annexes expired after the UK withdrew from the EU. These concerned the regulation of imports from third countries affected by the Chernobyl disaster[80] and temporary trade measures for goods originating in Ukraine.[81]

Considering all changes arising from repeal, replacement and expiry, alongside those article 13(4) changes agreed by the Joint Committee in December 2020, the number of EU acts that apply in post-Brexit Northern Ireland has decreased since the Protocol entered into force. As of 1 July 2022, 312 EU regulations, directives and decisions applied; 26 fewer than when the Protocol was first agreed in October 2019 (see Table 1).

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76 Directive 2001/82/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to veterinary medicinal products [2001] OJ L311/1.

77 Regulation (EU) 2019/6 of the European Parliament and of the Council of 11 December 2018 on veterinary medicinal products and repealing Directive 2001/82/EC [2019] OJ L4/43.

78 Council Directive 90/167/EEC of 26 March 1990 laying down the conditions governing the preparation, placing on the market and use of medicated feedingstuffs in the Community [1990] OJ L92/42.

79 Regulation (EU) 2019/4 of the European Parliament and of the Council of 11 December 2018 on the manufacture, placing on the market and use of medicated feed, amending Regulation (EC) No 183/2005 of the European Parliament and of the Council and repealing Council Directive 90/167/EEC [2019] OJ L4/1.

80 Council Regulation (EC) No 733/2008 of 15 July 2008 on the conditions governing imports of agricultural products originating in third countries following the accident at the Chernobyl nuclear power station [2008] OJ L210/1.

81 Regulation (EU) 2017/1566 of the European Parliament and of the Council of 13 September 2017 on the introduction of temporary autonomous trade measures for Ukraine supplementing the trade concessions available under the Association Agreement [2017] OJ L254/1.

Annex	Area	Regulations, directives, decisions*				
		2019	2021		2022	
		Oct	Jan	July	Jan	July
1	Individual rights	6	6	6	6	6
2	Trade in goods	287	284	261	261	261
3	VAT and excise	19	19	19	19	19
4	Single electricity market	7	7	7	7	7
5	State aid	19	19	19	19	19
Total		**338**	**335**	**312**	**312**	**312**

* Not included are the small number of EU treaty articles referenced in the Protocol, 'soft law' texts (eg commission communications), mostly included in annex 5, and a small number of unspecific provisions noted in the annexes.

Table 1: EU acts listed in the annexes to the Protocol (changed since the Protocol was agreed in October 2019)

Changes to EU legislation implementing applicable EU law

The third category of change relates to legislation that implements the regulations, directives and decisions listed in the annexes to the Protocol. As in the second category – repeal, replacement and expiry – this type of change is the result of normal EU legislative processes. It also follows from article 13(3) of the Protocol.

EU implementing legislation – including that relevant under the Protocol – is regularly adopted by either the Commission or the Council. In the first six months of 2022, the EU adopted 599 pieces of implementing legislation.[82] Not all of these apply to Northern Ireland under the Protocol. Of the 599 implementing acts adopted, 355 were within the scope of the Protocol (see Table 2).

Figures for both total implementing acts adopted in January to June of 2022 and the number that are Protocol-applicable may seem high. It is important to note, however, that most implementing acts concern very technical, minor and specific issues, and they always remain within the scope of the original 'parent' act. Moreover, while all implementing acts made under 'parent' acts listed in the Protocol and its annexes are applicable to Northern Ireland, not all of them are significant in terms of policy.

For example, implementing acts will be adopted to correct errors in different language versions of other EU acts: Commission Implementing

82 EUR-Lex, 'Legal acts – statistics'.

	Delegated legislation*			**Implementing legislation†**		
	Total	Protocol applicable		Total	Protocol applicable	
January	9	5	56%	82	48	59%
February	15	4	27%	102	56	55%
March	16	6	38%	89	61	69%
April	3	1	33%	89	44	49%
May	5	4	80%	89	64	72%
June	1	0	56%	99	62	63%
Total	49	20	41%	400	335	61%

Collated from information available on EU official EUR-Lex website.
* Includes Commission delegated regulations, directives and decisions.
† Includes Council implementing regulations and decisions, Commission implementing regulations, directives and decisions.

Table 2: EU delegated and implementing legislation and Protocol-applicable law – January to June 2022 Source: EUR-Lex Legal Acts – statistics.

Regulation (EU) 2022/176[83] made on 9 February 2022 corrects certain language versions of a particular annex of the Official Controls Regulation mentioned earlier and applies under article 5 and annex 2 of the Protocol; similarly Commission Implementing Regulation (EU) 2022/827[84] made on 20 May corrects the Danish language version of an Implementing Regulation[85] that concerns arrangements for adjusting allocations of greenhouse gas emission allowances and applies under article 9 and annex 4 of the Protocol. While both of these implementing acts make changes to EU acts that apply to Northern Ireland under the Protocol, they have no 'on-the-ground' impact.

83 Commission Implementing Regulation (EU) 2022/176 of 9 February 2022 correcting certain language versions of the annex to Implementing Regulation (EU) 2021/632 laying down rules for the application of Regulation (EU) 2017/625 of the European Parliament and of the Council as regards the lists of animals, products of animal origin, germinal products, animal by-products and derived products, composite products, and hay and straw subject to official controls at border control posts [2022] OJ L29/4.

84 Commission Implementing Regulation (EU) 2022/827 of 20 May 2022 correcting the Danish language version of Implementing Regulation (EU) 2019/1842 laying down rules for the application of Directive 2003/87/EC of the European Parliament and of the Council as regards further arrangements for the adjustments to free allocation of emission allowances due to activity level changes [2022] OJ L147/25.

85 Commission Implementing Regulation (EU) 2019/1842 of 31 October 2019 laying down rules for the application of Directive 2003/87/EC of the European Parliament and of the Council as regards further arrangements for the adjustments to free allocation of emission allowances due to activity level changes [2019] OJ L282/20.

Some technical changes do have more significance, or potential significance, in and for Northern Ireland. For example, 17 of the EU implementing acts adopted in the first six months of 2022 and which apply under the Protocol concern emergency measures being taken across the EU and in Northern Ireland to address bird flu. While the primary purpose of these 17 implementing acts was very technical – making amendments to lists of geographic regions where bird flu was or had been present – they also concern a very real issue facing the agrifood sector in Northern Ireland, so they are, in this respect, important.

A small number of implementing acts that address Northern Ireland and its position under the Protocol directly have been adopted. Examples include: a Commission Implementing Regulation (EU) 2022/250[86] made on 21 February 2022 to amend existing EU implementing legislation to introduce a new model of animal health certificate for movements of certain livestock GB–NI, which delays the requirement for certificates regarding scrapie disease to be provided to allow time for GB holdings to be approved as 'controlled risk' despite being outside EU regulation. A similar example is in Commission Implementing Regulation (EU) 2022/680,[87] adopted on 27 April 2022, to amend a standardised poster (provided for in Implementing Regulation (EU) 2020/178)[88] concerning the bringing of plants, fruits, vegetables, flowers or seeds into the EU so as to include the 'United Kingdom (Northern Ireland)' in the list of non-EU territories for which there is an exemption from the ordinary requirement of an SPS certificate for doing so. Again, the actual change here is very minor; yet it reflects the fact that the Protocol has provided for the continued free flow of goods on the island of Ireland, thereby negating

86 Commission Implementing Regulation (EU) 2022/250 of 21 February 2022 amending Implementing Regulation (EU) 2021/403 as regards the addition of a new model animal health/official certificate for the entry into Northern Ireland of ovine and caprine animals from Great Britain and amending Implementing Regulation (EU) 2021/404 as regards the list of third countries authorised for the entry into the Union of ovine and caprine animals [2022] OJ L41/19.

87 Commission Implementing Regulation (EU) 2022/680 of 27 April 2022 amending the information in the annex to Implementing Regulation (EU) 2020/178 by including United Kingdom (Northern Ireland) as an origin for which a phytosanitary certificate is not required for the introduction into the Union of plants, fruits, vegetables, flowers or seeds [2022] OJ L125/1.

88 Commission Implementing Regulation (EU) 2020/178 of 31 January 2020 on the presentation of information to passengers arriving from third countries and to clients of postal services and of certain professional operators concerning the prohibitions as regards the introduction of plants, plant products and other objects into the Union territory in accordance with Regulation (EU) 2016/2031 of the European Parliament and of the Council [2020] OJ L37/1.

the necessity for an SPS certificate that would otherwise be required in view of Brexit.

While the examples cited underline the often-technical nature of provisions made in EU implementing legislation, they also demonstrate the potential for wide variation in terms of policy significance and sectoral impacts in and for Northern Ireland. Legislative changes deriving from UK(NI)'s dynamic alignment under the Protocol ought to therefore be understood as occurring on a spectrum from no impact to noticeable impact with potential long-term effect. This being so, tracking relevant changes is an imperative for UK(NI) yet presents a considerable challenge, not only due to the complexity of the task, but also due to the polarised political context in which it must be carried out. This challenge and the others facing post-Brexit Northern Ireland as a consequence of the Protocol are considered further in the conclusion. Before this, however, the third section places UK(NI)'s dynamic regulatory alignment in broader context by reviewing some of its impacts, so far, in the legal orders it cross-sects.

POST-BREXIT NORTHERN IRELAND'S DYNAMIC FUTURE

The substantive implications of the dynamic regulatory alignment of UK(NI) with aspects of EU law can be considered in relation to the different legal orders impacted. Broadly, implementation of the Protocol takes place at the intersection of the UK–EU relationship, however, its effects also occur at various levels within the two polities. While it is beyond the scope of this article to review all the legislative implications of post-Brexit Northern Ireland's dynamic (in regulatory terms) future, this section sets out some of the most prominent effects evident so far in both the UK and EU contexts.

Implications for the United Kingdom

For the UK, the alignment of UK(NI) with aspects of the EU *acquis*, has implications that are: specific to Northern Ireland; those which play out, directly and indirectly, in GB (including at devolved level); as well as those which take effect on the UK national level.

In domestic law, the requirement to implement changes arising from the dynamic regulatory alignment of UK(NI), under article 13(3) of the Protocol, at present, flows through section 7A of the European Union (Withdrawal) Act 2018[89] which gives the Protocol direct effect in UK law.[90] For Northern Ireland, relevant 'amendments and replacements' in Protocol-applicable EU law have largely been made,

89 As amended by the European Union (Withdrawal Agreement) Act 2020.

90 See Gordon Anthony, 'The Protocol in Northern Ireland law' and Catherine Barnard, 'The status of the Withdrawal Agreement in UK law' in McCrudden (ed) (n 19 above).

so far, via secondary legislation passed at Westminster. Examples include: the Medical Devices (Northern Ireland Protocol) Regulations 2021[91] brought in to implement EU Regulation 2017/745 on medical devices[92] which came into effect in Northern Ireland, by dint of the Protocol, in May last year; the Market Surveillance (Northern Ireland) Regulations 2021[93] which implements Regulation (EU) 2019/1020[94] on Market Surveillance and Compliance which came into effect in Northern Ireland under the Protocol in July last year; the Hydrocarbon Oil and Biofuels (Northern Ireland Private Pleasure Craft) Regulations 2021[95] is another example, this instrument prohibits the use of rebated fuel (red diesel) for use in private pleasure craft in Northern Ireland and marked the final step required to implement a 2018 ruling by the CJEU on the matter;[96] the same changes were not made in UK(GB) legislation. To date, due to the relative stability in retained EU law across the whole of the UK, there are only a handful of examples of domestic legislation being used to implement changes arising directly from article 13(3) of the Protocol.

There are also examples of changes being made in UK(GB) law which do not apply in UK(NI) due to obligations under the Protocol, again these are relatively few in number and those that do exist tend, so far, to implement minor or technical changes. Examples include: the Pesticides (Revocation) (EU Exit) Regulations 2022,[97] which revoke various aspects of 'direct EU legislation' regarding the regulation of plant protection products and maximum reside levels in UK(GB), the amended EU law instruments apply in UK(NI) as Protocol-applicable EU law; and the Organic Production (Amendment) Regulations 2022,[98] which amend retained EU law in UK(GB) to extend existing derogations for the use of non-organic pullets (young chickens) and non-organic gellan gum in organic production – the explanatory memorandum to SI 2022/360 states the view of the Government that it 'do[es] not anticipate' that the resultant divergence 'will disadvantage Northern Ireland industry'.[99] Such examples underline the often-

91 SI 2021/905.
92 See n 48 above.
93 SI 2021/858.
94 Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and compliance of products and amending Directive 2004/42/EC and Regulations (EC) No 765/2008 and (EU) No 305/2011 [2019] OJ L169/1.
95 SI 2021/780.
96 Case C–503/17 *Commission v United Kingdom of Great Britain and Northern Ireland* [2018] ECLI:EU:C: 2018:831.
97 SI 2022/144.
98 SI 2022/360.
99 Explanatory Memorandum to SI 2022/360, para 10.1.

technical nature of intra-UK divergence arising from the dynamic regulatory alignment of UK(NI) so far, but this is not likely to remain the case.

Two, currently draft, pieces of legislation introduced by the UK Government have the potential to change the domestic legislative effect of provisions on UK(NI) alignment under the Protocol very significantly. The NIP Bill,[100] if enacted, would enable ministers to disapply (or 'except') core provisions of the Protocol while also changing the terms of its enforcement by removing CJEU jurisdiction and granting UK Ministers *very* sweeping discretionary powers to make law in areas covered (or previously covered) by the Protocol, including in respect to enforcement mechanisms.[101] Effectively replacing an agreed international legal framework, even a politically contested one, with a domestic legal framework that is almost entirely reliant on the future whims of UK ministers is, arguably, not an approach that will lend itself to economic certainty, policy clarity or political stability. Potentially layering on top of the ministerially contingent NIP Bill system there is the Retained EU Law (Revocation and Reform) (REUL) Bill,[102] which proposes to disapply or 'sunset' almost all retained EU law that remains on the UK statute on 31 December 2023. While Protocol-applicable EU law would not, under the REUL Bill, be subject to the 'sunset' it introduces, the removal of UK(GB) retained EU law versions of UK(NI) Protocol-applicable EU law via the REUL Bill sunset could have substantial intra-UK divergence implications along this axis. Not much consideration appears to have been given on the part of the UK Government to the relationship between these two Bills and the possible interaction of both the provisions they would make and the powers they would create. Suffice to say, from the perspective of Northern Ireland, there are a significant number of unanswered questions.[103]

In terms of UK national policy-making, the impact of UK(NI)'s dynamic alignment under the Protocol (if it continues) is most evident in relation to trade policy. Trade agreements signed by the UK Government since the withdrawal of the UK from the EU, and which are not 'roll-over' agreements, have included a 'without prejudice' clause in respect to the application of the Protocol in and for Northern

100 Northern Ireland Protocol HC Bill (2022–23) 52 [as brought from the Commons].

101 For a summary of the NIP Bill, see Nicola Newson, Northern Ireland Protocol Bill HL Bill 52 of 2022–23 (5 October 2022).

102 Retained EU Law (Revocation and Reform) HC Bill (2022–23) [as introduced].

103 For an initial mapping of the implications of the REUL Bill read together with the NIP Bill, see Jane Clarke, Lisa Claire Whitten and Viviane Gravey, 'The known unknowns of the Retained EU Law (Revocation and Reform) Bill in Northern Ireland' (Brexit & Environment Policy briefs 1/2022 17 October 2022).

Ireland.[104] A further implication of the relative stability *so far* in UK(GB) retained EU law in respect to goods is that the potential effects of the differentiation of UK(NI) in new UK free trade agreements as regards divergence of standards and/or access to third-country goods/markets have not yet emerged. Again, anticipated primary law changes via the REUL Bill and/or NIP Bill are very likely to shape the extent and nature of these dynamics.

Implications for the European Union

For the EU, the implementation of the Protocol represents a splitting of the Four Freedoms. Throughout UK–EU negotiations, and in the agreed text, strong emphasis is placed on the '*unique* circumstances' the Protocol is designed to address.[105] From the EU perspective it has thus been consistently made clear that the bespoke arrangements agreed for UK(NI) should remain as such – bespoke. This notwithstanding, the application of the Protocol and the development of the novel relationship it establishes between UK(NI) and the EU *acquis* is an interesting and important exercise in EU external governance. Although perhaps a lesser discussed aspect of its implementation so far, operationalising the Protocol has already resulted in and required changes in EU law, largely in the form of derogations, to further recognise and facilitate the persistently 'unique circumstances' on the island of Ireland; such processes are likely to repeat.

The most prominent example of EU legislative change to facilitate implementation of the Protocol is on the issue of medicines. A possible risk to the supply of medicines to UK(NI) was identified during the UK transition period with industry and stakeholders suggesting to the UK and EU that adaptation to new requirements for moving medicines GB–NI would take more time. A temporary 'grace period' arrangement was thus made as part of a package of Joint Committee decisions reached in December 2020.[106] On medicines, the 'grace period' amounted to a temporary removal of the obligation to decommission safety features applied to medicines for human use supplied to the UK

104 Agreement between the United Kingdom of Great Britain and Northern Ireland and Japan for a Comprehensive Economic Partnership [Tokyo, 23 October 2020] CP 311 vol 1: 1.9.5(a); Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and New Zealand (28 February 2022) Chapter 1: Initial Provisions and General Definitions: art 1.2.3; Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and Australia [16 December 2021] ch 1: Initial Provisions and General Definitions: art 1.2.3.

105 WA (n 1 above) Protocol, art 1(3) (emphasis added).

106 See: Council Decision (EU) 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] L29/1.

from EU suppliers alongside an abstention from sanctioning certain breaches of EU law arising due to the absence of manufacturing authorisation holders in UK(NI); these provisions were to last for one year. Consultations with pharmaceutical industry stakeholders throughout 2021 underlined long-term risks to the supply of medicines to Northern Ireland if the requirement to comply with EU procedures under the Protocol were to be applied without amendment, primarily due to the small size of the UK(NI) market and prohibitive costs of UK(GB) suppliers developing separate UK(NI) production lines. Attempts were made at UK–EU level to develop an agreed solution, but none was forthcoming. Instead, the EU decided to unilaterally change its laws on medicines that apply under the Protocol to address (at least some) of the issues pertaining to UK(NI). In April 2022, the European Parliament and Council, respectively, approved new legislation introducing derogations to address post-Brexit supply of medicines for human use in Northern Ireland.[107] While there are some outstanding issues as regards medicines,[108] the process and fact of EU adopting dedicated derogations for UK(NI) is itself notable.

Other cases of more minor changes in EU law to recognise or facilitate the Protocol have also taken place – examples of this level of amendments are included in the previous section.[109] Similar to some of the UK secondary law changes cited above, these have tended to be technical in content and have only minor effects on policy.

Given, in EU law terms, the unprecedented nature of the Protocol (the automaticity of alignment with and participation in the Single Market for goods) and the exceptional context of its implementation (in a post-Brexit UK actively pursuing divergence from the EU market), it is reasonable to assume that its implementation will continue to involve amendments and/or derogations in Protocol-applicable EU law. On this issue, the political contestation that surrounds the Protocol is also relevant because it is not only the legally unprecedented nature of the Protocol that is likely to beget future EU derogations; the possibility

107 Directive (EU) 2022/642 of the European Parliament and of the Council of 12 April 2022 amending Directives 2001/20/EC and 2001/83/EC as regards derogations from certain obligations concerning certain medicinal products for human use made available in the United Kingdom in respect of Northern Ireland and in Cyprus, Ireland and Malta [2022] OJ L118/4; Regulation (EU) 2022/641 of the European Parliament and of the Council of 12 April 2022 amending Regulation (EU) No 536/2014 as regards a derogation from certain obligations concerning investigational medicinal products made available in the United Kingdom in respect of Northern Ireland and in Cyprus, Ireland and Malta [2022] OJ L118/1.

108 James Cleverly, 'Official correspondence: Northern Ireland Protocol and medicines supply' (28 March 2022).

109 See nn 86 and 87 above.

of UK non-compliance with its obligations to keep pace with Protocol-applicable acts does the same. This latter scenario will raise questions as to how much risk the EU is willing to tolerate to its Single Market for goods, particularly, if/when the UK begins to diverge from the standards it currently (largely) retains. At present, the EU has seven separate infringement proceedings against the UK for various issues of non-compliance or non-implementation of EU laws under the Protocol. As time goes on and the respective regulatory orders of the UK and the EU chart separate paths, the potential for UK(NI) to fall behind EU law requirements under the Protocol will increase.

Whether intentionally in protest against its terms, or unintentionally due to its inherent complexity and constrained capacity in UK(NI) to implement it, the future operationalisation of the Protocol carries risk for the integrity of the EU Single Market.

CONCLUSION

Prima facie, the implications of UK(NI)'s dynamic regulatory alignment are most pressing for Northern Ireland. Its alignment with aspects of EU law under the Protocol present a tripartite governance challenge regarding capacity, scrutiny and legitimacy. Operationalising the novel arrangements of the Protocol in Northern Ireland has placed new burdens on its political and civic institutions, with the latter being, at present, suspended as a result. Going forward, monitoring and (potentially) adapting to relevant changes in EU law as well as tracking relevant changes in UK(GB) law which may have divergence implications is a complex task for officials and stakeholders in Northern Ireland and questions linger regarding their capacity to do so. At the same time, implementing or dealing with practical impacts of alignment will likely add to the workload of Northern Ireland departments and industry unused to having to apply specific UK(NI) policies on such differentiated terms. Moreover, such strains on the capacity of officials and businesses in Northern Ireland make the difficult task of scrutinising changes arising from its dynamic alignment with EU law even harder.

At present, there is limited formal provision for those directly impacted by Northern Ireland's position under the Protocol – Northern Ireland business, industry stakeholders, rights organisations and community representatives – to input into the process of dynamic regulatory alignment. This is problematic on grounds of legislative scrutiny, democratic accountability and public/political legitimacy regarding the Protocol. Existing mechanisms, such as the JCWG or respective UK and the EU proposals for greater involvement of

NI stakeholders could, if realised, improve the situation;[110] these could also be used to convey the position of the UK Government in respect of Northern Ireland on proposed EU legislation that the EU may seek to have applied – subject to the agreement of the UK in the Joint Committee – under the Protocol. Yet, at time of writing (October 2022) the prospect of the UK and EU agreeing a system for enhanced Northern Ireland engagement on relevant EU legislative developments seems unlikely as relations between the two sides hit a nadir in the wake of the UK Government introduction of the NIP Bill and the European Commission's subsequent announcement of revived, new, and then additional infringement proceedings.[111] Whether and with what amendments, if any, the Northern Ireland Protocol Act is adopted will determine the future of UK(NI) dynamic alignment; with its proposed dual regulatory regime, implementation of the NIP Bill system will involve acceptance of dynamic regulatory alignment with some EU law, at least for those goods expected to be traded across the land border and into the EU market. While the prospect of operationalising such a system has not been widely welcomed in Northern Ireland, the idea of some kind of 'dual regulatory' market will mean that the need for monitoring EU law developments will remain, as will the tripartite challenge for Northern Ireland governance regarding capacity to implement as well as scrutinise its newly differentiated arrangements.

Perhaps the most difficult challenge presented by the Protocol in and for Northern Ireland relates to perceptions of its legitimacy or otherwise. New checks and controls on goods crossing the Irish Sea, required by the Protocol, are viewed by many Unionists/Loyalists as a violation of British identity and a threat to Northern Ireland's position within the UK internal market. In protest against the Protocol, the DUP First Minister resigned from office in February 2022, thus collapsing devolved government in Northern Ireland, and the party has so far refused to elect an Assembly Speaker or agree to form an Executive in the wake of May 2022 elections, thus leaving Northern Ireland without a fully functioning government and facing the prospect of another election in the near future. Although not arising directly from the legal provisions of the Protocol, but rather political reactions to them, the evident instability of Northern Ireland institutions is very concerning.

110 European Commission, 'Protocol on Ireland and Northern Ireland non-paper engagement with Northern Ireland stakeholders and authorities' (2021); HM Government, 'Northern Ireland Protocol: the way forward' (2021).

111 See European Commission, 'Commission launches infringement proceedings against the UK for breaking international law and provides further details on possible solutions to facilitate the movement of goods between Great Britain and Northern Ireland' (15 June 2022) and 'Protocol on Ireland/Northern Ireland: Commission launches four new infringement procedures against the UK' (22 July 2022).

As this article has demonstrated, the implementation of the Protocol has important implications for the legislative trajectories of both the UK and the EU markets. Regardless of if, or how, or when, the latest dispute between the Protocol's two authors and signatories gets resolved, the 'unique circumstances' it was designed to address will linger on. For this reason alone, post-Brexit Northern Ireland is likely, for better and worse, to continue to be a legally dynamic and politically dramatic place.

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Understanding the implications of article 2 of the Northern Ireland Protocol in the context of EU case law developments

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ABSTRACT

Conscious of the careful balance stemming from the Rights, Safeguards and Equality of Opportunity provisions of the Belfast/Good Friday Agreement 1998, it was clear that human rights guarantees underpinned by European Union (EU) law would be a pivotal aspect of the Protocol on Ireland/Northern Ireland within the Withdrawal Agreement. The commitment is particularly prominent in respect of equality law, as a guarantee that no diminution of rights and equality protections would result from withdrawal from the EU was built into article 2(1) of the Protocol providing for non-diminution of rights in Northern Ireland post-Brexit. The purpose of this article is to identify and analyse recent developments in EU equality case law which may trigger the non-diminution obligation from the entry into force of the Protocol to the date of writing (ie between 1 January 2021 and 1 September 2022). This analysis is underpinned by a systematic case law review to provide an evidence-based analysis of: a) where divergence of equality protection standards is occurring presently; and b) where these concerns are likely to present in the future. The article identifies four substantive areas, namely religious discrimination, disability discrimination, gender equality in the field of pensions and social security, and migration law, which raise significant and complex questions about the practical feasibility of the non-diminution obligation. In light of the thematic case law analysis, the article offers broader reflections on the future direction of article 2 obligations, which could be used to approach the non-diminution commitment prospectively.

Keywords: Northern Ireland Protocol; Brexit; article 2 of the Northern Ireland Protocol; diminution of rights; Court of Justice of the European Union; equality.

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INTRODUCTION

Conscious of the delicate balance set up by the Rights, Safeguards and Equality of Opportunity provisions of the Belfast/Good Friday Agreement 1998[1] (the 1998 Agreement), both sides of the Brexit negotiations agreed early on that the maintenance in Northern Ireland of human rights guarantees underpinned by European Union (EU) law would be a central element of the Protocol on Ireland/Northern Ireland (the Protocol) annexed to the Withdrawal Agreement.[2] The significance of this commitment was particularly clear in respect of equality law, as EU secondary legislation has played a key role in codifying minimum standards in this field across the United Kingdom (UK). In the absence of an explicit guarantee of continued protection, it was feared that future changes could quickly jeopardise the 1998 Agreement. A guarantee that no diminution of rights and equality protections would result from withdrawal from the EU was, therefore, built into article 2(1) of the Protocol, which provides:

> The United Kingdom shall ensure that 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 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.

The purpose of this contribution is to identify and analyse developments in EU case law that may trigger this non-diminution obligation since the entry into force of the Protocol to the date of writing, ie between 1 January 2021 and 1 September 2022. This undertaking has a twofold significance: first, it provides an evidence-based account of the areas where divergence is likely to occur, based on a verifiable and consistent methodology. Secondly, in light of the breadth of the developments we identify within only a short span of time, the article underlines the complexity of the non-diminution commitment, thus offering a critical perspective on its day-to-day feasibility and, as such, potentially serving as a justification for further policy changes or support for the institutions entrusted with carrying it forward.[3]

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1 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes) 1998 (2114 UNTS 473).

2 Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union (30 January 2020) UKTS 3/2020.

3 Ibid. Sch 3, para 7, gives the obligation that the Northern Ireland Human Rights Commission (NIHRC) and Equality Commission for Northern Ireland (ECNI) must monitor the implementation of article 2(1) Protocol rights.

Our analysis proceeds by explaining key assumptions we have made and the methodology we have used to come to our findings, in the next section, before going on to lay down and closely analyse the direct implications of these findings. The substantive areas of equality and human rights law where we have identified significant changes or potential upcoming changes fall mainly into four categories: religious discrimination; disability discrimination; gender equality in the field of pensions and social security; and migration law. We then provide some reflections on the broader themes stemming from this case law, which could be used to approach the non-diminution commitment prospectively. These are: reliance on the principle of proportionality; the use of human dignity as an underpinning of equality and social rights; and a commitment to effective judicial protection and, particularly, access to the court. A final section concludes.

METHODOLOGY AND UNDERLYING ASSUMPTIONS REGARDING THE SCOPE OF THE ARTICLE 2 OBLIGATION

A broad interpretation of article 2

The language of 'non-diminution' used in article 2 of the Protocol is arguably difficult to unpack, and the nature of the obligation it enshrines has been the subject of extensive academic debate.[4] While it is not the primary purpose of this article to contribute to this debate, it is essential for us to set out our overall understanding of article 2, as this informs the developments that we have identified as relevant to its operation.

More specifically, whereas article 2 of the Protocol speaks of 'non-diminution' in a general way, when it is read alongside its annexes it appears to create a two-tiered obligation to track EU standards. First, there is a broad obligation not to fall below the level of protection of equality and human rights as it was at time of the Protocol's entry into force on 1 January 2021 in any area that pertains to the Rights, Safeguards and Equality of Opportunity section of the 1998 Agreement.[5]

4 See, for a thoughtful summary and analysis, Paul Evans, Alexander Horne and Tasneem Ghazi, Legislative Scrutiny and the Dedicated Mechanism for Monitoring Article 2 of the Ireland/Northern Ireland Protocol under the UK's January 2020 Withdrawal Agreement with the EU (ECNI 2022).

5 Thomas Liefländer and Daniel Denman, 'The Withdrawal Agreement, Protocol on Ireland/Northern Ireland' in Manuel Kellerbauer, Eugenia Dumitriu-Segnana and Thomas Liefländer (eds), *The UK–EU Withdrawal Agreement: A Commentary* (Oxford University Press 2021) 407, 414–416; Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick, 'Rights, opportunities and benefits in Northern Ireland after Brexit' (NIHRC and IHREC 2020) 42.

Second, article 2 also sets up a narrower in scope, yet in substance more intense, obligation to track *and align* with developments in EU law prospectively, in relation to six equality directives listed in annex 1 of the Protocol:

- Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services;
- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast);
- Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin;
- Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation;
- Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC;
- Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

A need for prospective tracking and alignment (known as 'dynamic alignment') is clear in respect of these directives, as they continue to be interpreted by the Court of Justice of the European Union (CJEU) after the entry into force of the Withdrawal Agreement.[6] However, this is not necessarily the case for other areas of EU equality and human rights law associated with the Rights, Safeguards and Equality of Opportunity part of the 1998 Agreement, which are not specifically identified in the Protocol and are, therefore, more difficult to pin down and track.

Nevertheless, even though the annex 1 directives entail a more *obvious* obligation to track legal developments than the rest of the EU *acquis* on equality and human rights, when read against the Protocol's aim, in light of the 1998 Agreement, of maintaining parity of standards between Ireland and Northern Ireland, article 2 justifies a broader perspective towards alignment, cutting across the elements of equality

6 This has been recognised by the UK Government: 'UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland' (2020) para 7.

and human rights law that can be linked to the 1998 Agreement.[7] In this regard, developments in EU case law pose a particular difficulty. While *new* developments in non-annexed areas (eg new legislation) may not be covered by the non-diminution commitment, case law developments are different because judicial interpretation will often relate to pre-existing measures covered by article 2, thus in practice requiring continued tracking and alignment. And even though article 13(2) of the Protocol[8] provides that case law developments should be 'interpreted in conformity with the relevant case law of the Court of Justice of the European Union', the practical outworking for NI courts is very complex. For instance, if the CJEU were to revise its position on employment benefits for migrants by interpreting secondary legislation in the light of human dignity (a non-annexed area), should this be viewed as an entirely new development? If a narrow view were taken, there would be no need for alignment in that area, provided the decision came after the transitional period. But this view is problematic when placed in the context of the CJEU's interpretive ethic, which views judicial decisions as authoritative interpretations of the core obligation (as this may from time to time be expressed in secondary legislation) and which therefore has a retroactive effect in principle (evidenced in the fact that the CJEU has had specifically to limit this retroactive effect in cases with budgetary implications, such as pensions law).[9] In short, then, while taking a broader view does not conceptually *resolve* the ambiguity around the limits of article 2, it does avoid it in practice and also minimises the risk of under-inclusion in breach of the Protocol. Over-inclusion, in turn, does not pose a risk of the UK breaching the Protocol, as article 2 only sets a minimum alignment obligation, which can be exceeded if desired.

For these reasons, in this article we have preferred to take a broad view of article 2, and therefore include case law developments in equality and human rights beyond the annex 1 directives, thereby also capturing broader questions of EU discrimination and human rights law. As detailed in our methodology, however, we recognise that our ability to identify the relevance of these broader developments to the terms of the 1998 Agreement is more limited and that our approach may be subject to a greater degree of contestation than in respect of the

7 Colin Murray and Clare Rice, 'Beyond trade: implementing the Ireland/Northern Ireland Protocol's human rights and equalities provisions' (2021) 72 Northern Ireland Legal Quarterly 1, 18.

8 Article 13(2) provides: 'Notwithstanding Article 4(4) and (5) of the Withdrawal Agreement, the 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 Court of Justice of the European Union.'

9 See, most famously, Case 43/75, *Defrenne v Sabena* [1976] ECR 455.

explicitly listed annex 1 directives. As such, to ensure that our findings retain analytical value regardless of one's stance on the scope of the article 2 obligation, we have researched the two types of developments separately and have made specific note of the involvement or not of an annex 1 measure in our analysis.

Methodology

The findings of this article are underpinned by a series of original systematic reviews of EU case law based on date-defined and term-specific searches of each of the annex 1 directives and of the rights we considered relevant to the 1998 Agreement in the official database for EU case law (curia.eu). The relevant dates searched for were 1 January 2021–1 September 2022. The terms searched for differed depending on the measure. First, for each of the annex 1 directives, we searched for mentions of the relevant directive by directive number (2004/113/EC; 2006/54/EC; 2000/43/EC; 2000/78/EC; 2010/41/EU; 79/7/EEC). Secondly, our mapping of case law developments beyond the annex 1 directives was completed by term-specific searches of provisions of the EU Charter of Fundamental Rights that broadly correspond to the rights covered by paragraph one of Strand Three of the 1998 Agreement, relating to Rights, Safeguards and Equality of Opportunities:

- right to free political thought;
- right to freedom and expression of religion;
- right to pursue democratically national and political aspirations and seek constitutional change by peaceful and legitimate means;
- right to freedom of choice of one's residence;
- right of equal opportunity in all social and economic opportunity;
- right to freedom from sectarian harassment;
- right of women to full and equal political participation;
- right of victims to remember as well as to contribute to a changed society;
- respect, understanding and tolerance in relation to linguistic diversity;
- the need to ensure that symbols and emblems are used in a manner which promotes mutual respect rather than division.

We considered the corresponding provisions of the Charter to be articles 1, 10, 11, 20, 21, 22, 23, 26, 40 and 45 thereof, which cover, respectively, the following rights: human dignity; the freedom of expression; equality before the law; non-discrimination; linguistic diversity; equality between women and men; the integration of persons with disabilities; the right to vote; and the right to move freely. The reason for our use of Charter provisions for this part of our analysis

is that the Charter is reliably referred to in CJEU case law and, as such, provides a clear basis for identifying relevant developments in this field.

By following a methodology based on the systematic mapping of case law, we tried to compile an exhaustive list of developments with actual or potential relevance for the Protocol. We subsequently read through all of the identified case law and coded it as 'core' or 'peripheral' (core being cases that have a substantive bearing on the target provision and peripheral being cases that merely mention the provision but do not go on to examine it). The analysis that follows highlights only the case law falling within the 'core' category. Our mapping is, however, available in full on request.[10]

DEVELOPMENTS IN EUROPEAN UNION HUMAN RIGHTS AND EQUALITY LAW[11]

Religion in the workplace

One of the most significant recent developments at the EU level relates to religion as a protected characteristic in the context of the Framework Equality Directive 2000/78 (Equality Directive) – arguably the most wide-ranging of the measures listed in annex 1. On 17 July 2021, the Court handed down a significant Grand Chamber ruling in *WABE and Müller*, which partially clarified the application of the Equality Directive to the wearing of religious symbols at work.[12] This ruling concerned two joined cases from Germany, each involving a female

10 An earlier version (covering the period between 1 January 2021–1 January 2022) will be publicly available on the ECNI website upon release in January 2023.

11 Seminal judgments have been noted within the following thematic groupings for the purposes of clarity. It must be noted that not all judgments fall within these. A notable example being Case C-817/19 *Ligue des droits humains* EU:C:2022:491 concerning a landmark data protection ruling by the Grand Chamber in respect of passenger name record (PNR) data which airline carriers store for the purposes of check-in etc for flights. In light of Directive 2016/681 (PNR Directive) data concerning passengers flying between the EU and a third country is sent to the member state of which the passengers were arriving and departing to screen for crime and terrorism offences. Despite the Ligue des droits humains seeing an annulment of the Belgian law transposing this Directive, the CJEU confirmed the overarching validity of the Directive. Despite noting that the directive 'entails undeniably serous interferences with the rights guaranteed in Arts. 7 and 8 CFR', with appropriate stricter safeguards in place the overarching rationale of the PNR Directive was deemed to be appropriately proportionate by the court. For further analysis, see Kristina Irion, 'Repairing the EU Passenger Name Record Directive: the ECJ's judgment in Ligue des droits humains (Case C-817/19)' (*European Law Blog* 11 October 2022).

12 Joined Cases C-804/18 and C-341/19, *IX v WABE eV and MH Müller Handels GmbH v MJ* EU:C:2021:594 (hereafter *WABE and Müller*).

Muslim employee who had been asked to remove her headscarf by a private-sector employer. The first claimant was a special needs teacher at WABE, a nursery school chain, which had a policy that prohibited *all* religious symbols at work. The second claimant was a sales assistant at the cosmetics and drugstore chain Müller Handels, which had a policy prohibiting 'conspicuous or large-sized' symbols. The legal question in both cases was the same: do religious neutrality policies that ban some or all religious symbols constitute discrimination within the EU's Equality Directive and, if so, do they constitute indirect or direct discrimination? While the former can be justified by reference to occupational requirements, the latter cannot.

In *WABE and Müller*, the Court affirms its earlier case law in *Bougnaoui* and *Achbita*, by holding that company rules restricting religious symbols can 'be justified by the employer's desire to pursue a policy of political, philosophical and religious neutrality in the workplace, in order to take account of the wishes of its customers or users'.[13] However, the Court clarifies that the means of achieving this legitimate aim must be appropriate as well as necessary, and that the relevant standard is one of strict proportionality in respect both of 'the concept of a legitimate aim and the appropriate and necessary nature of the means taken to achieve it'.[14] Like the European Court of Human Rights in *Eweida*,[15] the CJEU accepts that 'an employer's desire to display, in relations with both public- and private-sector customers, a policy of political, philosophical or religious neutrality may be regarded as legitimate'[16] and indeed notes that the employer's wish to project an image of neutrality forms part of the freedom to conduct a business recognised in article 16 of the Charter, 'in particular where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer's customers'.[17] However, the employer is now required to prove stricter proportionality conditions.[18] This is further supported by Case C-282/18 *MIUR*, which found that national legislation excluding Catholic religious education teachers in public education establishments from aspects of employment law relating to fixed-term employment contracts was contrary to the Equality Directive. The fact that Catholic education teachers needed

13 Ibid para 60. See also, to that effect, judgment of 14 March 2017, Case C 188/15 *Bougnaoui and ADDH* EU:C:2017:204, para 33; Case C-157/15 *Achbita v G4S Secure Solutions NV* EU:C:2017:203, paras 37–38

14 *WABE and Müller* (n 12 above) para 61; see also judgment of 16 July 2015, Case C-83/14 *CHEZ Razpredelenie Bulgaria* EU:C:2015:480, para 112.

15 *Eweida v The United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10, ECtHR 15 January 2013.

16 *WABE and Müller* (n 12 above) para 63.

17 Ibid. See also *Achbita v G4S* Secure Solutions (n 13 above) paras 37–38.

18 *WABE and Müller* (n 12 above) paras 68–69.

to hold a suitability certificate issued by an ecclesiastical authority was not considered an 'objective reason' for justifying an exception on the basis of religious freedom because that certificate was issued once and not before each school year leading to the conclusion of a fixed-term employment contract.[19]

These cases have had a direct significance for annex 1 of article 2 of the Protocol. In the spring of 2022, the Northern Ireland Assembly enacted the Fair Employment (School Teachers) Act 2022, which superseded a large-scale exclusion of schoolteachers from protection against discrimination in the workplace. Even though the special position of Northern Ireland was recognised in both the Preamble of the Equality Directive and in article 15 thereof, allowing specific provisions to operate regarding recruitment to certain professions, the aforementioned cases suggested that the Court may now be ready to scrutinise wide-ranging access rules applying to specific religions more closely, even in educational settings. While the introduction of the new legislation has largely removed the concern and supports the implementation of the broader equality framework established in Northern Ireland under the Fair Employment (Northern Ireland) Act 1989 and the Fair Employment and Treatment (Northern Ireland) Order 1998, the rulings remain relevant to Northern Ireland in at least two further respects.

First, both cases show greater willingness on the part of the Court to challenge rules applicable to a *specific* religion and to heighten the proportionality scrutiny of measures concerning both substantive occupational requirements (membership of specific religion or certification in that religion) and functional occupational requirements (such as dress codes). This stricter approach affects both private and public employers in Northern Ireland and may be used to challenge employment practices in excepted fields under section 70 of the Fair Employment and Treatment (Northern Ireland) Order 1998, such as religious instruction, as well as any over-reliance by employers on occupational requirements under the same provision. Second, the application of the *WABE* ruling to Northern Ireland will require significant contextualisation to prevent the possibility of abuse by employers, considering the complex status of religious symbols in Northern Ireland under the 1998 Agreement. Earlier studies have found that 'symbols such as flags, items of dress and adornments have proven to be particularly problematic in NI worksites' and 'can

19 Case C-282/18, *YT, ZU, AW, BY, CX, DZ, EA, FB, GC, IE, JF, KG, LH, MI, NY, PL, HD, OK v Ministero dell'Istruzione, dell'Università e della Ricerca – MIUR* EU:C:2022:3, para 125.

heighten hostility, animosity and relational discord'.[20] The decision of the Court in *WABE*, therefore, needs to be treated with particular care. Whereas, on the facts of the case, the Court was protective of Muslim workers' right to display their religion without discrimination, an outright ban on the exclusion of specific symbols from the workplace and the strong proportionality scrutiny of limitations to the wearing of all symbols may have undesired effects in a region with a recent history of sectarian violence, where they may become a source of division or undetected discrimination by a dominant religious group.[21] Here, the recognition of the need of special consideration for Northern Ireland in the Directive's Preamble is significant: while the ruling's findings on the meaning of direct and indirect discrimination are authoritative, their application by courts in Northern Ireland can be nuanced, in line with the Preamble, to ensure that they serve the purposes of equality legislation, rather than undermining it.

Disability discrimination

Another annex 1 area where developments have taken place at the EU level since the entry into force of the Protocol is disability discrimination. In this field, which has already been identified by the European Commission as requiring further legislative action,[22] a series of recent cases have strengthened the position of disabled persons in relation to added requirements, conditions, or incentives for their integration in the workplace, and in relation to justifications for the exclusion of persons with disabilities from certain professional roles.

For example, in its judgment in *Szpital Kliniczny*,[23] the Court elaborated on the concept of disability within the Equality Directive. The claimant in this case challenged her employer's decision to grant a disability allowance to workers with a disability only on the condition that they submit their disability certificates after a specific date chosen by the employer, thus excluding from the allowance workers who had already submitted their certificates before that date.

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20 David Dickson and Owen Hargie, 'Sectarianism in the Northern Ireland workplace' (2006) 17 International Journal of Conflict Management 45, 52.

21 Ibid 64.

22 European Commission, *Report from the Commission to the European Parliament and the Council on the Application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive')* 19.03.2021 COM(2021) 139(final) 23–24.

23 Judgment of 27 January 2021 in Case C-16/19, *Szpital Kliniczny im dra J Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie* EU:C:2021:64.

The claimant questioned the compatibility of the employer's actions with the Equality Directive, but a key problem arose regarding the relevant comparators: since the employer was granting the relevant allowance to other employees with a disability, could it be said that they discriminated against the claimant or treated her less favourably than other employees *because* of her disability?

The Court noted that the prohibition of discrimination laid down in the Equality Directive is not 'limited only to differences in treatment between persons who have disabilities and persons who do not have disabilities'.[24] Rather, disability discrimination may comprise any form of 'less favourable treatment or particular disadvantage … experienced *as a result* of disability'.[25] This interpretation is important because it significantly strengthens the role of the Equality Directive in disability discrimination cases in the absence of further legislative intervention. First, it extends the relevant comparator for establishing disability discrimination. As a result of the ruling, discrimination is not confined to less favourable treatment of persons with a disability by reference to persons without a disability. Rather, it includes less favourable treatment *within* the protected class, too, namely any discrimination amongst persons with disabilities, provided the discrimination is closely linked to the disability. Secondly, the ruling not only recognises this broader pool of possible comparators for establishing discrimination, but also that any discrimination or less favourable treatment that is inextricably linked to the protected characteristic of disability – regardless of whether it operates within or outside the protected class – amounts to *direct* discrimination, and therefore cannot be justified.[26]

Similar findings were reached in the *Jurors*,[27] *Tartu Vangla*[28] and *HR Rail*[29] rulings, all of which concerned reliance on 'genuine occupational requirements' under article 4 of the Equality Directive as justifications for excluding disabled persons from certain professional roles. In all three cases, the Court found that absolute bars on employment were unjustifiable and required the adoption of reasonable accommodation measures, including adjustments and assignment to a different service, in line with article 5 of the Directive, read in the light of articles 21 and 26 of the Charter of Fundamental Rights of

24 Ibid para 29 (emphasis added).
25 Ibid (emphasis added).
26 Ibid paras 51–53.
27 Judgment of 21 October 2021 in Case C-824/19, *TC and UB v Komisia za zashtita ot diskriminatsia and VA (Jurors)* EU:C:2021:862.
28 Judgment of 15 July 2021 in Case C-795/19, *XX v Tartu Vangla* EU:C:2021:606.
29 Case C-485/20, *XXXX v HR Rail SA* EU:C:2022:85, para 49.

the European Union as well as article 5 of the UN Convention on the Rights of Persons with Disabilities (UNCRPD).[30]

These cases have immediate implications for the law in Northern Ireland and, more specifically, for the legal standard required to prove discrimination. There is an incompatibility between section 3(A)(5) of the Disability Discrimination Act 1995, which provides statutory protection against disability discrimination in Northern Ireland, and the Court's findings in *Szpital Kliniczny*, as section 3(A)(5) of the Act posits the absence of disability as the relevant comparator:

> A person directly discriminates against a disabled person if, on the ground of the disabled person's disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person.

This incompatibility clearly triggers the dynamic alignment obligation set out in article 2 of the Protocol, as it pertains to the interpretation of an annexed directive (2000/78/EC) and the legislation should therefore be amended. As shown by the *Szpital Kliniczny* ruling, Northern Ireland must ensure that the implementation and interpretation of disability discrimination does not render the concept of disability dependant on the *absence* of disability as the key comparator. Rather, the existence of any discrimination resulting from disability must be accommodated, even if this treatment is less favourable only by reference to other members of the protected class.

Beyond the abovementioned developments regarding the concept of disability discrimination, the case law also highlights a broader shift in the Court's understanding of the integration of persons with disabilities from what was once an aspirational protection[31] to what may now be seen as an enforceable element of EU equality law,[32] through the application of articles 21 and 26 of the EU Charter of Fundamental Rights and the international law obligation to comply with article 5

30 *Jurors* (n 27 above) para 63.

31 See eg judgment of 11 July 2006 in Case C-13/05, *Chacón Navas v Eurest Colectividades SA* EU:C:2006:456; judgment of 22 May 2014, C-356/12, *Glatzel v Freistaat Bayern* EU:C:2014:350; judgment of 18 December 2014 in Case C-354/13 *Kaltoft v Municipality of Billund* EU:C:2014:2463.

32 *Jurors* (n 27 above).

of the UNCRPD.[33] This view of disability is supported by concrete legislative initiatives. For example, the European Parliament has adopted a resolution calling for amendments to the Equality Directive to ensure the full integration of persons with disabilities and give further effect to the UNCRPD,[34] and the need for further legislative change has also been identified by the European Commission in its most recent report on Directive 2000/78/EC.[35]

This broader context not only confirms that there is a need to align with EU law on this issue because of the operation of the annex 1 Equality Directive, but also highlights the absence of legal certainty regarding the limits of the article 2 commitment. Rather than being neatly sectioned off from one another, the obligations of dynamic alignment on matters pertaining to the annex 1 directives and the broader obligation of non-diminution of standards in equality and human rights law relevant to the 1998 Agreement, more generally, often merge uncomfortably into one another. For example, identifying a change in the CJEU's position on the integration of persons with disabilities does not necessarily constitute a change to the terms or interpretation of the Equality Directive as such, but it is so closely related to it substantively that it would be overly formalistic not to view it as part of the dynamic alignment commitment. Similarly, it is unclear how dynamic alignment should be ensured in cases where an annexed directive is replaced with an instrument that is significantly broader in scope, either partially, eg through a much more expansive directive on the rights of persons with disabilities, or even fully, such as through

33 Articles 21 and 26 of the EU Charter of Fundamental Rights provide for the protection from discrimination on grounds of disability and for the integration of persons with disabilities, respectively. Article 5 of the UNCRPD goes further than these provisions, as it includes an explicit obligation of reasonable accommodation. It provides:

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

34 European Parliament Resolution of 10 March 2021 on the implementation of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation in light of the UNCRPD (2021) OJ C 474/04.

35 European Commission (n 22 above).

a new horizontal directive on equal treatment.[36] This lack of clarity in respect of the contours of the legal obligations set out in article 2 could create a significant wave of litigation challenging employment practices in cases where a narrow view of alignment has been taken.

Gender discrimination in respect of pensions and social security

In the last couple of years, there have been notable developments in CJEU case law on part-time work and other non-standard employment arrangements, particularly in relation to gender equality in the field of pension entitlements. Here, the Court has provided clarifications regarding the breadth and evidential requirements of the non-discrimination obligation enshrined in Directives 2006/54/EC and 79/7/EEC.

In *Fogasa*, the Court considered a question of indirect discrimination on grounds of gender in the context of part-time work. The case concerned a question for a preliminary ruling on the interpretation of articles 2(1) and 4 of Directive 2006/54. Spanish courts sought guidance on whether these provisions should be interpreted as precluding national legislation which, as regards the payment by the liable national institution of the wages and compensation that had not been paid to workers due to the insolvency of their employer, provided for a ceiling to that payment for full-time workers, which was reduced *pro rata temporis* for part-time workers. The reduction placed female workers at a particular disadvantage because the majority of part-time workers in the sector are female. On the facts, the Court decided that the *pro rata temporis* rule constituted an objective and coherently applied ground, which justified a proportionate reduction of the rights and employment conditions of a part-time worker.[37]

Similarly, in *INSS v BT*, the Court was asked to consider whether article 4(1) of Directive 79/7 precludes national legislation which makes a worker's right to an early retirement pension subject to the condition that this pension be at least as much as the minimum pension amount to which that worker would be entitled at the age of 65 years. It was argued that such legislation puts female workers at a particular disadvantage compared to male workers because workers in

36 Reform of the Equality Directive has been a long-standing proposal by the European Commission. See, to this effect, the progress report prepared by the Presidency of the Council, 'Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation' 2008/0140(CNS), 23 November 2021, 14046/21 7.

37 Case C-841/19 *JL v Fogasa* EU:C:2021:159, para 43. See also, to that effect, Case C-395/08 and C-396/08 *Bruno and Others* EU:C:2010:329, para 65; and Case C-476/12 *Österreichischer Gewerkschaftsbund* EU:C:2014:2332, para 20.

the affected fields (domestic work) are mostly female. The reason for this was that, in fields such as domestic work, the minimum pension entitlement at 65 years would often require a state supplement, as the level of contributions would not in itself have been sufficient. Thus, workers whose pensions at 65 years would have required a supplement were prevented from seeking early retirement, and these workers were predominantly women. The Court affirmed that if, as it appeared from the evidence (which it was ultimately for the national court to assess), the body of workers to whom a supplement had to be paid was systematically female, then a measure that prevented those workers from voluntarily seeking early retirement under the same conditions as other workers would be indirectly discriminatory.[38] It would therefore require objective justification.[39] In the same vein as in *Fogasa*, though, such a justification was available in this context: the protection of the financial viability of the state pension system.[40]

By contrast, in a second judgment against INSS with respect to a prohibition on the cumulation of invalidity pensions under the same scheme (when cumulation was permitted for pensions from different pension schemes), the Court found that the possibility of adverse impact on women was sufficient to render it incompatible with Directive 79/7. That legislation permitted a significantly higher proportion of male workers to cumulate pensions compared with the corresponding proportion of female workers and, unlike the cases mentioned above, it was not justified by objective factors.[41] Similarly, in *CJ v TGSS*, the Court found that an exclusion from unemployment benefits for domestic workers in a social security scheme could not be considered 'coherent' and objectively justified merely on the basis that the pattern of pay and contributions in domestic work was not comparable to that of salaried workers.[42] Considering that the majority of domestic workers were women, that exclusion violated Directive 79/7. The same principles (albeit with a different outcome) were set out in *EB v BVAEB*. In this somewhat unusual case, male pensioners earning high pensions challenged the lack of proportionate inflationary adjustment to their pensions by arguing that this affected males more than females. In this case, though, the Court confirmed that the measure was coherently applied and therefore did not violate EU equality law

38 Case C 843/19 *Instituto Nacional de la Seguridad Social (INSS) v BT* EU:C:2021:55, para 31.

39 Ibid para 32.

40 Ibid para 40.

41 Case C-625/20, *KM v Instituto Nacional de la Seguridad Social (INSS)* EU:C:2022:508, para 66.

42 C-389/20, *CJ v Tesorería General de la Seguridad Social (TGSS) (Chômage des employés de maison)* EU:C:2022:120, para 64.

(in this case Directive 2006/54). The case for the first time recognised explicitly that statistical data can be used to establish the existence of indirect discrimination, thus placing the onus on the state to explain any apparent discrepancies by showing that the relevant measure was objectively and coherently justified and applied.[43]

While these cases seemingly reach contradictory findings, three important themes can be identified, which are likely to influence discrimination and social security law in Northern Ireland in the future. First, it is clear that the Court remains willing to accept coherent 'social justice' justifications for the restriction of pension entitlements and other occupational benefits. Secondly, though, it appears to scrutinise more closely such justifications for objectivity and coherence and is prepared to accept *prima facie* evidence of discrimination, thus placing a greater burden on the state to justify its policies. In particular, EU law now recognises that relatively simple statistical evidence is sufficient to establish discrimination, thereby triggering the duty to justify it coherently and systematically. This could be an important development in the adjudication and settling of pension disputes, as it clarifies the ways in which the relevant comparators under section 7 of the Sex Discrimination (Northern Ireland) Order 1976 may be established.[44] Last but not least, the Court appears to be more willing to treat equality questions contextually. This is very strongly felt in *BVAEB*, albeit that it is still only implicit in that judgment: there, recognising perhaps that any indirect discriminatory impacts on male pensioners were the result of the long-standing inequality suffered by women in respect of pay, the Court appeared more willing to accept state justifications in the social interest than it was in the very similar case of *KM v INSS*. While this case law can, therefore, be criticised for inconsistency and further case law is needed before a move towards a contextual interpretation of sex discrimination can be authoritatively established, it appears that the CJEU is – at least to an extent – alive to the complexity that questions of past or compounded discrimination raise and is starting to develop its case law accordingly. Such a development could be important for Northern Ireland, where the equal pay framework has been criticised by the Committee on the Elimination of Discrimination against Women for lacking redress for multiple discrimination.[45]

43 Case C-405/20, *EB, JS, DP v Versicherungsanstalt öffentlich Bediensteter, Eisenbahnen und Bergbau (BVAEB)* EU:C:2021:159, paras 50–51.

44 1976 No 1042 (NI 15).

45 Committee on the Elimination of Discrimination against Women, 'Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland' (2013) CEDAW/C/GBR/CO/7*, paras 17–19.

The Rights of Migrants

Other case law developments which will be relevant to the obligation to keep pace with EU law under the Protocol include protections of the right to move and reside freely in other member states and the rights of migrants, more widely. These issues do not necessarily raise concerns from the perspective of annex 1, but they are central to the non-diminution commitment of article 2 more generally, as they relate to rights closely mapping onto the 1998 Agreement, including the right to establish one's residence freely, equal opportunity in all social and economic opportunity, and respect for linguistic diversity.

The more predictable implications for Northern Ireland in this field stem from classic EU law rights that may now be associated with the rights not to be discriminated against on grounds of nationality and to move freely, such as the need to recognise foreign certifications and qualifications. For example, in *Stolichna obshtina, rayon Pancharevo*,[46] the Court was asked to review the non-recognition in Bulgaria of a birth certificate issued in the UK, which listed two mothers as a child's parents (but did not indicate the biological mother). The CJEU found that this was incompatible with article 4(2) of the Treaty on European Union, articles 20 and 21 of the Treaty on the Functioning of the European Union and articles 7, 24 and 45 of the Charter of Fundamental Rights of the European Union, read in conjunction with article 4(3) of the Citizens' Rights Directive.[47] It can be expected that questions about the recognition of certification from EU member states will eventually arise in Northern Ireland, and it is important to highlight that such questions will have to be answered by reference to the EU standard of human rights protection enshrined in the Charter (albeit that it is no longer recognised as part of UK law) and not to national standards.

The broader implications of recent case law in the field of migration law are wider-ranging and could have significant budgetary ramifications. They include the need to ensure equality in respect of social security entitlements (again highlighting the difficulty of distinguishing annex 1 from non-annex 1 issues in practice), as well as obligations to improve the living conditions of migrants, so as to avoid destitution. The *VI* case illustrates this well. In this case, the

46 Judgment of 14 December 2021 in Case C-490/20, *Stolichna obshtina, rayon Pancharevo* EU:C:2021:1008.

47 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158/77.

CJEU ruled that the UK had wrongfully required EU citizens to obtain private comprehensive sickness insurance as part of its residence requirements under article 7(1)(b) of the Citizens' Rights Directive and had, by consequence, unjustifiably denied EU citizens who did not meet this condition associated tax deductions, such as Child Tax Credit, and social security benefits, such as Child Benefit.[48] The Court found that, given the nature of the NHS as a public health provider, 'the fact remains that, once a Union citizen is affiliated to such a public sickness insurance system in the host Member State, he or she has comprehensive sickness insurance within the meaning of Article 7(1)(b)'.[49] As a result of this ruling, it is evident that many EU citizens resident in the UK have been wrongfully obliged under the UK's Immigration Regulations 2006 to purchase private health insurance, potentially leading to claims for compensation.[50]

While the case raises difficult UK-wide legal questions about the application of CJEU case law under the Withdrawal Agreement and its relationship to now-obsolete remedies, such as state liability in damages, the challenges that the case poses are compounded in respect of Northern Ireland. As Frantziou and Murray have argued in more detail elsewhere, rights regarding healthcare and benefits, such as those at stake in *VI*, fall within the 1998 Agreement's concept of a right to equal opportunity in all social and economic activity.[51] Since the requirement of comprehensive sickness insurance prevented EU migrants from being able to rely on these benefits on an equal footing as others in the community, the clauses limiting claims in damages under schedule 1 of the European Union (Withdrawal) Act 2018 may be considered breaches of the Northern Ireland Protocol, as they result in a clear *remedial* diminution of rights falling within the scope of article 2 (since they preclude their reparation). Most importantly, perhaps, this case highlights the difficulty with viewing the non-diminution obligation as a static one: while article 2 only captures the interpretation of EU law that existed before the end of the transitional period, its application is prospective, putting Northern Ireland under an obligation to allow compensation claims for pre-transitional period failures to recognise EU citizens' entitlement to the relevant benefits, as well as providing settled and pre-settled EU citizens in Northern

48 Case C 247/20 *VI v Commissioners for Her Majesty's Revenue & Customs* EU:C:2022:177.

49 Ibid para 69.

50 See Sylvia de Mars, 'Economically inactive EU migrants and the NHS: unreasonable burdens without real links?' (2014) 39 European Law Review 770.

51 Eleni Frantziou and Colin Murray, 'C-247/20 VI v The Commissioners for Her Majesty's Revenue & Customs and the implications of preliminary references during the transitional period: a case study in legal complexity' (*European Law Blog* 17 March 2022).

Ireland and their family members (who have acquired that status on the basis of article 7(1)(b) of the Citizens' Rights Directive), with a right to public comprehensive healthcare and certain tax deductions and social security benefits on the same terms as UK and Irish citizens.[52]

VI is not an isolated case. In *Land Oberösterreich v KV*,[53] the Court assessed the compatibility with Directive 2004/38/EC and article 21 of the Charter of Fundamental Rights of a requirement that third-country nationals prove basic language proficiency as a condition of eligibility for housing benefit, when this condition did not apply to EU citizens. The Court found that mastery of a language does not always relate to ethnicity or race, so that arguments about race/ethnicity discrimination were unsuccessful. However, the case weaves important links between the protection of linguistic diversity under article 22 of the Charter (and also present in the 1998 Agreement), which is used as a supporting ground in the analysis, and the right to human dignity protected in article 1 of the Charter. While the former provision may not be strong enough under EU law to form the basis of discrimination claims in its own right, it is starting to be used as an important supplementary basis for assessing the compatibility of social policy with EU law.[54] Further, and perhaps more significantly, the Court suggests that the right to human dignity itself is capable of shaping the assessment of compatibility of domestic social policy with EU law. More specifically, the Court accepted in this case that housing benefit was likely to amount to a 'core benefit' within the meaning of article 11(4) of Directive 2003/109 concerning the status of third-country nationals who are long-term residents,[55] as housing benefit makes an essential contribution to the Directive's objective of social integration by ensuring a decent standard of living above the poverty line.[56] While the matter was ultimately left to domestic courts to decide in light of their assessment of the broader system of benefits offered to migrants, the Court agreed with the Advocate General that the disbursement of benefits enough to ensure a dignified standard of living, interpreted in line with article 1 of the Charter, was essential and any additional eligibility conditions based on language would therefore be incompatible with EU law.

Similarly, in its judgment on the Universal Credit benefit in *CG v The Department for Communities in Northern Ireland*, the Court

52 Ibid.

53 Judgment of 10 June 2021 in Case C-94/20, *Land Oberösterreich v KV* EU:C:2021:477.

54 Ibid para 49. See also Case C-64/20, *UH v An tAire Talmhaíochta, Bia agus Mara, Éire, An tArd-Aighne* EU:C:2021:207. See, particularly, para 81 of AG Bobek's Opinion in this case, delivered on 14 January 2021.

55 Judgment of 25 November 2003 (OJ 2004 L 16) 44.

56 *Land Oberösterreich* (n 53 above) para 42 (see also para 59 of the Opinion).

found that the Northern Ireland authorities were under an obligation to disburse Universal Credit to a Croatian national who had already been granted a temporary right to reside in the UK, despite the fact that they could have refused the application based on the absence of sufficient resources under article 7 of the Citizens' Rights Directive (Directive 2004/38/EC).[57] The Court held that the UK could not exclude from a subsistence benefit such as Universal Credit an EU citizen without sufficient resources to whom it had already granted a right to reside, solely on the basis of her nationality.[58] It was also essential to ensure, in line with the right to human dignity enshrined in article 1 of the Charter, that the individual could benefit from a dignified standard of living.[59] Whereas, on the facts of the case, it was not clear whether the decision to refuse Universal Credit exposed the EU citizen in question to a serious risk of breaches of the right to human dignity, the Court emphasised that 'where that citizen does not have any resources to provide for his or her own needs and those of his or her children and is isolated, [the] authorities must ensure that, in the event of a refusal to grant social assistance, that citizen may nevertheless live with his or her children in dignified conditions'.[60]

The principle of human dignity is thus acquiring an important role in structuring minimum welfare standards at the EU level for migrants who do not have sufficient resources. This is further supported by the *KS and MHK* ruling, where the Court associated the concept of human dignity with the possibility of access to the labour market for individuals who are residing in the member state in question, pending an application for asylum. During that time, it is essential that they are provided with the means of lawfully achieving a dignified living standard.[61] Thus, in what is a relatively novel use of dignity as an enforceable right within EU jurisprudence,[62] the CJEU has started cautiously to venture into questions of material injustice and redistribution. And while the implications of this case law may no longer bind other parts of the UK, they relate to the content of pre-transitional period obligations bearing close links with the equality protections of the 1998 Agreement, such that they need to be considered in future litigation in Northern Ireland.

57 Case C-709/20, *CG v The Department for Communities in Northern Ireland* ECLI:EU:C:2021:602, para 78.

58 Ibid para 81.

59 Ibid para 89.

60 Ibid para 93.

61 Judgment of 14 January 2021 in Joined Cases C-322/19 and C-385/19, *KS, MHK v The International Protection Appeals Tribunal, The Minister for Justice and Equality, Ireland, The Attorney General* (C-322/19) and *RAT, DS v Minister for Justice and Equality* (C-385/19), EU:C:2021:11, para 69.

62 See further Eleni Frantziou, 'The binding charter ten years on: more than a "mere entreaty"?' (2019) 38 Yearbook of European Law 73–118.

BROADER REFLECTIONS ON THE MEANING OF NON-DIMINUTION FROM A EUROPEAN UNION PERSPECTIVE

The above analysis has identified certain key recent developments in the case law of the CJEU. But are there any principles that cut across these materially distinct areas, which could influence the operation of the non-diminution obligation in a broader manner? In our view, these may be summarised as follows.

First, across each of the areas we have examined, we have seen a deepening commitment to strict proportionality scrutiny of justifications for indirect discrimination, combined in turn with a greater willingness to classify as unjustifiable direct discrimination differences in treatment that are not explicitly targeting particular groups, but which do so by necessary implication, as seen in respect of both religious symbols and discrimination against persons with disabilities. The evidential requirements for proving discrimination are also weakening, as shown in particular in the field of social security. These developments heighten the need for coherent justifications across Northern Ireland's equality law.

Secondly, the CJEU's approach may be considered to be more contextual and more clearly rights-based in recent years, having shown that minimum human rights standards can play a powerful role in situations where states may have otherwise acted justifiably under a plain reading of the secondary legislation. This is particularly evident as the Court begins to flesh out the implications of the commitment to human dignity under article 1 of the Charter of Fundamental Rights. Yet it is also underpinned by a conscious and public commitment on the part of the Court's President to allow judicial intervention in cases where the 'essence' of rights is compromised.[63] This is increasingly developing into an 'essence-of-rights test', which is additional to and separate from proportionality. It may be described as a threshold point for intervention in situations where the 'hard nucleus' of the right has been attacked.[64] There are now discernible examples of this approach in several areas of EU equality and human rights law, including discrimination law,[65] minimum employment standards,[66] and privacy.[67] It follows that, in addition to specific developments that will be identified from time to time, the non-diminution obligation entails,

63 Koen Lenaerts, 'Limits on limitations: the essence of fundamental rights in the EU' (2019) 20 German Law Journal 779.

64 Ibid 781.

65 Judgment of 25 May 2018 in Case C-414/16 *Vera Egenberger* EU:C:2018:257.

66 Joined Cases 569 & 570/16, *Bauer and Willmeroth* ECLI:EU:C:2018:871; Case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften v Shimizu* ECLI:EU:C:2018:874, Judgment of 6 November 2018.

67 Case C-362/14, *Schrems v Data Protection Commissioner* ECLI:EU:C:2015:650.

at least, a risk assessment based on the 'essence' of the rights protected in EU law across law and policy in Northern Ireland. While such an assessment is already in place for provisions of the Human Rights Act 1998 (HRA), non-diminution captures a broader set of rights, as reflected in the provisions of the EU Charter of Fundamental Rights that map onto the 1998 Agreement's guarantees relating to diversity, freedom of residence and equality of opportunity.

Last but certainly not least, the case law highlights a continuing emphasis on effective judicial protection as a core tenet of EU equality and human rights law. The clearest indication of this in recent case law stems again from discrimination law. In the *Braathens Regional Aviation* case, the Court considered the compatibility with the Race Equality Directive of a settlement under Swedish legislation that allowed an airline to pay compensation to a Chilean passenger whom it had subjected to additional controls. The passenger challenged this legislation on symbolic grounds because it did not stipulate the need for a formal acknowledgment that discrimination had occurred. The Court agreed, noting that articles 7(1) and (2) of the Race Equality Directive are specific expressions of article 47 of the Charter (the right to an effective remedy, which is also known in EU law as the general principle of effective judicial protection).[68] The Court went on to find that, while member states are free to choose the nature of national procedures and the corresponding remedies, they must ensure that these remedies result in 'real and effective judicial protection of the rights that are derived from [the Racial Equality Directive]'.[69]

Crucially, the Court's reasoning is not confined to this case, to this directive, or indeed to this area of law. Rather, similar findings have previously been made in diverse fields of EU human rights and equality law, such as in respect of the Equality Directive in *Egenberger*[70] and in rulings by the Court's Grand Chamber relating to judicial independence, such as the *Appointment of Judges* case.[71] Subsets of article 47 of the Charter, such as the rights to an effective remedy and to a fair trial, are routinely used as supplementary grounds in EU human rights litigation, such as to support free movement rights for dual citizens[72]

68 Case C-30/19 *Diskrimineringsombudsmannen v Braathens Regional Aviation AB* EU:C:2021:269, paras 33–34.

69 Ibid para 38.

70 Judgment of 25 May 2018 in *Vera Egenberger* (n 65 above).

71 Case C-824/18, *AB and Others v Krajowa Rada Sądownictwa and Others* EU:C:2021:153.

72 *Stolichna obshtina, rayon Pancharevo* (46 above).

and to challenge delays in a criminal trial process.[73] Thus, the CJEU has shown considerable willingness to affirm article 47, associating it with the 'full effectiveness' of EU law. As the Court put it in *Francovich*, this effectiveness 'would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible'.[74]

In addition to the specific issues of EU human rights and equality law identified above, therefore, as well as the emergence of stronger case law on proportionality and minimum 'essence' safeguards in various aspects of the case law in these fields, it is necessary to recognise and account for the fact that the EU interpretation of rights integrates procedural dimensions often treated separately in regional human rights litigation (eg in the European Convention on Human Rights system). This means that, beyond the alignment obligations stemming from the different areas of EU case law reviewed in this article, it is similarly essential to ensure that the application of UK-wide legislation, such as the Judicial Review and Courts Act 2022 and potential reform of the HRA,[75] does not compromise this specific protection for access to justice and effective judicial protection feeding into Northern Ireland law from article 2 of the Protocol.

CONCLUSION

This article has provided an analysis of areas in EU equality and human rights law where recent case law developments are likely to trigger the Protocol's commitments regarding non-diminution of human rights and equality standards. Overall, we have argued that the article 2 obligation operates in a complex manner, requiring careful consideration of the implications for Northern Ireland of ongoing case law developments by the CJEU in fields pertaining both to the six directives listed in annex 1, as well as to other fields that map onto the safeguards set out in Strand Three of the 1998 Agreement. Between 1 January 2021 and 1 September 2022, we identified relevant developments in four main substantive areas of EU case law (religion in the workplace; disability discrimination; discrimination in social security entitlements; and migration). We also found that there are cross-cutting themes in the interpretation of EU rights, which may

73 Case C-769/19 *Spetsializirana prokuratura (Vices de forme de l'acte d'accusation) v UC and TD* EU:C:2021:28. We note that, although the Court did not find a violation of the Charter in this case, it is crucial that the matter was considered admissible.

74 Case C-6/90 *Francovich and Bonifaci v Italy* EU:C:1991:428, para 33.

75 Judicial Review and Courts Act 2022 (UK), s 50.

become relevant in setting up overarching ways of responding to the need for alignment in the future, such as risk assessments based on EU human rights and a heightened focus on the procedural and remedial elements of those rights.

Is the task set out in article 2 feasible? While it is clear that the obligation of non-diminution is wide-ranging, Ireland's experience of adapting a comparable legal order to changes in these EU obligations, drawing in particular upon the 1998 Agreement's terms relating to cross-border rights and equality equivalence, shows that it is possible to deliver such a commitment successfully.[76] For this to happen, however, the breadth of the commitment needs to be appreciated and its execution needs to be based on regular review, in order to avoid gaps and unmanageable caseloads. Finally, there will also have to be an acceptance of potentially divergent interpretations of EU rights within the UK. Domestic case law, particularly through the case law of the UK Supreme Court, could effectively replicate and adapt some EU principles, such as access to court and proportionality, in its approach towards retained EU law. However, some of the suggestions made in the preceding section, such as the assessment of the 'essence' of human rights obligations, as well as the strong focus on remedies, could create incompatibilities with legislation on retained EU law in the rest of the UK, and are thus likely to require Northern Ireland to interpret certain rights and equality obligations differently, and potentially to legislate to account for this divergence, especially in respect of procedural and remedial aspects of EU human rights and equality law.

76 See Aoife O'Donoghue, 'Non-discrimination: article 2 in Context' in Federico Fabbrini (ed), *The Law and Politics of Brexit: volume IV The Protocol on Ireland/Northern Ireland* (Oxford University Press 2022) 89, 101.

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An analysis of the UK Government's defence of the Northern Ireland Protocol Bill under international law

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ABSTRACT

In the early summer of 2022, the United Kingdom (UK) Government introduced the Northern Ireland Protocol Bill in the House of Commons. This Bill establishes a regulatory framework that is intended to enable the UK Government to breach its obligations under the Withdrawal Agreement and, more specifically, the Ireland/Northern Ireland Protocol (the Protocol). The UK Government contends that the Bill can, however, be justified under international law by reference to both article 16 of the Protocol and the plea of necessity under customary international law. This article examines the extent to which the UK Government's position is valid.

Keywords: Ireland/Northern Ireland Protocol; Protocol Bill; Brexit; customary international law; necessity defence; safeguards.

INTRODUCTION

On 13 June 2022, the United Kingdom (UK) Government published the Northern Ireland Protocol Bill (the Bill).[1] If enacted, this piece of legislation would enable government ministers to override core components of the Ireland/Northern Ireland Protocol (the Protocol) annexed to the European Union (EU)–UK Withdrawal Agreement (Protocol).[2] As explained by Barnard, the Bill 'drives a coach and horses

* Senior Lecturer, Queen's University Belfast. Article updated and hyperlinks last accessed on 13 December 2022. Co-Investigator, Governance for 'a Place between': The Multilevel Dynamics of Implementing the Protocol on Bothenr Ireland Project, Economic and Social Research Council (ESRC) Grant: ES/V004646/1. Co-Investigator, Centre for Inclusive Trade Policy, ESRC Grant: ES/W002434/1.

1 Northern Ireland Protocol Bill, 13 June 2022.

2 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the Economic Atomic Energy Community, OJ L 29, 31.1.20207-187/7.

through the Northern Ireland Protocol'[3] and, in doing so, paves the way for the UK to circumvent legally binding international obligations.

The UK Government has not sought to contest the notion that the Bill is incompatible with its obligations under the Protocol. Instead, in a legal position published alongside the Bill (UK Legal Position),[4] it contends that non-compliance with the Protocol can be justified under international law. Two legal bases for the justification of the Bill are identified by the UK Government. Firstly, it suggests that the Bill can be justified under article 16 of the Protocol which allows the parties to adopt safeguard measures where the application of the Protocol 'leads to serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade'. Secondly, it is argued that the type of non-compliance with the Protocol envisaged under the Bill can be excused via the plea of necessity under customary international law.

The aim of this article is to examine the extent to which either article 16 of the Protocol or the doctrine of necessity offer a valid legal basis for the justification of the UK's actions as envisaged in the Bill. The next section explains the purpose and operation of the Protocol, the manner in which it has been contested since its entry into force and how the Bill seeks to upend many of its central features. The third and fourth sections respectively provide an overview of the rules governing the use of article 16 of the Protocol and the doctrine of necessity justifications and examines the UK Government's arguments in relation to both justifications. The final section explores the relationship between article 16 of the Protocol and the doctrine of defence and determines the extent to which the availability of the former either precludes or affects the use of the latter.

NORTHERN IRELAND PROTOCOL BILL

One of the central aims of the Protocol is the establishment of a regulatory framework to enable the avoidance of a hard border within the island of Ireland and, in particular, the application of border checks on goods traded between Northern Ireland (NI) and the Republic of Ireland (ROI).[5] This became a negotiating priority for the EU during the withdrawal negotiations when it became clear that the brand of Brexit being pursued by the UK Government – one which entailed the departure from both the EU customs union and internal market – would lead to checks on goods traded between the UK and the EU. The

3 Catherine Barnard, quoted in E Milligan, 'UK sparks EU ire with Bill to override parts of Brexit deal' (*Bloomberg UK* 13 June 2022).

4 Northern Ireland Protocol Bill: UK Government Legal Position (13 June 2022).

5 J Curtis, 'Insight: Brexit and the Northern Ireland border' (House of Commons Library 14 January 2020).

position taken by the ROI (and the EU) was that any checks carried out would be incompatible with commitments made under the 1998 Belfast/Good Friday Agreement.[6] This position was accepted by the UK and reflected in the final outcome of the negotiations.[7]

The Protocol achieves the goal of avoiding border checks within the island of Ireland by requiring the UK, in respect of NI, to comply with EU customs and internal market law relating to trade in goods.[8] It also means that the UK must give such rules the same legal effects as those they produce within the EU.[9] EU customs and internal market rules are thus covered by the doctrine of supremacy of EU law (EU law prevails over domestic law) and produce direct effect (individuals can invoke their rights derived from EU law directly before domestic courts under certain conditions). Furthermore, the Court of Justice of the European Union (CJEU) maintains its jurisdiction on matters relating to the application and interpretation of EU law under the Protocol.[10]

Removing and replacing this regulatory regime is very much the key aim of the Bill. It identifies a number of Protocol provisions, which it classifies as 'excluded provisions'. Excluded provisions include those Protocol provisions which require the UK, with respect to NI, to comply with EU rules on the movement of goods and customs,[11] the regulation of goods,[12] state aid[13] and be subject to the jurisdiction of the CJEU. Together, these provisions comprise significant components of the regulatory framework established by the Protocol with the aim of ensuring that NI can trade with the EU as if it was still part of the EU internal market. The Bill also allows UK ministers to exclude other provisions of the Protocol where this is justified in order to safeguard 'social or economic stability in Northern Ireland'[14] and 'the territorial or constitutional integrity of the United Kingdom'.[15]

More importantly, the Bill provides that the EU law covered in excluded provisions will not produce the same legal effect as that of EU law within the EU legal order. In other words, EU law to which NI is subject under articles 5–10 of the Protocol would no longer be covered by the principle of supremacy or produce direct effect in the UK. This then allows the Bill to achieve its main aim, which is to allow

6 R Montgomery, 'The Professional' (*Dublin Review of Books* November 2021).
7 Art 1.3 Protocol.
8 Arts 5, 7–10 Protocol.
9 Art 12(5) Protocol.
10 Art 12(4) Protocol.
11 S4 NI Protocol Bill.
12 Ibid s 5.
13 Ibid s 12.
14 Ibid s 15.
15 Ibid.

the UK Government to disapply and replace the regime covered by the excluded provisions.

Not only does the Bill include provisions that are in direct conflict with obligations under the EU–UK Withdrawal Agreement (eg the obligation to accord EU law the same legal affect as that accorded to EU law within the EU), it establishes a legal framework whose entire reason for being is to empower UK ministers to further deviate from legally binding commitments made under said agreement. The Bill also establishes an alternative trade regime which would replace that currently provided for under the Protocol. It provides, firstly, for the establishment of a green lane/red lane system where goods originating from Great Britain (GB) would be subject to EU customs checks or not depending on their final destination[16] and, secondly, a dual regulatory regime where NI economic operators can choose whether to place their goods in the NI market under either EU or UK rules.[17]

It is therefore indisputable that the Bill, as it currently stands, is incompatible with the UK's international obligations. In light of this, rather than adopting the indefensible stance that the Bill is compatible with the Withdrawal Agreement, the UK Legal Position argues that such non-compliance can, exceptionally, be justified under customary international law. It contends that there are circumstances that preclude the wrongfulness of its conduct[18] and, more specifically, it invokes the doctrine of necessity, arguing that the non-performance of some of its obligations is needed to 'alleviate the socio-political conditions, while continuing to support the Protocol's objective'.[19] The UK Legal Position also briefly refers to article 16 of the Protocol, but it is not entirely clear whether the UK intends to rely on this legal basis to justify the Bill. The UK Government explains that its 'assessment that the situation in Northern Ireland constitutes a state of necessity is without prejudice to the UK's right to take measures under Article 16 of the Protocol',[20] which suggests that, whilst the UK is currently seeking to justify the Bill by reference to the necessity defence alone, it has not discounted the possibility of making use of the Protocol's safeguards regime at some point in the future.

ARTICLE 16 OF THE PROTOCOL

Article 16 of the Protocol – often referred as the Protocol's safeguard clause – has become the most (in)famous provision in the Protocol. It

16 Ibid s 6.
17 Ibid s 7.
18 UK Legal Position (n 4 above).
19 Ibid.
20 Ibid.

first made its way into public consciousness a few weeks after the entry into force of the Protocol, after the leak of a draft proposal for a European Commission Proposal on Covid-19 vaccines, which stated that export restrictions on vaccines traded between the EU and the UK (including NI) could be justified under article 16 of the Protocol.[21] Although the European Commission quickly moved to dismiss the proposal and article 16 of the Protocol was never formally invoked, this incident had the effect of galvanising opposition to the continued application of the Protocol within the UK.[22] Since then, the UK has expressed its openness to invoking article 16 to justify the disapplication of certain elements of the Protocol when it published the NI Protocol Command Paper, which challenged the viability of the Protocol and threatened to disregard the UK's obligations unless such flaws were addressed.[23] More recently, there have been reports that the former UK Prime Minister, Liz Truss, considered invoking article 16 of the Protocol to justify the unilateral extension of the so-called 'grace periods' on certain imports (where the UK does not, contrary to Protocol requirements, apply border checks on certain goods imported from GB into NI).[24] The invocation of article 16 of the Protocol has become a regular feature of discussions surrounding the Protocol and its reference in relation to the Bill is yet another instalment in this long-running saga.

Article 16 of the Protocol can be subdivided into three components. Firstly, the substantive component in paragraph 1 outlines a number of requirements that must be met in order for a party to validly apply safeguard measures. This includes conditions relating to the external circumstances that must be present in order to invoke article 16 of the Protocol, as well as requirements relating to the application and scope of the safeguard measures. Secondly, the procedural component governed by paragraph 3 and annex 7 of the Protocol requires that any party wishing to apply safeguards must first notify its intention to do so to the other party and engage in consultations prior to the application of said safeguards. Thirdly, paragraph 2 governs the application of rebalancing measures. Even where safeguard measures are lawfully applied by one party, the other party has the right to adopt rebalancing measures as long as these are proportionate and limited to what is strictly necessary to address the imbalance caused by the safeguard measures.

21 European Commission Implementing Regulation on making the exportation of certain products subject to the production of an export authorization, 29 January 2020, SEC(2021) 71 final.

22 A McCormick, 'The Northern Ireland Protocol Bill' (IIEA July 2022) 10.

23 HM Government, 'Northern Ireland Protocol: The Way Forward' (Policy Paper July 2021).

24 P Foster, 'Biden warns Truss not to rip up Northern Ireland protocol' *Financial Times* (London 6 September 2022).

As things stand, the UK has not formally invoked article 16 of the Protocol to justify the Bill. Nor, as discussed above, has it signalled any clear intent to do so in the near future.[25] And, whilst the UK's Legal Position identifies article 16 of the Protocol as a legal basis for non-compliance with the Protocol obligations envisaged by the Bill, it makes no attempt to explain how such non-compliance can be justified under this provision. Instead, the focus is placed almost exclusively on justifying the Bill in light of the doctrine of necessity. The following discussion therefore focuses solely on the substantive requirements of article 16 of the Protocol and examines whether the Bill can be justified under this legal basis. To do so, the article will rely on the UK Legal Position's description of the rationale for the Bill, as well as past arguments made by the UK Government, notably in the NI Protocol Command Paper, to justify the use of article 16 of the Protocol.

Conditions for the invocation of safeguard measures

As outlined above, Protocol safeguards can be applied if the application of the Protocol 'leads to serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade'.[26] According to the UK Legal Position, those conditions were already met in 2021, 'as a result of both diversion of trade and serious societal and economic difficulties occasioned by the Protocol'.[27] It adds that the UK Government has now been forced to act given 'the strain the arrangements under the Protocol are placing on institutions in Northern Ireland, and more generally on socio-political conditions'[28] and explains that the Bill 'will alleviate the imbalance and socio-political tensions without causing further issues elsewhere in the Northern Ireland community, including by ensuring that East–West connections are restored, without diminishing existing North–South connections'.[29] The UK's position is that the non-compliance envisaged under the Bill is intended to address serious economic and societal difficulties as well as trade diversion which result from the application of the Protocol. However, none of these terms are defined in the Protocol.

The application of safeguards in case of economic difficulties is reminiscent of the World Trade Organization (WTO) safeguards regime whereby WTO members are allowed to reimpose barriers to trade – mostly tariffs – on a temporary basis where trade liberalisation commitments have caused harm to specifically identified domestic

25 UK Legal Position (n 4 above).
26 Art 16.1 Protocol.
27 UK Legal Position (n 4 above).
28 Ibid.
29 Ibid.

industries.[30] However, article 16 of the Protocol does not limit its scope to sectoral or even regional difficulties – it casts the net wider by seemingly encompassing any type of economic difficulty. This is certainly how the UK Government sees it. In the Command Paper, for example, it listed high consumer prices, increased operating costs faced by businesses and disruptions to food and parcel supplies as evidence of difficulties of an economic nature resulting from the application of the Protocol. The difficulties of a societal nature are potentially also very wide in their scope. In theory, it could cover any safeguard intended to address a non-economic public interest objective (eg public order, protection of human rights, the fight against crime and protection of cultural heritage). When referring to societal difficulties associated with the Protocol, the UK has mentioned instances of disorder, protests and surveys which it argues indicate the unease of the NI public with the Protocol and the general lack of support for the Protocol in the Unionist community.[31]

All of these difficulties must be 'serious' and 'likely to persist'. Of note is that article 16 of the Protocol does not envisage application of circumstances in cases where difficulties have not yet occurred – in order for a party to invoke the provision, it must be able to demonstrate that the difficulties resulting from the application of the Protocol have materialised. The requirement that these difficulties be 'serious' underlines the exceptional and grave nature of the circumstances that must be present in order to apply safeguard measures. A mere inconvenience would not suffice – the degree and extent of the difficulty should be such that the party is compelled to adopt safeguard measures. The requirement that difficulties are 'liable to persist' reinforces the notion that article 16 of the Protocol should only be invoked in truly exceptional circumstances. A temporary difficulty which is part and parcel of the adjustment process to a new regulatory regime cannot fall under the scope of the Protocol safeguards regime.[32] By contrast, a serious difficulty that will persist in the long term unless action is taken could justify the application of safeguards.

Finally, it must be shown that the application of the Protocol has *led* to these serious difficulties. In other words, any party wishing to apply safeguards must establish a causal link between the requirement to comply with Protocol obligations and the occurrence of the serious difficulties. Whilst the text of the Protocol does not exclude the

30 Article XIX of the General Agreement on Tariffs and Trade, 30 October 1947, 61 Stat A-11, 55 UNTS 194; A Sykes, *The WTO Agreement on Safeguards: A Commentary* (Oxford University Press 2001).

31 NI Protocol Command Paper, 14.

32 R Howse, 'Safeguards' in F Fabbrini (ed), *The Law and Politics of Brexit* vol IV (Oxford University Press 2021) 266.

possibility that other factors may have contributed to these serious difficulties, the use of the term 'leads to' suggests that the application of the Protocol must be, if not the primary cause, at the very least a substantial factor behind the emergence of these difficulties. Such an interpretation would be in line with the overarching rationale of the Protocol safeguard regime, which is to permit the parties to adopt restrictive measures only under exceptional and grave circumstances. A scenario where a party is able to adopt safeguards to address a difficulty that might only be marginally and incidentally related to the application to the Protocol would go against the purpose of the regime.

The ability of the factors identified by the UK to justify the Bill and to meet the abovementioned requirements can be reasonably questioned. The alleged serious economic difficulties concern trade disruptions that followed the Withdrawal Agreement's entry into force and the UK's exit from the EU internal market, and their consequences on certain economic sectors and consumer prices. These consequences were entirely predictable and, in fact, were indeed predicted outcomes of the Protocol and the decision to leave the EU internal market. On 14 December 2020, the NI Department for the Economy released a paper confirming that, even if the UK were to sign a trade agreement with the EU, the combination of the Protocol and the UK's exit from the EU internal market would lead to 'increased trade frictions'.[33] The economic modelling employed in the paper predicted a '5.6% reduction in imports from GB'[34] and 'a 5.3% reduction in exports to the rest of the world (including ROI & EU)'.[35] That the EU and the UK accepted the inevitability of these adverse consequences is evidenced by the fact that, prior to the entry into effect of the Protocol, the UK and the EU both agreed on a number of grace periods that would allow the UK not to apply full checks on certain GB goods imported into NI, as required under the Protocol. There was, then, an acceptance that trade disruptions would occur once the Protocol became operational, and that some level of economic adjustment would be required.[36] The requirements of seriousness and permanence would arguably preclude difficulties that were anticipated by the parties from the outset.[37]

33 NI Department for the Economy, Direct Economic Impact of the Northern Ireland Protocol on the NI Economy (NI Department for the Economy 14 December 2020) 4.

34 Ibid.

35 Ibid

36 See, for example, the multiple Unilateral Declarations of the UK and the EU concerning the application of grace periods where the UK states that the relevant such periods are intended to give NI economic operators time to adjust to new trading patterns: Post-Brexit Governance NI, 'Joint Committee: decisions and declarations'.

37 Howse (n 32 above) 265.

Equally, whilst an economic impact assessment of the Protocol is beyond the scope of this article (and the expertise of the author), it is worth noting that the economic effects of the Protocol should be interpreted in the wider context of the UK's decision to leave the EU. Recent studies indicate that, since the entry into effect of the Protocol, NI's economic performance has outperformed that of the rest of the UK. Reports published by both the National Institute for Economic and Social Research (NIESR) and the London School of Economics and the Resolution Foundation have shown that, in the absence of the Protocol, NI would have achieved much lower growth.[38] In other words, although it is clear that NI has experienced economic difficulties since the Protocol became operational, those difficulties are not as pronounced as those experienced by those parts of the UK that are not covered by the Protocol. Indeed, the economic modelling published by the NI Department for the Economy shows that NI is worse off now, but only relative to a counterfactual in which the UK had not left the EU internal market.[39] Viewed from this perspective, the economic difficulties experienced by NI seem as much a consequence of the UK's exit from the EU customs union and internal market as they are related to the Protocol itself.

With respect to the societal difficulties – focusing largely on the political and community tensions that have followed the Protocol – the discontent felt by some within the Unionist community in relation to the Protocol, and, in particular, border checks applied on GB goods entering NI, is real and should not be dismissed. It reflects fears about the long-term viability of NI's place in the UK and has affected the operation of the political institutions that underpin the Belfast/Good Friday Agreement, not least the decision of the leading Unionist party in NI to paralyse the region's executive and legislative institutions.[40] Nonetheless, it is by no means a given that these grievances are sufficient to invoke the application of Protocol safeguards. In the first instance, Unionist opposition to the Protocol was an anticipated consequence of the Protocol. As explained by Andrew McCormick, ex-Director General of International Relations for the Northern Ireland Executive Office, 'the implications [of the Protocol] were clear to unionist leaders, who opposed the Withdrawal Agreement in December 2019 and January 2020'.[41] The UK signed up to the Protocol knowing that it was opposed

38 NIESR, 'Economic outlook: powering down, not levelling up' series A no 1 (Winter 2022); S Dhingra, E Fry, S Hale and N Jia, 'The big Brexit: an assessment of the scale of change to come from Brexit' (The Resolution Foundation June 2022).

39 Howse (n 32 above) 268.

40 'Stormont deadlock: DUP "in denial about financial situation"' (*BBC News* 20 June 2022).

41 McCormick (n 22 above) 7.

by significant elements of Unionism in NI. Secondly, the view that Unionist opposition to the Protocol represents a societal difficulty justifying the non-application of Protocol obligations is problematic in that it ignores the views of other stakeholders in NI. Recent polling, for example, shows that the majority of NI voters support the Protocol, and that such support is steadily increasing with time.[42] Finally, it is also debatable whether the societal difficulties mentioned by the UK can be attributed to the Protocol. The Belfast/Good Friday Agreement was negotiated in a specific context, where the UK was an EU member state and checks on goods traded between the UK and the ROI were not required. The UK's decision to extricate itself from the EU customs territory and internal market disturbed the balance achieved in the Belfast/Good Friday Agreement by creating a situation where such checks would have to be reinstated. The Protocol is an attempt to mitigate some of the adverse effects of Brexit on the Good Friday/Belfast Agreement by ensuring that no checks are applied on goods traded within the island of Ireland. It is an imperfect response in that it does not solve the problem of checks on East–West trade, but the Protocol remains a symptom of difficulties which were caused by the UK's original decision to leave the EU's regulatory framework.

The UK Government has also argued that safeguard measures can be justified because the Protocol has led to 'trade diversion'. Trade diversion is defined as an 'increase in trade volume through the replacement of imports from third countries with low-priced imports from trading partners in the free-trade area'.[43] The decision to include trade diversion as a condition for the invocation of article 16 of the Protocol was odd, given that this is a phenomenon which can be expected to occur when countries sign trade agreements which are, by their very nature, intended to reduce trade barriers between the parties. Whilst the Protocol is not a 'standard' trade agreement in the sense that it is not primarily intended to promote trade liberalisation, it does present the central feature traditionally associated with trade agreements – that is, it requires the removal of barriers to trade between two customs territories: the UK (with respect to NI) and the EU. Establishing trade diversion as a ground for the application of safeguards creates a fairly unique situation in international treaty practice, where parties are allowed to adopt safeguard measures to address circumstances that are wholly unexceptional but also entirely predictable.

42 D Phinnemore, K Hayward and L Whitten, 'Testing the temperature 5: what do voters in Northern Ireland think about the Protocol on Ireland/Northern Ireland?' (Post-Brexit Governance NI June 2022).

43 W Koo, P Kennedy and A Skripnitchenko, 'Regional preferential trade agreements: trade creation and diversion effects' (2006) 28 Applied Economic Perspectives and Policy 410.

It is also worth noting that, whilst trade diversion is typically understood in reference to the effect of a trade agreement on trade with countries that are not part of the trade agreement, in the case of article 16 of the Protocol, it seems that the focus is on internal trade diversion. The requirement seems to have been included in the Protocol to allow the parties to react to situations where application of the Protocol has led to the diversion within the UK or the EU. This is certainly a view shared by the UK which has argued that the Protocol has led to GB trade with NI being diverted towards the EU.

However, demonstrating that trade diversion has occurred and that such diversion has been caused by the Protocol may not be straightforward. In the first instance, this is because determining the existence of trade diversion is an empirical question entailing the identification and assessment of a counterfactual, and the results will vary significantly depending on a variety of factors, such as the initial structure of the economic relationship, the sectors involved and the nature of the new economic relationship.[44] The magnitude of the diversionary effects will also vary depending on the choice of the statistical model employed by economists, meaning that different design choices can lead to radically different findings.[45] Assessing trade diversionary effects is therefore a highly complex process that requires much more than merely pointing to the correlation between the Protocol and an increase in trade between NI and the EU.

Establishing a causal link between the Protocol and subsequent changes in trade flow patterns also presents challenges. The UK's position is based on the claim that the Protocol has caused trade diversion by erecting barriers to trade between GB and NI. The counter-argument to this point is that the main purpose of the Protocol is to ensure that there are no barriers to trade within the island of Ireland and that barriers to trade between NI and GB were caused by the decision of the UK to leave the EU customs territory and diverge from EU internal market rules. It would be odd if the UK were to be allowed to adopt safeguard measures to address circumstances that are a direct consequence of its decision to place NI in a regulatory regime that is separate and distinct from the rest of the UK.

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44 L Sun and M Reed, 'Impacts of free trade agreements on agricultural trade creation and trade diversion' (2010) 92 American Journal of Agricultural Economics 1351, 1352–1353.

45 T Eicher, C Henn and C Papageorgiou, 'Trade creation and diversion revisited: accounting for model uncertainty and natural trading partner effects' (2012) 27(2) Journal of Applied Econometrics 296–321.

The Bill as a safeguard measure

If the conditions for the invocation of article 16.1 of the Protocol are met, a party 'may unilaterally take the appropriate safeguard measures'. However, as far as the NI Protocol Bill is concerned, the determination that conditions for the invocation of article 16 of the Protocol have been met is only one part of the equation. It must also be determined whether the measures envisaged under the Bill constitute safeguard measures under article 16 of the Protocol. The provision, however, does not define what constitutes a safeguard measure.

The first sentence of article 16.1 of the Protocol states that safeguard measures can be applied if 'the application of the Protocol leads' to materialisation of certain situations. One might assume that if a particular difficulty is being caused by compliance with a Protocol obligation, the remedy for that difficulty would entail the suspension of that obligation. This view of article 16 of the Protocol as an 'escape clause'[46] that allows the parties to derogate from Protocol obligations under certain conditions is endorsed by both parties. The leaked European Commission Proposal on export restrictions claimed that '[w]hilst quantitative restrictions on exports are prohibited between the Union and Northern Ireland, in accordance with Article 5(5) of the Protocol on Ireland/Northern Ireland, this is justified as a safeguard measure pursuant to Article 16 of that Protocol'.[47]

Similarly, the UK's legal position on the Bill makes it clear that article 16 of the Protocol is viewed as a legal basis that can justify the adoption of measures that would otherwise be deemed incompatible with the Protocol. It is also worth noting in this regard that, when the UK threatened to suspend its obligations under the Protocol by invoking article 16 of the Protocol, the EU sought to challenge this by claiming that the conditions for the invocation have not been met rather than arguing that the provision does not allow for the suspension of Protocol obligations.[48] This interpretation of article 16 of the Protocol is also corroborated by those who were involved in the negotiations of the agreement. For example, Anton Spisak, previously a UK civil servant involved in the negotiations of the Protocol, has explained how the safeguard clause allows either side to 'act unilaterally … by suspending certain obligations'[49] if certain circumstances arise. Similarly, Thomas Lieflander, a member of the European Commission team that negotiated

46 K Pelc, 'Seeking escape: the use of escape clauses in international trade agreements' (2009) 53(2) International Studies Quarterly 349–368.

47 European Commission (n 21 above) 3.

48 A Beesley, '"Serious consequences" for EU–UK relations if article 16 triggered – Šefcovic' *Irish Times* (Dublin 15 May 2021).

49 A Spisak, Twitter, 4 February 2021.

the Withdrawal Agreement, describes the safeguards clause as catering to situations that 'justify temporary and limited non-compliance'.[50]

This reading of article 16 of the Protocol as an escape clause is reinforced by an examination of its origin. Article 16 of the Protocol is largely inspired from the text of article 112 of the European Economic Area (EEA) Agreement.[51] The EEA encompasses the EU and three non-EU countries (Iceland, Liechtenstein and Norway) who are entitled to benefit from and participate in the EU internal market subject to their continued compliance with the EU internal market rules. The main purpose of article 112 EEA is to allow these countries to derogate from such rules under exceptional and limited circumstances.[52] The transposition of a legal mechanism akin to that of article 112 EEA in the Protocol makes sense given that, like the EEA, the Protocol requires the UK (a third country) to comply with a considerable portion of EU internal market rules. Viewed in this light, the Protocol safeguards regime provides a safety net for the parties, allowing them to exceptionally and temporarily suspend certain obligations where such obligations produce adverse effects.

This reading of the concept of safeguards is disputed. Howse has argued that there is no textual basis for an interpretation of article 16 of the Protocol which allows for the derogation of the Protocol obligations.[53] Instead, he claims that the Protocol safeguards regime is similar to the non-violation clause in the General Agreement on Tariffs and Trade (GATT), where GATT members may challenge measures adopted by other members which, whilst not constituting breaches of their obligations, have the effect of undermining reasonable expectations on trade liberalisation commitments.[54] Under this reading, the Protocol safeguards regime would not allow parties to suspend their obligations. It would only serve to justify Protocol-compatible measures that destabilise the operation of the Protocol. The underpinning rationale for this position is that one of the Protocol's central objectives is to protect the Belfast/Good Friday Agreement 'in all its dimensions'.[55] The safeguards regime, as read by Howse, acknowledges this wider context by providing that measures that disrupt the Belfast/Good Friday Agreement can only be justified

50 T Liefländer, 'Article 16' in T Lieflander, M Kellerbauer and E Dimitriu-Segnana (eds), *The UK–EU Withdrawal Agreement: A Commentary* (Oxford University Press 2021) 482.

51 Agreement on the European Economic Area, OJ No L 1, 3 January 1994, 3.

52 H H Frederiksen, 'Part VII: institutional provisions' in F Arnesen, H Haukeland Fredriksen, H P Gravaer, O Metsad and C Veder (eds), *Agreement on the European Economic Area: A Commentary* (Hart/Nomos 2018) 883.

53 Howse (n 32 above) 263–265.

54 Ibid 263.

55 Art 1.2 Protocol.

exceptionally and on a limited and temporary basis. While this interpretation of the concept of 'safeguard measures' under article 16 of the Protocol is compelling, there is no escaping the fact that it remains a minority position and certainly not one that, as discussed above, has been endorsed by the subsequent practice of the parties to the Withdrawal Agreement.

Although there may be some questions surrounding the nature of Protocol safeguards, article 16 of the Protocol imposes strict limits in terms of the scope and the duration of such measures. Where applied, safeguard measures must be 'restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation' and 'priority should be given to measures that least disturb the functioning of the Protocol'.[56] This language replicates verbatim that of article 112 EEA and, in doing so, establishes a proportionality requirement to ensure that safeguard measures do not unnecessarily inhibit the functioning of the Protocol. Moreover, the express stipulation that the safeguard measures be *strictly* necessary to remedy the situation, combined with the clarification that the measures should least disturb the operation of the Protocol, indicates that a least-restrictive means test should be applied when assessing the lawfulness of safeguards.[57] Such an interpretation of the strict necessity test has also been endorsed in relation to article 112 EEA[58] and would mean that, in order to meet the requirements of article 16 of the Protocol, a party would have to show that (i) the safeguard does contribute to remedying the situation it is purportedly seeking to address and (ii) it has applied the safeguard measure that least disturbs the operation of the Protocol. Instinctively, it is difficult to see how the Bill, in its current form, would pass any proportionality analysis, even less so one that comprises a strict necessity test. The Bill does not propose the adoption of isolated measures designed to remedy specific difficulties – rather, it seeks to permanently replace provisions that are central to the achievement of the Protocol's stated aims. Even if it is accepted that article 16 of the Protocol allows the parties to suspend their obligations, the regime is not intended to justify the wholesale substitution of the negotiated outcome with a completely new regulatory framework.

In some cases, the changes proposed by the Bill do not seem to be linked to any of the grounds identified in article 16 of the Protocol. For example, the Bill proposes the removal of the application of EU state aid rules and the CJEU's jurisdiction on EU law matters covered by the Protocol, when there is little to show that these requirements are intended to address, or would contribute to remedying, any economic

56 Art 16(1) Protocol.
57 Howse (n 32 above) 268.
58 Frederiksen (n 52 above) 887.

or societal difficulties. Although some politicians in Westminster have called for the removal of these Protocol obligations, they have not been criticised by industry and consumer groups in NI, nor have they featured prominently in the list of complaints voiced by Unionist opposition to the Protocol.[59]

It is also doubtful whether any adjudicatory body would come to the conclusion that the regulatory frameworks envisaged by the Bill constitute the least restrictive means to remedy the economic and societal difficulties which result from the checks on East–West trade in goods. On the contrary, there are other options that could be pursued by the UK, which are not only less restrictive but also address these concerns more efficiently. For example, whilst the green/red channel regime might potentially reduce some of the checks carried out on GB goods entering NI, it will not remove them altogether. By definition, the GB goods entering NI via the red channel will be subject to the full panoply of EU customs and regulatory compliance checks. An alternative solution, which has been mooted specifically in relation to sanitary and phytosanitary standards, would be to negotiate agreements on mutual recognition of rules with the EU.[60] This is an option that would obviate regulatory compliance checks in this area without the need to derogate from Protocol obligations. It is also an option that has been met with support from the NI electorate,[61] businesses[62] and the Unionist community.[63] However, the UK Government has continuously rejected this option because it would require the UK to maintain regulatory alignment with the EU. Far from being a proportionate and least restrictive response to a situation of necessity, the Bill seems to be the result of a political choice. By ignoring a solution to the difficulties presented by East–West trade barriers that is not only favoured by most stakeholders in NI but is also less restrictive and more efficient than what has been proposed in the Bill, the UK Government prioritised its political desire to maintain its ability to diverge from EU rules over the need to address the alleged serious economic and social difficulties resulting from the application of checks on East–West trade.

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59 McCormick (n 22 above) 19.

60 J Curtis and N Walker, 'Securing a Veterinary Agreement in the Northern Ireland Protocol' (House of Commons Library Briefings 13 December 2021).

61 K Hayward, D Phinnemore and L Whitten, 'Testing the temperature 3: what do voters in Northern Ireland think about the Protocol on Ireland/Northern Ireland?' (Post-Brexit Governance NI October 2021).

62 Northern Ireland Business Brexit Working Group – Written Evidence (FUI0025), 7 June 2022.

63 D Young, 'Swiss-style deal would only solve part of NI protocol problem – Arlene Foster' *Belfast Telegraph* (17 February 2021); P Foster and A Beesley, 'DUP's shifting stance on "Swiss-style" EU trade alignment revealed' *Financial Times* (London 22 February 2021).

DOCTRINE OF NECESSITY

The necessity defence as a circumstance precluding wrongfulness under customary international law

Under international law, state responsibility can be engaged for conduct that is wrongful where a breach of a binding international obligation has been committed. An internationally wrongful act consists of either a violation of an obligation derived from customary international law, or a general principle applicable within the international legal order or a treaty.[64] In either scenario, state responsibility is triggered if the wrongful act (or omission) is: (i) attributable to a state under international law; and (ii) inconsistent with an international obligation.[65]

However, the state can rely on defences or excuses to preclude the wrongfulness of the international act. Such circumstances precluding wrongfulness are derived from customary international law and codified in articles 20 to 25 of the International Law Commission's (ILC) Articles on State Responsibility (ASR).[66] They include, for example, the doctrines of self-defence, distress, *force majeure* and necessity. The latter is the main legal basis invoked by the UK Government to justify the Bill. The claim, articulated in the UK Legal Position, is that the Bill is 'lawful under international law' as the non-performance of the Protocol can be justified under the doctrine of necessity. Before undertaking a more detailed analysis of the defence of necessity, it is worth noting that the claim that the Bill would be lawful under international law, via the defence of necessity, is based on a misunderstanding of the nature of the effects of circumstances precluding wrongfulness.

A central conceptual feature governing the application of circumstances precluding wrongfulness is the distinction between primary and secondary rules. Primary rules concern substantive requirements under international law which regulate the conduct of states, whereas secondary rules relate to the conditions under which state responsibility can be engaged – that is the conditions under which a state can be 'considered responsible for wrongful actions or

64 International Law Commission, 'Draft articles on the responsibility of states for internationally wrongful acts with commentaries' UN GAOR 56th Session Supp 10, ch 4, UN Doc A/56/10 (2001), 55.

65 J Klabbers, *International Law* 2nd edn (Cambridge University Press 2017) 139–141.

66 Draft Articles on the Responsibility of States for Internationally Wrongful Acts, art 7, Report of the International Law Commission on the work of its fifty-third session, 19 UN GAOR Supp no 10, at 43, UN Doc A/56/10 (2001).

omissions and the legal consequences that flow therefrom'.[67] The distinction is key in understanding the effect of the invocation of circumstances precluding wrongfulness. They do not serve to render the non-performance of an obligation under international law lawful. They merely serve to exonerate the state invoking them from the liability that results from the non-performance of primary rules.[68] Consequently, even if it is determined that the defence of necessity can justify the Bill, it does not follow that the Bill is lawful under international law. The effect of a successful invocation of the defence of necessity is merely to excuse the non-performance of an international obligation so long as the conditions of necessity remain in place.[69]

Conditions for the invocation of the necessity defence

The existence of a ground of defence under international law has been contested in the past, but today it is generally recognised as customary international law by scholars[70] and the case law.[71] As explained in the ILC Commentaries, the necessity defence only applies to truly exceptional circumstances, namely in situations where there is 'a grave danger either to the essential interests of the State or of the international community as a whole'.[72] As such, the necessity defence can only be invoked under strict conditions.[73]

According to article 25 of the ASR, there are four substantive standards that must be met in order for the non-performance of an international obligation to be covered by the necessity defence. It must be shown that: (i) the non-performance is the only way to safeguard an essential interest;[74] (ii) the non-performance cannot seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole;[75] (iii) the international obligation does not preclude the use of the necessity defence;[76] and (iv) the state invoking necessity cannot have contributed

67 Ibid 59.

68 J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press 2002) (ILC Commentaries) 160.

69 *Case Concerning the Gabčikovo-Nagymaros Project* (Hungary/Slovakia) Judgment of the International Court of Justice, 25 September 1997, ICJ reports, 1997, 67, para 101. See M Agius, 'The invocation of necessity under international law' (2009) 56(2) Netherlands International Law Review 95–135, 113–119.

70 F V Garcia Amor, L Sohn and R R Baxter, *Recent Codification of the Law of State Responsibility for Injury to Aliens* (Oceana Publications 1974) 34–35.

71 See *Gabčíkovo-Nagymaros* (n 69 above) para 51.

72 ILC Commentaries (n 68 above) 80.

73 Ibid 83.

74 Art 21(1)(a) ASR.

75 Art 21(1)(b) ASR.

76 Art 21(2)(a) ASR.

to the situation of necessity.[77] While the Withdrawal Agreement does not expressly preclude the possibility of invoking the necessity defence, as set under point (iii), it may be that the very existence of a treaty-based exception such as article 16 of the Protocol affects the UK's ability to invoke the necessity defence. This issue will be addressed in the final section of this article. The proceeding discussion thus focuses on the conditions for invocation of the necessity defence set out under points (i), (ii) and (iv).

The plea of necessity may only be exercised to justify the non-performance of international obligations where such non-performance is needed to safeguard an essential interest. The ILC Commentaries on the ASR provide only minimal guidance as to what constitutes an essential interest beyond stating that such interests extend to 'interest of the State and its people as well as the international community and that the essential nature'[78] of an interest 'depends on all circumstances, and cannot be prejudged'.[79]

Avoiding a straitjacket definition of essential interests makes sense since such interests may vary significantly from one state to the next depending on historical, cultural and socio-economic circumstances. In practice, international tribunals have accepted that essential interests are not limited to cases where the existence of the state is threatened and have, instead, accepted that the necessity defence can be invoked to address a wide spectrum of interests, from national security to the functioning of public services, environmental concerns and economic interests.[80]

The vagueness and the largely subjective nature of the concept of essential interest[81] means that a great emphasis is typically placed on demonstrating the gravity and imminence of the peril threatening the interests.[82] The requirement of gravity, which is often equated to any peril that negatively affects the essential interest,[83] is used to ensure that minor harms caused to an essential interest are not covered by the necessity defence.[84] The requirement that the peril be imminent

77 Art 21(2)(b) ASR.

78 Ibid.

79 ILC Commentaries (n 68 above) 183.

80 R Ago, 'Addendum to the Eighth Report on State Responsibility – Document A/CN.4/318/ADD.5–7' (1980) II(1) Yearbook of the International Law Commission 14, para 2.

81 H Lauterpacht, *The Function of Law in the International Community* (Oxford University Press 1933) 196.

82 E Paddeu and M Waibel, 'Necessity 20 years on: the limits of article 25' (2022) International Centre for Settlement of Investment Disputes (ICSID) Review 12.

83 Agius (n 69 above) 103.

84 *Russian Indemnity (Russia v Turkey)* (1912) XI UNRIAA 421, translated in (1913) 7 AJIL 178, 196

is understood to mean that the peril must be more than a mere theoretical possibility. In *Gabčíkovo-Nagymaros*, the International Court of Justice (ICJ) clarified that, while the threat must be imminent in the sense of proximate,[85] a peril in the long term can also be deemed to be imminent if 'it is established, at the relevant point in time, that that realization of that peril, however far off it might be, is not thereby any less certain and inevitable'.[86] However, this does not mean that the invoking state must show that the peril will happen, rather that its occurrence is not merely plausible.[87]

The essential interests outlined in the UK Legal Position are the same as those referred to in the context of article 16 of the Protocol. The UK points to 'both diversion of trade and serious societal and economic difficulties occasioned by the Protocol'[88] and adds that 'the strain that the arrangements under the Protocol are placing on institutions in NI, and more generally on socio-political conditions, has reached the point where the Government has no other way of safeguarding the essential interests at stake than through the adoption of the legislative solution that is being proposed'.[89] Given the considerable breadth of the concept of essential interests, it seems likely that difficulties of a societal or economic nature would fall under the scope of necessity defence. Similarly, the requirement of 'imminence' should not pose any particular problems, as the difficulties that the UK Government has identified are plausible and, in some cases, have materialised in practice. Satisfying the requirement of 'gravity' might, however, prove more challenging in certain cases. The claims of serious societal difficulties relating to rising political and community tensions in NI can be qualified as grave. And as they touch on issues of security and identity, which are deeply connected to the notion of national sovereignty, adjudicators will likely extend a significant margin of discretion to the UK. With respect to the claims of serious economic difficulties, as examined above, it is doubtful whether they can be qualified as grave. Many of these difficulties were predicted at the time of the conclusion of the Withdrawal Agreement and accommodations were made for the most serious ones through the establishment of grace periods which, at the time of writing, are still in place. The economic difficulties that are currently being experienced, to the extent that they exist and can be linked to the Protocol, were predicted negative externalities associated with the Protocol. Moreover, to the extent that NI's economic performance, post-Protocol, is actually better than that

85 ILC Commentaries (n 68 above) para 15.
86 *Gabčíkovo-Nagymaros Project* (n 69 above) para 54.
87 Agius (n 69 above) 104.
88 UK Legal Position (n 4).
89 Ibid.

of the rest of the UK, it is difficult to argue that the difficulties are of a nature to truly imperil the UK's essential interests.

The unlawful act or omission must be the only way to ensure the goal of safeguarding the essential interest. This is one element where the ILC Commentaries provide ample guidance. The ILC clarifies that the necessity defence will not cover instances where there are 'other [lawful] means, even if they may be more costly or less convenient'.[90] The alternative means available could consist of unilateral actions, concerted action with other states or within the context of international organisations. A state must always opt for a lawful means to safeguard its interests if one is available. Moreover, the 'only way' must be understood as a requirement of necessity in the sense that unlawful conduct must be limited to what is strictly necessary to safeguard the essential interest. Any conduct that goes beyond what is necessary to achieve that goal cannot be justified under the necessity defence. The ILC Commentaries therefore endorse the application of a strict necessity test which, like the one found in article 16 of the Protocol, severely restricts the discretionary power of states.

This strict reading by the Commentaries of the 'only way' condition is reflected in state practice and case law.[91] Indeed, this is the requirement where the necessity defence often falls down, as it is extremely unlikely in any given circumstance that there would be only one course of action available to states to achieve a particular goal.[92] However, the stance that the necessity defence only applies in instances where absolutely no other lawful alternatives apply is one that is contested by scholars and in some recent international investment law case law. In most cases, states will have a variety of policy tools available to them and will, based on information available at the time, make an assessment as to which tool or package of tools they consider the most appropriate to realistically achieve their aims. With that in mind, some have suggested that states be given more leeway in their assessment of whether a course of action is the 'only way' to safeguard essential interests.[93] One suggestion, which has gained some traction in academic literature, is that courts should examine the extent to which the measure adopted by the state was the only feasible and effective means to safeguard the essential interest.[94] The test of

90 ILC Commentaries (n 68 above) 81.

91 Agius (n 69 above) 105; ILC Commentaries (n 68 above) 83.

92 Paddeu and Waibel (n 82 above) 15.

93 See R Manton, Necessity in International Law, Thesis submitted in partial fulfilment of the requirements for the degree of Doctor of Philosophy in Law (University of Oxford 2016 164–177).

94 A Reinisch, 'Necessity in international investment arbitration – an unnecessary split of opinions in Recent ICSID Cases' (2007) 8 Journal of World Investment and Trade 191, 20; Paddeu and Waibel (n 82 above) 15; Manton (n 92 above) 177.

feasibility would look at whether suggested alternative measures were options that could be realistically implemented at the time – rather than simply theoretical options that were not practically feasible. The test of effectiveness would then assess whether the lawful and feasible alternatives could achieve the objective of safeguarding the essential interest. Although this reading of the 'only way' test is less strict than that endorsed by the ILC Commentaries and the case law, it is one that the Bill will also struggle to pass. As discussed in the previous section above, many of the measures included in the Bill that would lead to non-compliance with the Protocol do not seem to be genuinely linked to the essential interests that are supposedly being safeguarded. Furthermore, where a link can be established between the non-compliant measures and the essential interests, there are alternative measures that are not only feasible but are also more effective means of safeguarding those interests. On this point it is relevant that the 'only way' requirement covers not just unilateral measures but also cooperative action with other states.[95] The UK's refusal to consider the conclusion of mutual recognition of rules arrangements on areas such as sanitary and phytosanitary standards – despite the overwhelming support for such an agreement in NI – the EU's willingness to do so and the potential for such arrangements to colossally reduce border checks, all indicate that the UK has ignored other means to safeguard its essential interests that were lawful, feasible and effective. Finally, article 16 of the Protocol could potentially provide the UK with a lawful means to derogate from its obligations under the Protocol. If the UK were to refuse to even test the applicability of article 16 of the Protocol in relation to the Bill it could not reasonably argue that it had explored all alternative lawful means.

A state invoking the necessity defence must show that the unlawful conduct does not seriously impair an essential interest of the other state or states concerned or of the international community as a whole. Both the ILC Commentaries and the majority of case law have read this requirement as entailing the balancing of the interests of the state invoking the defence against those of other states and the international community.[96] Under this interpretation, the invoking state must show that the essential interest justifying the unlawful conduct outweighs 'all other considerations, not merely from the point of view of the acting State, but on a reasonable assessment of competing interests'.[97] In other words, there is a balancing exercise to be carried out by the invoking state where it must weigh its essential interests, the urgency

95 ILC Commentaries (n 68 above) 83.

96 See R Sloane, 'On the use and abuse of necessity in the law of state responsibility' (2017) 106(3) American Journal of International Law 457–508, 459.

97 ILC Commentaries (n 68 above) 84.

of the situation and in the absence of action the harm that would be caused to those essential interests that would be damaged by the unlawful conduct.[98]

Despite its ubiquity in case law, the balancing inquiry has been subject to criticism. States invoking the necessity defence will, naturally, tend to value their interests above those of others.[99] Further, this reading places international judges in a very difficult position. In the absence of a hierarchy of values in international law, judges are being asked to make subjective assessments as to which values and interests should prevail over others.[100] In practice, international courts have tended not to struggle with the balancing inquiry, often siding with the invoking state. This is a natural consequence of the inherently exceptional circumstances under which a plea of necessity tends to be invoked.[101] It is, generally speaking, 'unlikely that a State against which necessity is invoked will also happen to face a comparably, let alone more, exceptional situation'.[102] Some have suggested that the necessity defence cannot be successfully invoked in cases where the competing essential interests are more or less equivalent in weight.[103] Under this reading, unlawful conduct may only be justified via the necessity defence if the weight and urgency of the essential interest of the invoking state is clearly more important than those of other states and the international community.[104]

The UK Legal Position goes no further than simply asserting that it has been 'assessed that the legislation will not seriously impair an essential interest of the state or states towards which the obligations exist or of the international community as a whole'. But a closer examination of the potential impact of the Bill suggests that the competing interests of the EU and the UK are fairly equivalent. For the UK, the Bill is intended to minimise border checks on the Irish Sea border and quell the socio-political tensions that have led to the collapse of NI's devolved institutions as a result of the withdrawal of support from the main Unionist party. But, if enacted, the Bill would create very similar problems for the EU (and the ROI), as it would force them to consider the establishment of border checks within the island of Ireland and potentially cause unrest within the Irish

98 R Boed, 'State of necessity as a justification for internationally wrongful conduct' (2000) 3(1) Yale Human Rights and Law Development Journal 18–19.

99 Manton (n 92 above) 78, 181.

100 Sloane (n 96 above) 458.

101 Manton (n 92 above) 184.

102 Ibid.

103 R Ago, 'Addendum – Eighth Report on State Responsibility' (29 February, 10 and 19 June 1980) UN Doc A/CN.4/318/Add.5-7 (1980) II(1) Yearbook of the International Law Commission 19.

104 Ibid. See also Paddeu and Waibel (n 82 above) 171–172.

nationalist community within the UK. It is not clear, then, that the essential interests being invoked by the UK clearly outweigh those of its partners. Rather, this seems to be a case of a party prioritising its interests over those of its counterparts.

Article 2(b) of the ASR articulates the non-contribution requirement, according to which necessity cannot be invoked where the state has contributed to the state of necessity. The ILC Commentaries add that the preclusion of the necessity defence concerns situations where the state's contribution to the situation of necessity is 'sufficiently substantial and not merely incidental or peripheral'.[105] Many of the points raised in relation to the causation requirement under article 16 of the Protocol can be applied to the non-contribution assessment. The UK contributed to the situation by leaving the EU customs territory and internal market and concluding the Protocol in full knowledge of both the disruptions it would cause to East–West trade and the political tensions it would create within NI. Its contribution to the materialisation of the circumstances that it argues have given rise to a state of necessity is a pivotal one rather than an incidental or peripheral one.

This element of the necessity analysis is, however, problematic. Firstly, this is because its basis as customary international law is contested. It was, until relatively recently, rarely mentioned in international rulings,[106] and its inclusion in the ASR was not unanimously approved by states.[107] Secondly, international courts have tended to address the question of a state's contribution in a superficial and inconsistent manner.[108] There is, as a result, a lack of clarity regarding the standards that should be employed to determine the degree of a state's contribution to the state of necessity that would preclude the plea of defence. For example, the concept of 'substantial contribution' is barely addressed in the case law. In *Gabčíkovo-Nagymaros*, the ICJ found that the invoking state had 'helped, by act or omission to bring about' the state of necessity, but failed to provide any detailed guidance as to what the term 'help' means in practice. In recent investment arbitration cases, tribunals have tended to simply note that the invoking state had contributed to the situation of necessity and assumed that such contribution was sufficiently substantial without further examination.[109] There is also uncertainty as to whether the requirement of non-contribution should be read as a purely causal requirement (where the mere existence of a contribution precludes

105 ILC Commentaries (n 68 above) 83.
106 Manton (n 92 above) 190.
107 Ibid; Paddeu and Waibel (n 82 above) 19.
108 Manton (n 92 above) 191–192.
109 Paddeu and Waibel (n 82 above) 20.

the defence) or one that requires some degree of fault on the part of the invoking state. Some commentators argue that a purely causal requirement would make it impossible, in most cases, to successfully make the plea of necessity as it is always possible to identify actions or omissions of the invoking state that have contributed to the state of necessity.[110] Such an outcome would lead to scenarios where states are precluded from adopting measures to safeguard essential interests purely because they may have at some point in the past taken a decision that contributed to their current predicament. A fault-based approach – where the invoking state must show that it did not contribute to the state of necessity either deliberately or through negligence – is seen as a preferable option, in that it protects the ability of states to address harmful situations whilst at the same time ensuring that states are not able to abuse the necessity defence by invoking it in relation to events which they caused either deliberately or by acting recklessly.[111] However, the case law on this remains mixed, with some rulings adopting the purely causal approach suggested by the text of the ASR and others adopting a fault-based conception.[112]

Irrespective of whether a causation or fault-based approach is applied, the UK would surely struggle to pass the non-contribution test because the difficulties that the Bill is seeking to address were identified and, with respect to economic difficulties, quantified before the Protocol was concluded. It cannot be overlooked that the UK knowingly contributed to the state of necessity which the UK claims currently exists by opting to leave the EU customs territory and internal market and signing the Protocol. The state of necessity to which the Bill is responding is one of the UK's own making. In addition to this, since the entry into force of the Protocol, the UK has actively pursued policies that have further exacerbated those difficulties. A clear example of this can be found in relation to the UK's external tariffs policy. Under article 5(1) of the Protocol, goods imported into NI from third countries – that is, non-EU countries – are subject to EU tariffs unless they are shown to be goods at risk of being subsequently moved on to the EU. Imported goods are deemed not at risk of being subsequently moved on to the EU where the UK tariffs applicable for those goods are equal or higher than the applicable EU tariffs or, where the NI importer is registered with the UK Trusted Trader Scheme, if the applicable UK tariff is not lower than the EU tariff by more than

110 Sloane (n 96 above) 475; Paddeu and Waibel (n 82 above) 179.
111 Manton (n 92 above) 195; Paddeu and Waibel (n 82 above) 180.
112 Paddeu and Waibel (n 82 above) 180.

3 per cent.[113] In short, the more UK tariffs are lowered relative to EU tariffs, the more it is likely that goods entering NI will be deemed at risk and subject to higher EU tariffs. This applies whether the third-country imports access NI directly from those third countries or via GB. Yet, since formally withdrawing from the EU, the UK has lowered its external tariffs applied on imported goods relative to those applied by the EU.[114] The increase in the disparity between UK and EU tariff rates inevitably leads to an increase in the number of goods imported into NI from GB that are considered to be at risk of being moved on to the EU. This, in turn, leads to increased barriers to trade on goods moving from GB into NI.[115] The same applies to the UK's plans to diverge from EU regulatory standards in areas such as food safety and environmental protection, which apply in the UK in respect of NI under the Protocol.[116] The further the UK moves away from EU law, the more onerous the border checks on GB goods entering NI become.[117] The UK has thus not only contributed to the GB–NI barriers to trade it argues have led to a situation of the state of necessity, but it has also knowingly pursued policies which have increased such barriers since the entry into force of the Protocol.

RELATIONSHIP BETWEEN THE DOCTRINE OF NECESSITY AND THE PROTOCOL SAFEGUARDS CLAUSE

In addition to the question of the validity of the invocation of both the Protocol safeguards clause and the necessity defence, one must also assess the relationship between these two legal mechanisms. In particular, it is necessary to determine the extent to which the availability of a treaty-based exception, such as article 16 of the Protocol, affects or even precludes the ability of the UK to invoke the necessity defence.

113 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] OJ L443/6.

114 L A Winters, M Gasiorek and J Magntorn Garrett, 'New tariff on the block: what is in the UK's global tariff?' (*UKTPO Blogs* 20 May 2020).

115 M Gasiorek and J Magntorn Garrett, 'Reflections on the UK global tariff: good in principle, but perhaps not for relations with the EU' (*UKTPO Blogs* 21 May 2022).

116 UK in A Changing Europe, 'UK–EU regulatory divergence tracker: fourth edition' (12 July 2022).

117 D Phinnemore, K Hayward, B Melo Araujo and L Whitten (Queen's University Belfast) – Written evidence to the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland (IIO0023), June 2021.

The first port of call in answering this question is article 55 of ASR which identifies the maxim of *lex specialis derogate legi generali* as the principle governing conflicts between ASR and treaty provisions.[118] It provides that the ASR does not apply 'where and to the extent that the conditions of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law'. The question then arises as to whether article 16 of the Protocol can act as *lex specialis* to the necessity defence. On this matter, Howse observed that the references to necessity and proportionality under article 16 of the Protocol 'might be interpreted as indicating that [the provision] is intended as *lex specialis* of the customary international law of state responsibility'.[119] Howse points to other striking overlaps between the two rules:

> The language of 'serious economic, societal or environmental difficulties' in Article 16 could be understood as a modification of the notion of 'essential interests' that are 'in grave or imminent peril'. The obligation to prioritize measures that 'will least disturb the function of this Protocol' might similarly be seen as reflecting (while modifying) the idea that necessity may not be invoked to 'seriously impair an essential' interest of the state to which the obligation is owed.[120]

For Howse, the operation of *lex specialis* would result in either article 16 of the Protocol 'modifying or completely displacing custom'[121] or the cumulative application of article 16 of the Protocol and the custom. In the latter case, any requirements imposed under the defence of necessity over and above those imposed under article 16 of the Protocol (eg non-contribution requirement) would also apply.[122]

The *lex specialis* rule, however, cannot govern the relationship between article 16 of the Protocol and the defence of necessity. When it comes to the issue of state responsibility, the distinction between primary rules and secondary rules is key to assessing the extent to which customary defences apply. This is because, despite the substantive overlap between the two mechanisms, the Protocol safeguards regime and the defence of necessity fulfil very different normative functions. Circumstances precluding wrongfulness under customary international law only apply, by definition, in cases where states have committed breaches of international law that are considered unlawful. But, as explained by Paddeu, an unlawful breach of international law requires

118 S Forlati, 'Reactions to non-performance of treaties in international law' (2012) Leiden Journal of International Law 25, 768.

119 Howse (n 32 above) 260.

120 Ibid 261.

121 Ibid.

122 Ibid 262.

more than just the determination that an act or omission attributed to a state is incompatible with an international obligation.[123] It must also be shown that 'no justifications are present before it can be concluded that a breach has occurred'.[124] The analytical structure which follows is that 'the treaty defence comprises a set of primary legal rules that must be adjudicated upon before possibly attracting the secondary, customary defence'.[125]

Viewed under this light, the necessity defence is very much a 'defence of last resort'.[126] The upshot is that, where treaty provisions include mechanisms that allow parties to deviate from their obligations in situations where the necessity to do so arises, such mechanisms must be applied 'prior to and independently'[127] of the doctrine of defence. In other words, where the necessity defence is available, it can only come into play after it is shown that non-performance cannot be justified by reference to a treaty-based exception.

This position has been articulated in a number of international investment law rulings.[128] In *Sempra v Argentina*, for example, an investment-arbitration ruling was annulled because it had chosen to apply the customary defence of necessity without ever examining the necessity exception that was available under the relevant bilateral investment treaty. The *ad hoc* committee annulling the decision reasoned as follows:

> Article 25 is concerned with the invocation by a State Party of necessity 'as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State.' Article 25 presupposes that an act has been committed that is incompatible with the State's international obligations and is therefore 'wrongful.' Article XI, on the other hand, provides that 'This Treaty shall not preclude' certain measures so that, where Article XI applies, the taking of such measures is not incompatible with the State's international obligations and is not therefore 'wrongful.' Article 25 and Article XI therefore deal with quite different situations. Article 25 cannot therefore be assumed

123 F Paddeu, 'Circumstances precluding wrongfulness in international law' in F Paddeu and L Bartels, *Exceptions in International Law* (Cambridge University Press 2020) 209.

124 Ibid.

125 J Kurtz, 'Adjudicating the exceptional at international investment law: security, public order and financial crisis' (2010) International and Comparative Law Quarterly 59, 344.

126 Paddeu and Waibel (n 82 above) 2.

127 Manton (n 92 above) 104.

128 For an excellent analysis of relevant case law, see A Gourgourinis, '*Lex specialis* in WTO and investment protection law' (2010) 53 German Yearbook of International Law 610–618.

> to 'define necessity and the conditions for its operation' for the purpose of interpreting Article XI, still less to do so as a mandatory norm of international law.[129]

The *ad hoc* committee finds then that the treaty exception and the customary defence, despite the substantive similarities, relate to 'quite different situations'. It is only where there is a determination that the conduct is not compatible with the treaty provision (primary obligation) that the tribunal can examine whether the responsibility of a state can be covered by a customary defence. Transposed to the context of the NI Protocol Bill, this would mean that the UK can only invoke the defence of necessity if the Bill cannot be justified under article 16 of the Protocol.

The above discussion highlights a problematic aspect of the UK's legal position on the Bill. The UK Government contends that Bill can be justified by reference to either (or both) article 16 of the Protocol and the defence of necessity. But it focuses its arguments almost exclusively on the latter. As the legal position states, the arguments based on the necessity defence are made without prejudice to the UK's right to take measures under article 16 of the Protocol.[130] In short, the UK Government does not exclude the possibility of invoking article 16 of the Protocol but is presently justifying the Bill by reference to the defence of necessity.

The extent to which it can validly invoke the defence of necessity nonetheless depends on the rules governing the defence's relationship with article 16 of the Protocol. If article 16 of the Protocol is deemed to act as *lex specialis* to the defence of necessity, the effect would be to either preclude the application of the latter or to only apply those aspects of the defence that go above and beyond the requirements of article 16 of the Protocol. In any event, the UK would be required to justify the Bill in light of the more stringent requirements of article 16 of the Protocol. If, as this article argues, the primary/secondary rules distinction applies, then the UK could rely on the defence of necessity if the Bill is shown to be an unlawful act under international law – that is, if the Bill violates the UK's obligations under the Withdrawal Agreement and cannot be justified under article 16 of the Protocol. Only in this scenario can the UK invoke the defence of necessity to preclude the wrongfulness of its conduct. The only way to get to the necessity defence is to accept the illegality of the conduct – something which the UK has so far rejected. Therefore article 16 of the Protocol cannot be sidestepped. Under the *lex specialis* rule, article 16 of the Protocol will be the main (possibly only) focus of any analysis, whereas

129 ICSID, *Sempra Energy International v Argentina*, Decision on Application for Annulment of 29 June 2010, ICSID Case No ARB/02/16, para 200.

130 UK Legal Position (n 4 above).

under primary/secondary rule analysis, the defence of necessity only comes into play after the justification of the Bill under article 16 of the Protocol has been dismissed.

CONCLUSION

Even if it is accepted that article 16 of the Protocol does allow for derogations to Protocol obligations, it seems inconceivable that the conditions for the invocation of the provision would be met. The Bill's aim is not to tweak and adjust problematic aspects of the Protocol. Its purpose is to entirely remove central components of the Protocol and replace them, unilaterally, with a completely different regulatory framework. Leaving aside the contentious questions of whether the external circumstances justifying the adoption of safeguards are present and whether these circumstances have been caused by the Protocol, it is difficult to imagine a world in which an adjudicator would come to the conclusion that the adoption of a measure which torpedoes the Protocol in almost its entirety is limited to what is strictly necessary. It is possible that the non-committal approach of the UK Legal Position towards article 16 of the Protocol reflects a recognition by the former's drafters of the inadequacy of the latter as a legal basis for the justification of the Bill.

Another issue that may have been weighing on the minds of the drafters of the UK Legal Position is whether existence of article 16 of the Protocol precluded the availability of the defence of necessity. Should the rule of *lex specialis* govern the relationship between article 16 of the Protocol and customary defence, the necessity defence – or most of it at least – would no longer be available to the UK. However, the *lex specialis* rule should not apply in relation to article 16 of the Protocol and the defence of necessity, as these two legal mechanisms have two very different normative functions. The Protocol safeguards regime allows parties to lawfully derogate from their obligations, whereas the defence of necessity has the effect of precluding the wrongfulness of unlawful conduct. The upshot is that the defence of necessity comes into play once it is shown that the Bill cannot be justified under article 16 of the Protocol.

It is, in any case, doubtful that the UK will fare significantly better by relying on the necessity defence. Whilst the *rationae materiae* scope of the defence is wider than that of the Protocol safeguards, some of the substantive standards that must be met for the former to be validly invoked are as restrictive as the latter – sometimes more so. That the Bill should fail to meet these conditions should not come as a surprise. The necessity defence can only excuse non-performance under exceptional circumstances and on a temporary basis. But many

of the circumstances identified by the UK to justify a state of necessity were predicted outcomes of the Protocol combined with the decision to leave the EU customs union and internal market. More than that, not only are these difficulties at least partly of the UK's own making; in some cases they have been exacerbated by the UK's actions since the entry into force of the Withdrawal Agreement. There is also nothing particularly limited or temporary about the Bill. It is sweeping in its scope. Many of the features of the Bill which would lead to a breach of the Protocol are only loosely, if at all, related to the circumstances identified in the UK Legal Position to justify non-performance. Where a link can be established, the Bill goes significantly beyond what is necessary to remedy the difficulties, often ignoring alternative measures that are not just less disruptive in terms of the operation of the Protocol but also, arguably, more effective means of achieving their supposed aims. Rather than limiting itself to the non-performance of obligations for a time-limited period, the Bill hollows out much of the Protocol and replaces it with an entirely different regulatory framework. Viewed in this light, the Bill seems like an attempt by the UK to unilaterally rewrite its international obligations under the pretext of necessity.

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Inevitably diminished: rights of frontier workers in Northern Ireland after Brexit

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ABSTRACT

Brexit has exposed a fundamental weakness in the free movement legal architecture of the European Union (EU): a failure to map out the complexities arising from different configurations of frontier work, despite its prevalence – almost one third of article 45 (of the Treaty on the Functioning of the EU) workers commute across borders. However, EU legislation on free movement is generally written with those in mind who work and reside in a member state not of their own nationality, with frontier work an afterthought. Brexit has exposed the problems of this approach, especially at the EU land border on the island of Ireland. This article argues that there are frontier-work-sized 'gaps' in the Citizens' Rights chapter of the United Kingdom/EU Withdrawal Agreement and weighs up the capacity of three potential sources to plug them: the Common Travel Area; the Trade and Cooperation Agreement; and the Protocol on Ireland/Northern Ireland. What emerges is a picture of a legislature at best ignoring or, at worst, not fully cognisant of the differences between and significance of various configurations of frontier work. The Withdrawal Agreement addresses some of these, but not others. Even those who successfully apply for and hold 'frontier worker' status post-Brexit risk losing or not being able to regain it – amounting to a 'diminution' of rights potentially contrary to the Protocol on Ireland/Northern Ireland's article 2. These problems not only indicate shortcomings in drafting but also flag up a lesson for the EU: it is time to address the taxonomy of frontier workers and protect their rights so they do not slip through the cracks of EU free movement law.

Keywords: Brexit; frontier workers; EU/UK Withdrawal Agreement; Northern Ireland; free movement of persons; social security coordination.

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INTRODUCTION

It has long been accepted that 'frontier work' – working in one European Union (EU) member state and living in a different EU member state – is one of the ways in which EU nationals can be 'working' under article 45 of the Treaty on the Functioning of the European Union (TFEU) as a matter of EU law. However, because of the nature of frontier work, in that it by-and-large only takes place close to the national borders between the member states, the number of frontier workers has always remained relatively small. According to recent EU Commission estimates, there are 2 million frontier workers in the EU,[1] out of a total of 6.27 million broader 'EU migrant workers' under article 45 TFEU.[2] Some borders between EU member states are more porous than others when it comes to frontier work; the Commission reports that in 2019 the largest flows of frontier workers were those residing in Poland and commuting to Germany to work (122,000 people) and those travelling between France and Luxembourg (93,000) and Hungary and Austria (56,000).[3] Regardless, the attention paid to this subset of workers in EU legislation, which generally addresses EU nationals who work where they *reside*, has been very limited.

Brexit has changed this: if attention had not been paid to frontier work, workers living in the Republic and working in Northern Ireland or working in the Republic and living in Northern Ireland would have fallen between the cracks of any general Brexit settlement. The Irish/Northern Irish border is the only land border between the United Kingdom (UK) and the EU, and cross-border work between Ireland and Northern Ireland is a relatively common occurrence. Estimates of between 18,000 and 29,000 people crossing the invisible border on the island of Ireland for work purposes were provided by Northern Ireland's Department for the Economy in 2018, as context for efforts to ensure that such cross-border work would remain possible even after the UK left the EU.[4]

Frontier workers are thus for the first time explicitly addressed in detail in a treaty co-produced by the EU, and the Withdrawal Agreement (WA) in its part 2 on Citizens' Rights both defines what frontier workers are and what rights they retain after Brexit. However, this is not enough to mitigate the effects of Brexit. This article explores what amounts to an irrevocable 'loss of status' and protection that these frontier workers are experiencing, even with all the law that is applicable to them *because* of Brexit and all the further provisions –

1 Eurostat, 'People on the move: statistics on mobility in Europe' (2020) ch 2.3.

2 EU Commission, 'Eurostat statistics explained: EU citizens living in another member state – statistical overview' (2021) Key Messages.

3 Eurostat (n 1 above).

4 Department for the Economy, 'Background Evidence on the Movement of People across the Northern Ireland – Ireland Border' (March 2018) s 2.9.

such as the arrangements under the Common Travel Area (CTA) – that remain applicable to many of them.

The article commences with an overview of what a 'frontier worker' is under EU law and then considers how part 2 of the WA addresses the specific rights they had under EU law and that are meant to be maintained. The following section will then examine how the UK has implemented the WA, as this has significant consequences for how many cross-border workers will actually be 'frontier workers' in Northern Ireland. After highlighting the shortcomings of the WA (as implemented), a final section of the article considers to what extent other international law compensates for these shortcomings, by assessing arrangements under the CTA, the Trade and Cooperation Agreement (TCA), and the Protocol on Ireland/Northern Ireland (the Protocol). The only possible conclusion to draw from the analysis is that a subset of frontier workers in Northern Ireland may continue to have the same level of protection when it comes to rights to work, rights to residency, and rights to employment-related benefits as they did when both Ireland and the UK were in the EU – but all the other possible frontier workers are at risk of losing status and rights. Their best hope is that article 2 of the Protocol means that those rights *have* to be preserved, regardless of what the WA and its implementing law generally say. The shortcomings of the WA and the Protocol when it comes to frontier workers reflect a perhaps well-meaning but ultimately inept attempt to redress in a short space of time decades of neglect when it comes to addressing frontier work seriously in EU legislation. While the effects are felt most immediately in the context of Northern Ireland, these experiences could be a useful prompt – in light of the frontier work hotspots elsewhere in the EU – to stop skating over the complexity of frontier workers' lives.

FRONTIER WORKERS IN EU LAW

The words 'frontier worker' do not appear in the EU treaties and never have, but, as early as 1968, EU secondary legislation confirmed that the EU concept of 'worker' encompasses 'permanent, seasonal and frontier workers'.[5] The case law of the Court of Justice of the European Union

5 Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (1968) OJ L257/2, preamble. This is reinforced by Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (1971) OJ L149/2, which declares itself to be addressing 'all the basic provisions for implementing [art 45 TFEU] for the benefit of workers, including frontier workers' in the preamble and defines 'frontier worker' in article 1(iii)(b). The first mention of 'frontier work' in CJEU case law is Case 13/64 *Van Dijk* ECLI:EU:C:1965:19.

(CJEU) has further established that frontier workers can operate in two different ways: they can stay living in their home member state while taking up employment in a host member state,[6] which is the 'standard' way of doing frontier work, but they can also stay working in their home member state and move their residence to a host member state as 'reverse' frontier workers.[7] Because of free movement of EU nationals, there is even a third 'route' to frontier work, which involves living in a host member state and working in a *separate* host member state; these frontier workers will be referred to as 'dual' frontier workers in this article.

In the context of the island of Ireland, this establishes the following six types of frontier workers as holding EU rights prior to Brexit:

- UK nationals living in the UK and working in the Republic of Ireland ('standard' frontier worker);
- Irish nationals living in Ireland and working in the UK ('standard' frontier worker);
- UK nationals living in Ireland and working in the UK ('reverse' frontier worker);
- Irish nationals living in the UK and working in the Republic of Ireland ('reverse' frontier worker);
- EU nationals (non-Irish) living in Ireland and working in the UK ('dual' frontier worker); and
- EU nationals (non-Irish) living in the UK and working in Ireland ('dual' frontier worker).

The pre-Brexit rights of all these frontier workers are found in article 45 TFEU and in the accompanying Regulation 492/2011 (the Workers Regulation), which sets out in detail what specific rights 'workers' hold in their state of employment. These include a broad range of equal treatment rights, in particular with regards to social and taxation advantages.[8]

Almost as important to frontier workers is Regulation 883/2004 (the Social Security Coordination Regulation), which makes clear as a matter of coordinated law between all the EU member states *which* state is responsible for paying for social security for a given EU national. In the case of a frontier worker, the majority of responsibility will fall on their state of employment, as it does for other EU workers – but exportability rules built into the Social Security Coordination Regulation acknowledge that some workers, or their families, do not

6 See, as an early example, Case C-57/96 *Meints* ECLI:EU:C:1997:564.

7 Case C-212/05 *Hartmann* ECLI:EU:C:2007:437; Case C-286/05 *Hendrix* ECLI:EU:C:2007:494.

8 Regulation (EU) 492/2011 on freedom of movement for workers within the Union (2011) OJ L 141/1, art 7.

live in the state of work, and they should be entitled to claim those benefits notwithstanding that they will not meet residence conditions that might normally attach to those benefits.[9] The regulation also contains a few specific references to frontier work, regarding the entitlement of family members to sickness benefits in kind in the states of residence and of work, for example.[10] Moreover, the CJEU has interpreted the coordination rules permitting member states to restrict special non-contributory benefits to the state of residence, as also requiring an exception for frontier workers, where the condition of residence would lead to 'an unacceptable degree of unfairness'.[11]

However, the Social Security Coordination Regulation actually defines what a 'frontier worker' is and, in doing so, extends access to medical care in the frontier worker's state of work only to very specific types of frontier workers. Article 1(f) of the Regulation reads:

> 'frontier worker' means any person pursuing an activity as an employed or self-employed person in a Member State and who resides in another Member State to *which he/she returns as a rule daily or at least once a week*. (emphasis added)

This addresses very regular frontier work only and excludes those who work in another member state *less regularly* – nor does it address those working in several member states or providing short-term services in another member state. Seasonal frontier work also appears precluded, despite preambles to earlier versions of the Workers Regulation making clear that the EU legislature intended for it to be covered. This definition may mean that the legislation was drafted to avoid too many workers being taken out of the realm of general article 45 worker status, and/or it could be an attempt to narrow down the scope for inter-member state disputes about competence. In any case, as the specific term of frontier worker is only invoked in the main text of the regulation to address sickness and maternity/paternity benefits of the frontier worker and their family members, it is not clear whether or to what extent this restrictive definition influences other areas of social security.[12]

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9 Regulation 883/2004/EC on the coordination of social security systems (2004) OJ L 166/1, art 7.

10 Regulation 883/2004, arts 17–18.

11 *Hendrix* (n 7 above), interpreting the rules in Regulation 1408/71, reproduced in the successor Regulation 883/2004.

12 Regulation 883/2004, arts 17 and 28.

Finally, further rights of some frontier workers are found in Directive 2004/38 (the Citizens Directive).[13] However, as the Citizens Directive is essentially about rights of *residence* outside the state of nationality, it does not obviously capture standard frontier workers who live in the state of nationality and commute to another state for work.[14] In contrast, *reverse* frontier workers, who move their state of residence but keep working in the state of nationality, and *dual* frontier workers, who are not nationals of either the state of residence or work, do fall within its scope and benefit from its provisions. This creates something of a paradox – that frontier workers engaging in cross-border economic activity, so exercising the ultimate market ideal, have fewer rights to, for example, non-EU family reunification, than cross-border residents whose economic activity is purely internal to the state of nationality.

The fact that standard frontier work does not trigger protection from the Citizens Directive might in practice not cause many residence problems for those with EU-national family members residing in the worker's state of nationality because they hold their own residency rights as self-sufficient EU nationals. However, this significantly reduces their entitlement to equal treatment: while it is in theory possible to be self-sufficient and still need temporary support, in practice, member states often take the view that a claim for benefits negates a claim of self-sufficiency and refuse such claims without much, if any, consideration.[15] As family members of workers, however, they would have been so entitled. This is not a purely academic point; with in-work poverty on the rise in the UK, it is entirely normal for families on low and middle incomes to rely on supplementary benefits.[16]

However, the lack of work-based protection from the Citizens Directive in a standard frontier worker's state of residence and nationality bites even harder where they have non-EU family members who wish to reside with them. While in principle, the 'scope' of EU

13 Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (hereafter CD).

14 See, very explicitly, art 3(1) CD: 'This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.'

15 See, *inter alia*, Charlotte O'Brien, '*Civis capitalist sum*: class as the new guiding principle of EU free movement rights' (2016) 53(4) Common Market Law Review 937; Victoria Hooton, 'A tale of two citizens: the *Brey-Dano* proportionality gap in UK courts and tribunals' (2021) 23(2) European Journal of Social Security 144.

16 See Clare McNeil et al, 'No longer "managing": the rise of working poverty and fixing Britain's broken social settlement' (IPPR May 2021).

law includes anything that involves cross-border movement – which frontier work does *for work* – the reality is that most secondary legislation on free movement of persons assumes that they also change residence.

Even case law like *Surinder Singh* only affects those EU nationals returning to their 'home' state after having worked and resided in a 'host State'.[17] The one possible analogy to standard frontier workers in the CJEU's case law is in *Carpenter*, where a service provider's non-EU spouse was found to have residency rights in the service provider's home state (the UK), because to deny those would make it significantly harder for him to provide services in other EU member states and would thus pose a restriction to that right.[18] However, such an analogy to *Carpenter* has never been attempted by a frontier worker residing in their state of nationality, either before the CJEU or (to the authors' knowledge) domestic courts, and so it is difficult to say whether such a standard frontier worker 'right to be joined by family in the home State' exists as a matter of EU law.

Reverse frontier workers have a step up on standard frontier workers in terms of Citizens Directive coverage. They themselves have rights of residence in the host member state, by virtue of the Citizens Directive, while commuting back to their 'home' state for work. They will be resident as self-sufficient EU nationals, but they *are* entitled to rights of family reunification. This is particularly crucial for those frontier workers residing in a member state different to their state of nationality with family members who are not themselves EU nationals, who in the absence of the Citizens Directive would struggle to join their EU frontier worker family member in the EU.[19]

However, as discussed above, the self-sufficient EU national reverse frontier worker must prove that they have sufficient resources to live in that member state so as not to burden it.[20] Full-time employed frontier workers will not struggle to meet either of those conditions, but those engaged in seasonal or part-time work might find that there are months where they cannot demonstrate having sufficient resources. And, as with the family members of standard frontier workers, they will struggle to claim subsistence benefits in the state of residence,

17 Case C-370/90 *Surinder Singh* ECLI:EU:C:1992:296.

18 Case C-60/00 *Carpenter* ECLI:EU:C:2002:434.

19 Contrast the open-ended 'right to join' reiterated by Case C-127/08 *Metock and others* ECLI:EU:C:2008:449, based on art 3(1) CD, with highly conditional immigration law in the member states.

20 Art 7(3) CD. They also require comprehensive sickness insurance (CSI); see on this Case C-247/20 *VI v Commissioner of HMRC* ECLI:EU:C:2022:177, rejecting the UK's overly restrictive approach to the concept of CSI, as discussed in Sylvia de Mars, 'A little less liable? Enforcing post-Brexit EU law in the UK' (forthcoming).

many of which count as 'social assistance' and so cannot be claimed and exported from the state of work.[21]

'Dual' frontier workers, meanwhile, are covered by the full range of rights in the Citizens Directive and treated purely as EU migrant workers, the most privileged category of EU citizen 'free movers'. Their entitlement to equal treatment is unconditional, and the EU's generous definition of 'work' means that even part-time work, providing it is more than 'marginal and ancillary', will qualify an EU national for those worker benefits.[22] These same generous rights are extended to frontier workers with regards to their *work* activity and the entitlement of their family members to, for example, housing and education. Coverage in the Citizens Directive also enables reverse and dual frontier workers to attain permanent residence in a host member state, granting them greater protection in the event of unemployment or inability to work, or if they are faced with deportation.[23]

Even dual frontier workers may face difficulties invoking the protections of the Citizens Directive, however, if their work is at all irregular. Nothing in the CJEU's case law or EU secondary law specifies how *regular* 'work' has to be – it merely notes that it cannot be 'marginal or ancillary'. The Citizens Directive's rules on retention of 'worker' status in the case of involuntary unemployment[24] require registration with an employment agency, like the UK's Jobcentres, and 'actively' looking for work to remain a 'worker' with all the associated rights. Someone habitually engaged in frontier work in a very seasonal sector, like agriculture, may not be doing this, in which case they will lose their 'worker' status and all associated entitlement to benefits after six months.

These may sound like they are 'niche' gaps in coverage, simply not caught by legislation intended to function in 28 different jurisdictions. However, especially in the context of the island of Ireland, they are crucial gaps that are likely to affect many frontier workers who are simply not *aware* of the ways they are expected to jump or bridge these gaps themselves – and consequently are not aware of these 'self-sufficiency' or 'registering as unemployed' requirements. This is because most frontier workers on the island of Ireland will also be covered by the arrangements of the CTA, whereby neither British nor Irish nationals face any restrictions on their right to reside and work in each other's countries. Given this absence of restrictions, and the consequent lack of checks on status, why would a seasonal British frontier worker register with an employment office in Ireland when they do not live there? And

21 Regulation 883/2004, art 3(5).
22 Case 53/81 *Levin* ECLI:EU:C:1982:105.
23 See arts 16 and 28 CD.
24 Art 7(3)(b)–(c) CD.

why would an Irish family resident in Northern Ireland bother with registering for residency rights under EU law when their rights to reside are not restricted by domestic law anyway?

The ease of movement and reciprocal rights established under the banner of the CTA were in practice heavily underpinned by EU law from the 1970s onwards – but most Irish and UK beneficiaries of those rights will have been able to live in relative ignorance of the role EU law played.[25] However, with the UK leaving the EU, the role of EU law and the gaps created by its absence became clear – and so the UK and the EU negotiated to preserve the rights of all those benefiting from EU law for the duration of their lives in either an EU member state or in the UK. In principle, the WA as concluded *should* consequently preserve all rights of EU national workers who work in the UK, or UK nationals who work in Ireland.

FRONTIER WORKERS IN THE WITHDRAWAL AGREEMENT

General rights

Despite the fact that the most frontier workers affected by Brexit will be working and living on opposite sides of the land border on the island of Ireland, their rights are set out in the body of the WA and not specifically addressed by the Protocol. Unlike most EU law on free movement of workers, however, which alludes to frontier workers primarily in non-binding preambles and limited provisions where they were due exceptional treatment, part 2 of the WA – which details EU citizens' rights maintained by the WA – centres them immediately.

Article 9(b) of the WA defines 'frontier workers':

> 'frontier workers' means Union citizens or United Kingdom nationals who pursue an economic activity in accordance with Article 45 or 49 TFEU in one or more States in which they do not reside …

The definition given by the WA is an appropriately broad one, encompassing both work and self-employment, with the key distinguishing factor between 'work' and 'frontier work' being 'residence' in another state. This should include standard, reverse and dual frontier workers travelling in both directions between Northern Ireland and Ireland. However, it seems clear within the space of a couple of provisions that any intention to capture workers and families falling within all six headline permutations of frontier worker was either quickly (but quietly)

25 Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick, 'Discussion paper on the Common Travel Area' (IHREC and NIHRC October 2018) (Discussion Paper).

abandoned, or simply undermined through drafting inconsistency and poor understanding of the complexities of frontier work.

Article 10 lists those falling in the personal scope of the Citizens Rights part of the Agreement:

> (a) Union citizens who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside there thereafter;
>
> (b) United Kingdom nationals who exercised their right to reside in a Member State in accordance with Union law before the end of the transition period and continue to reside there thereafter;
>
> (c) Union citizens who exercised their right as frontier workers in the United Kingdom in accordance with Union law before the end of the transition period and continue to do so thereafter;
>
> (d) United Kingdom nationals who exercised their right as frontier workers in one or more Member States in accordance with Union law before the end of the transition period and continue to do so.

Again, (c) and (d) appear to recreate the breadth of definition of article 9. However, on then outlining the family members who will have rights, article 10 WA adds:

> (e) family members of the persons referred to in points (a) to (d), provided that they fulfil one of the following conditions:
>
> (i) they *resided in the host State* in accordance with Union law before the end of the transition period and continue to reside there thereafter;
>
> (ii) they were directly related to a person referred to in points (a) to (d) and resided outside *the host State* before the end of the transition period ...
>
> (iii) they were born to, or legally adopted by, persons referred to in points (a) to (d) after the end of the transition period ...
>
> (f) family members who resided in the host State ... before the end of the transition period and continue to reside there thereafter. (emphasis added)

While the wording of 'family members of the persons referred to in points (a) to (d)' gives the impression that persons in (a) to (d) will have similar family reunification rights, the reliance in (e) and (f) upon the 'host state' excludes the family members of '*standard*' frontier workers. This is because at article 9(c), the WA defines 'host state' as:

- for EU nationals: the UK if they lived there in accordance with EU law prior to Brexit (and continue to live there afterwards);
- for UK nationals: the member state they lived in in accordance with EU law prior to Brexit (and continue to live there now).[26]

26 Art 9(c) WA.

Frontier workers explicitly do not *live* in the state they work in. Instead, they either live in their state of nationality and work elsewhere, or work in their state of nationality and live elsewhere – or they simply work and reside in two different member states, neither of which are their states of nationality. Family members of 'standard' frontier workers thus will never 'reside in the host State' for EU law purposes, as a 'standard' frontier worker will also not 'reside in the host State' – they will reside in their state of nationality.

Article 10(3) WA consequently does not seem to apply to those frontier workers' families any more than EU law did – but it *can* cover reverse or dual EU frontier workers and their families who are resident in the UK but work in a different member state, or reverse or dual non-Irish EU and UK national frontier workers and their families who are resident in Ireland but work in the UK. Given the specific context of frontier work *on* the island of Ireland, however, the fact that 'standard' frontier workers' families are not expressly included in these definitions means that the bulk of frontier workers on the island of Ireland will not see their family's residency rights addressed by the WA. This is of little concern for Irish and British nationals, who hold residency rights under the CTA's arrangements, as we will see below – but might be of significant consequence for non-British and non-Irish family members of both UK and EU national 'standard' frontier workers, who seem to fall outside of the scope of the WA just as they did EU law, bar an application for *Carpenter*-style EU law rights that has never been attempted.

While this replicates the paradox already in existence in EU law – of 'standard' frontier workers having fewer family reunification rights than reverse frontier workers – it is arguable that the consequences are more severe because routes to engage coverage of the Citizens Directive are no longer available, making their exclusion final.

In terms of residency rights for reverse frontier workers and their families, or dual frontier workers and their families, the WA, in articles 13–15, in effect copies over the relevant provisions of the Citizens Directive and so maintains the rights of exit and entry, rights of initial residence, and rights of permanent residence held by these frontier workers and their families prior to Brexit. Article 16 ensures that they can *attain* permanent residence even after Brexit. However, the WA version of 'permanent residence' is distinct from that in the Citizens Directive: article 15(3) makes clear that it can be lost after an absence from the host state of more than five consecutive years. The Citizens Directive also makes provision for 'quicker' permanent residence for 'onward' frontier workers, who live and work in an EU member state and, after three years, proceed to work in a *different* member state;[27]

27 Art 17(1)(c) CD.

this has not made its way into the WA, simply because UK nationals do not have 'onward' free movement rights under the WA, and any EU national starting to work in the UK after Brexit will likewise not be doing so as a matter of EU law.

Article 18 sets out the rules applicable to what in the UK has become the European Union Settlement Scheme (EUSS), permitting the UK and member states to adopt a residency registration process that results in part 2 rights being conferred to EU nationals by their host state. Again, this provision can only be relevant for reverse UK or dual EU national (including Irish) frontier workers and their families who are resident in the UK and work in the EU. As was the case under the Citizens Directive, frontier workers and their families resident in Northern Ireland could register for this new residency status (Settled Status) as self-sufficient under article 18(1)(k)(ii) WA. Article 23 of the WA copies over the Citizens Directive's article 24, granting equal treatment with host state nationals, in full – including its limitations on student maintenance grants and its extension of equal treatment to resident family members of EU nationals residing in the host state. This complements article 12 WA, which references article 18 TFEU's prohibition of discrimination based on nationality and applies it to both the host state and the state of work. Article 22, meanwhile, confirms that family members of EU nationals resident in the host state are entitled to take up work or become self-employed there as well.

A big change in terms of rights of reverse and dual frontier worker families resident in Northern Ireland but working elsewhere in the EU is found in article 20, which makes clear that, while decisions to deport such frontier workers and their families on the basis of conduct that took place before the end of transition were to be taken in line with the Citizens Directive, decisions on deportation as of 2022 are taken on the basis of national legislation.[28] This is a visible loss of protections, as national legislation does not offer the protections granted by the Citizen Directive and the CJEU's case law to those who hold long-term residency in the UK.[29]

Chapter 2 of part 2 discusses the specific rights of workers and self-employed persons. Article 24 WA here copies over the relevant rights

28 Art 20(2) WA. The UK deports on grounds known as 'conducive deportation', where they can be deported from the UK if that deportation is 'conducive to the public good' (Immigration Act 1971, s 3(5)).

29 See art 28 CD, which only permits deportation of permanently resident EU nationals on 'serious grounds' and only permits deportation of EU nationals resident in the host state for longer than 10 years on 'imperative grounds'. 'Imperative' grounds of public security include dealing in narcotics as part of organised crime (Case C-145/09 *Tsakouridis* ECLI:EU:C:2010:708) and terrorism (Case C-300/11 *ZZ* ECLI:EU:C:2013:363), as opposed to lesser criminal activity – which can be grounds for a 'conducive deportation'.

set out in Regulation 492/2011 and adds a specific proviso for frontier workers.[30] Article 24(3) WA creates an interesting new provision, not only allowing the retention of that worker status for frontier workers regardless of where they are resident, but also giving former frontier workers the right to enter and exit their state of former work in the way that other persons covered by the WA are entitled to enter the host state. This is a useful supplement to the Citizens Directive's content on retained worker status, compensating for the fact that EU nationals can always travel back and forth between member states, but EU nationals would not have those rights regarding the UK after Brexit.

The rights contents of part 2 is gatekept by article 26 WA, which enables the state of work to require a frontier worker to apply for a document certifying they are a frontier worker. This is a wholly new development, in that prior EU documentation as set out in the Citizens Directive was concerned only with *residency*, and the UK opted to not require EU nationals to apply for residency status documentation for the duration of its membership. As we will see, the UK has set up a frontier worker permit scheme (FWP scheme) in line with article 26 WA, meaning that accessing frontier worker rights under the WA requires formal registration.

Title IV of part II contains other provisions that are of relevance to frontier workers. Article 37 WA obliges the member states and the UK to 'disseminate information concerning the rights and obligations of persons covered' by part 2, which is of relevance when we consider the UK approach taken to 'informing' Irish nationals about the post-Brexit registration schemes. Article 38(1) enables the UK and the member states (as either host state or state of work) to uphold 'more favourable provisions' than the baseline required by part II; and article 38(2) specifies that the article 12 non-discrimination commitment and article 23's equal treatment commitment operate 'without prejudice' to the CTA and more favourable treatment stemming from its operation. This latter article echoes the CTA exemption that was contained in Protocol 20 of the EU treaties when the UK was a member state and so represents more continuity for relevant frontier workers.

Finally, article 39 makes clear that those covered by part II shall enjoy its rights for their lifetime, unless they cease to meet the conditions set out in part II. This provision, too, looks promising – until we consider just what 'ceasing to meet the conditions' amounts to, and how easy it is to *lose* frontier worker status under the WA.

Social security coordination

Title III of part 2 addresses social security coordination under the WA. Article 30(1) makes clear that it covers any EU national (and

30 Art 24(3) WA.

their family) subject to UK social security legislation, as well as any UK national (and their family) subject to an EU member state's social security legislation at the end of the transition period. Article 30(2) makes clear that those covered will *remain* covered as long as they continue *without interruption* to fall within the scope of article 30(1), and article 30(3) adds to this that title III will also apply to those who are not in the specific residency or 'subject to legislation' situation but otherwise fall within the scope of part 2, as long as they continue to have a right to reside in a relevant host state, or continue to hold the right to work in their state of work. These provisions, taken together, mean that all configurations of frontier workers involving the UK will be covered by title III of the WA.

Title III's substantive content is composed of references to Regulation 883/2004 and its implementing regulation (Regulation 987/2009). Article 31 WA makes explicit that definitions of terms in Regulation 883/2004 will apply across the title, meaning that it effectively copies over and applies the regulation in full – including the restriction on the family members of frontier workers accessing sickness benefits in the state of work.

One further provision of interest to all workers, including frontier workers, is article 36, which makes clear that title III of part 2 is 'living' legislation, rather than 'static' in the way that earlier titles of part 2 are. What this means is that where Regulation 883/2004 and its implementing regulation are amended or replaced at any point in the future, these *new* social security coordinating regulations will apply to all EU and UK nationals covered by the current ones. Where there are significant changes to the benefits granted, this is a matter of discussion in the Joint Committee – but, in any event, the content of title III ensures that those covered by it will be entitled to the same social security *access* as they were when the UK was an EU member state.

Summary

Frontier workers were expressly considered in the WA, which is in principle a positive, but there are distinct gaps in that consideration. Residency rights for families of frontier workers who are living in the state of that frontier worker's nationality remain left unaddressed, and indeed, the concept of 'residence' as applicable to frontier workers has been left ambiguous by the WA. This would be less concerning if the only other explicit EU legislative provision on frontier work prior to Brexit did not define the concept of 'residency' in the frontier worker context as requiring almost *daily* commuting back to that state of residence, which consequently excludes a wide range of semi-irregular and irregular frontier work from the definition.

Other 'losses' visible in the WA include the rights to residency protections, which under the Citizens Directive grow stronger the longer someone resides in their host state – something of specific relevance to dual frontier workers and reverse frontier workers; and the ability to engage in 'onward' frontier working is lost to UK nationals, as is the ability to attain accelerated permanent residency as an 'onward' frontier worker.

However, most of the rights set out in the variety of regulations and directives addressing free movement of workers are preserved by the WA – and so insofar as frontier workers *can* be treated like other workers, they will retain those rights. Importantly, they can also themselves enforce those rights: the WA's content is directly effective where it meets the EU law conditions for direct effect, as the rights set out in part 2 do;[31] this means that those covered by part 2 can go to UK courts and seek redress by relying on the WA's content itself if the UK fails to respect the rights it is meant to preserve under part 2.[32] Frontier workers are thus fairly well protected by the terms of part 2 of the WA, provided they registered as frontier workers before the end of the UK's transition period.

FRONTIER WORKERS UNDER UK LAW IMPLEMENTING THE WITHDRAWAL AGREEMENT

Much of how the WA protects frontier workers on the island of Ireland after Brexit depends on how the UK (given that these are not generally devolved powers) has implemented the WA. The previous section highlighted that there are two specific types of rights envisioned by the UK and the EU as persisting after Brexit under the WA:

- general *residency* rights, which in the UK are granted by the EUSS – and are relevant for reverse and dual frontier workers and their families, as well as non-EU family members of standard frontier workers, provided they joined their EU national frontier worker in the UK under EU law; and
- frontier worker rights, which in the UK are granted by the FWP Scheme.

The EUSS was established and started accepting applications *prior* to Brexit and so will be considered separately from the UK's implementation

31 For a detailed discussion of potential shortcomings of this direct effect, see Stijn Smismans, 'EU citizens' rights post Brexit: why direct effect beyond the EU is not enough' (2018) 14(3) European Constitutional Law Review 443; the point made in this article is simply that it is not a *de jure* diminution from the enforcement rights existing under EU law.

32 Art 4(1) WA.

of the WA, as found in the European Union (Withdrawal Agreement) Act 2020 (the 2020 Act) and the secondary legislation adopted under it.

The European Union Settlement Scheme: residency rights in Northern Ireland

The EUSS is the UK implementation of article 18 WA, which sets out the conditions under which both the EU member states and the UK can set up 'residency registration' schemes for relevant beneficiaries of part 2 of the WA. In the case of the UK, the EUSS enables EU nationals who were resident in the UK on 31 December 2020 to register as such right-holders. The details of how the EUSS works is set out in Appendix EU to the Immigration Rules.[33]

As the EUSS is about *residence in the UK*, then for our purposes, it is only of relevance to frontier workers and their families that are resident in Northern Ireland (and so the frontier worker is employed in Ireland). What is of particular interest is that Appendix EU creates two specific categories of applicants under the EUSS in light of Northern Ireland. First, there is the 'relevant person of Northern Ireland':

> a person who:
>
> (a) is:
>
> (i) a British citizen; or
>
> (ii) an Irish citizen; or
>
> (iii) a British citizen and an Irish citizen; and
>
> (b) was born in Northern Ireland and, at the time of the person's birth, at least one of their parents was:
>
> (i) a British citizen; or
>
> (ii) an Irish citizen; or
>
> (iii) a British citizen and an Irish citizen; or
>
> (iv) otherwise entitled to reside in Northern Ireland without any restriction on their period of residence[34]

This subset of those born in Northern Ireland are treated as European Economic Area (EEA) citizens, and so their family members can 'join' them under the EUSS scheme. The category of 'relevant person of Northern Ireland' thus addresses a shortcoming of both the Citizens Directive and the WA: these particular residents of Northern Ireland can sponsor family members to join them in their state of nationality; it is thus a rare prohibition of '"reverse" discrimination', so allowing

33 The Immigration Rules are treated as secondary legislation and are where all applicable 'law' on the details of immigration-related decisions are kept for all visa and status categories.

34 Appendix EU, annex 1.

own state nationals (in Northern Ireland) similar family reunification rights to EEA migrants.

A further category of applicants created by Appendix EU is the 'specified relevant person of Northern Ireland', which *can* only be held by those who meet the conditions of 'relevant person of Northern Ireland' but do not hold exclusively Irish citizenship. These 'specified' applicants were given additional rights under the EUSS on 1 July 2021 to sponsor non-EU dependent relatives for EUSS residency rights even when they themselves were not in the UK at the time of Brexit for compelling reasons. There are thus a range of 'EU-law-based' immigration options available to family members of certain British and/or Irish nationals from Northern Ireland that compensate for what the Citizens Directive and the WA exclude because of limits to the scope of EU law – which was very good news for frontier workers and their families if they *were aware* of this prior to the final application deadline to the EUSS scheme, which was 1 July 2021. There was, in other words, a window of time in which a British and/or Irish frontier worker could sponsor their family for residency rights *in their home state of Northern Ireland* – but that window has now expired.

Appendix EU further discusses family members of frontier workers generally, and notes that they count as EEA citizens eligible for EUSS registration where the frontier worker holds a frontier worker permit under UK law. This is curious, however, because any EU national frontier worker holding a frontier worker permit in UK law cannot themselves be resident in the UK (or they would simply be a worker). It is difficult to see what the purpose of this definition is: it seems to enable families of frontier workers to hold residency rights in the UK, but only if they do not live with the frontier workers themselves – or the frontier worker would not be a frontier worker. If nobody examines this contradiction too closely, however, it gives yet another group of family members of frontier workers residency rights in the UK after Brexit.

What we see in the EUSS is consequently an implementation of the WA's core requirements for citizens' rights, but also additional rights for those born in Northern Ireland to British and/or Irish parents. Without needing to, it treats them as EEA nationals, so as to maximise the benefits they gain from the WA *without* needing them to leave their home state at all.

The EU (Withdrawal Agreement) Act 2020: other rights involving frontier workers

The WA is implemented in the UK by the 2020 Act. As with previously directly applicable EU law, the primary mechanism for giving effect to the WA's content is via a 'reference' clause, set out in article 5 of the

2020 Act. It makes, 'without further enactment', the contents of the WA a part of UK domestic law, to be 'enforced, allowed and followed accordingly'.

Likewise, the 2020 Act reintroduces the 'implied supremacy' clause that was at the heart of the European Communities Act 1972, by making clear that 'every enactment (including an enactment contained in this Act) is to be read and has effect subject to' the contents of the WA. This addresses the content of part 2 of the WA, but there are specific sections in the 2020 Act that deal explicitly with citizens' rights.

The majority of the 2020 Act gives powers to ministers to enact secondary legislation to give effect to the WA and its obligations. Key here is section 8, which enables ministers to set up a system to register for the 'frontier worker status' document alluded to in article 26 WA in secondary legislation. Section 13 permits the passing of statutory instruments that implement title III of part 2 of the WA, addressing social security coordination; and there is also section 14, which enables the passing of statutory instruments to implement article 12 WA on non-discrimination, article 23 WA on equal treatment, and articles 24 and 25 WA with regards to the rights of workers, the self-employed and frontier workers. Section 8 has been acted on, but much as the UK did not transpose article 24 of the Citizens Directive in the Immigration (EEA) Regulations 2016 when it was still a member state, it has not passed any secondary legislation to address equal treatment rights for any EU workers as section 14 permits. Perhaps more surprisingly, section 13 has also not produced any statutory instruments at the time of writing.

The Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020

The Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020 (Frontier Workers Regulations) bring the WA's specific provisions concerning frontier workers into UK domestic law. They do so in significant detail. The first job the regulations do is that of definition. Regulation 2 makes clear that the Frontier Workers Regulations apply to EEA nationals who are *not* also British nationals. Regulation 3 adds to this that the definition of a frontier worker for the purpose of the regulations is an EEA national who is *not* primarily resident in the UK. Certain categories of frontier workers are thus explicitly *not* addressed by these regulations: UK nationals living in Ireland and working in the UK (eg reverse frontier workers).[35] However, regulation 3 gives a 'not primarily resident' extremely broad scope: anyone who returns to their country of residence at least twice in every 12-month period is deemed

35 This latter category of frontier workers, however, falls within the scope of relevant Irish legislation on frontier work after Brexit.

to not be 'primarily resident' in the UK. For those who want to benefit from falling within the frontier worker regulations, this is a generous definition, which will catch many more workers than that in Regulation 883/2004, which requires them to return to their state of residence 'at least once a week' and thereby excludes most irregular frontier workers from coverage. This approach does create some potential complexity, however, in that it also captures a lot of people who consider themselves *resident* in the UK; there is definite overlap in the personal scope of the Frontier Workers Regulations and the EUSS.

The definition is further expanded upon in regulations 3 and 4 which address employment status. Frontier workers can be workers, self-employed, or 'retained' workers – with regulation 4 here making clear that self-employed 'frontier workers' can also 'retain' status on account of involuntary unemployment or voluntary vocational training linked to their previous work. The pre-Brexit Immigration (EEA) Regulations 2016 made no such provision – in fact, they made no mention of frontier workers at all. However, that is because they were primarily about the creation of residence rights; retaining worker status being of importance in order to retain a *right to reside*. In a post-Brexit UK, it is, however, necessary for frontier workers to demonstrate that they retain that status in order to retain a *right to work* – a factor that was not in question while the UK was an EU member.

This retained right is not indefinite. When the activity ceases because of involuntary unemployment, frontier worker status can only be 'retained' for a period longer than six months *if* the EEA national can prove that they are continuing to seek employment. This has potential implications for those who have historically engaged in very casual or seasonal frontier work, as highlighted above. And it is worth noting that the UK Government has a track record of introducing strict[36] – and unlawful[37] – rules and guidance when it comes to checking the employment prospects of EU national former workers.

Having defined them, the next job the regulations do is provide frontier workers with a right to be admitted to work *qua* frontier worker; regulation 5 establishes that frontier workers are not subject to immigration control in the UK, and regulation 6 provides that to be admitted they must provide an identity document as well as a valid frontier worker permit. Regulation 6(2) excepts Irish nationals from holding such a permit, however.

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36 See Charlotte O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Hart 2017) ch 6; Charlotte O'Brien, 'The pillory, the precipice and the slippery slope: the profound effects of the UK's legal reform programme targeting EU migrants' (2015) 37(1) Journal of Social Welfare and Family Law 111.

37 *KH v Bury MBC and SSWP* [2020] UKUT 50 (AAC).

This right of entry is subject to exceptions; frontier workers can be refused the right of entry into the UK on grounds of public policy, public security and public health,[38] on grounds conducive to the public good (where the conduct in question took place after the end of the transition period)[39] or on grounds of the misuse of frontier workers' rights,[40] or if the immigration officer doubts they actually (still) are a frontier worker.[41] However, there is no cross-reference to the relevant EU law, which is potentially confusing for those who hold rights under the Citizens Directive (as preserved by the WA). Regulation 20(3) makes clear that decisions on these grounds must be proportionate and 20(4) adds that decisions cannot be taken 'systematically' in relation to misuse of frontier worker rights. Frontier workers' appeals will operate under a first-level administrative and a second-level judicial redress system that is identical to the one the UK operated to comply with the Citizens Directive.[42]

Where they are denied entry, frontier workers are subject to regular UK immigration law as set out in the 1971 Immigration Act in that they will be 'removed' to their country of nationality.[43] Likewise, when a frontier worker's right of entry is later revoked, they will be issued with a notice to leave the UK under the 1971 Immigration Act;[44] and frontier workers can be removed if they cease to be frontier workers, or if there are removal grounds (under the same categories of grounds as for refusing admission).[45] Removals will be processed under normal UK immigration law, as opposed to under EU law.[46]

Having covered definition and admission, the regulations then outline the duration of frontier worker rights. Frontier worker permits are valid for *two* years in the case of an application from a 'retained' frontier worker, and *five* years for other frontier workers.[47] However, frontier workers can apply for their permit to be renewed if they meet the original conditions of eligibility.[48] The duration of the permit is somewhat irrelevant, in that it will not lead to a 'permanent frontier

38 The Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020, reg 18 (Frontier Workers Regulations 2020).
39 Ibid reg 19.
40 Ibid reg 20.
41 Ibid reg 12.
42 Under reg 24 which amends the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.
43 See sch 2 of the Immigration Act 1971, para 8.
44 Frontier Workers Regulations 2020, reg 14.
45 Ibid reg 15.
46 Ibid reg 16. In this case, the Immigration Act 1971 and the Immigration and Asylum Act 1999.
47 Frontier Workers Regulations 2020, reg 10.
48 Ibid reg 11.

worker' status, the way that five years of continued residence under the EUSS *does* lead to eligibility to apply[49] for indefinite leave to remain. Frontier workers have to therefore continuously *stay* frontier workers, as defined, and have to continually reapply for status as long as they remain frontier workers.

In short, the Frontier Workers Regulations are a detailed and faithful implementation of the WA's content on frontier workers, but they exclude from their consideration the scenario of the British national reverse frontier worker, who (despite being a subject of EU law prior to Brexit) now is likely to be subject purely to UK social security legislation while resident in Ireland. Certain other dimensions of the Frontier Worker Regulations highlight the limitations of the WA as a 'snapshot' settlement, in that limitations on retaining what has become a 'one-off' status under the WA means that, in future, those regularly engaging in cross-border work in Northern Ireland but with significant interruptions in *when* that work takes place will fall outside the scope of part 2 of the WA.

Guidance on Withdrawal Agreement rights

One curious aspect of the UK's implementation of EU law, as a member state, was that a significant amount of directly applicable EU legislation (eg that not requiring implementation) was only ever found in guidance to administrators and decision-makers. As just an example, the Social Security Coordination Regulation receives passing mentions in UK primary and secondary legislation, but takes a prominent place in guidance to decision-makers on benefit applications – each of which tends to contain a bespoke 'European' section where the effects of the regulation on applications from EU nationals are laid out in great detail.[50] This is not contrary to EU law, but it is concerning from the perspective of legal certainty for EU citizens – in that UK law only ever told *half* the story of the entitlements EU nationals held in the UK.

Ironically, in leaving the EU, the UK's approach seems to have flipped, to make the legislation more detailed and the guidance sketchy. All official guidance on the WA is significantly lacking in at least one key respect: both the EUSS and the FWP Scheme guidance reflect public-facing UK Government websites prior to Brexit, and stress that Irish citizens 'do not need to apply' for either status to work and live

49 Note that the Independent Monitoring Authority for the Citizens' Rights Agreements is pursuing a judicial review on whether a second application should be required, arguing that instead the transition to indefinite leave should be automatic.

50 For example, HM Revenue & Customs, 'Child benefit technical manual' (29 March 2022) CBTM10000.

in the UK, but can do so if they want to.[51] The EUSS guidance adds to this that non-Irish and non-British family members do need to apply under the EUSS, but their Irish national family member does not need to. There is no further comment in the caseworker guidance on why Irish nationals might *wish* to apply for EUSS status if they are resident in the UK; there is only a generic comment that 'Irish citizens enjoy a right of residence in the UK that is not reliant on the UK's membership of the EU.'[52]

This is of course correct, but ignores that the WA also contains detailed rules on equal treatment, social security coordination, retention of status and appeal rights to decisions concerning residency. It also arguably *is* problematic from the perspective of article 37 WA and its obligations to 'disseminate information on rights' held under the WA – in that it is unclear whether most Irish nationals understood what rights they *could* have held if they had applied for a status under the WA. In the absence of registering a status *under* the WA, it is not obvious that those rights will be available to Irish nationals.

Summary

The above summary of how the UK has implemented the WA should present a picture of broad coverage, and in some cases coverage that goes beyond the WA's express requirements (eg on family reunification rights for 'relevant persons of Northern Ireland' and on the definition of 'frontier worker' and their residence requirements) – but they nonetheless do not address all six of the various configurations of frontier work that might take place on and across the Northern Ireland border and, in any event, are supplemented by public guidance that strongly suggests that Irish nationals do not *need* to register for any status under the WA.

Because it is hard to explicitly legislate for the absence of a status, it is also easy to overlook the biggest shortcoming of the 'frontier worker' rights preserved by the WA, and as implemented by the UK: once someone loses the 'frontier worker status' that the WA enables them to obtain, they cannot get it back as a matter of WA law. Those who fail to register in the first instance (and do not have a sufficiently good reason for a later application) or those who cease to be frontier workers (whether in full, or simply do not engage in it regularly enough to be captured by the *definition* of frontier worker or retained frontier worker) consequently fall outside of the scope of the WA and so former dual frontier workers (who are neither British nor Irish nationals)

51 Home Office, 'EU Settlement Scheme: EU, other EEA, Swiss Citizens and Family Members' (version 17, 13 April 2022) 21; and Home Office, 'Frontier worker permit scheme guidance' (version 2, 1 April 2021), 9.

52 EU Settlement Scheme (n 51 above) 20.

consequently lose their rights to work in their state of work and lose their WA-based social security coordination rights as well. As we will see, these 'gaps' in the WA remain and are not fully addressed by the CTA and the TCA concluded between the EU and the UK. The Protocol on Ireland/Northern Ireland might nonetheless offer a route to retention of 'frontier worker' rights as they existed in EU law.

FRONTIER WORKER RIGHTS BEYOND PART 2 OF THE WITHDRAWAL AGREEMENT

There are three possible other 'international law' sources of rights for frontier workers employed or resident in Northern Ireland. These are, in no particular order, the CTA's arrangements – and particularly its Convention on Social Security; the TCA's Protocol on Social Security; and article 2 of the Protocol on Ireland/Northern Ireland.

The Common Travel Area

The constant refrain in the lead-up to Brexit was that there were no reasons to be concerned about the rights of those living on the island of Ireland because the CTA would continue existing and would address all the same points.[53] This was, of course, only ever true for British and Irish nationals, not for all other EU nationals or third-country nationals – and a detailed study showed that, while there is substantial overlap between EU law rights and the rights that the UK Government associates with the CTA, those former rights were enforceable as a matter of EU law, where the latter are bilateral commitments to uphold reciprocal rules on issues like the right to work and residency rights, as well as access to education and health services.[54] They are not, in short, directly effective.

The exception to 'reciprocal domestic law' is in the realm of social security, where the UK and the EU concluded a treaty in February 2019 to ensure that 'the reciprocal rights enjoyed by British and Irish citizens under the CTA arrangements are protected following the withdrawal of the United Kingdom from the European Union'.[55] The indefinitely applicable[56] Social Security Convention cross-references

53 See Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick, 'Continuing EU citizenship "rights, opportunities and benefits" in Northern Ireland after Brexit' (March 2020) s 5.5; Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick, *Bordering Two Unions: Northern Ireland and Brexit* (Policy Press 2018) ch 5.

54 See Discussion Paper (n 25 above).

55 Convention on Social Security between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (2021) CP 379, Treaty Series No 6.

56 Art 66 of the Convention.

EU social security coordination rules and, in its basic setup, effectively copies Regulation 883/2004, including its definition of frontier workers. Consequently, the CTA's Social Security Convention works as a 'back-up' for Irish and UK national frontier workers who either did not qualify for a frontier worker permit in December 2020 – because, perhaps, their frontier work started after that – or who failed to register for a frontier worker permit. It entitles them to identical social security benefit access as that system, with the exception of healthcare access in their state of work if they do not meet the definition of 'frontier worker' under the Convention. Social security coordination thus appears well addressed by the CTA's Convention, but it, too, is not enforceable as a matter of domestic law; and, as above, does not benefit any non-Irish or non-British frontier workers and their families.

The Trade and Cooperation Agreement's Protocol on Social Security

EU nationals who are not Irish or British citizens and who wish to start any kind of work in the UK after the transition period have to apply for a UK visa. The details of UK immigration law are beyond the scope of this paper, but most 'work visas' available do not enable sporadic, flexible, or low-paying work and come with minimum earning requirements. Even visas available for more low-paying 'frontier' work, such as seasonal agricultural work, are valid for only six months and have conditionalities attached.[57] Non-Irish EU nationals working in Ireland who wish to start living in the UK after Brexit are simply out of luck altogether: visas do not exist to enable longer-term 'residency' in the UK in the absence of work or pre-existing family members there. Frontier work on the island of Ireland will consequently prove much more difficult, if not impossible, for non-Irish EU nationals who fall outside of the scope of the WA. However, should they find themselves successful in obtaining a relevant UK work visa, some of their rights are addressed by the TCA's Protocol on Social Security (PSS).[58]

It is important to stress here that the PSS addresses social security coordination for British and Irish nationals *as well as* other EU nationals. Article 489 of the TCA makes clear that the PSS applies to all those 'legally residing' in a member state or the UK, which covers those British and Irish nationals engaging in frontier work who are not

57 See, for example, the post-Brexit UK Government 'Check if you need a UK visa' answer for a German national. Note that these visas grant residency rights in the UK, but as they enable travel to and from the UK as well as residency there, nothing appears to preclude residency in a different country for a visa holder.

58 It is implemented in UK law by s 26 of the European Union (Future Relationship) Act 2020.

within the scope of the WA and/or failed to register under the WA, as well as any non-Irish EU nationals holding relevant visas for the UK.

The PSS, like the CTA Convention, by and large copies out the Social Security Coordination Regulation – but it has different provisions on enforcement from the CTA's Convention. The PSS requires all parties to ensure that the contents of the PSS can be enforced domestically before courts, tribunals and administrative bodies.[59] In essence, this makes the PSS 'directly effective' as the WA is, and as EU law was, in the UK; and makes it significantly more effective in terms of enforcement than the CTA Convention, which cannot itself be relied upon directly before domestic UK courts. Given that the PSS explicitly covers UK and Irish nationals as well as all other 'legal residents' of the UK and Ireland, this makes it the most likely focus of redress claims for all those who are not covered by the WA.

However, the PSS's advantage in enforceability comes with a different downside to the Convention: the PSS in principle will last 15 years – and then has to be renewed by agreement between the EU and the UK.[60] In the absence of renewal, all rights and benefits accrued prior to the Protocol's end of application date would be retained by relevant frontier workers, but further benefits would not be coordinated in the way indicated. At that time, the Convention would once more become the only available 'back-up' for those British and Irish nationals not eligible, or not registered, for a frontier worker permit under the WA.

The Protocol on Ireland/Northern Ireland

One other possible route to rights for those not expressly covered by part 2 of the WA is the existence of the Protocol and its article 2(1):

> The United Kingdom shall ensure that *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 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. (emphasis added)

There has been significant debate as to the scope of this 'no diminution' commitment.[61] In terms of concrete rights protected, evidence to the

59 Art SSC.67 PSS.

60 Art SSC.70 PSS.

61 See Colin Murray and Clare Rice, 'Beyond trade: implementing the Ireland/Northern Ireland Protocol's human rights and equalities provisions' (2021) 72(1) Northern Ireland Legal Quarterly 1, and the ongoing series of reports published by the NIHRC, exploring the scope of art 2: Tamara Harvey, 'Brexit, health and its potential impact on article 2 of the Ireland/Northern Ireland Protocol' (NIHRC March 2022); Alison Harvey, 'Human trafficking and article 2 of the Ireland/Northern Ireland Protocol' (NIHRC March 2022).

Lords Committee on the Protocol has suggested that there are no clear limitations to the Good Friday Agreement (GFA) concept of 'rights, safeguards and equality of opportunity' – the GFA only sets out a non-exhaustive list of examples of rights confirmed for 'everyone in the community'.[62] The concept of the 'community' across the GFA is used to describe those in Northern Ireland, and McCrudden argues persuasively that, in the context of Brexit, it should also capture all those in Ireland.[63] As such, these rights appear confirmed for all (regardless of nationality) engaged in frontier work on the island of Ireland.

For the current purposes, however, there are several rights listed in the relevant part of the GFA that can be clearly linked to the lives of frontier workers. First, there is the right to 'freely choose one's place of residence'. Even taken very literally, that right implies that there should be no restrictions on the ability of someone in the UK deciding to go live in Ireland and work in the UK as a reverse frontier worker, nor should there be any restrictions on an Irish national moving to the UK but remaining working in Ireland. Secondly, there is the 'right to equal opportunity in all social and economic activity'. This right does not specifically prevent discrimination on the basis of nationality as EU law does but instead encompasses a broader work-related equal treatment obligation. Here, again, if there are restrictions on the ability for someone from Ireland to go to work in the UK, or someone from the UK to go to work in Ireland, we find a potential violation of the relevant dimension of the GFA. Likewise, if there are different benefits available to the same worker when they are a frontier worker as opposed to when they are a 'standard' worker, this would pose a possible problem in terms of 'equal opportunity' of economic activity.

Of course, article 2 of the Protocol only applies to a *diminution* of rights that is a result of Brexit, and not a general change in rights or the overall availability of rights within the UK. This requires a careful consideration of the different types of frontier workers that exist on the island of Ireland; the rights they held before Brexit in connection to GFA-protected rights; how their rights operate post-Brexit; and whether this represents a diminution.

As has been shown, the highest level of 'protection' of rights for all post-Brexit frontier workers in Northern Ireland is that granted by the WA. However, even those protections come with one extremely

62 Protocol on Ireland/Northern Ireland Sub-Committee, 'Corrected oral evidence: article 2 of the Protocol' (*parliament.uk* 15 September 2021), statement by Éilis Haughey, 8.

63 Christopher McCrudden, 'Human rights and equality' in Christopher McCrudden (ed), *The Law and Practice of the Ireland/Northern Ireland Protocol* (Cambridge University Press 2022) 145.

significant depletion from the former regime applicable to frontier workers: a frontier worker covered by the WA had to be a frontier worker in December 2020 and *cannot stop being a frontier worker and keep their rights*. When they fall outside of the definition of frontier worker or retained frontier worker, they simply cease to be covered by the WA altogether. A further depletion comes in the field of protections against deportation, which after Brexit – for frontier workers, like all workers – is purely based on UK 'public good' considerations; the fact that EU national workers have enhanced protection against deportation after 5 and 10 years of residence there ceases to exist for anyone covered by the WA.

To ameliorate the harsh consequences of loss of status, the UK's implementation of the WA offers a generous definition of 'frontier work' that enables those who only sporadically return to their country of residence to fit within the scheme – but that still excludes any frontier workers who do not engage in frontier work continuously and with great regularity. It would not have done so prior to Brexit, as anyone resident in the UK or Ireland in line with EU law would have been able to start and stop frontier work *whenever they wished to*. Given the connections between frontier work and the GFA right to reside in a place of one's choice and right of equal opportunity in economic activity, the mere fact that 'frontier worker status' now has an included expiration date for those who stop their frontier work amounts to a diminution of rights held prior to Brexit under article 2 of the Protocol. Likewise, the ability to be deported is now taken solely on the basis of a consideration of whether the reverse or dual frontier worker's presence in the UK 'is not conducive to the public good' – a test the Home Office describes as 'intentionally broad in nature', with no consideration as to the length of their residence in the host state, nor any enhanced protections because of that residence.[64]

These diminutions will not be alleviated for many frontier workers even when we consider the CTA and the PSS as 'alternatives' or 'supplements' to the WA. Irish and British nationals who are not covered by the Frontier Worker Regulations can, of course, start and stop frontier work as they see fit – but where 'standard' frontier workers are covered by the CTA arrangements, the ability to enforce the social security coordinating rules applicable under the CTA are diminished in comparison to enforcing the WA. The PSS is more enforceable than the WA – but it may not remain in force forever. There consequently may be *some* Irish and British frontier workers who fall outside of the scope of the WA, are covered by the CTA, but nonetheless find that their rights have been diminished because they are trying to enforce

64 See r EU15(2) in Appendix EU, and Home Office, 'EU Settlement Scheme: suitability requirements' (version 8, 29 June 2022).

the GFA 'equality of opportunity in economic activity' right they have but find that they cannot as a matter of domestic law.

For EU nationals outside the scope of the WA, the situation is far worse, in that they will find 'stopping' and 'restarting' frontier work significantly more difficult than UK and Irish nationals. UK immigration law will make something that is automatic for those covered by the CTA much harder for other EU nationals who are living in Ireland and wish to work in the UK.

In sum, even the 'best-covered' frontier worker imaginable, who is a UK or Irish national, resident in Ireland and working in the UK, will lose the added protection of the WA if they take an extended 'break' from frontier work and will not see that compensated for by the CTA or the PSS. This seems a clear article 2 Protocol issue – but one that has as of yet not been addressed by the UK or the EU.

CONCLUSION

Both Theresa May and Boris Johnson stressed their desire to push 'Brexit' through as quickly as possible, and it is unsurprising that this urgency contributed to imperfect legislation. Likewise, the ability of treaties to cater for all specific configurations of their subjects' rights is limited, and so it is perhaps unfair to expect part 2 of the WA to have dealt with each subset of its beneficiaries more effectively. Regardless of whether this was realistically avoidable, however, we end up with a variety of conflicting impulses in the WA that neither domestic legislation nor other international law can *really* compensate for.

The aim of part 2 of the WA was to preserve all possible rights. The immediate problem, of course, was that not all rights *could* be preserved outside of the very specific legal strictures of the EU. We saw challenges to this, in terms of retention of citizenship status for UK nationals, and in terms of lobbying for 'onward' movement rights for UK nationals resident in the EU – but they all failed when faced with the limits of EU law, as set out in the EU treaties. Frontier workers face the most obvious of the consequences of Brexit in the same way: the 'frontier' has changed and, while any such work already existing is protected, any started fresh or interrupted falls outside of what the WA is intended to protect. Anything less than such a severance, after all, would not have been deemed to be 'Brexit'.

However, those brutal shortcomings of EU law could, and should, have been softened in the specific context of the island of Ireland by domestic law or the UK–EU arrangements on the CTA given the prominence of discussion of an 'all-Island' economy in the context of the Brexit negotiations. Domestic law has made serious attempts, by enabling residency rights for frontier worker families who could have

been left in the cold by a narrow implementation of the WA; and by ensuring that frontier work that did not fit a daily '9-to-5' definition would be protected under its registration scheme. But those attempts do not capture all those crossing the invisible border to work, and while the CTA *today* offers rights to those British and Irish nationals crossing each other's borders, those rights are not protected in domestic law and impossible to enforce if anything *were* to be found lacking in them.

The PSS attached to the TCA is not an attempt to compensate for Brexit so much as a baseline for future cross-border work, where relevant EU and UK nationals qualify for the visas to engage in it. It was thus never going to address the rights that frontier workers stood to lose in Brexit in a complete manner. And that leaves article 2 of the Protocol on Ireland/Northern Ireland, which *was* drafted to deal with the specific context of the island of Ireland. The fact that 'frontier worker', whether as defined in the WA or in domestic UK law, is now a status that can be *lost* is a diminution of rights directly attributable to Brexit – and, especially for those who failed to register for the FWP Scheme, or whose work never quite qualified for it to begin with, it may be worth making that argument.

The WA's shortcomings when it comes to frontier workers – the gaps, the overlooked categories, the drafting inconsistencies, the overlaps, and the potential for all-out loss of status – are symptomatic of legislating under pressure and at speed on an area with which the drafters were not fully acquainted. This, in turn, highlights that until now frontier workers have been subject to (benign) legislative neglect – there simply wasn't a detailed body of law, evidence or experience of the lived complexity at issue from which the WA drafters could draw. The rest of the EU – with even more cross-border commuting – still keeps frontier work at legislative arm's length, but should view the Brexit-inflicted island of Ireland experience as a prompt to reconsider that approach.

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