



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

Withdrawal Agreement, 14 November 2018
Political Declaration on the Future Relationship,
25 November 2018
Briefing note on NI/human rights implications

Introduction

This briefing note refers to the draft Withdrawal Agreement published by the UK Government and the EU on 14 November which, at the time of writing, is expected to be voted upon by the UK and EU Parliaments in coming weeks. The notes below are designed to provide an overview of the aspects of the Withdrawal Agreement most relevant to human rights in Northern Ireland.

Part 1 looks at the rights implications of the Ireland/Northern Ireland Protocol., including a preliminary assessment of its provisions considered against the concerns raised since March by the Joint Committee of the Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission¹. This includes a summary of the Protocol provisions most important to rights; a note on the backstop; and an overview of some key provisions of the main treaty most relevant to rights.

Part 2 is a briefing note on rights aspects of the Political Declaration on the Future Relationship, published on 22 November.

Appendix 1 is a content guide for the Ireland/Northern Ireland Protocol.

The briefing seeks to highlight key human rights elements of the texts in order to facilitate debate; we would welcome engagement from readers identifying omissions or suggesting alternative interpretations or corrections.

Overview

- The 585-page draft Withdrawal Agreement (DWA), published on 14 November², sets out the terms of the UK's exit from the EU including:
 - the rights of EU citizens resident in the UK before the end of the transition period & reciprocal rights of Britons in the EU;
 - a transition period from exit day on 29 March 2019 until the end of December 2020 during which the UK would no longer be a member state but would continue to apply all EU legislation;
 - a financial settlement in respect of existing financial commitments;
 - a Protocol on Ireland/Northern Ireland, described as temporary, and designed to avoid a hard border and protect the Belfast (Good Friday) Agreement; it would be operable from the end of the transition period

¹ The Joint Committee was established under paragraph 10 of the Rights, Safeguards & Equality of Opportunity chapter of the Belfast (Good Friday) Agreement 1998

² Available at: <https://www.gov.uk/government/publications/progress-on-the-uks-exit-from-and-future-relationship-with-the-european-union>

until part or all of it can be replaced by a Future Relationship treaty which meets its objectives³.

- Whereas in the March draft of the DWA⁴, the proposed 'backstop' involved Northern Ireland continuing within the EU customs union and maintaining alignment with the EU regulatory framework for goods, the November version saw the EU accede to the UK's request for a UK-wide solution.
- Given the size of the GB economy, however, the EU has included significant conditions in return for the tariff-free and quota-free trade that this would permit. It does so to maintain a 'level playing-field', i.e. to ensure that EU businesses can't be under-cut by UK decisions to produce goods according to lower standards.
- Should the backstop take effect, the UK would be prohibited from reducing standards in a range of regulatory matters, including workers' rights and environmental protection. NI would still be subject to a range of additional regulatory requirements, keeping it within EU VAT, excise, agricultural & additional environmental rules, for example.
- The Future Relationship is the subject of a 26-page non-binding political declaration, published on 22 November, stating shared aspirations for the treaty to be negotiated after the UK has left the EU. It states that the intention is to build on the UK-wide customs arrangement proposed in the backstop.

PART 1: THE DRAFT WITHDRAWAL AGREEMENT

Aspects of the Ireland/Northern Ireland Protocol relevant to rights

1. The Joint Committee of NIHRC and IHREC published its policy statement on EU Withdrawal⁵ in March; in light of its recommendations and engagement with the two governments and the EU Taskforce since then, the following points are of note.

Article 4 and Annex 1

³ See objectives set out under Protocol Article 1(3) as discussed below and section on Exiting the Backstop

⁴ Available at: <https://www.gov.uk/government/publications/draft-withdrawal-agreement-19-march-2018>

⁵ Accessible here: <http://www.nihrc.org/publication/detail/joint-committee-statement-on-the-uk-withdrawal-from-the-european-union>

2. Whereas the UK Government committed in December 2017 to ensuring that “**no diminution of rights is caused by its departure from the European Union**”⁶, the Draft Withdrawal Agreement has narrowed this commitment to the rights included the Rights, Safeguards and Equality of Opportunity section of the Belfast Good Friday Agreement 1998 insofar as those rights or standards are protected by virtue of EU membership.
3. The **protection of EU anti-discrimination directives** set out in Annex 1, while welcome, will not fully uphold the rights currently enjoyed under the specified section of the Agreement.
4. The following directives will continue to have effect in Northern Ireland:
 - Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services
 - Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation
 - Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
 - Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation
 - Directive 2010/41/EU 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
 - Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security.
5. The list does not include, for example, directives on parental leave, pregnant workers or part-time workers nor the victims directive, despite their relevance to the Rights, Safeguards and Equality of Opportunity section of the 1998 Agreement. The limits of Annex 1 could be mitigated to some extent by the inclusion in Annex 4 of UK-wide commitments to no regression in labour or social standards or environmental protection which would take effect under the backstop.

⁶ Joint EU-UK Report on Phase 1 of Negotiations, 8 December 2017, paragraph 52

6. Notably also, Annex 1 does not include the **EU Charter of Fundamental Rights** which currently provides an 'ECHR-plus' approach along the lines envisaged for the Bill of Rights for NI under the 1998 Agreement. The Joint Committee had argued for its retention in Northern Ireland at least unless or until a Bill of Rights is in place.
7. Article 4 refers to implementation of its provisions by "**dedicated mechanisms**". The UK Government says this will draw on existing roles of the NIHRC, ECNI and, for issues with an all-island dimension, the Joint Committee of the NIHRC and IHREC. It intends to confer new powers on the NIHRC and ECNI to monitor, supervise, advise, report on and enforce (through court action) the no diminution commitment, as well as provide adequate resources to ensure that they are able to perform the enhanced roles effectively⁷.
8. In respect of **individual redress**, while there is no direct reference in Protocol Article 4, it is noted that Article 4 of the main treaty now provides a right of individual redress where provisions contained or referred to in the Withdrawal Agreement meet the conditions for direct effect under Union law⁸. It is also hoped individual redress will be part of the dedicated mechanism; clarity on the scope of individual redress, and the dedicated mechanism as a whole, is awaited.
9. The **CJEU** will have no role in upholding the no diminution commitment, despite its continuing role in respect of the customs and trade aspects of the Protocol⁹.
10. Article 4 does not address **North-South equivalence of rights**, though there is specific reference to the Joint Committee of NIHRC & IHREC as part of the 'dedicated mechanisms' to implement the 'no diminution' commitment and multiple references to protecting North-South cooperation. (See below under 'Recitals' and Article 13 for detail.)
11. Article 15(4) of the Protocol states that **references to EU law under the Protocol will be to that law as amended or replaced** so this will allow rights to evolve under legislation in Annex 1. That Article also allows the EU and UK to agree that new EU legislation could be added to a relevant

⁷ Explainer for the agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union, UK Government, 14 November 2018, paragraph 176

⁸ See section below on implementation of the DWA & CJEU

⁹ See comments below on Article 14

Annex of the Protocol if it falls within scope of the Protocol (see below in relation to Articles 164-181).

Recitals

12. Concerns about the commitment to **continuing EU citizenship** in Northern Ireland have not been addressed and remain as drafted in the March draft of the Withdrawal Agreement. The commitment remains in recitals which are not enforceable; it is not spelled out in any detail and continues to apply only to those who choose to take up Irish citizenship and are entitled to do so.
13. Almost all of the March text on recitals is carried across with additional provisions added. One exception is the following which does not appear in the November text:

“AIMING to support current and future common policies and approaches between Ireland Northern and Ireland in accordance with the 1998 Agreement”.
14. As referenced above, one of the six main issues raised by the Joint Committee in March, and acknowledged in the EU Guiding Principles for negotiations¹⁰, is North-South equivalence of rights, which is not addressed in the Withdrawal Agreement. Though there is reference to protecting the 1998 Agreement in all its parts, and North-South cooperation features in recitals as well as several Protocol articles, the above reference in recitals was the closest thing to North-South equivalence in the text (though non-binding). This suggests that the UK Government does not accept that the 1998 Agreement committed the parties to developing an equivalence of rights across the island of Ireland. The dedicated mechanism (DM) and the Joint Committee appear to be the vehicles through which rights on the island can be addressed.
15. Additional text in the November draft includes: emphasis that the Withdrawal Agreement does not aim to establish a permanent relationship between the UK and the EU; a shared intention to replace the backstop solution with a permanent arrangement that can ensure the absence of a hard border; and a common objective to build a close future relationship which will establish “ambitious customs arrangements that build on the

¹⁰ EU Guiding Principles for the Dialogue on Ireland/Northern Ireland TF50 (2017) 15 – Commission to UK, published 21 September 2017 accessible here: https://ec.europa.eu/commission/sites/beta-political/files/dialogue_ie-ni.pdf

single customs territory provided for in this protocol". (These commitments are fleshed out in Articles 1 and 2 of the Protocol – see below.)

16. New paragraphs further note that nothing in the Protocol prevents the UK from ensuring unfettered access to GB markets for NI goods and express the shared aim of avoiding controls at ports and airports, to the extent legally possible.
17. The Joint Committee had expressed concerns about the loss of **EU funding** in disadvantaged and border areas. The recitals now reference the existing commitment to PEACE and INTERREG under the current multi-annual framework (2014-2020) and a commitment to "maintaining...the current funding proportions for the future programme". (This commitment is repeated in the Future Relationship political declaration.)
18. Finally, a new bullet point states that the UK and EU are "determined that the application of the protocol should impact as little as possible on the everyday life of communities both in Ireland and Northern Ireland".

Articles 1 & 2 – Objectives of the Protocol & protection of the 1998 Agreement

19. It is worth noting that, whereas the reference in recitals to protecting the 1998 Agreement in all its parts, is not enforceable, Article 1(3) sets out the **objectives of the Protocol**, to:
 - **address unique circumstances on the island of Ireland;**
 - **maintain necessary conditions for continued North-South cooperation;**
 - **avoid a hard border on the island of Ireland;**
 - **protect the 1998 Agreement in all its dimensions.**
20. This protection of the 1998 Agreement is underpinned by Article 20 (Review) which provides that the UK and EU may jointly agree, through the Joint Committee, to exit the backstop on the basis that all/parts of the Protocol are 'no longer necessary to achieve the objectives set out in Article 1(3)'; it also stipulates that recommendations shall take into account the obligations of the parties to the 1998 Agreement.

Article 5 - Common Travel Area

21. Provisions on the **Common Travel Area** remain as drafted¹¹, permitting the UK and Ireland to continue to make arrangements on a bilateral basis¹². Taken together with references in the main treaty in Article 38, this means the UK and Ireland can continue to offer 'more favourable treatment' to each other's citizens without falling foul of equality and non-discrimination provisions.

Article 6 – Single customs territory, movement of goods

22. Article 6 sets out provisions that will help avoid a hard border, something that will facilitate the exercise of rights across the border and the maintenance of daily life in border communities, including a UK-wide customs arrangement and degree of regulatory compliance; NI adherence to additional EU regulatory standards for goods; & continuing EU VAT & excise arrangements in NI. (See below for additional note on 'the backstop').

Article 13 - North-South cooperation

23. The North-South cooperation provisions of the DWA remain as in the March version of the DWA, committing the UK and EU to implementing the Protocol in such a way as to facilitate North-South cooperation across a range of areas including health, education, justice and security, and permitting new arrangements to be made consistent with the 1998 Agreement. The Joint Committee (on the Withdrawal Agreement) remains tasked with reviewing implementation of this Article and empowered to make recommendations to the EU and UK in this respect, including as a result of recommendations from the Specialised Committee¹³.

Article 14 – Implementation, application, supervision and enforcement (inc. role of CJEU)

24. The UK is responsible, under this Article, for implementing the provisions of EU law made applicable by the Protocol, though EU representatives will have the right to access information and be present during relevant 'activities' and may require the UK authorities to carry out control measures.

¹¹ Protocol Article 5

¹² See research on the Common Travel Area commissioned by the Joint Committee and published in November 2018 available here: <http://www.nihrc.org/publication/detail/discussion-paper-on-the-common-travel-area>

¹³ See Protocol Article 16 below

25. Notwithstanding the above, the CJEU will continue to have jurisdiction regarding the implementation of Protocol Articles 6(2), Articles 8 – 12 and Annex 4, Article 7(1). These provisions cover customs, trade, state aid, agriculture & fisheries, single electricity market & VAT.

Article 15 (Common provisions) – EU law as amended or replaced

26. Article 15(4) of the Protocol states “Notwithstanding Article 6(1) of the Withdrawal Agreement, and unless otherwise provided, where this Protocol makes reference to a Union act, the reference to that act shall be read as referring to it as amended or replaced”. (The Protocol includes its ten Annexes.)
27. Whereas Article 6(1) of the main treaty provides for references to EU law to be understood as relating to the law as it applies on the last day of the transition period, Article 15(4) makes an exception for the Protocol which would ensure, for example, an accrual of rights under Annex 1 in terms of the ongoing development of the specified equality directives and the updating of Annex 5 directives on regulatory compliance.
28. Unfortunately, it will not protect the unspecified EU legislation that would otherwise be relevant to the ‘no diminution’ commitment in Article 4 so this, once identified, will be ‘frozen in aspic’ as on the last day of transition.
29. Article 15(4) will protect some EU environmental standards and healthcare standards in Northern Ireland, on an accruing basis. Annex 4 commits the UK and EU simply to ‘no regression’ in labour, social and environmental standards in force at the end of transition but does not list all relevant directives. Annex 5, however, binds Northern Ireland in respect of specified EU legislation and, due to Article 15(4), these would be expected keep pace with EU changes.
30. Paragraphs 20-22, for example, list relevant EU standards on health e.g. medicinal products, medical devices and substances of human origin (blood, organs, tissues & cells) which will be helpful, though not conclusive, in terms of continuing cooperation on cross-border healthcare.
31. Paragraphs 25 and 26 list a range of waste and environmental legislation governing matters including substances that deplete the ozone layer, management of invasive species, protection of wild flora and fauna, energy-efficiency labelling, GMOs and the quality of petrol and diesel

fuels, so environmental rights could be enhanced as EU law advances in these areas.

32. Article 15(5) allows the Joint Committee to agree that a new piece of EU legislation can be added to a relevant Annex of the Protocol if it falls within scope (even if no other piece is being repealed as a consequence).

Article 16 - the Specialised Committee on implementation of the Ireland/Ni Protocol

33. Article 165 of the main treaty provides for the establishment of a series of specialised committees to report to the Joint Committee established under Article 164 (see below under 'Dispute settlement'). These include a Specialised Committee on implementation of the Ireland/Ni Protocol. Article 16 of the Protocol sets out the responsibilities of that Specialised Committee to consider issues raised by the EU, UK, North-South Ministerial Council or North-South implementation bodies, and make recommendations to the Joint Committee as regards the functioning of the Protocol.

34. The new draft of the treaty gives it an additional power to:

“consider any matter of relevance to Article 4 of this Protocol (rights of individuals) brought to its attention by the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland”¹⁴

35. Article 165 provides little detail in terms of membership of the specialised committees, merely stating that they shall comprise representatives of the EU and UK.

Article 17 - Joint Consultative working group

36. In another new addition to the Protocol, Article 17 provides for a 'joint consultative working group' on the implementation of the Protocol, to provide a forum for information exchange and consultation, operating under, and reporting to, the Specialised Committee. It is to be co-chaired by the EU and UK and meet at least monthly.

¹⁴ Protocol Article 16(c)

Annex 4 - 'No regression' commitments on labour, social and environmental standards

37. In light of concerns about Northern Ireland alone remaining in the EU customs union, as proposed in the March version of the DWA, Article 6 makes provision for a UK-wide "single customs territory" of the EU and the UK. Given the difference in scale and potential impact on the EU economy, of such a large customs arrangement, this change has come on condition that the UK adheres to a range of EU rules designed to maintain a 'level playing field' including state aid rules, competition policy, social and employment standards, environmental standards, climate change and relevant tax matters set out in Annex 4¹⁵.
38. By way of example, Annex 4, Part 2 provides (extensively) for no regression in environmental protection UK-wide, but see above in relation to additional obligations on Northern Ireland under Annex 5, to continue to align with a range of EU environmental standards as they evolve. Annex 4, Part 3 provides for no regression in labour and social standards.
39. Monitoring and enforcement of labour and social standards is to be carried out in the UK by its own authorities (Annex 4, Article 6).
40. The dispute resolution provisions of the main treaty are expressly excluded from application in respect of disputes over the no regression commitment on labour, social and environmental standards under Annex 4 of the Protocol¹⁶.

The 'Backstop'

41. Consistent with earlier drafts, but addressed prominently in Articles 1 and 2, the backstop is presented as a temporary measure designed to achieve the objectives in Article 1(3) (see above), including avoiding a hard border and protecting the 1998 Agreement. It will operate from the end of the transition period until the UK and EU conclude a trade agreement which meets its objectives and therefore supersedes some or all of its provisions.
42. In order to minimise difference between NI and GB, a key part of the Protocol in terms of the idea of the 'backstop' is centred on Article 6 which provides for a "single customs territory" of the UK and EU and brings in, for the whole of the UK, Annex 2 requiring continued adherence to EU

¹⁵ In addition, Annex 2 sets out areas of required compliance in respect of goods.

¹⁶ Annex 4, Articles 4(2) and 5(4)

rules on trade in goods and Annex 4 on regulatory alignment to maintain a 'level playing field'. Annex 3 is a draft on customs co-operation which would bring the UK within the EU Customs Code unless 'detailed rules on trade' are agreed 6 months before the end of the transition period (Article 6(1)).

43. Annex 5 is particular to Northern Ireland¹⁷. It deals with regulatory requirements in respect of goods, and would require NI to adhere to "a small fraction of the single market rules that currently apply" according to the UK Government¹⁸. It is a 70-page list of EU legislation spanning customs code issues and standards on goods from toys and clothes to food, pharmaceutical and medicinal products, waste and environmental regulation.
44. A UK-wide customs arrangement was resisted until now by the EU, as falling outside the terms of the Article 50 'divorce' process and creating risks to the EU by getting into the detail of a future relationship in a partial or hasty manner.
45. **Protocol Article 20 (Review) provides that the UK and EU may jointly agree, through the Joint Committee, that all/parts¹⁹ of the Protocol are no longer necessary to achieve its objectives²⁰.** Either side may notify the other of its opinion that this is the case and then, within 6 months, the Joint Committee must meet at Ministerial level and consider the matter. It may seek an opinion from institutions created by the 1998 Agreement before making recommendations to the UK and EU.
46. This has provoked criticism on the basis that, whereas a Member State may unilaterally decide to leave the EU, by triggering Article 50, once the UK ratifies this Treaty, a unilateral decision to exit the backstop would not be possible.
47. Article 132 of the main treaty provides that the Joint Committee²¹ may, before 1 July 2020, request a single extension to the transition period. Article 3 of the Protocol makes reference to the possibility of requesting

¹⁷ As are Annexes 6 & 7

¹⁸ Explainer for the agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union, UK Government, 14 November 2018, paragraph 193

¹⁹ Note that it is understood that it is the aspects around the customs union and partial regulatory alignment which are expected to be replaced, not the whole Protocol.

²⁰ See notes on Article 1(3) above

²¹ The "Joint Committee" is to be established under Article 164 of the main treaty. See section on dispute settlement below in this briefing, for details.

that extension having had regard to the progress towards conclusion of an agreement to replace some/all of the Protocol.

48. An extension of the transition could be used to avoid the backstop coming into play, since neither the UK nor the EU regard it as ideal. Extending the transition period may /may not be more palatable given that it entails the UK abiding by all EU standards and procedures without having a vote in decision-making bodies. An extension of the transition period would also entail an additional financial commitment to the EU.

Aspects of the main Withdrawal Agreement relevant to rights

Part Two - Citizens' rights (Articles 9-39)

49. Citizens' rights provisions were agreed in the March version of the DWA and entail granting EU citizens who are legally resident in the UK by the end of the transition period (or who have begun to work across EU-UK frontier) "broadly the same entitlements to work, study and access public services and benefits as now", in as far as these entitlements have derived from UK membership of the EU.
50. Those rights include:
- a. Those legally resident by the end of the transition period (December 2020) will be entitled to continue living in the UK and to permanent residency after five years whether that is complete at the end of 2020 or later. This will be reflected in the EU (Withdrawal Agreement) Bill when it is introduced.
 - b. Permanent residency or "settled status" will include a right to stay indefinitely, have access to public funds and public services and go on to apply for British citizenship. It also entails a right to return having been out of the UK for up to five years.
 - c. Irish citizens will not need to apply as they are covered under the Common Travel Area, but may do so if they wish²².
 - d. Family members living with an EU citizen by the end of the transition period will be entitled to the same rights and will be able to apply for settled status usually after 5 years in the UK.

²² There have been suggestions that this may, however, be worth doing e.g. Discussion Paper on the Common Travel Area, commissioned by the Joint Committee of NIHRC and IHREC, which described the CTA's protections as "written in sand": <http://www.nihrc.org/publication/detail/discussion-paper-on-the-common-travel-area>

- e. Individuals in scope of the Agreement may be joined by close family members at any time in the future so long as the relationship existed by the end of the transition period and still exists at the point they wish to come to the UK.
 - f. Workers' rights including self-employed and frontier workers' rights are protected on "broadly" the same basis as now and rights include equal treatment and non-discrimination.
 - g. A right of appeal is to be provided for in domestic legislation in respect of a decision not to grant settled status.
 - h. Those who (by the end of the transition period) have had a qualification recognised under UK law will continue to be able to rely on that decision. Applications submitted may be processed and relied upon once approved. (The Future Relationship negotiations will address rights of future workers/migrants in terms of mutual recognition of professional qualifications.)
 - i. The Withdrawal Agreement states that those who have moved between the EU and the UK by the end of the transition period will not be disadvantaged in respect of access to pensions, benefits and other forms of social security and makes provision for ongoing dialogue and coordination between the UK and the EU to ensure the system operates effectively. Other protections include Article 32 – in respect of those not living in EU at end of transition period but who paid in contributions at earlier point.
 - j. EU citizens will be able to rely directly on rights in the Withdrawal Agreement and assert those rights in a UK court to the extent that they satisfy the rules for direct effect²³.
51. Domestic legislation will be required to reflect the principle that the citizens' rights set out in the Withdrawal Agreement take precedence over any inconsistent UK legislation (as EU law does today) and that incompatible legislation will be disapplied²⁴.
52. Domestic legislation must provide for consistent interpretation of the Withdrawal Agreement, and EU law underpinning it, by the UK and the EU. For 8 years, following the end of the transition period, UK courts will be able to refer issues to the CJEU in relation to the citizens' rights provisions of the Withdrawal Agreement, where necessary to give judgement in a case. Referrals can also be made for 8 years following exit

²³ Article 4

²⁴ Withdrawal Agreement Article 4(2)

day, in relation to applications for settled status. UK courts will nevertheless make the final decisions.

53. There will be additional procedures required if the UK Parliament seeks to repeal aspects of legislation implementing the citizens' rights provisions of the Withdrawal Agreement.
54. A new Independent Monitoring Authority (IMA) will be established under Article 159 and given statutory powers under the Bill, to monitor the implementation of the citizens' rights provisions, operative from the end of the transition period. It will have the power to receive complaints from citizens and take "appropriate action" if it believes there has been a failure to implement the citizens' rights provisions. The IMA will report annually to the Joint Committee (see next section) and conduct systemic inquiries.
55. The UK Government will work with devolved administrations to address areas where the IMA's functions intersect with areas of devolved competence.

Articles 164 – 181 Institutional Provisions & Dispute settlement

56. A Joint Committee (JC) of EU and UK representatives is established under Article 164 to supervise and facilitate implementation, application and interpretation of the Withdrawal Agreement and it is through this that the parties should seek to resolve disagreements. The JC will decide on the tasks of the specialised committees (SCs), supervise their work and may establish specialised committees in addition to those set up under Article 165.
57. The JC must meet at least annually and issue an annual report on the functioning of the Agreement. Decisions are by 'mutual consent' and are binding, having "the same legal effect" as the Withdrawal Agreement.
58. The UK or EU can, despite the existence of a relevant SC, refer a matter directly to the JC (though it can delegate matters).
59. Six specialised committees are to be established including that focused on implementation of the Ireland/NI Protocol and one on citizens' rights. In terms of status, the SCs may draw up draft recommendations for adoption by Joint Committee.

60. Dispute settlement provisions are set out in the Withdrawal Agreement from Article 167 onwards. The parties commit to seeking to resolve disputes by cooperation and consultation by written notice to the JC. If no solution is reached within three months, either side may write to the other to request establishment of an arbitration panel and this shall be copied to the International Bureau of the Court of Arbitration.²⁵ A panel of 25 independent, highly legally qualified people is to be agreed; any given panel will be composed of five members.
61. Time limits are set for discussions on the compliance timeframe and reporting on compliance. The arbitration panel is empowered to impose financial penalties for non-compliance²⁶ and if matters are not resolved, the panel may authorise the complainant to suspend temporarily its obligations under the Agreement (or other mutual agreements), with the exception of the commitments regarding citizens' rights under Part Two. The respondent may request a review of compliance measures it has taken and seek the end of the suspension of obligations.
62. An arbitration panel will seek to make decisions by consensus but may vote if necessary; no dissenting opinions will be published.
63. The dispute resolution provisions of the main treaty are expressly excluded from application in respect of the no regression commitment on labour, social and environmental standards under Annex 4 of the Protocol²⁷.

Implementation of the Agreement & the CJEU

64. Article 4(1) states that aspects of EU law made applicable under the Agreement will have the same effect in the UK as they have in the EU. It has been re-worded in relation to individual redress which, in the March version, emphasised the rights of individuals in relation to the citizens' rights provisions under Part Two of the main treaty. It now reads:

“... legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.”

65. Article 4(2) stipulates that the UK:

²⁵ Article 170

²⁶ Article 178

²⁷ Annex 4, Articles 4(2) and 5(4)

“shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation”.

66. Under Article 4(3), the general principles of EU law are to apply for the purposes of interpreting and applying EU law and concepts referenced in the DWA.
67. Under Article 4(4) and 4(5), EU law or related concepts referred to in the Agreement are to be interpreted in conformity with CJEU case law handed down by the end of the transition period. In interpreting and applying the treaty, UK courts will have ‘due regard’ to relevant case law handed down afterwards.
68. The Court (as other EU institutions and bodies) will maintain its role during transition, under Article 131.
69. Under Articles 174 & 179, if a dispute under consideration by an arbitration panel involves a question of the interpretation of a provision of EU law or a concept of EU law or a question of the UK’s compliance with certain CJEU judgments, then the arbitration panel must refer the matter to the CJEU for a binding ruling on interpretation.
70. Judicial Procedures are dealt with by Articles 86-91. The CJEU has jurisdiction over cases brought before the end of transition period (A.86). If, before end of transition period, the European Commission considers that UK has failed to fulfil an obligation under the Treaties or Part Four (Transition), the Commission can refer the matter to the CJEU for up to 4 years from end of transition.
71. Under Article 89, judgements handed down before end of transition will be binding as well as those handed down after that point in respect of proceedings under A.86 or A.87. Similar provisions apply in terms of the European institutions’ role regarding administrative procedures/complaints initiated before the end of the transition period.
72. Article 136 refers to jurisdiction in respect of UK financial commitments to the EU, until the end of the financial period in 2020.
73. Under Article 138, EU law will apply in respect of UK participation in EU programmes and activities under the multi-year financial framework 2014-20.

74. Article 158 provides that in respect of cases initiated any time during a period of 8 years from the end of the transition period, a UK court may request a preliminary ruling from the CJEU in respect of the interpretation of Part Two which deals with citizens' rights. (This will necessitate a change to the EU (Withdrawal) Act 2018.)
75. Article 160 gives CJEU jurisdiction in respect of Part Five (Financial Provisions).
76. See above in relation to CJEU jurisdiction in respect of aspects of the Ireland/Northern Ireland Protocol.

PART 2:

POLITICAL DECLARATION SETTING OUT THE FRAMEWORK FOR THE FUTURE RELATIONSHIP BETWEEN THE EU AND THE UK, 22 NOVEMBER 2018

Overview

1. The document reflects high-level aspirations checked by an acknowledgement of the 'red lines' of each party. While stating clearly that **free movement will end** in the UK, that it will pursue an **independent trade policy** and that the **EU's four freedoms are indivisible**, it goes on to state that "with a view to facilitating the movement of goods across borders, the Parties envisage **comprehensive arrangements** that will create **a free trade area, combining deep regulatory and customs cooperation, underpinned by provisions ensuring a level playing field** for open and fair competition"²⁸.
2. There is an inevitable tension in these propositions. The document acknowledges explicitly that "**the closer and deeper the partnership, the stronger the accompanying obligations**"²⁹. Of course, the other constraint on the eventual Future Relationship treaty is the Withdrawal Agreement commitment that, to replace the backstop, any new deal would avoid a hard border on the island of Ireland and protect the 1998 Agreement in all its parts etc. (the objectives in Article 1(3)).
3. The document sets out ten pages of detail on the proposed '**economic partnership**' including aspirations to negotiate future cooperation on a wide range of issues from goods to services, transport, public procurement, financial services, mobility and energy as well as fishing.
4. Cooperation under the '**security partnership**' is to span law enforcement, judicial cooperation, foreign policy, security and defence, sanctions, operations and missions, defence capabilities, intelligence exchange, cyber-

²⁸ Paragraph 22

²⁹ Paragraph 83

security, counter-terrorism, civil protection, space and development cooperation.

5. Although the political declaration is not legally binding, it may be worth noting that some of the proposals are expressed firmly as “the parties agree” or the “the parties will” but many are framed as areas they “should address”, “will explore” or “will consider”.

Key points affecting rights

Rights-specific provisions

6. Whereas paragraph 7 refers to the UK respecting the ‘framework’ of the ECHR, there is later recognition that cooperation “should be underpinned by long-standing commitments to the fundamental rights of individuals, including **continued adherence and giving effect to the ECHR and adequate protection of personal data**”³⁰.
7. Introductory paragraphs express shared determination:
“to work together to safeguard the rules-based international order, the rule of law and promotion of democracy, and high standards of free and fair trade and **workers’ rights, consumer and environmental protection**, and cooperation against internal and external threats to their values and interests”.
8. The stated intention is that the level-playing field elements of backstop should form the basis for the negotiations, including **employment and environmental standards**:
“The future relationship must ensure open and fair competition. Provisions to ensure this should cover state aid, competition, social and employment standards, environmental standards, climate change, and relevant tax matters, building on the level playing field arrangements provided for in the Withdrawal Agreement and commensurate with the overall economic relationship.”³¹
9. Since the declaration is non-binding, such features may not be guaranteed if the UK and EU can find an alternative way to avoid a hard border and agree a mutually acceptable approach to free trade and customs.

³⁰ Paragraph 83

³¹ Paragraph 79

Data exchange & Justice

10. Crucial to cooperation in the field of justice, amongst other things, the parties state that they are “**committed to ensuring a high level of personal data protection**”³² to facilitate data-flows between them and that they intend to make arrangements for cooperation between their regulators, to that end.
11. The document states that the parties “**should establish reciprocal arrangements for timely, effective and efficient exchanges of Passenger Name Record (PNR) data...DNA, fingerprints and vehicle registration data (Prüm)**”.
12. The parties will “**work together to identify the terms for the United Kingdom’s cooperation via Europol and Eurojust**”³³
13. Previous statements by Mr Barnier did not include a commitment that the UK could continue to participate in the European Arrest Warrant without retention of the EU Charter and acceptance of the role of the CJEU; instead the document states that “**the Parties should establish effective arrangements based on streamlined procedures and time limits enabling the United Kingdom and Member States to surrender suspected and convicted persons efficiently and expeditiously, with the possibilities to waive the requirement of double criminality, and to determine the applicability of these arrangements to own nationals and for political offences.**”³⁴
14. The justice section creates the potential for further arrangements for practical cooperation including joint investigation teams on the basis of what is “appropriate to the UK’s future status”.³⁵

Institutional arrangements & dispute settlement

15. The parties have agreed that the future relationship “should be based on an overarching institutional framework” which “could take the form of an Association Agreement”³⁶, with specific governance arrangements in individual areas.

³² Paragraph 8

³³ Paragraph 88

³⁴ Paragraph 89

³⁵ Paragraph 90

³⁶ Paragraphs 120-122

16. Institutional dialogue, consultation, and cooperation is envisaged on matters of security, foreign policy & defence, for example.³⁷
17. Once again resonating with the Withdrawal Agreement, a Joint Committee, with specialised sub-committees, is to be established for “managing and supervising the implementation and operation of the future relationship”.³⁸
18. The stated aim of the parties is to base **dispute resolution** on the Withdrawal Agreement provisions, including **referral to the Joint Committee** and reliance on **international independent arbitration where required** with provisions for financial compensation and temporary suspension of obligations³⁹.
19. The role of **CJEU is acknowledged as the “sole arbiter” in the interpretation of EU law**⁴⁰.

Northern Ireland

20. The need to avoid a hard border in Ireland is restated several times as is the commitment to protecting the 1998 Agreement ‘in all its parts’:

“The Parties recall their determination to replace the backstop solution on Northern Ireland by a subsequent agreement that establishes alternative arrangements for ensuring the absence of a hard border on the island of Ireland on a permanent footing”⁴¹

“[Both parties] agree that the Good Friday or Belfast Agreement reached on 10 April 1998 by the United Kingdom Government, the Irish Government and the other participants in the multi-party negotiations (the “1998 Agreement”) must be protected in all its parts, and that this extends to the practical application of the 1998 Agreement on the island of Ireland and to the totality of the relationships set out in the 1998 Agreement”⁴²
21. One of the issues relevant to maintaining economic normality in border communities is the right of establishment for businesses, something not covered by the CTA. It may, therefore, be helpful that, under the heading of market access and non-discrimination, the document proposes

³⁷ Paragraphs 95-98

³⁸ Paragraph 129

³⁹ Paragraph 132-3

⁴⁰ Paragraph 134

⁴¹ Paragraph 19 and additional references to avoidance of hard border in paragraphs 27 & 142

⁴² Paragraph 139

arrangements to ensure that “providers and investors are treated in a non-discriminatory manner, including with regard to establishment”.

22. Paragraph 13 recalls “a shared commitment to delivering a future PEACE PLUS programme to sustain work on reconciliation and a shared future in Northern Ireland, maintaining the current funding proportions for the future programme.”

Mobility

23. Noting that free movement will end, the document includes a stated aim to agree visa-free travel for short-term visits but expresses a looser commitment “to consider” conditions for entry and stay for research, training and youth exchanges; and social security coordination.
24. Separately, it is worth noting that the UK Government’s long-awaited White Paper on Immigration, widely expected to provide that EU citizens wishing to move to the UK after the end of the transition period, will be subject to the same rules as those coming from elsewhere in the world.⁴³

Process

25. The declaration envisages a two-stage process in negotiating the future relationship, the first phase, before withdrawal involving preparatory work, drawing up a proposed schedule and considering logistical requirements for negotiations.
26. The second phase, after withdrawal (but during transition), would entail negotiating in parallel the various sectoral agreements proposed with a high-level review conference to review progress at least every six months.

Comments and suggestions on this briefing are welcome; please email to Colin.Caughey@nihrc.org

⁴³ <https://www.bbc.co.uk/news/uk-politics-46257168>

Appendix 1

Content guide to Ireland/NI Protocol & Annexes

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Annexes 1 – 10 to Protocol on Ireland /Northern Ireland pp. 331-475

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