

# DÁIL ÉIREANN

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## ROGHCHOISTE SPEISIALTA AN TSEANAID UM AN RÍOCHT AONTAITHE DO THARRAINGT SIAR AS AN AONTACH EORPACH

## SEANAD SPECIAL COMMITTEE ON THE WITHDRAWAL OF THE UNITED KINGDOM FROM THE EUROPEAN UNION

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*Dé Máirt, 12 Deireadh Fómhair 2021*

*Tuesday, 12 October 2021*

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Tháinig an Comhchoiste le chéile ag 12 p.m.

The Joint Committee met at 12 p.m.

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Comhaltaí a bhí i láthair / Members present:

Seanadóirí / Senators	
Malcolm Byrne,	Malcolm Byrne,
Timmy Dooley,	Timmy Dooley,
Robbie Gallagher,	Robbie Gallagher,
Róisín Garvey,	Róisín Garvey,
Niall Ó Donnghaile.	Niall Ó Donnghaile.

Seanadóir / Senator Lisa Chambers sa Chathaoir / in the Chair.

## **Dispute Resolution Mechanism: Discussion**

**Chairman:** Apologies have been received from Senators Flynn and Joe O'Reilly. I welcome members to this meeting of the Seanad Special Committee on the Withdrawal of the United Kingdom from the European Union. On correspondence, we have a number of matters to note. Correspondence on the EU-UK Parliamentary Assembly, dated 7 October 2021, was sent by the Houses of the Oireachtas liaison officer to the EU Parliament dated 7 October 2021. There is correspondence from the House of Lords European Affairs sub-committee on the protocol, dated 1 October 2021, regarding the proposed format of meeting with the clerk to the EU affairs committee. The third item is a brief note by the clerk to the committee, dated 7 October 2021, on the visit to the Northern Ireland Executive committee. Can I ask that correspondence be noted? Is that agreed? Agreed.

The minutes from our public meeting on 30 September also have to be noted. The meeting in question was terminated due to IT issues, but can we adopt the minutes in any event? Is that agreed? Agreed.

The purpose of this meeting is to discuss the dispute resolution mechanism for the trade and co-operation agreement, TCA, and the withdrawal agreement between the United Kingdom and the European Union. I welcome our witnesses from the European Union division of the Department of Foreign Affairs: Ms Maeve Collins, director general; Ms Deirdre Farrell, director, EU-UK unit; and Mr. Karl Gardner, director, EU-UK unit.

I must inform our guests that witnesses giving evidence from within the parliamentary precincts are protected by absolute privilege in respect of the evidence that they give to the committee. This means that a witness has a full defence in any defamation action for anything said at a meeting of the committee. However, witnesses are expected not to abuse this privilege and may be directed to cease giving evidence on an issue at the Chair's direction. Witnesses should follow the direction of the Chair in this regard. They are reminded of the long-standing parliamentary practice to the effect that, as is reasonable, no adverse commentary should be made against an identifiable third party or entity.

As witnesses are all present in the committee room, there is no need for the next section. Privilege against defamation does not apply to the publication by witnesses outside the proceedings held by the committee of any matter arising from the proceedings.

Members are reminded of the long-standing parliamentary practice to the effect that they should not comment or make charges against a person outside the Houses or an official either by name or in such a way as to make him or her identifiable. I also remind members that they are only allowed to participate in this meeting if they are physically located within the Leinster House complex. In this regard I ask all members prior to making their initial contribution to the meeting to confirm they are on the grounds of the Leinster House complex. If they are directed by the Chair to cease giving evidence on a particular matter, please respect that direction.

With regard to Covid-19 guidance, members and all in attendance are asked to exercise personal responsibility in protecting themselves and others from the risk of contracting Covid-19. They are strongly advised to practise good hand hygiene and also to wear masks.

Without any further ado, I invite our witnesses to make their opening statements. I call Ms Collins.

**Ms Maeve Collins:** I thank the Chair and Senators for the opportunity to speak to the committee. I have just returned from Brussels where I was serving as Ireland's deputy permanent representative to the EU. I took up duty in my new post last Thursday. I am delighted to have a chance to join the committee so early in my tenure as the new director general for the EU division of the Department of Foreign Affairs.

While I am new to this role, my time in Brussels has provided me with an awareness of the many challenges that Brexit brings to so many sectors across the European Union, but especially in Ireland. I am also aware of the valuable contributions Members of the Oireachtas have made to Ireland's Brexit response. Between them, the EU-UK withdrawal agreement, which includes the protocol on Ireland and Northern Ireland, and the TCA underpin the UK's withdrawal from the EU and establish the framework for our new relationship. While both agreements contain provisions and structures for governing the relationship, like most international agreements, they prudently also outline how the parties should engage where difficulties or issues of concern or disputes arise.

The avenues available for resolving disputes differ between the agreements and between the specific parts of the agreements depending on the issue in question. However, the most important recourse is to try to resolve differences through dialogue. This takes place, in the first instance, within a series of governing structures. In the case of the withdrawal agreement, the joint committee is the overarching committee. In the case of the withdrawal agreement, the joint committee is the overarching committee. For the EU-UK trade and co-operation agreement, TCA, this is the partnership committee. Both are led by Commission Vice-President Šefčovič for the European Union, and Lord Frost for the UK. This ensures that the appropriate political engagement and direction can be provided. Each agreement provides for additional co-chaired specialised committees and working groups where EU and UK officials can engage on specific issues and discuss any points that could give rise to difficulties.

Ireland closely monitors the implementation of the withdrawal agreement and the TCA. We are fully engaged with the Commission and other member states to raise any concerns we might have about the implementation of the agreements and to make sure that our voice is heard. In the case of the specialised committee on the protocol on Ireland and Northern Ireland, the Irish delegate is the only member state observer invited to speak for the EU side. In hopefully infrequent cases where difficulties cannot be addressed in the committee structures, both agreements provide a framework for dispute resolution through arbitration. The main features of the two arbitration systems are set out in the briefing note that we provided. The note also highlights differences in approaches on issues such as timelines, panel sizes and remedies for non-compliance with an arbitration ruling. A significant difference is that the withdrawal agreement allows for possible recourse to the European Court of Justice. However, in both agreements, non-compliance can lead to suspension of treaty obligations. Both agreements mandate the establishment of separate independent arbitration bodies. For the withdrawal agreement, a panel of 25 members is now in place and includes one member who is Irish. The 25-person panel for the TCA is in the process of being established. While the arbitration process has not been invoked, should it be required, members will be selected from the appropriate panel.

I will address two other areas that may be of interest. The TCA provides for the creation of an EU-UK parliamentary assembly to include 35 members each from the European Parliament and the UK Parliament. Once established, it will be informed of the partnership council's decisions and can make recommendations to it. The European Parliament has agreed its approach, and is in the process of determining which of its members will attend. The UK Parliament is

yet to determine its approach.

The protocol also includes elements relevant to dispute resolution. The EU has twice initiated infringement proceedings against the UK for breach of obligations under the protocol. The first of these was dropped after the offending clauses from the UK's Internal Market Bill were removed. The second is currently on hold pending wider developments in EU-UK engagement on the implementation of the protocol. Article 16, which we hear so much about, is a safeguard option which either party can invoke, if the application of the protocol leads to "serious economic, societal or environmental difficulties that are liable to persist" or to "diversion of trade". It is important to note that invoking Article 16 does not immediately suspend the protocol or allow either party to dispense with it. It starts a process of engagement with a view to finding a commonly acceptable solution engagement.

While we have focused today on how we would address any difficulties that may arise, we hope that recourse to formal dispute resolution procedures under both of these agreements is not something that needs to be regularly relied upon by either party. The agreements are about building a positive and mutually beneficial set of arrangements, supported by sustained, regular and detailed dialogue at official and political levels. We remain committed to doing our part in making the relationship work. I thank the Cathaoirleach. I am happy to take any questions, as are my colleagues, who are probably more familiar with the technical details than I am.

**Chairman:** I thank Ms Collins. I am sure she is being modest. I wish her the best of luck in her new role. It is great to have this opportunity to engage with her, Ms Farrell and Mr. Gardner. We did not foresee when we set up this meeting that it would be so timely. We are all acutely aware of the political happenings related to this. We want to be cautious and make sure that we do not do anything to disrupt that process in any negative way. I ask members to indicate if they have a question but I might come in first. There is quite a lot in that. The witnesses have done a good job in putting together a succinct document. It is all factual and every sentence is relevant. It is a good opening statement and briefing document. We might just break the discussion into two sections, first the withdrawal agreement and then the trade and co-operation agreement, TCA. We might first focus on the withdrawal agreement, which currently is the main topic for discussion. We are probably realising more and more how important it is to have those dispute resolution mechanisms. While we hope that we never need to use them, they could be one of the more lasting things that stay with us when we move to the next phase of Brexit and the phase after that. This will obviously be an ongoing process for many years.

On the withdrawal agreement and the specialist committee, the witnesses should give a little more detail on how that works. The Irish delegate has an opportunity to speak. In the witnesses' opinion what is the strength of that? Is the delegate's view heard? At present, Commissioner Šefčovič is representing the European Union, both overall and in the committee, and then there is the UK representative. There has been an accusation previously that there is a lack of democratic oversight in terms of an elected person who could represent Ireland's interests. Obviously therefore, this delegate is important to us in having our views heard. To what extent does this delegate make his or her views known and to what is the strength of that? What does that mean in practical terms? If we have a dispute with all of the different agendas at play and all of the different wants and demands at play, how protected are we to make sure that in ten or 20 years' time, we will be able to protect Ireland's interests?

**Mr. Karl Gardner:** I will take that question. The key point is that by the time we get to those meetings, a huge amount of work has been done in advance. A huge amount of engagement in respect of the agenda and our key points happens both in Brussels and through

headquarters in Dublin before those meetings even happen. In terms of political input, there is constant engagement between the Minister, Deputy Coveney, and Commissioner Šefčovič. Ireland's inputs are fed into this process from an early point. I am the delegate on the specialised committee and by the time one gets to the meeting, in general nothing will be said that will be a shock or a surprise to anyone. On the day, we will be reinforcing our message again, as well as ensuring that it is not just the voice of the Commission and the UK, but that member states are watching this closely and are clearly engaged in the process.

As I am an official, I do not engage in the kind of political input the Chair is talking about. However, as I said, the Minister, Deputy Coveney, and the Minister of State, Deputy Thomas Byrne, have direct engagement with senior Commission officials and with the Commissioners and so on. That is happening on an ongoing basis.

**Chairman:** Can Mr. Gardner talk us through the committees? There is the joint committee and the specialist committee on the protocol itself. In the last number of weeks, practically, how have they interacted? How does the joint committee interact with the specialist committee? How does that work? This is probably the first time it has been tested to this degree.

**Mr. Karl Gardner:** The last meeting of the specialised committee was a couple of weeks back. There are several specialised committees and we are focusing on the committee that deals with the protocol, which is the one in which the Chair is interested. The specialised committee talks through the agreed agenda. It was a useful meeting on the last occasion because it gave us a chance to catch up on elements of the protocol that the EU had concerns about, as well as to hear what the UK was doing in terms of implementation. More broadly, it was a chance to allow the EU to once again repeat the need for complete, fuller implementation by the UK side. That, then, will feed into the next meeting of the joint committee.

The joint committee is the committee that has the power to take decisions, whereas the specialised committee is the advisory committee. The specialised committee gets a chance to go through the issues on its agenda. I do not have a date for the next meeting of the joint committee. We would hope to see a meeting soon after tomorrow's announcements, as part of that the bigger discussion around the Commission's papers that will come out tomorrow. It feeds into that process.

Again, there is constant engagement between the co-chairs of the committee, so for the UK and then on the Commission's side and the EU is where we feed in. There are regular meeting of the working party on the United Kingdom at Brussels, where Ireland is a constant voice that member states look to for views as to what the Commission is considering. Members will be familiar with the work being done in Brussels by continually engaging with representatives of other member states and with the Commission. I refer to engagement with the UK service and to the broader Directorates-General, DGs, to ensure that our voice is heard. It is, therefore, a parallel but joined-up process between the political and official side.

**Chairman:** Does the specialised committee make formal recommendations or is it more of an informal engagement? Is there a formalised process to link the specialised committee with the joint committee regarding how they interact in the context of making recommendations, or is that process still being determined?

**Mr. Karl Gardner:** That element is still being worked through. The specialised committee is working through the technical detail, while the joint committee tends to take the bigger political and strategic overview. There is not a sense that a set of recommendations will be handed

over from every meeting to just be rubber-stamped. The two bodies are working together. The co-chairs of the specialised committee are the deputies of the chairs of the joint committee and there is a close link between the two committees.

**Chairman:** Would it be fair to say that whatever papers that it is anticipated will be presented by Commissioner Šefčovič tomorrow will have been informed by the work of the specialised committee and that Ireland's views are reflected therein?

**Mr. Karl Gardner:** They will have been informed by the specialised committee and by the meetings the Commission had in Northern Ireland. The papers will also have been informed by the work that we and our colleagues in Brussels have done, as well as by the views of many other member states. It is not just the specialised committee. A great deal of information is feeding into this initiative. I have not seen all the formal papers, but what I understand is that they will cover all the elements that I imagine would have been discussed at the specialised committee.

**Chairman:** To return to the question about Ireland's delegate, what is the strength of that position? I ask that question because it is not a democratically-elected position and we have no other way of feeding our views into this process. Criticism has been made about the democratic deficit and there being no accountability to elected representatives. How strong is the position of Ireland's delegate in that context? It appears to be the case that an opportunity has been given to speak, which is great. Does the position go any further than that though? It seems to be a position that is quite limited, if I can put it that way.

**Ms Maeve Collins:** The delegate is speaking on behalf of the Government of Ireland. I will let Mr. Gardner talk in more detail about the role. It can be guaranteed, however, that this is not someone who is going to put forward a position that has not been agreed within Government. Brexit is given much attention across all Departments, so whatever is said is going to be representative of a position that is held by the Irish Government, which is democratically elected and accountable.

**Mr. Karl Gardner:** The specialised committee is a meeting of officials. Everyone there is an official. That is the key point. It is not considering the views of the Department of Foreign Affairs based on those of the members here. There is close co-ordination across a variety of issues in those meetings and we also have the usual regular engagement with our Ministers in this regard. This matter, as can be imagined, is also a regular topic of conversation between officials here, in Brussels and in London, across the Department with the Minister, the Minister of State with responsibility for European affairs, Deputy Thomas Byrne, and also elsewhere.

**Chairman:** Would it be fair to say then that the ultimate decision-making power rests with the joint committee?

**Mr. Karl Gardner:** Yes, the joint committee has the power to make decisions.

**Chairman:** Moving on to Article 16, Ms Collins very properly touched upon the conditions or the bar to be met in respect of invoking it. This aspect is perhaps sometimes not discussed in as much detail as it should be. A high bar must be met in this regard. How can it be decided whether one partner to the agreement has had serious economic, societal or environmental difficulty? Ultimately, if one side says that such difficulty has been experienced and the other side says it has not, does that question then move into the realm of the European Court of Justice, ECJ, for determination?

**Mr. Karl Gardner:** Again, this comes down to one side to decide. There is no definition of these things. Therefore, it comes down to one side to decide that certain elements of the experience meet the requirement to trigger Article 16. Once that happens, the question goes straight into a process which includes an announcement in that regard. I have the exact choreography of what happens here. There is an announcement that this is going to be done through the joint committee-----

**Chairman:** I am sorry to interrupt but before Mr. Gardner moves on to the process itself, if there is a dispute over whether the bar has been met, in other words, if the UK said it met the bar in that there was a serious economic and societal impact but the EU said there has not been, then I assume the process simply does not start. If there is disagreement at the outset, how is that determined? That might be the crux of the issue in the next number of weeks.

**Mr. Karl Gardner:** Let us say one of the parties, we will not say which, decides it is going to invoke Article 16. The first thing that party does is notify the joint committee it is doing this and there are immediate consultations with a view to trying to find the solution. If no solution can be found one side or the other can take safeguard measures, but there is also a dispute settlement mechanism within that which allows the development of an arbitration panel, just to decide on issues that arise within Article 16 as well. Again, as with what Ms Collins was saying earlier, it is a process. It is not that suddenly Article 16 crashes things; instead it is a process of joint committee discussions and then various options which flow from that as well.

**Chairman:** Ultimately then, if there is a disagreement as to whether that bar has been met to even trigger Article 16, it could end up before the ECJ.

**Mr. Karl Gardner:** Yes, it ultimately could.

**Chairman:** The irony of it.

**Ms Maeve Collins:** That would be a long journey though.

**Chairman:** Yes. The marker of this entire process has been that it is a long journey.

I move to the EU-UK Trade and Cooperation Agreement because there is an interesting element of that, namely, the parliamentary assembly. Will the officials take us through what that is going to look like? How will its members be selected? How will it operate? Ultimately, what powers does it have with respect to overseeing the implementation of the TCA?

**Ms Maeve Collins:** We do not have an awful lot to add beyond the opening statement. The European Parliament will appoint members. We are still waiting for the UK to take a position and begin nominating its own members. Regrettably, it is yet to happen. We are not sure yet. Obviously, we would like to see some Irish representation on that body but ultimately it is for the European Parliament to decide which of the 25 members will be on it. I understand that is being worked on at the moment. My colleagues may have something to add.

**Ms Deirdre Farrell:** I add that the TCA is not prescriptive. It is very much that the parliaments themselves may establish the parliamentary assembly. It does not prescribe what that looks like and it is thus very much up to the European Parliament on the EU side to determine what that looks like. The information we have is what has been set out so far but it is certainly at an early stage in the process, as Ms Collins said.

**Chairman:** The officials are saying there is no guaranteed way for an Irish MEP to sit on

the assembly, though we would obviously hope to get a slot there .

**Ms Maeve Collins:** Yes.

**Chairman:** The officials have said it can make recommendations. What happens when recommendations are made? Must they be acted upon or are they just to be considered and noted?

**Mr. Karl Gardner:** I will double check that but my sense is they will be considered and noted. There is no sort of prescriptive duty for the joint committee to take them on board. They would have to have some form of weight, coming from elected representatives on both the EU and UK sides. I do not have the exact language in front of me but my sense is it is for consideration.

**Chairman:** It is early days and I appreciate that. We are waiting for one side to catch up in some aspects of it.

Returning to the specialist committee, it has been debating and deliberating over the last number of weeks around ways to make the protocol work a bit better for people. It has been fantastic to see the engagement between the Vice President, Maroš Šefčovič, the Irish Government, the Department and all the stakeholders in Northern Ireland to really get to the crux of what the problem is. There seem to be very practical issues. From the officials' work in the Department, what have been the key issues businesses and citizens are saying they want us to look at, in terms of day-to-day, practical living and business requirements? What are their asks, essentially?

**Mr. Karl Gardner:** Their biggest ask for them all is certainty, as the committee will have heard. Businesses do not particularly like any form of uncertainty. It is important to note that it has been good on citizens and business, it is not just focused on economics but the broader community. They would like to see some form of clarity on customs and how the process is to work. SPS checks have been raised in our engagements with businesses there and the committee will have heard that too. Medicines are raised all the time. The fourth thing is similar to the point the Chair made earlier which is the need for some form of engagement process between Northern Ireland and the Commission, that they understand what is happening in the Commission that impacts on them. Those are the four broad areas that tend to be covered in our engagements.

**Chairman:** The engagement process is something that would have been raised at the committee. Citizens and businesses in Northern Ireland are subject to Single Market and customs union rules but there is a democratic deficit as they do not have an elected member representing them at the table. Do the officials have any thoughts? The committee has done a little work on citizens' rights and democratic representation for those in the North. Have there been any conversations around the shape that might take in coming years in terms of having that voice heard?

**Mr. Karl Gardner:** From tomorrow, if our understanding is right, we will see a set of proposals from the Commission that will address a number of these issues so that they will be better informed and engaged through the process. At a political level, the Taoiseach, the Minister for Foreign Affairs and so on, are constantly engaged with the parties in Northern Ireland, and not just the parties but also civic society, and business groups to make sure that what we are hearing also feeds into the Commission in the work we spoke of earlier, ensuring that the Commission is aware of what we are hearing on the ground.

Much of this not only falls on the Commission and the EU side; the UK can also decide how it will engage and bring certain elements of Northern Ireland, whether politics or civic society, into the debate as well. It is not purely an issue for the EU to solve, the UK also has capacity to do it.

**Chairman:** Absolutely, we would certainly agree on that. I have one final question on the dispute resolution mechanisms, around the arbitration panels, how they are selected and comprised and how it is agreed between the parties to the withdrawal agreement and trade and cooperation agreement, TCA.

**Ms Maeve Collins:** I will hand over to Ms Farrell for more detail but in the case of the Irish person who is on the panel, quite a detailed selection process was undergone. There was a list of candidates all of whom had to be qualified and eligible to hold the highest judicial office in the land, so they all had a detailed legal background. An assessment panel was then set up which included senior officials from the Departments of Foreign Affairs and the Taoiseach and from the Office of the Attorney General. It reviewed the CVs, publications and track records of the candidates and finally put forward two candidates, one of whom was agreed in Brussels as a suitable candidate for this panel. My assumption is that other member states followed quite a similar process. From the Irish perspective, it has the potential to be a very important role indeed so it was crucial to have a very rigorous assessment process of the person's professional and technical abilities and qualifications.

**Ms Deirdre Farrell:** Just to add, that was the arbitration panel for the withdrawal agreement which includes the protocol but the process is still under way for the arbitration panel for the TCA.

**Chairman:** Is that a similar process for us domestically and beyond?

**Ms Deirdre Farrell:** If I recall correctly, the European Commission runs the process in a similar way to free trade agreements and other international agreements. The process is run centrally from Brussels and not so much with a nomination process that we went through for the withdrawal agreement. That is why it is managed centrally from Brussels.

**Chairman:** Is there one or more Irish applicant?

**Ms Deirdre Farrell:** The process is run centrally through the Commission without, quite rightly, oversight or involvement from member states. We have no information and the process is still under way. We hope to shortly hear who the nominees are on the EU side and, hopefully, we will then have agreement with the UK to have that panel set up and ready to go.

**Mr. Karl Gardner:** There was a call so Irish people could apply, if they so wished.

**Ms Deirdre Farrell:** Yes.

**Chairman:** This mechanism is of particular interest to me. It has not gotten anywhere near the level of discussion other elements of the process have and yet we will have to live with these mechanisms for a very long time. It is important that as Brexit slips off the agenda Ireland is still front and centre because we have the most to lose. The mechanism is still in the process of being established and we will watch to see how things pan out.

Last July, this committee produced an interim report but we did not touch on this area. I am very keen that we include this area in our final report before the end of the year because it is a

crucial element of our work.

As no other members are offering and we cannot make contact with Senator Ó Donnghaile, I thank Mr. Karl Gardner, Ms Maeve Collins and Mr. Deirdre Farrell from the Department of Foreign Affairs for coming here. The clerk to the committee will forward a copy of our final report to them and we hope to publish the debate in December before we go into recess. I wish Ms Collins the best of luck and wish everyone else the best of luck with their work. It is going to be a busy few days and few weeks for everybody. Obviously we hope that any issues are resolved and move forward to where we want them to be.

The date of the next meeting is Thursday, 14 October, and it will commence at 3 p.m. in the Seanad Chamber. A further meeting will take place at 12 noon in Committee Room 4 on Tuesday, 19 October when we will meet officials from the Department of Health and the HSE to discuss the cross-border healthcare directive. For the second hour of the meeting, we will have witnesses from Medicines for Ireland who will discuss the supply of medicines and medical devices post Brexit.

The select committee adjourned at 12.47 p.m. until 3 p.m. on Thursday, 14 October 2021.