

## **CAJ Initial comments on draft Withdrawal Agreement protocol on Ireland/Northern Ireland**

### **Synopsis of the Contents**

The Protocol begins with a lengthy preamble dealing with the context which has led to it. The vital points are:

- The GFA must be protected “in all its parts”
- The commitment of the UK to protect North-South cooperation and the guarantee to avoid a hard border are “overarching requirements” and any future arrangements must be compatible with them
- The Protocol will be without prejudice to the “rights, opportunities and identity that come with citizenship of the Union for the people of Northern Ireland who choose to assert their right to Irish citizenship”
- The Protocol is based only on the “third scenario” of maintaining the “full alignment” with those Union rules which support North-South cooperation, the all-island economy and the 1998 Agreement (the assumption seems to be made that this commitment to alignment applies only to Northern Ireland not the UK as a whole)
- A main purpose of the Protocol is to create a “common regulatory area” of the island of Ireland
- If a broad agreement is made satisfying the “overarching requirements” the Protocol can be dispensed with

**Article 1** obliges the UK to ensure “no diminution” of rights and equality as in that part of the GFA, “including in the area of protection against discrimination as enshrined in the provisions of Union law listed in Annex 1” (text of the Annexes is not included), and to set up “dedicated mechanisms” to do so. It also commits the UK to continuing to facilitate the NIHRC and its Joint Committee with the Irish Commission and the ECNI.

**Article 2** allows for a continuation of the Common Travel Area respecting the rights of natural persons under Union law and the free movement of Union citizens and their families “to, from and within Ireland.”

**Articles 3 to 9** deal with the “common regulatory area.”

**Article 3** establishes an “area without internal borders in which the free movement of goods is ensured and North-South cooperation protected.”

**Article 4** has ten detailed paragraphs establishing NI as “part of the customs territory of the Union” and details the tax and tariff arrangements thereby necessary. Specific arrangements to implement this Article are left to the Joint Committee (established between the UK and EU to oversee the whole agreement) on the proposal of a Specialist Committee set up to deal with Ireland and Northern Ireland.

**Article 5** deals with agriculture and fisheries and establishes one “sanitary and phytosanitary” (animal and plant health) regime for the island. It also applies Union law on the production and marketing of agricultural and fisheries products to NI (detailed in annexes for which the text is not provided).

**Article 6** affirms the single electricity market for the island regulated by EU law.

**Article 7** applies Union environmental law to NI.

**Article 8** provides for the maintenance of existing North-South cooperation and the development of new forms based on the GFA “in full respect of Union law.”

**Article 9** deals with state aid (aid that “distorts competition” and is barred) and says that only measures which affect trade between NI and the Union are so disbarred.

**Article 10** establishes a Specialised Committee, made up of UK and EU representatives which would facilitate the implementation of the Protocol and make any appropriate recommendations to the overall Joint Committee.

**Article 11** deals with supervision and enforcement. As regards the common regulatory area, all the relevant Union institutions and agencies, including the ECJ, will have full powers and legal impact upon the UK in the same way as in the Union. In other words, in respect of the specific aspects covered in the idea of a common regulatory area, the UK will be bound by the authority of EU institutions.

**Article 12** applies provisions in the main document relating to such matters as definitions, interpretations, privileges and immunities of officials, duties of confidentiality and the operation of various institutions. It also specifies that UK domestic legislation must be used to effect relevant provisions and that the case law of the ECJ must be taken into account. Exceptionally, “representatives or experts” of the UK may be invited to attend Union institutions and meetings to discuss matters relating to the Protocol but only on a “case-by-case basis” and without a vote.

**Article 12(1)(c)** specifies that the whole of Part Six of the Agreement, which covers implementation, enforcement and dispute resolution, applies to this Protocol though without prejudice to the specific measures contained in Article 11 with respect to the common regulatory area. Amongst other things, Part Six establishes a Joint EU/UK Committee for the whole Agreement and Specialised Committees for different areas, including this Protocol. The final arbiter is, however, the Court of Justice of the European Union.

**Article 13** is entitled “Safeguards” and allows either the UK or the EU to take unilateral action to correct “serious economic, societal or environmental difficulties liable to persist” caused by the operation of the Protocol. In turn the other party might take “rebalancing” measures. These powers are to be governed by “procedures and dispute settlement arrangements set out in Annex 3” (text not included).

**Article 14** commits both parties to counter fraud and other financial illegality.

**Article 15** allows for a subsequent agreement between the Union and the UK to supersede the Protocol if it satisfies the overarching requirements of addressing the unique circumstances of the island, avoiding a hard border and protecting all aspects of the GFA.

**Article 16** provides that the three annexes (1 on discrimination, 2 on tax, tariffs and trading regulations and 3 on dispute settlement mechanisms) form an integral part of the Protocol.

## **Commentary**

There are important formulations in the Preamble and it is necessary to recognise the strength of the formulation of the protection of the Agreement in general and the particular definition of North-South cooperation and avoiding a hard border as “overarching requirements.” It is a recognition of the importance of our peace settlement that its protection is seen as an essential foundation of a major, multilateral, international negotiation. The rights of Union citizenship for those who choose to claim Irish citizenship are recognised but that does, as we have pointed out elsewhere, lead to a division between the rights accruing to British and Irish citizenship in the North, which is an unresolved question.

Article 1 is of huge significance. There is welcome recognition of the whole Rights, Safeguards and Equality of Opportunity section of the GFA but equally important is the commitment to no diminution in the protections against discrimination found in EU law. The content of Annex 1, listing the relevant provisions of Union law, will be important and may be a subject for active lobbying. It is certainly arguable that the full protections of the Charter on Fundamental Rights comes under the description of “protections against discrimination,” and that should probably be the starting point of advocacy. Again, the commitment to (presumably new) “dedicated mechanisms” to implement these provisions is potentially very important and we should consider what form they may take. It would be unfortunate if the UK interpreted these mechanisms as being just the NIHR and the ECNI which find difficulty in carrying out their existing responsibilities without being given additional ones. Nonetheless, the commitment to the continued facilitation of these bodies in the second paragraph is welcome and gives an opportunity to lobby for a restoration in the cuts to their respective budgets.

Article 2 on the Common Travel Area perhaps requires a little interpretation. It allows the continuance of bilateral arrangements between Ireland and the UK but with conditions. The first is that arrangements must fully respect the “rights of natural persons conferred by Union law.” These are rights of all people, not just citizens, but the question is how might their rights be engaged by a common travel area? The most obvious answer is that, if free movement is guaranteed to British and Irish citizens, other people might find themselves subject to particular controls and the most obvious of those that might violate human rights is racial profiling. In other words, it seems that the EU is saying that the CTA must avoid infringing EU-guaranteed human rights and, perhaps in particular, must avoid racial discrimination.

The second condition, in paragraph 2, is that the CTA must operate “without affecting the obligations of Ireland under Union law, in particular with respect to free movement for Union citizens and their family members, irrespective of their nationality, to, from and within Ireland.” Under EU law on freedom of movement for EU citizens, Ireland is obliged to facilitate movement of EU citizens in and out of the country, including family members who may be from third party countries (outside the EU). In the future, some such may not be entitled to free, unmonitored access to the UK, but the CTA prohibits passport/border controls for Ireland-UK journeys. We would interpret this paragraph as preventing, or at least discouraging, any idea that Ireland would monitor EU citizens entering or leaving the country (including into the UK) on the basis of UK immigration law. This should help obviate the current and future danger that “cooperation” between Ireland and the UK on immigration would in effect mean that UK immigration control is outsourced to Ireland in respect of people travelling through the country.

As noted, Articles 3 to 9 establish a common regulatory area and make detailed provision in the areas described above. Amongst other things, the articles would designate UK customs officers dealing with Northern Ireland as customs officers for the purpose of EU law and Article 4.7 provides for customs controls to be carried out jointly by such officers and Union customs officers. This is obviously the most politically contentious area of the Protocol as, in practice it would make NI part of the EU Customs Area and at least some aspects of the EU Internal Market, and implies that customs controls would therefore be necessary in respect of goods coming from Britain into Northern Ireland.

Trade and customs controls generally would not engage human rights issues. However, this is the way the EU proposes to definitively avoid a hard border on the island. CAJ defends the peace agreement since it is the best and only available barrier to renewed violent conflict and the consequent bonfire of human rights and in our view a hard border would demolish a major foundation of the GFA. We are therefore duty bound to comment on practical proposals – as opposed to fantastical “technical” solutions – designed to avoid a hard border.

The first point to make is that these proposals are not generally directed to controlling the movement of people – or at least those not involved in trade. We are opposed to immigration and other controls on people on the land border or indeed involving any travel within the common travel area. We are also opposed to enhanced “in-country” immigration controls within Northern Ireland. Customs checks can, of course, involve stopping, questioning and searching ordinary people and such checks on a land border intersected by up to 300 official crossings would be highly intrusive. They might be considerably less so at ports and airports where security checks are already common. We might also note that many cross-border journeys are local, short distance, for shopping, health care or education in which delays and disruption could engage people’s socio-economic rights. All NI-GB journeys are, by definition, long distance and involve transport by ship or aeroplane and any short delays are unlikely to engage rights issues. In our view there should be no need for controls in either location but we have to recognise practical differences between them.

Another point is that the extent of any necessary customs and regulatory controls between NI and GB depends on the extent to which Britain decides to trade outside “the” or “a” customs area and the EU internal (single) market. That is, as yet, an unknown factor. Furthermore, there is already very significant regulatory divergence between NI and GB; the sanitary and phytosanitary regimes are distinct, as is the electricity single market.

Arguments have been put that any customs or regulatory controls between NI and GB would change the constitutional status of NI as part of the UK. It is impossible to justify that argument without also accepting that the separate legal jurisdictions and, indeed, devolution itself also offend against the unity of the United Kingdom. However, so long as a hard land border is avoided, CAJ is agnostic about the means to do that unless equivalent or greater threats to the peace process are being proposed; we do not think that is the case here and so are prepared to give the ideas around a common regulatory area a fair wind.

In terms of the oversight of the implementation of this Protocol, the Specialised and Joint Committees are to be made up of representatives from both the EU and UK. It is important that Annex 3 include effective dispute resolution mechanisms. From the text, however, it seems that these would only refer to actions taken under Article 13. The only other reference to Annex 3 is in Article 4(2) and that seems to be a typo – it should refer to Annex 2.2. It seems, therefore, that there is a gap in the area of dispute resolution for the Protocol as a whole. This would need to be clarified.

Otherwise, Article 11 provides that the Court of Justice of the European Union (ECJ) would have final jurisdiction over the elements covered by the Common Regulatory area, but at first sight not in other areas such as the human rights guarantees. Article 12, in listing those articles of the main Agreement that apply to the Protocol, notably omits Article 4(5). This is the provision that, in the main Agreement, says that UK courts must have due regard to post-transition period case law of the ECJ. This may be omitted because Article 12(2) of the Protocol provides that any reference to EU law or its concepts must be interpreted in line with ECJ case law without making a distinction between pre and post-transition. This is an obligation that would presumably be put first on UK courts, at least as regards matters outside the operation of the common regulatory area, but the important point is that the Protocol seems to be designed to be permanent and unaffected by the ending of the Transition Period.

In this context, the application of the whole of Part Six of the Agreement to this Protocol is highly significant. It appears to mean that the Joint Committee for the whole Agreement, as well as the Specialised Committee for the Protocol, will continue to oversee the operation of the Protocol. However, in the case of a dispute which the Joint Committee fails to resolve, Article 162 of the main Agreement allows for the case to be referred, either by consent or by one of the parties, to the European Court of Justice for a binding ruling. This means that the ECJ will have direct jurisdiction over the common regulatory area arrangements (by Article 11) and appellate jurisdiction over the other parts of the protocol by virtue of the application of Part Six.

It is, however, clear that much in practice will depend on the detailed domestic legislation passed to implement the Agreement. Of course, there is clearly scope for much negotiation – and lobbying – around this draft Agreement itself before we get onto UK legislation.

Committee on the Administration of Justice  
March 2018