



The island of Ireland and “Brexit” –a legal-political critique of the draft withdrawal agreement

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Abstract

Based on a legal analysis of the position of the island of Ireland in the draft withdrawal agreement, this paper argues that the draft does neither fully protect socio-economic and civic cooperation between on the island of Ireland, nor do justice to the Agreement concluded in Belfast o Good Friday 1998 (the 1998 Agreement). While the common regulatory area is an ingenious proposal to keep Northern Ireland in the Customs Union as well as the EU Internal Market for goods (including agricultural goods and electricity), the fledgling service economy on the island of Ireland remains unprotected, as well as civic cooperation and an all-island services of (social) general interests such as (higher) education and health care. As a consequence, even the second draft falls short of fully safeguarding North-South cooperation on the island of Ireland. If that is to be achieved, Northern Ireland will have to remain not only in the Customs Union, but also in the Internal Market and covered by the EU citizenship acquis, including the anti-discrimination acquis. However, if Great Britain does not follow the same course, the existing constitutional divergence between Northern Ireland and Great Britain will become more pronounced. The draft is thus testimony to the decisive role of common EU membership of the UK and Ireland for safeguarding the 1998 Agreement.

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I. Introduction

Even before the UK Prime Minister's latest EU speech,¹ the EU Commission has delivered the first draft of a legal document for a withdrawal agreement² between the EU and the UK, which has been discussed with the Council (Article 50 formation) and the European Parliament's Brexit Steering Group and in a slightly revised version sent to the UK on 15 March.³ Without adding further changes to the document, a colour-coded version of 19 March indicates which provisions are agreed (green), agreed in political principle (yellow) and not agreed (unmarked) after further discussion between the EU Commission and UK government negotiation parties from 16 to 19 March.⁴

It is thus the EU which takes the necessary steps to avoid that the UK drops out of the EU without agreement on 29 March 2019.

Dropping out without agreement would, as observed widely,⁵ guarantee the return of full border controls between Northern Ireland and Ireland. But would the draft, if it were to become legal, avoid such controls? Will it live up to its aim "to safeguard North-South cooperation, the all-island economy, and protect the 1998 Agreement" (13th recital of the Protocol on Ireland / Northern Ireland), or fulfil the aspiration of "achieving reconciliation and the normalisation of relationships on the island of Ireland" (paragraph 47 of the December Joint Negotiation Report⁶)? And where does this leave the initial aspiration to take into account unique circumstances arising from the geographic position of the island of Ireland, which were acknowledged in paragraph 56 of the Joint Negotiation Document?

By crafting this 119 pages legal draft, including a 20 page draft protocol on Ireland/Northern Ireland, the EU has unilaterally invested considerable resources. This is a long way from the statement, made in September 2017:⁷ "The onus to propose solutions which overcome the challenges created on the island of Ireland by the United Kingdom's withdrawal from the European Union and its decision to leave the customs union and the internal market remains on the United Kingdom". The draft protocol on Ireland/Northern Ireland also makes substantial concessions, such as seemingly abandoning the principle of the indivisibility of the Internal Market.⁸

This paper argues that the draft does not amount to keeping Northern Ireland in the Internal Market and the Customs Union. Instead, the draft mitigates the effects of the UK's aspiration to re-establish borders to other EU Member States through "Brexit" for the island of Ireland and avoids the need to establish a physical border infrastructure on the island of Ireland. While free movement of goods will be protected to some degree, even the second draft falls short of fully safeguarding North-South

¹ Theresa May, Speech on Our Future Economic Partnership with the EU, 2 March 2018 <https://www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union>

² European Commission, TF50 (2018) 33 – Commission to EU 27, https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement.pdf

³ European Commission, TF50 (2018) 33/2 – Commission to UK, https://ec.europa.eu/commission/sites/beta-political/files/negotiation-agreements-atom-energy-15mar_en.pdf

⁴ European Commission, TF50 (2018) 35 – Commission to EU 27, https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf

⁵ Gavin Barrett, 2 March 2018 (<https://theconversation.com/would-staying-in-a-customs-union-after-brexit-avoid-a-hard-border-with-ireland-92485>)

⁶ EU Commission, 8 December 2017, TF50 (2017) 19 (https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf)

⁷ EU Commission, Guiding principles for the Dialogue on Ireland/Northern Ireland (https://ec.europa.eu/commission/sites/beta-political/files/dialogue_ie-ni.pdf)

⁸ Anand Menon, Guardian 28 February 2018 (<https://www.theguardian.com/commentis-free/2018/feb/28/brexit-eu-draft-agreement-britain>)

cooperation on the island of Ireland and protecting the 1998 Agreement in all its parts. If that is to be achieved, Northern Ireland will have to remain not only in the Customs Union, but also in the Internal Market and covered by the EU citizenship acquis, including the anti-discrimination acquis. In order to make these points beyond mere political claims, the paper starts with a legal analysis of the draft (part II). It then proceeds to a cautious evaluation, including some first ideas on how to move forward (III).

II. What does the proposal amount to in legal terms?

This part introduces the legal content of the protocol on Ireland/Northern Ireland in the draft withdrawal agreement, thus enabling the reader to truly assess the evaluation offered below. The protocol provides three substantive subchapters on Rights of Individuals (Chapter I), Movement of Persons (Chapter II) and a Common Regulatory Area (Chapter III), alongside a chapter on institutional provisions (Chapter IV), and general and final provisions (Chapter V, also referencing in a number of provisions from the main agreement).

1. Rights of individuals (Chapter I with Article 1)

The sole article of Chapter I requires the UK to ensure that no diminution of rights, safeguards and opportunity results from “Brexit”, stressing in particular protection against discrimination under EU law. Rights, safeguards and equality and opportunity are specified as those set out in the 1998 Agreement (otherwise known as the Good Friday or Belfast Agreement). The article also obliges the UK to continue facilitating related work of institutions and bodies, in particular the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Joint Committee of representatives of the Irish and Northern Irish Human Rights Commissions. These two paragraphs, in their main substance, go beyond preserving any existing commitments under EU law, and elevate the European Union to a formal co-guarantor of the 1998 Agreement. It is agreed in principle, but not in detail between the negotiation parties as of 19 March 2018.

In order to comprehend this provision, it is necessary to refer to the 1998 Agreement, which actually contains two sections with the identical heading “Rights, Safeguards and Equality of Opportunity”,⁹ probably a result of its negotiation as multi-party peace agreement after a long and arduous conflict.

The first section, dedicated to “human rights”, affirms the signatories’ commitment to mutual respect, civil rights and religious liberties of everyone in the community, alongside eight specific rights. It requires the United Kingdom to legislate for the European Convention of Human Rights (ECHR) to become binding in Northern Ireland with direct access to courts in cases of violations, to create a public sector duty to promote equality of opportunity, and to support the creation of a Bill of Rights for Northern Ireland in consultation with the relevant Northern Irish institutions. Further, a Northern Irish Human Rights Commission and a new Equality Commission for Northern Ireland are to be created, with comparable steps to be undertaken by the Irish government, which is also reminded of the necessity to become a signatory of the Council of Europe (CoE) Framework Convention on National Minorities.

The human rights specified in this paragraph mainly correspond to classical liberal human rights: free political thought, freedom and expression of religion, to seek constitutional change by peaceful and

⁹ This applies to the versions published on the Irish and UK governments’ web pages (<https://www.dfa.ie/media/dfa/alldfawebitemedia/ourrolesandpolicies/northernireland/good-friday-agreement.pdf> and <https://www.gov.co.uk/governmentpublications/the-belfast-agreement>); the version published on the UN peacemaker web page has the heading only once (<https://peacemaker.un.org/uk-ireland-good-friday98>)

legitimate means, to freely choose one's place of residence, and freedom of sectarian harassment. Two go beyond this, in affirming a right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity, and the right of women to full and equal political participation.

The second section under "Rights, Safeguards and Opportunity" is headed "Economic, Social and Cultural Issues". It requires for the UK government to promote "sustained economic growth and stability" in Northern Ireland, as well as promoting social inclusion "including in particular community development and the advancement of women in public life". All this is specified with political commitments, such as a regional development strategy for Northern Ireland addressing the "divided society" alongside strengthening the physical infrastructure of the region, an obligation to take measure on employment equality including anti-discrimination legislation, combatting unemployment while also eliminating the difference in unemployment rates between "the two communities", and last but not least a commitment to support linguistic diversity, consisting of the Irish language, Ulster Scots and languages of the various ethnic communities to address, with an emphasis on promoting the Irish language and the signing of the Council of Europe Charter for Regional or Minority Rights and to address in particular the Irish language.

The 1998 Agreement's content under "Rights, Safeguards and Opportunity" is only loosely related to any hard legal guarantees under EU law. There is no EU law guarantee whatsoever of rights to equal opportunity in socio-economic activity regardless of class, to freedom of sectarian harassment, to pursue constitutional changes and women's rights to full and equal political participation, and EU law guarantees only partly encompass language rights and other emanations of minority protection.¹⁰ Rights of free political thought, freedom and expression of religion were not explicitly enshrined in EU law in 1998. Their recognition as general principles of EC law through ECJ case law from 1974 and guarantees of the Charter of Fundamental Rights for the European Union (CFREU) today only impinge on the EU institutions themselves and on Member States if implementing EU law. Thus, it is difficult to see how these rights should be diminished by the UK's withdrawal from the EU.

Some of the guarantees are, however, paralleled by EU law: the right to freely choose one's place of residence is also encompassed by EU citizenship rights (Articles 21, 45, 49 and 59 TFEU), and socio-economic equal opportunity regardless of religion and belief, disability, gender and ethnic or racial origin is the aim of EU anti-discrimination law and policy, based on today's Articles 19 and 157 (3) TFEU¹¹ and incorporating Articles 21 seq CFREU. The latter also underpin the obligation of Ireland and the UK to implement enhanced employment equality legislation in Ireland and Northern Ireland (under economic, social and cultural issues).

¹⁰ Critical Dimitry Kochenov and Timofey Agarin, 'Expecting too much: European Union's Minority Protection Hide and Seek', *Anti-Discrimination Law Review*, 1 (2016), 1-25 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795191.

¹¹ Which, in 1998, had just been created in Articles 13 and 141 paragraph 3 of the EC Treaty (version of the Treaty of Amsterdam). It is safe to assume that the as yet unspecified annex will refer to a set of EU Directives obliging Member States to outlaw discrimination on grounds of sex, ethnic or racial origin, religion and belief, age and sexual orientation in occupation and employment, for sex and ethnic origin also in some other sectors. The main directives are Directive 2000/43/EC on equal treatment irrespective of racial and ethnic origin in employment and occupation, education, health care and access to goods and services, Directive 2000/78/EC on equal treatment irrespective of religion and belief, sexual orientation, disability and age in employment and occupation, Directive 2004/113/EC on equal treatment between men and women in the access to and provision of goods and services and Directive 2006/54 on equal opportunities and equal treatment of women and men in employment and occupation (recasting directives first originating in 1975 and 1976).

The UK is able to vouch maintaining the protection based on these directives, by maintaining the relevant legislation in Northern Ireland, although this legislation will be weakened by the loss of fortification through enforcement by the EU Commission and the Court of Justice. Treaty rights are reciprocal, depending on the EU recognising and guaranteeing them as well as the Member States. Thus, the UK will be unable to guarantee that these will not be diminished by its departure from the European Union.¹²

2. Maintaining the Common Travel area (Chapter II with Article 2)

Chapter II is headed – as its sole article – “movement of persons”, contrasting with the terminology of free movement (of persons, goods, services and capital) characteristic for the EU Internal Market and Citizenship acquis. Its sole article first allows for the UK and Ireland “to make arrangements between themselves relating to the movement of persons between their territories, while fully respecting the rights of natural persons conferred by Union law.” The proposed provision is one of only 4 draft articles agreed between the negotiation parties as of 19 March.

It creates a new permission to bilaterally agree on issues related to movement, though any agreement must respect all the rights of natural persons conferred by Union law. However, under EU case law preferences for non EU nationals by EU countries must be matched by the same preferences for EU nationals.¹³ Thus, Ireland would be barred from giving UK citizens special rights in Ireland which EU citizens do not enjoy. However, there would be little to hinder Ireland to give UK citizens the same rights as EU citizens enjoy. As regards privileges for Irish citizens in the UK specifically, the EU has a strong preference for all its citizens to be treated equally in non-EU countries, and it could indeed be argued that to allow special preferential treatment of a part of its citizenry violates the principle of equal treatment of the EU citizens which the EU is bound to respect and promote.

While some have argued that the EU would be prepared to abandon its principles in favour of the continued existence of the CTA,¹⁴ the proposed withdrawal agreement makes no such concessions. Instead, the second paragraph of the same article insists that the UK ensures that the CTA is operated in such ways that it does not conflict with free movement rights of EU citizens and their family members, indicating that there are potential frictions, which the operation of the CTA as a national law concept in the UK has to avoid. The provision also implies that the CTA needs to be reregulated between Ireland and the UK, elevating it from a set of customs and practices to an international law agreement proper.

3. Common regulatory area (Chapter III, Articles 4-9)

Chapter III constitutes the bulk of the Ireland/Northern Ireland Protocol with seven articles, of which one is agreed and another one is agreed in principle as of 19 March. The common regulatory area

¹² See below on the hybrid status of Northern Ireland and the corresponding right of its citizens to assert British, Irish or both nationalities.

¹³ In the *Gottardo* case ([C-55/00 – Gottardo \[2002\] ECR I-413](#)) on privileging Swiss nationals over French nationals in the Italian pension system, the Court found that “when a Member State concludes a bilateral international convention on social security with a non-member country which provides for account to be taken of periods of insurance completed in that non-member country for acquisition of entitlement to old-age benefits, the fundamental principle of equal treatment requires that that Member State grant nationals of other Member States the same advantages as those which its own nationals enjoy under that convention unless it can provide objective justification for refusing to do so.” (Paragraph 34), though it recognised that in extreme circumstances discrimination of EU citizens in comparison with non EU citizens might be justified, confirming its ruling in *St Gobain* (case [C-307/97 \[1999\] ECR I-06161](#), paragraph 59, see also paragraph 60).

¹⁴ See Imelda Maher, 'The Common Travel Area: More Than Just Travel' <https://www.ria.ie/sites/default/files/ba-travel-online.pdf> [accessed 28 February 2018]

“constitutes an area without internal borders”, a half-line reminiscent of Article 14 TFEU on the EU’s Internal Market, “in which the free movement of goods is ensured and North South cooperation is protected”. (Article 3)

The term “common regulatory area” is alien to EU law, which refers to an “area without internal frontiers” (Articles 3 TEU, 26 TFEU). The EEA Treaty, which together with the EFTA Treaty includes Norway, Liechtenstein and Iceland into the EU’s Internal Market, does not recognise the term either, as it aims at a “homogeneous European Economic Area” (Article 1), comprising the four fundamental freedoms (free movement under the condition of equal treatment for goods, services, persons and capital) as well as EU competition law and closer cooperation in fields such as research and development, the environment, education and social policy. The term “common regulatory area” has been used in EU Commission policy documents on extending the common energy market into the EU neighbourhood, stating that while “markets are the best way of ensuring safe and affordable energy supplies”, “markets do not operate in a vacuum” and “need (...) legal infrastructure”. The “common regulatory area” would deliver this legal infrastructure.¹⁵ The term is also used by the IMF in relation to the banking union.¹⁶

As a legal term it is unprecedented, which indicates that the concept is entirely new. It mainly aims at avoiding a physical infrastructure at the border between Ireland and Northern Ireland for controlling goods (Article 4). This would not only require a massive investment by Ireland, as the EU Member State required to enforce the EU external customs border with the UK at this point, but also bring back painful memories of the times of conflict on the island, when the trade border was not only (ab)used for intimidation through its harsh enforcement, but also had a real impact on livelihoods.¹⁷

To take full advantage of the EU Customs’ Code, which only in 1993 enabled all Member States to abolish border controls of goods, Article 4 encloses Northern Ireland in the Customs Code (Regulation 952/2013 EU as amended), as well as into the VAT legislation, transforming the UK customs authorities competent for the territory of Northern Ireland into EU customs authorities. Implementing Article 4, including the collection and distribution of revenue, becomes the task of the Sub-committee of the Joint Committee for supervising the withdrawal agreement (Article 157 Withdrawal Agreement). Article 4 also references the prohibition of customs duties, of quantitative restrictions on imports and exports, on discriminatory and protective taxation complete with exceptions from the TFEU (Article 4 paragraphs 3-6 of the draft protocol on Ireland/Northern Ireland withdrawal agreement roughly correspond to Articles 30, 34, 35, 36, 110 TFEU).

Article 9, agreed in principle, complements the part-extension of the internal market to Northern Ireland by extending the full breadth of state aid provisions to Northern Ireland, though only incompletely referencing Article 107 TFEU in. The core competition law provisions on bans on cartels and

¹⁵ European Commission, an external policy to serve Europe’s energy interests: paper from the Commission/SG/HR to the European Council, S 160/06 Brussels 2006 (http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/reports/90082.pdf); as well as European Commission, 'A European Strategy for Sustainable, Competitive and Secure Energy, COM(2006) 105' <http://europa.eu/documents/comm/green_papers/pdf/com2006_105_en.pdf> [accessed 4 March 2018] (p. 6)

¹⁶ See IMF Staff Reports, 'Central and Eastern Europe: New Member States (NMS) Policy Forum 2014, Staff Report on Cluster Consultations Common Policy Frameworks and Challenges' <https://www.imf.org/en/Publications/CR/Issues/2016/12/31/Central-and-Eastern-Europe-New-Member-States-NMS-Policy-Forum-2014-Staff-Report-on-Cluster-42853> [accessed 28 February 2018] (p. 18), referring to the banking union.

¹⁷ See [Mary Daly, 'Brexit and the Irish Border: Historical Context'](https://www.ria.ie/sites/default/files/ba-border-1-online.pdf) <<https://www.ria.ie/sites/default/files/ba-border-1-online.pdf>> [accessed 4 March 2018]

abuses of a dominant market position (Articles 101, 102 TFEU) and the relevant enforcement competences (Article 103 TFEU) are not mentioned. This is surprising, because there are more focused on markets in goods (though service providers are bound by the provisions as well), while state aid is indiscriminately relevant for the services and goods sector.

Article 5 references as yet unspecified provisions on agricultural policy into the draft protocol. This aims at avoiding border controls for compliance with phyto-sanitary and sanitary rules, and maintaining economic cooperation on the all-island agricultural economy. Article 6, also agreed in principle, vouches to maintain the single electricity market on the island of Ireland, which is based on the EU single energy market.¹⁸ Again, the exact provisions are not specified, which raises the question of in how far agricultural policy at large, including subsidies, or of EU environmental and energy policy at large, will continue to apply to Northern Ireland.

Article 8, the second provision fully agreed by the negotiation parties, states that the implementation of the protocol should ensure not only continuing North South cooperation in the areas explicitly covered by Articles 4-7, but also in transport, health, education and tourism, telecommunication, broadcasting, inland fisheries, justice and security, higher education and sport. The implementation is entrusted to the Joint Committee (Article 157 draft withdrawal agreement), but in addition the UK and Ireland “may continue to make new arrangements building on the provisions of the 1998 Agreement”. This provision is confusing, since the areas mentioned beyond those covered by Articles 4 mainly comprise services under Article 56 TFEU, with the exception of (higher) education, access to which is a right of economically inactive citizens as well. This raises the question whether the implementation process may lead to extending the common regulatory area beyond free movement of goods. Given that justice and security encompass lawyers’ services, the question also could be raised whether freedom of establishment (through establishing a branch in either Ireland or Northern Ireland) is also comprised. Further, given the fact that both employers and trade unions have highlighted the importance of continuing access to labour especially for the agro-food sector¹⁹, which of course raises the question in how far free movement of workers will be encompassed by the protocol. For all these aspects, more clarity on whether the implementation of the protocol may imply an extension of the common regulatory area would have been desirable.

4. Implementation, surveillance, subsidiarity (Chapters IV, V, Articles 10-15)

Comprising of Articles 10 and 11, chapter IV completes the implementation and provides supervision and enforcement mechanisms, which are supplemented by the references to the main withdrawal agreement in chapter V.

Article 10, fully agreed between the negotiation parties, links the activities of the Specialised Committee on issues related to the island of Ireland (Article 158 withdrawal agreement) to the

¹⁸ See for a summary on the EU legal framework European Parliament, 'Internal Energy Market - Fact Sheet' <http://www.europarl.europa.eu/ftu/pdf/en/FTU_2.1.9.pdf> [accessed 3 March 2018] On the Northern Irish dimension see Northern Ireland Affairs Committee, House of Commons, 'The Northern Ireland Electricity Market - 3rd Report 2016-2017' <<https://publications.parliament.uk/pa/cm201617/cmselect/cmniaf/51/51.pdf>> [accessed 3 March 2018]

¹⁹ The employers’ pleas are summarised in a September 2016 plea by Northern Ireland Food & Drink (http://nifda.co.uk/wp-content/uploads/2018/01/NIFDA_Brexit_pdf-3.pdf) while the United Union supported this in 2017 (<https://unitetheunionireland.org/2017/07/28/northern-ireland-political-leaders-must-secure-agri-food-sector-access-to-eu-workers-post-brexit/>); the aspect is also highlighted in an NI Assembly report (<http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2016-2021/2016/aera/6616.pdf>)

institutions established by the 1998 agreement. It assumes that North-South implementation bodies for the Ireland/Northern Ireland protocol will be set up under the 1998 Agreement. While Article 8 certainly empowers the UK and Ireland to do so, this is not a guaranteed outcome yet. Thus, there is a lack of coherence in the draft protocol. While the reference to any specific North South implementation bodies may not become relevant for some time, the Specialised Committee will have to examine protocols from the North-South Ministerial Council nevertheless, as well as discussing any point of relevance raised by the UK or the EU. This renders the input of Ireland into the implementation dependent on the functioning of the North South Ministerial Council, whose functioning depends on the cooperation by the UK.

Under Article 11, supervision and enforcement of the protocol relies on the European Court of Justice as well as the EU Commission and any other EU agencies. Its second paragraph stipulates that any acts of the institutions shall have the same effect in the United Kingdom as in the EU. This would, for example, mean that any decisions and directives the EU Commission issues in relation to state aid have direct effect in Northern Ireland, and that the decisions of the European Court of Justice will have to be complied with for Northern Ireland as if the UK was still a Member State. Further, the Commission could continue to raise infringement actions against the UK for Northern Ireland's non-compliance with the protocol, and Northern Irish courts could refer cases to the Court of Justice of the European Union within the ambit of the protocol. Article 12 paragraph 1 further extends the authority of EU law and the Court of Justice for the European Union in relation to the protocol, by extending some paragraphs of Articles 4,5 and 6 Withdrawal Agreement to the protocol. Under Article 4, the provisions of the Withdrawal Agreement (and by extension of the protocol) shall produce the same effects in the UK as in the EU. The UK will have to create primary legislation in order to make this happen, which in the case of the Northern Ireland protocol could be achieved through changes of the Northern Ireland Act. Further, the provisions of the Withdrawal Agreement as well as the Ireland/Northern Ireland protocol shall be interpreted in line with general principles of Union law. These principles comprise human rights in line with the common traditions of the Member States (Article 6 TEU). Article 4 also makes reference to interpretation in conformity with ECJ case law handed down before (paragraph 3) and after (paragraph 4) the UK's withdrawal. These paragraphs do not apply to the protocol itself, because for its application the ECJ retains full jurisdiction under Article 11.

The complementing provisions of Article 12 (Chapter V) are noteworthy here: in general, the UK has no "seat at the table" in any EU institution under Article 6 of the Withdrawal Agreement. For Northern Ireland affairs, this is modified by Article 12 (4), for representation of the UK for Commission Implementation procedures and in expert groups is at stake. Further, the "national security privilege" for EU Member States contained in Articles 346, 347 continues to apply to the UK as regards Northern Ireland.

Article 13 (Chapter V, agreed in principle) complements the judicial enforcement of the protocol by the option to take unilateral measures in case of serious economic, societal or environmental difficulties for either the UK or the EU (paragraph 1), to which the other party can respond by defence mechanisms. This provision moves the protocol closer to international law agreements, stressing the lack of a supranational relationship between the UK and the EU after its withdrawal.

Article 14 (Chapter V, agreed in principle) commits the UK and the EU to combating fraud and other illegal activities threatening mutual financial interests in the context of Northern Ireland, which seems to refer to the potential for smuggling *inter alia*.

Article 15 (Chapter V, fully agreed) highlights that the protocol is indeed a “backstop regulation”: it will cease to apply, or may never even start to apply, if the future relationship between the UK and the EU achieves the aims of addressing the unique circumstances of the island of Ireland, avoiding a hard border and safeguarding the 1998 Agreement in all its parts. This provision has not been changed from 28 February, although the agreement on this wording is now hailed as a novelty in the press.²⁰

III. A cautious evaluation

As has already become apparent, this draft can only be just that - a first draft, with a number of annexes still to be specified. A provisional critical assessment should not distract from the fact that most of the terms are not yet agreed even at the level of the negotiation parties. This constitutes a contrast to the rest of the withdrawal agreement, where more consensus could be achieved.

1. Internal Market access, protecting the all-island economy,

Some press statements portrayed the draft withdrawal agreement as a major coup for keeping Northern Ireland within the EU Internal Market entirely.²¹ It should have become apparent that this is not a correct assessment. The draft can be criticised for giving up the integrity of the Internal Market, by dividing it into a very specified part comprising freedom of customs duties and the establishment of an area without a customs border, and free movement of goods, including agricultural goods and electricity, as well as a less specified part of integration necessary to maintain the cooperation under the 1998 Agreement. It clashes with the initial negotiation mandate of the European Council which stated:

“Preserving the integrity of the Single Market excludes participation based on a sector-by-sector approach. A non-member of the Union, that does not live up to the same obligations as a member, cannot have the same rights and enjoy the same benefits as a member. In this context, the European Council welcomes the recognition by the British Government that the four freedoms of the Single Market are indivisible and that there can be no “cherry picking”.”²²

The sectorial access of Northern Ireland to the Internal Market (reduced to goods, including agricultural goods, and electricity) is also problematic with regards the commitment to develop the Northern Irish economy to approximate a mature developed economy. The all-island economy, mentioned in the joint negotiator report in December, is actually characterised by significant divergence between the Irish and Northern Irish economy, as summarised in a recent report by Paul Gosling.²³ The Northern Irish economy has not yet compensated the loss of traditional industrial sectors such as shipbuilding and shirt-making by developing a service economy. Instead, replacement industrial

²⁰ See, for example https://www.irishtimes.com/news/world/europe/brexit-uk-agrees-to-backstop-solution-for-border-in-treaty-text-1.3432512?utm_source=lunchtime_digest&utm_medium=email&utm_campaign=news_digest and <https://www.theguardian.com/politics/2018/mar/19/uk-and-eu-agree-terms-for-brexit-transition-deal>

²¹ The BBC reported this as statement by Simon Coveney, the Tánaiste (<http://www.bbc.co.uk/news/uk-northern-ireland-43194888>), see also A Payne in the business insider (<http://uk.businessinsider.com/eu-northern-ireland-customs-union-single-market-irish-border-official-brexit-treaty-2018-2>)

²² European Council (Article 50) Guidelines on Brexit Negotiations of 29 April 2017, EUCO XT 20004/17 (<http://www.consilium.europa.eu/media/21763/29-euco-art50-guidelinesen.pdf>)

²³ Paul Gosling, 'The Economic Impact of an all-island economy - a draft report for consultation' <http://www.paulgosling.net/2018/02/the-economic-impact-of-an-all-island-economy-a-draft-report-for-consultation/#_ftn41> [accessed 21 February 2018]

sectors could be stimulated, and the agricultural and public sectors provide employment and growth in addition. While in recent years some progress in expanding the service economy has been made,²⁴ growth in this sector relies on foreign direct investment (FDI). While FDI in the past was stymied by the different tax rates in Ireland and Northern Ireland, lower corporate tax for certain companies can now be achieved based on UK legislation of 2016. Being excluded from the integrated EU market in services is likely to have an additional stymying effect not only on growth in this important sector, but also on the desired rebalancing of the NI economy and the creation of employment opportunities in a more inclusive way than possible by growing public sector, manufacturing and agricultural employment. Depriving Northern Ireland from access to the European Union service sector (which also requires freedom of establishment and free movement of labour) will continue to limit its adequate economic development.

Finally, subjecting Northern Ireland as a whole to the EU state aid rules would make sense if Northern Ireland effectively remains within the Internal Market. However, if Northern Irish businesses only acquire limited access to the EU Internal Market, subjecting those who as service providers do not get access to the state aid regime would seem somewhat disproportionate. Likewise, dividing the rest of the competition rules from the state aid rules would seem disproportionate if Northern Ireland would get access to the full Internal Market.

2. EU Citizenship rights and anti-discrimination rights

The diminution of rights affects also EU Citizenship rights, which include, but go beyond economic rights (guaranteed in Articles 45, 49 and 56 TFEU), and encompass free movement for other than economic purposes (under Article 21 TFEU), encompassing free movement for purposes of education, including higher education, and also for civic cooperation. These free movement rights can be viewed as underpinning an easing of tensions between two parts of the island of Ireland. They are not encompassed by the draft protocol, while the draft withdrawal agreement only covers the activities of those who are already engaged in cross border work (whether self-employed or employed, see Articles 9 and 22-26 draft withdrawal agreement in particular). While the inclusion of future family members in the rights to engage economically in the EU ensures some generational prospective development, this only applies to those whose forefathers already are using EU economic freedoms as frontier workers or while working outside the state of which they are citizens.

Not extending EU citizenship rights to all citizens of Northern Ireland will have a specifically negative effect on those who are UK citizens. Those holding Irish citizenship while living in Northern Ireland are encompassed by Directive 2004/38, and thus part II of the withdrawal agreement. Those holding UK citizenship are only encompassed by it if they engage in cross-border activity in another EU Member State, including Ireland, through employed work or self-employed activity. In the latter respect Article 23 of the withdrawal agreement allows the setting up and managing of undertakings, which does not seem to exclude the setting up of a branch in Ireland. However, those not engaged in cross national activity, and their children, cannot profit from the withdrawal agreement.

However, there are shortcomings for UK and Irish citizens alike. After all, the draft withdrawal agreement's provisions on citizens' rights only aim at safeguarding decisions to move to the UK (by citizens of the EU 27) or to one of the 27 Member States by citizens of the UK. This aim is congruent with excluding the provision of services across borders from part 2 of the withdrawal agreement

²⁴ Eoin Murphy, Michael Scholes and Aidan Stennet, 'The Executive's Forthcoming Revised Economic Strategy for Northern Ireland: Preliminary Considerations' <www.niassembly.gov.uk/globalassets/documents/raise/publications/2016-2021/2016/economy/8116.pdf> [accessed 4 March 2018]

(Article 32). Its protection of EU citizenship is thus not encompassing, and in particular insufficient to protect the all-island service economy.

If citizenship rights (economic and otherwise) were included in the protocol, those rights would also remain underpinned by the jurisdiction of the European Court of Justice (through Article 11 of the protocol) and partake in the specific quality of EU law epitomised by the terms direct effect and supremacy (primacy), through Article 12 of the protocol. In a nutshell, this ensures that citizens can rely on EU rights (and prospectively on the rights deriving from the withdrawal agreements and its protocols) before national courts. In the case of directly effective rights, this means that these have the same character as national law. Even if rights are not directly effective (such as rights which Member States must ensure pursuant to EU directives), citizens can claim before national courts that national law should be interpreted in line with such rights or in extreme cases should not be applied in order to secure the effectiveness of EU rights. If those indirect effects of EU law are not sufficient, the citizens can claim damages against their own Member States to ensure efficiency.²⁵ In short, EU rights have a completely different character than provisions of agreements under international law, or under national UK law.

It should be said that rights entailed in the Charter of Fundamental Rights of the European Union are only directly effective if citizens are subject to directly effective EU rules. If Member States implement EU rights, they too are bound by the CFREU, which then means that national law may be inapplicable if contravening its rights. The CFREU, just as protection of human rights as general principles of EU law, is predominantly aimed at closing a gap in human rights protection resulting from the supremacy of EU law: because EU law enjoys supremacy, it applies independently from any human rights protection within the Member States. Thus, as far as there is supreme EU law, there must also be a special human rights protection. From this perspective, it constitutes a problem that the withdrawal agreement is not more specific on human rights protection in so far as its provisions do enjoy primacy.

However, the EU's limited remit in the field of human rights also justifies that the withdrawal agreement does not require that no diminution of rights guaranteed under the 1998 Agreement whatsoever occurs. Instead, it only demands that the withdrawal from the EU does not lead to diminution of rights. This clause does not protect all the human rights aspects. In addition, the effectiveness of the CFREU is at times overrated.²⁶ The case of whether gay men who had sex with men may donate blood may serve as an example: although discrimination on grounds of sexual orientation is banned by Article 21 CFREU and there is EU legislation on blood donations, the ECJ ruled that France could maintain such a ban on blood donations without violating the CFREU.²⁷ Similarly, the CFREU ban on age discrimination does not prevent Member States to maintain legislation phasing out air pilots from active service on grounds of age when implementing EU legislation.²⁸ Thus, while the application of the CFREU must be secured in so far as EU law, or the law of the withdrawal agreement

²⁵ These principles are explained in any textbook on EU law, see, for example, Robert Schütze, *European Union Law* (Cambridge: Cambridge University Press, 2015) (pp. 77-146, Part I, 3, 4). For a short summary see also Christopher McCrudden, 'The Good Friday Agreement, Brexit and Rights' <https://www.britac.ac.uk/sites/default/files/TheGoodFridayAgreementBrexitandRights_0.pdf> [accessed 7 December 2017] (pp. 4-5)

²⁶ See for example Human Rights Consortium, 'Rights at Risk. Brexit, Human Rights and Northern Ireland' <<http://www.humanrightsconsortium.org/wp-content/uploads/2018/01/RIGHTS-AT-RISK-Final.pdf>> [accessed 25 January 2018] (pp. 111-16)

²⁷ *ECJ case C-528/13* – Léger - EU:C:2015:288, paragraph 54

²⁸ *ECJ Case C-190/16* – Fries - EU:C:2017:513, paragraph 38

applies in Northern Ireland,²⁹ it does not have any free standing effects, and its effects within the area of EU law are limited. The extensive human rights protection required by the 1998 agreement continues to demand specific measures by the UK and Irish government irrespective of EU law.

Limiting the common regulatory area to free movement of goods (including agricultural goods and electricity), the protocol also fails to achieve the aim to avoid diminishing rights as envisaged by the joint negotiation report. This applies to free movement rights in the area of persons (workers and self-employed) and services, as well as to the rights derived from EU anti-discrimination directives. It also applies to EU citizenship rights, which have a specific relevance in maintaining the hybrid identities guaranteed under the 1998 Agreement, to which we turn next.

3. Hybridity of Northern Ireland and its citizens under the 1998 Agreement

The draft has been criticised politically³⁰ and in first assessment by legal scholars³¹ for reinstating the proverbial border in the Irish Sea. This critique seems directed at the wrong addressee, as it is the UK's intention to withdraw Britain from the Internal Market and the Customs' Union which is motivated by "taking back control", and thus fortifying borders. In the absence of a hard border on the island of Ireland this requires a border in the Irish Sea.

As the UK government never tires to repeat, border controls can be facilitated by electronic preregistering, reducing waiting times and negative impact.³² Through successive reforms of the Immigration Act, the UK government has also introduced in-land controls by employers, landlords, banks and educational establishments for the movement of persons, thus rendering person controls at borders less relevant from their perspective. The proclaimed frictionless border will thus ease any inhibition at the sea border.

Further, the idea that there is presently no "regulatory divergence" between Northern Ireland and Great Britain is not quite accurate. While divergence in laws related to sexualities and reproductive rights (same sex marriage and abortion, as well as the lack of a general Equality Act) may be discarded as concession to the specific religious conservatism of some "communities" in Northern Ireland, the lower corporate tax allowed by UK legislation in 2016 does not fall into that category, and neither do divergence in laws governing employment, real estate and the annual motor testing of cars.

Nevertheless, the joint negotiation report stated that the UK is committed to avoid regulatory divergence from occurring at the occasion of its withdrawal from the EU (paragraph 50) without maintaining the principle of consent under the 1998 Agreement, and to ensure that Northern Irish business has "unfettered access" to the UK internal market. It is worthy of note that this commitment is by the UK, and not a common commitment of the UK and the EU.

²⁹ In so far the critique of the Joint Committee of the Human Rights Commissions of Ireland and Northern Ireland is justified (see <http://www.nihrc.org/news/detail/belfast-good-friday-agreement-joint-committee-warns-of-brexit-human-rights>)

³⁰ See, for example, Staunton, IT 28 February 2018, reporting on the position of Theresa May and the DUP. <https://www.irishtimes.com/news/world/theresa-may-rejects-draft-brexit-withdrawal-agreement-1.3409215>

³¹ See, for example, Steve Peers' blog (<http://eulawanalysis.blogspot.co.uk/2018/03/the-return-of-border-analysis-of-irish.html>)

³² For an extensive elaboration on smart borders, also illustrating the costs involved, and the remaining disruption see Lars Karlsson, 'Smart Border 2.0. Avoiding a hard border on the island of Ireland for Customs control and the free movement of persons' <[http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596828/IPOL_STU\(2017\)596828_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596828/IPOL_STU(2017)596828_EN.pdf)> [accessed 4 March 2018]

The critique however, as far as directed against the EU Commission as a drafter of the withdrawal agreement is partly legitimate in another dimension. The 1998 Agreement establishes a hybrid status for Northern Ireland, as specified in its first part headed “Constitutional Questions”. It commits the “British and Irish Governments” to accepting as legitimate any choice by the majority of the people of Northern Ireland between supporting the Union with Great Britain and a sovereign united Ireland. They are also committed to recognise the right of self-determination for the people of the island of Ireland, which includes the option to bring about a united Ireland, provided the majority of the people of Northern Ireland agree. The fifth paragraph of the chapter ensures that any sovereign government with jurisdiction over Northern Ireland will govern with impartiality and respect for equality of civil political social and cultural rights for all citizens. In addition, there is a specific obligation to govern with parity of esteem for identity, ethos and aspirations of both communities, defined by their wish to either retain the Union with Great Britain or to pursue a united Ireland. This is followed by the commitment to recognise the birth right of all the people of Northern Ireland to identify themselves and be accepted as British or Irish or both, which includes the right to either or dual citizenship irrespective of any future change of the status of Northern Ireland.

Common EU membership of Ireland and the UK offered the background for the 1998 Agreement, and the relevance of this cannot be underestimated when it comes to a hybrid identity. Creating an Internal Market where goods, persons, services and capital move freely in an area without internal frontiers is one of the Union’s principal aims. It has remained thus from 1957, while it was complemented by EU citizenship and a common currency in 1993, and a legally binding Charter of Fundamental Rights for EU acts and their implementation in 2009. Internal Market, Citizenship and Fundamental Rights are pursued with the purpose of creating an ever closer union of peoples, where state borders and indeed states would decline in relevance. This creates a good environment for hybrid places and identities.

The withdrawal agreement does not yet sufficiently secure the ongoing hybridity of Northern Ireland. The joint negotiation report of December openly admitted that it would not and also entail a limited recognition of the hybridity only in relation to individual rights of citizens, in paragraph 52:

*“Both Parties acknowledge that the 1998 Agreement recognises the birth right of all the people of Northern Ireland to choose to be Irish or British or both and be accepted as such. The people of Northern Ireland who are Irish citizens will continue to enjoy rights as EU citizens, including where they reside in Northern Ireland. Both Parties therefore agree that the Withdrawal Agreement should respect and be without prejudice to the rights, opportunities and identity that come with European Union citizenship for such people and, **in the next phase of negotiations**, will examine arrangements required to give effect to the ongoing exercise of, and access to, their EU rights, opportunities and benefits.”*

This recognition fails to acknowledge the specifically detrimental position of those people of Northern Ireland who choose to be British only, as already indicated above. Again, because EU citizenship rights is reciprocal, the UK is unable to maintain the citizenship rights of its Northern Irish citizens single-handed.

Another criticism could be launched against the withdrawal agreement and the underlying December joint declaration. The declaration states in paragraph 50 that any additional regulatory divergence between Great Britain and Northern Ireland will require the consent of the Northern Irish institutions. However, additional barriers between Northern Ireland and Ireland would also have to be encompassed by the principle of consent it clashes with the 1998 Agreement should be avoided. After all, they affect the opportunities of those acclaiming an Irish identity to continue exercising this

identity. If, as the draft withdrawal agreement proposes, the all island economy will be limited to trade in goods (including agricultural goods and electricity); this limitation would equally require consent.

Finally, the withdrawal agreement does not, contrary to expectations of last year, contain any reference to the potential reunification of Ireland, which also is provided for in the 1998 Agreement under “Constitutional Issues”. The hybrid status of Northern Ireland also means that its being part of the UK is a temporary phenomenon in principle, just as a unified Ireland would be temporary in principle. The Withdrawal Agreement should recognise that in the event of that future choice the enlarged Ireland remains a Member State of the EU as a default option – after all, EU membership is widely supported in Ireland, and was supported by the majority of voters in Northern Ireland. This recognition should be underpinned by an obligation of the EU to change the Treaties accordingly, and to enlarge the representation of Ireland in the EU institutions in accordance with its enhanced size.³³ The precedent for this, German reunification, has been praised as demonstrating the flexibility of the EU in regards to any formal legal procedures to be complied with.³⁴ Whether that praise is justified or should rather be phrased as a critique under rule of law aspects is a question for a different paper. However, it would be foolish to rely on the EU to abandon the principles of rule of law once again in the event of Irish reunification. Accordingly, proper precautions should be implemented in the withdrawal agreement.

4. Scope for future design

Accordingly, there is much scope for future design, both by the EU and the withdrawal agreement and/or future relationship between the EU and the UK, and by the UK in its legislation relating to Northern Ireland.

As indicated, the draft withdrawal agreement already hints in Article 8 at the option of expanding its remit through additional agreements by the Joint Committee and/or its Subcommittee on Ireland. If this option is to be understood that those committees can extend the coverage of EU Internal Market Law to Northern Ireland, such a procedural solution offers much potential.

The Joint Committee and Subcommittee should be under an obligation to ensure that any such expansion is accepted while maintaining the principle of consent by both communities within Northern Ireland, which the 1998 Agreement recognises as decisive, as well as by Ireland and the UK. The obligation to liaise with the institutions established by the 1998 Agreement can only be a starting point for this.

Ensuring that any future access to EU institutions such as the Internal Market and citizenship for Northern Ireland complies with the consent principle could be achieved by devolving this area to the Northern Irish institutions.³⁵ A corresponding obligation on the part of the UK should be specified in

³³ See already Dagmar Schiek, 'Hard Brexit: how to address the new conundrum for the island of Ireland' <<http://dx.doi.org/10.2139/ssrn.2949264>> [accessed 20 January 2018].

³⁴ Nikos Skoutaris, 'Territorial Differentiation in EU Law: Can Scotland and Northern Ireland Remain in the EU and/or the Single Market?', *Cambridge Yearbook of European Legal Studies*, 19 (2017), 287-310., from political science perspectives David Phinnemore and Katy Hayward, 'UK Withdrawal ('Brexit') and the Good Friday Agreement' <[http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596826/IPOL_STU\(2017\)596826_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596826/IPOL_STU(2017)596826_EN.pdf)> [accessed 5 January 2018]

³⁵ In a similar direction see David Phinnemore and Katy Hayward, 'The Northern Ireland/Ireland Border, Regulatory Alignment and Brexit' <<http://www.gub.ac.uk/brexit/Brexitfilestore/Filetoupload,796726,en.pdf>> (p. 6)

the withdrawal agreement, alongside draft legislation using the 1998 Agreement as a model. Given the periodic recess of the institutions governing Northern Ireland (i.e the legislative Assembly in Stormont and the Executive, which have been in recess for more than a year now), it would be advisable to add a backstop-solution to the protocol for periods of recess. For example, the Subcommittee could be tasked with gauging the position of the different communities through their political representatives before any extension of the common regulatory area to free movement of persons (as workers or self-employed) and services is considered.

As the draft does not constitute more than a first step, we can only hope that those future developments may be undertaken.

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