

## INTRODUCTORY STATEMENT

# A Legal Assessment of the draft Protocol on Ireland/Northern Ireland and its Implications for the Integrity of the EU Internal Market

*Expert Hearing of the Constitutional Affairs Committee of the European Parliament (AFCO) on the 'The withdrawal agreement between the EU and the UK'*

Monday, 24 September 2018

Good afternoon, Madam Chairwoman Professor Hübner, and dear Members of the Constitutional Affairs Committee. I would like to thank you for inviting me to participate in this hearing on the 'The Withdrawal Agreement between the EU and the UK'. Giving substantive legal input in matters relating to Brexit is always a difficult task as even now – more than two years after the referendum – we still have to deal with a moving target.

The basis for any assessment is a draft withdrawal agreement that was published in February.<sup>1</sup> Given the statements made by the heads of states or governments at last week's European Council meeting in Salzburg, we are still far away from a deal that would convert the draft text into an actual withdrawal agreement proposal submitted to the European Parliament for obtaining its consent. Nevertheless it is worth to have a closer look at the draft text and at proposals that were made, in particular by the UK government. The issues that were to be solved by a withdrawal agreement are citizens' rights, the financial arrangements, the governance of the withdrawal agreement, a transition period and avoiding a hard border between Northern Ireland and the Republic of Ireland. In my introductory statement I would like to focus on the latter point, the 'Northern Irish/Irish question'.

I will, first, look at the draft protocol on Ireland and Northern Ireland and assess it against two benchmarks: Does it avoid border controls on the Irish island? Does it preserve the integrity of the internal market? Having discussed these points, I will, second, address the question what this protocol would mean for the negotiations of the future trade agreement if it entered into force as it is proposed. Third, I will take a look at the alternatives to the draft protocol, in particular those presented by the UK government, and will, fourth, discuss their suitability to avoid a hard border. Fifth and finally, I will conclude on these alternatives and on the draft protocol.

### POLITICAL PARAMETERS DEFINING THE PLAYING FIELD FOR A VIABLE DEAL BETWEEN THE EU AND THE UK

Before turning to the details of the draft protocol on Ireland and Northern Ireland, let me quickly recall the political parameters defining the playing field within which a viable deal between the EU and the UK can be struck. There is, first, 'Brexit means Brexit', according to which the UK has to leave the financial, legal and institutional framework of the EU in implementing the 'people's will'; second, there is the EU's imperative not to divide the integrity of the internal market; and, third, a hard border between the Republic of Ireland and Northern Ireland with border controls may in no way be re-established. Finding an answer to the 'Irish question' that accommodates all these interests amounts to cutting the Gordian knot: How can the integrity of the internal market be upheld without setting up border controls in the event that Northern Ireland is to leave the EU?

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<sup>1</sup> European Commission, *Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*, 28 February 2018, Brussels 2018 ([https://ec.europa.eu/commission/sites/beta-political/files/draft\\_withdrawal\\_agreement.pdf](https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement.pdf)).

## A LEGAL ASSESSMENT OF THE DRAFT PROTOCOL ON IRELAND AND NORTHERN IRELAND

Let's have a look at how the draft protocol addresses this issue. The draft protocol implements the so-called 'backstop' solution, which means that it only applies unless and as long as both the UK and the EU do not find another solution to the Irish question in a future trade agreement. The protocol shall apply as from the end of the transition period, which is supposed to be on 31 December 2020. The draft protocol is subdivided into five chapters, dealing with 'rights of individuals', 'movement of persons', the 'common regulatory area', 'institutional provisions' and 'final provisions'.

### Incorporating the Chapter on 'Rights, Safeguards and Equality of Opportunity' of the Good Friday Agreement (Article 1)

Article 1 incorporates parts of the Good Friday Agreement into the draft protocol. Paragraph 1 of this articles refers to the chapter on 'rights, safeguards and equality of opportunity' in the Good Friday Agreement.<sup>2</sup> This chapter deals with human rights and with economic, social and cultural issues. Most notably, the chapter requires from the UK to make the European Convention of Human Rights legally binding in Northern Ireland with direct access to courts and remedies in case of breaches. Under the draft protocol this obligation will become part of the withdrawal agreement and the EU will act as a guarantor<sup>3</sup> for this obligation.

It is worth noticing that many rights foreseen by the agreement in 1998 could rely on the enforceability of EU law,<sup>4</sup> which is directly applicable in both Northern Ireland and the Republic of Ireland. The withdrawal of the UK from the EU may therefore deprive citizens from actual legal protection of rights that the parties under the Good Friday Agreement are committed to respect because directly applicable EU rights won't be available in Northern Ireland anymore after Brexit. Article 1 paragraph 1 responds to this threat by including a legal obligation for the UK that there would be 'no diminution' of rights.

This must be understood as an obligation for the UK to uphold the EU *acquis* and its free movement rights in its content and in its enforceability on the territory of Northern Ireland to the extent that they cover the commitments under the chapter on rights, safeguards and equality of opportunity in the Good Friday Agreement. What remains vague is the meaning of 'dedicated mechanisms', through which Article 1 is supposed to be implemented. This reference must be understood as excluding a direct effect of this article so that citizens could not rely on it in front of national courts. If this understanding is correct, it would reduce the practical importance of this article significantly.

### Upholding the Internal Market in Northern Ireland (Chapter II and III)

Chapters II and III of the draft protocol must be read jointly. Together they form the successor of the EU internal market for Northern Ireland. Most strikingly, both chapters read together show a significant deviation from what is the integrity of the internal market.<sup>5</sup> The free movement of workers, the freedom to provide services and the freedom of establishment are somewhat dealt with by Article 2, which integrates the Common Travel Area into the draft protocol. The free movement of goods is addressed by the 'common regulatory area' in chapter III. The free movement of capital is not mentioned anywhere. Checking these chapters against the existing internal market law reveals significant gaps.

### Insufficiency of the Common Travel Area to Provide for a Protection the Free Movement of Persons Equal to EU law (Article 2)

When it comes to the first set of free movement rights, the reference to the Common Travel Area has not the same quality as directly applicable free movement rights for persons under EU law. The Common Travel Area is based on a mutual understanding between the UK and Ireland to conform immigration laws to each other so that any border control is unnecessary. The creation of the Common Travel Area dates back to the year 1923.<sup>6</sup> Traces of it can be found in UK and in Irish national law. Yet, its purely political nature can be seen in the period between 1939 and 1952, in which controls of passengers between the entire Irish island – including Northern Ireland – and Great Britain took place.<sup>7</sup> If I may say so, in this period there were obviously UK prime ministers agreeing with some sort of separation with border controls in the Irish Sea between

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<sup>2</sup> Northern Ireland Peace Agreement (The Good Friday Agreement), 10 April 1998 ([https://peacemaker.un.org/sites/peacemaker.un.org/files/IE\\_GB\\_980410\\_Northern\\_Ireland\\_Agreement.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/IE_GB_980410_Northern_Ireland_Agreement.pdf)).

<sup>3</sup> Dagmar Schiek, 'The island of Ireland and "Brexit" – a legal-political critique of the draft withdrawal agreement', *TREUP occasional Paper* 2018, p. 3 (<https://blogs.gub.ac.uk/tensionatthefringes/files/2018/03/The-island-of-Ireland-and-the-UK-in-Withdrawal-Agreement-Draft-19-March-2018-Schiek-SSRN.pdf>).

<sup>4</sup> In detail on this argument: Dagmar Schiek, 'Brexit on the island of Ireland: beyond unique circumstances', [2018] *NILQ* 69(3), 367 at 372-4.

<sup>5</sup> Dagmar Schiek (note 4) at 388-9.

<sup>6</sup> Bernard Ryan, 'The Common Travel Area between Britain and Ireland', [2001] *Modern Law Review* 64(6), 855.

<sup>7</sup> Bernard Ryan (note 6) at p. 857.

Northern Ireland and the rest of the UK. Border controls were again abolished in 1952 based on an agreement between Ireland and the UK, which was deemed by Irish officials as – I quote – ‘entirely informal’.<sup>8</sup> A joint statement by the UK and Irish minister for immigration on the Common Travel Area of 2011 states explicitly that – I quote – ‘it is not intended to create legally binding obligations, nor to create or confer any right, privilege or benefit on any person or party, private or public’.<sup>9</sup>

All in all, Article 2 of the draft protocol and its reference to the common travel area means, on the one hand, legally less than the free movement of persons rights foreseen by the EU Treaties as the actual legal meaning of this area depends entirely on domestic law, which – after Brexit – may deviate from each other. On the other hand, if the UK adopts tougher immigration rules than the EU, to which Irish law is bound, and if the UK sticks to its commitment not to establish a hard border between Northern Ireland and the Republic of Ireland, it can only return to the precedent of the time between 1939 and 1952, during which it established border controls on the Irish Sea.

### Extending the Customs Union and the Free Movement of Goods to Northern Ireland (Articles 4 and 11)

Turning to the free movement of goods, the draft protocol creates in chapter III a so-called ‘common regulatory area’ – a creature unknown in EU law. Article 4 of the draft protocol copies and pastes Article 30 TFEU on the prohibition of customs duties and charges having an equivalent effect. It incorporates Articles 34 and 35 TFEU on quantitative restrictions and measures having an equivalent effect. It transfers Article 110 TFEU on tax restrictions for goods into the common regulatory area. It extends the scope of application of the Union Customs Code to the Northern Irish territory and qualifies the UK customs authorities in Northern Ireland as customs authorities of an EU Member State.

Whilst this appears to be a copy of the internal market to be applicable in Northern Ireland, a closer look reveals that this is not entirely true. The secondary Union acquis is only covered by the draft protocol to the extent that a legal act is mentioned in annexes to the protocol, which are – at least publicly – not yet defined. This legislative technique reminds of traditional trade agreements with a so-called positive list approach rather than of an integrated internal market for goods. This has two consequences: Firstly, the European Court of Justice will have to decide on the appropriate level of protection in Northern Ireland. And, second, there will only be a dynamisation of EU legal acts mentioned in the annexes (Article 12(3)). Any other new legal act after Brexit would have to be included into the annexes following the formal amendment procedure, which means only upon approval by the UK.

Regarding the powers of the Court of Justice, it has to be seen that secondary law in the field of free movement of goods mostly defines common protection standards. When not being covered by a secondary legal act listed in the annexes, there will be uncertainty with regard to the legality of a particular protection standards in Northern Ireland. Legal certainty that is achieved within the EU by a secondary legal act has then to be established by the European Court of Justice on a case-by-case basis. According to Article 11 of the draft protocol the Court remains competent for the interpretation of the free movement provisions in Article 4 of the draft protocol and has therefore to decide whether a protection standard is justified under the requirements set by the protocol (Article 4(6)), which equal those set by EU primary law (Article 36 TFEU).

To complete the comparison with the EU internal market, one has to look at competition law. Strangely, the draft protocol only incorporates state aid law (Article 9), whilst it leaves the prohibition of cartels and the abuse of dominant positions out of the protocol.

### Interim Conclusions – Splitting Up the Integrity of the Internal Market for the Sake of Avoiding Hard Borders on the Irish Island

Having compared the provisions of the draft protocol with EU internal market law, one can draw the following interim conclusion: The draft protocol creates a customs union between the EU and Northern Ireland and an internal market in relation to goods, albeit incomplete as only a limited number of EU secondary law will be transferred into the common regulatory area. There is no equivalent for the freedom to provide services, the free movement of workers and the freedom of establishment. Only the free movement of persons aspect of these fundamental freedoms is guaranteed to the extent that it is covered by the common travel area, which, however, does not include any enforceable individual rights. The free movement

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<sup>8</sup> Citation found in Bernard Ryan (note 6) at p. 859.

<sup>9</sup> Joint Agreement between Ireland and the United Kingdom regarding cooperation on measures to secure the external Common Travel Area border, 20 December 2011, point 8 ([https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/99045/21197-mea-sec-trav.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/99045/21197-mea-sec-trav.pdf)).

of capital is not mentioned at all. We can therefore conclude, that the EU in this draft protocol already gave up on the integrity of the internal market.

The draft protocol covers the absolute minimum that is, indeed, needed to avoid border controls between Northern Ireland and the Republic of Ireland with a view to goods – betting on an autonomous continuation of the common travel area on the Irish island. Since the draft protocol only enters into force after the expiration of the transition period in case no future trade agreement between the UK and the EU was found, the consequence of the protocol would be to move the border for goods to the Irish sea – something, with which, according to Prime Minister May, no British Prime Minister could ever agree.

## AVOIDING THE ENTRY INTO FORCE OF THE PROTOCOL: FREE TRADE AGREEMENT BETWEEN THE UK AND THE EU RATIFIED BEFORE 31 DECEMBER 2020 (ARTICLE 15)

The entry into force of the draft protocol can – as it still stands – be avoided by a future free trade agreement (Article 15). The UK government has published its position with regard to such an agreement in a white paper this July (Chequers proposals).<sup>10</sup> In brief, it aims at entering into ‘facilitated customs arrangements’, according to which – I quote – ‘the UK would apply the EU’s tariffs and trade policy for goods intended for the EU’, whereas it ‘would [...] apply its own tariffs and trade policy for goods intended for consumption in the UK’.<sup>11</sup> In practice, – I quote – ‘where a good reaches the UK border and the destination cannot be robustly demonstrated at the point of import, it will pay the higher of the UK or EU tariff. Where the good’s destination is later identified to be a lower tariff jurisdiction, it would be eligible for a repayment from the UK Government equal to the difference between the two tariffs’.<sup>12</sup>

Besides customs, the UK government seeks to establish an ‘economic partnership’ with a view to goods, which would be governed by a common rulebook legislated for by the UK Parliament. For services new arrangements are to be found, whilst the free movement of persons is to be ended. The UK government’s proposal specifies that – I quote – ‘these proposals are without prejudice to the Common Travel Area arrangements between the UK and Ireland’.<sup>13</sup> If the EU were to accept this proposal, border controls would have to be established on the Irish island. Whilst the ‘facilitated customs arrangements’ could – provided its real-life implementation in practical, financial and technical terms would work out – at least avoid customs checks at the border between Northern Ireland and the Republic of Ireland, the common rulebook would still make product checks necessary as product standards in the EU and in the UK can be different as the UK Parliament may always veto the implementation of EU standards in UK legislation. In sum, the Chequers proposals may alleviate the Irish problem. They are, however, no solution with a view to avoiding border controls on the Irish island.

### Comparing the Chequers Proposals with the Draft Protocol on Ireland and Northern Ireland

Before turning to the overall discussion of the Irish question, let me raise an additional point in relation to the negotiation dynamics. I believe that the draft protocol as it stands now backs those voices that are in favour of giving up the integrity of the internal market for the sake of a soft Brexit deal. When we compare the Chequers proposals only to the draft protocol, we can see that, in principle, the proposals reflect the same splitting up of the integrity of the internal market as it can be found in the draft protocol: Services, persons and capital can be treated with a different quality than goods. Persons are sufficiently protected by the Common travel area arrangements. In relation to goods both the UK White Paper and the draft protocol propose some sort of customs union and common rules. Admittedly, the customs arrangements and the common rulebook proposed by the UK government stay behind the model supported by the draft protocol.

Yet, and this is a point that I would like to make, the uniqueness of circumstances – which is put forward by the recitals of the draft protocol – won’t be a convincing argument for the British side to accept a fully-fledged internal market for all four freedoms in a future trade agreement whilst on the territory of Northern Ireland only an internal market for goods has to be in place.

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<sup>10</sup> HM Government, *The future relationship between the United Kingdom and the European Union*, 12 July 2018, London 2018 ([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/725288/The\\_future\\_relationship\\_between\\_the\\_United\\_Kingdom\\_and\\_the\\_European\\_Union.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf)).

<sup>11</sup> HM Government (note 10), point 14, p. 16.

<sup>12</sup> HM Government (note 10), point 16a, p. 17.

<sup>13</sup> HM Government (note 10), point 77, p. 33.

## ALTERNATIVES FOR A PROTOCOL ON IRELAND AND NORTHERN IRELAND IN ORDER TO AVOID A HARD BORDER ON THE IRISH ISLAND

Where do we stand? We have, on the one hand, a draft protocol that allows for avoiding a hard border on the Irish island in relation to goods. This is done by extending the EU's customs union and significant parts of EU's free movement of goods to the Northern Irish territory and by upholding the European Court of Justice's jurisdiction in these fields in the event of a hard Brexit. As a consequence, the UK would have to establish a customs border in the Irish Sea. The same would have to happen for persons if UK immigration rules were to deviate from the Irish ones in implementation of EU rules – just as it was the case between 1939 and 1952. On the other hand, we have the UK government's proposals for a future trade agreement that would alleviate the need for border controls on the Irish island but not completely avert it. Both solutions appear unacceptable for either the EU or the UK.

### Accelerating Border Controls: The Smart Borders 2.0 Proposal

Is there a third way? Well, as long as the UK wants to withdraw from the EU, there must be some sort of border – and this border will be either on the Irish island or in the Irish Sea. The hindering effects of the border on the actual movement of goods, services, people and capital could be diminished by modern border control technologies. This argument was put forward by the UK government in the Chequers proposals and was discussed by a study commissioned by AFCE in November 2017 on 'Smart Border 2.0'.<sup>14</sup>

Whilst there are doubts to the extent that these proposals are actually technologically feasible, more importantly, implementation of technology will only accelerate the border control process but not make borders invisible. Placed in the political context of the Irish/Northern Irish border, however, it is the very presence of border controls that endangers the peace process. Even a technologically accelerated border control would therefore not be sufficient to meet the political requirements of avoiding a hard border on the Irish island.

### The UK Government's Proposal for 'Temporary Customs Arrangements'

If one dismisses technological solutions for border controls between the Republic of Ireland and Northern Ireland and if one considers the backstop solution presented by the EU as unacceptable for reasons of the unity of the United Kingdom and if one concludes that both parties are so far away from each other with regard to a consensual solution on a future trade agreement that would make border controls between the UK and the EU unnecessary, attention must be drawn to alternatives to the draft protocol with regard to the period after the expiration of the transition period on 31 December 2020 and a possible entry into force of a free trade agreement. In this context, the UK government presented a technical note on 'temporary customs arrangements'.<sup>15</sup>

According to this note, the UK and the EU would form together the customs territory of the Union insofar as the Common Customs Tariff or other tariff measures are concerned without the European Court of Justice having the exclusive jurisdiction over these matters. At the same time, the UK wants to regain the competence to negotiate and to conclude own free trade agreements. In short, the UK wants to remain in the customs union without the authority of the European Court of Justice until a free trade agreement with the EU is concluded and ratified. Accepting these temporary customs arrangements would most certainly turn around the bargaining powers of the EU and the UK in the negotiations for a future free trade agreement. The UK would then basically have already achieved what it seeks to achieve: Splitting up the integrity of the internal market by focussing on goods. The EU would then have to negotiate the integrity of the internal market into the free trade agreement. But besides these more political strategic considerations, the temporary customs arrangements would also not solve the hard border issue as they do not address regulatory divergence.

### Extending the Transition Period through Amending the Withdrawal Agreement

What are the remaining alternatives to the draft protocol? The 'Norway solution' does not appear as an alternative to the protocol as an EEA membership of the UK might solve problems relating to the free movement rights and regulatory divergence. It would, however, not solve anything with regard to the customs border as the EEA is no customs union.

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<sup>14</sup> Lars Karlsson, *Smart Border 2.0 – Avoiding a hard border on the island of Ireland for Customs control and the free movement of persons*, Study for the Constitutional Affairs Committee of the European Parliament, November 2017 ([http://www.europarl.europa.eu/Reg-Data/etudes/STUD/2017/596828/IPOL\\_STU\(2017\)596828\\_EN.pdf](http://www.europarl.europa.eu/Reg-Data/etudes/STUD/2017/596828/IPOL_STU(2017)596828_EN.pdf)).

<sup>15</sup> HM Government, *Technical note on temporary customs arrangements*, 7 June 2018 ([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/714656/Technical\\_note\\_temporary\\_customs\\_arrangement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/714656/Technical_note_temporary_customs_arrangement.pdf)).

The only viable solution to me would be, the closer we get to 31 December 2020 without a free trade agreement, to change Article 121 of the withdrawal agreement and to extend the transition period. In procedural terms, amending the Withdrawal agreement, would mean to follow the Article 50 TEU procedure, so: obtaining a qualified majority in the Council, the consent of the European Parliament and of the UK Parliament. This follows from the fact that the withdrawal agreement does not have own rules on its amendment, which means to apply the procedures of its creation to its modification.

## SUMMARY AND CONCLUSION

Let me now summarize and conclude: Finding a solution that avoids any sort of border controls between Northern Ireland and the Republic of Ireland that meets the political requirements of 'Brexit means Brexit' and 'safeguarding the integrity of the internal market' is a 'mission impossible'. Solving this problem is additionally aggravated by the fact that the discussions turning around it are in fact 'proxy discussions' on the future trade agreement. Since the protocol on Northern Ireland and Ireland is supposed to be in place after the expiration of the transition period, it will be the benchmark for any future trade agreement. Avoiding a hard border in the future would mean to either align the free trade agreement with the protocol or to perpetuate the unique status of Northern Ireland.

If we downscale the discussion to the mere point of how to avoid hard borders the best, the draft protocol as it stands represents the best of all available options. Yet, it only addresses the free movement of goods on the Irish island. As explained previously, the free movement of persons is – at least from a legal perspective – not sufficiently protected by the Common Travel Area as compared to the EU free movement rights. It must be noted that the EU gave up on the integrity of the internal market in the draft protocol. I believe that this might become a burden in the future negotiations for a free trade agreement with the UK for the simple reason that the draft protocol will serve as the benchmark for this agreement. From this perspective it would certainly be preferable to include into the draft protocol the other fundamental freedoms as well. Saying this, I am fully aware of the fact that this would make the situation politically only more difficult than it currently is. Alternatives to the draft protocol presented so far are not suitable to avoid hard borders with the same certainty as the draft protocol and must therefore be dismissed. The only feasible alternative to me would be a prolongation of the transition period in the withdrawal agreement until a consensual solution in a free trade agreement is found.

I hereby want to conclude my introductory statement and I am very much looking forward to the upcoming debate of this hearing.



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