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## The Protocol in Irish Law

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### 11.1 Introduction

Brexit involves a fundamental reshaping of relations between the UK and the EU and its member states, including Ireland. As the Preamble to the Protocol recognizes, this represents ‘a significant and unique challenge to the island of Ireland’. Since the conclusion of the 1998 Agreement, the EU has provided a critically important, if often invisible, underpinning of the peace process in Ireland. In the wake of Brexit, Northern Ireland is a ‘place between’.<sup>1</sup> On the one hand, it is no longer part of the EU and Protocol Article 4 confirms that it is part of the customs territory of the UK. On the other hand, under the Withdrawal Agreement (WA) and the Protocol, Northern Ireland retains its special relationship with Ireland and remains subject to a substantial body of EU law.<sup>2</sup> If Brexit involves a shift in the legal framework for EU–UK relations from EU law to international law, that shift is incomplete, particularly for Northern Ireland. And, for Ireland, including in its relations with Northern Ireland, Brexit serves to reinforce the bonds with the EU. This is reflected in the role and status of the Protocol in Irish law, which is examined in this chapter.

The chapter begins by exploring the formal status and effect of the Protocol in the Irish legal system. As part of an international agreement concluded by the EU, the Protocol takes effect in Irish law as EU law. However, its formal status is only part of the story. The Protocol has a wider influence on the legal framework governing relations among Ireland, Northern Ireland and the UK. For this reason, the chapter also

<sup>1</sup> D Phinmore, ‘Northern Ireland – A “Place Between” in UK–EU Relations?’ (2020) 25(4) *European Foreign Affairs Review* 631–49.

<sup>2</sup> Arts 5–10 Protocol. See S Weatherill, ‘The Protocol on Ireland/Northern Ireland: Protecting the EU’s Internal Market at the Expense of the UK’s’ (2020) 45 *European Law Review* 222–36.

considers how the Protocol has, first, contributed to the formalization in Irish law of the Common Travel Area (CTA) between Ireland and the UK and, second, brought the 1998 Agreement for the first time within the purview of EU law. In these ways, the Protocol adds an increasingly important EU dimension to the legal framework governing relations on the island of Ireland and between Ireland and the UK.

## 11.2 The Status and Effect of the Protocol in Irish Law

The shifting legal framework governing EU–UK relations is evident in the status of the Protocol in the UK and Irish legal systems. While both Ireland and the UK have traditionally adopted a dualist approach to international agreements, Ireland’s continued membership of the EU is critical in determining the effect of the Protocol in Irish law.

In the UK, although the conclusion of the WA was of great political significance, ‘it had no legal effect within the UK legal order’.<sup>3</sup> In accordance with the dualist approach, revived in respect of EU international agreements following Brexit, domestic legislation was necessary to give effect to the WA and the Protocol in UK law.<sup>4</sup>

By contrast, in Ireland, the dualist approach to international agreements<sup>5</sup> remains significantly qualified by the wide constitutional immunity afforded to EU law.<sup>6</sup> No provision of the Constitution invalidates laws enacted, acts done or measures adopted by the state that are necessitated by the obligations of EU membership or prevents such laws, acts or measures from having the force of law in the state.<sup>7</sup> This is complemented by the European Communities Act 1972 (as amended) (ECA 1972), which recognizes that acts of the EU institutions are ‘binding on the State’ and form part of domestic law ‘under the conditions laid down in the treaties governing the European Union’.<sup>8</sup> It is through this mechanism that EU law – including the EU’s international agreements – takes effect within the Irish legal order.<sup>9</sup>

<sup>3</sup> P Craig, *The Ratifications of the Withdrawal Agreement: UK and EU Perspectives* (DCU Brexit Institute, Working Paper No 05/2020) 2.

<sup>4</sup> See, in particular, the European Union (Withdrawal Agreement) Act 2020 and, in this volume, Chapters 3 and 9.

<sup>5</sup> Art 29.6 of the Constitution of Ireland (‘the Irish Constitution’).

<sup>6</sup> See D Fennelly, *International Law in the Irish Legal System* (Round Hall 2014), chs 2 and 3.

<sup>7</sup> Irish Constitution, Art 29.4.6.

<sup>8</sup> ECA 1972, s 2.

<sup>9</sup> *Maher v Minister for Agriculture* [2001] 2 IR 139, 251.

The Protocol forms an ‘integral part’ of the WA, the international agreement concluded between the EU and the UK to ensure an orderly withdrawal process.<sup>10</sup> In accordance with Article 216(2) of the Treaty on the Functioning of the European Union (TFEU), agreements concluded by the Union ‘are binding upon the institutions of the Union and on its Member States’. The Court of Justice of the European Union (CJEU) has long recognized that, upon their entry into force, international agreements concluded by the Union form ‘an integral part’ of EU law and, for the purposes of Article 267 TFEU, are regarded as an act of the EU institutions.<sup>11</sup> In this way, upon the entry into force of the WA on 1 February 2020, the Protocol became an integral part of EU law and, by extension, Irish law.

While these principles do not necessarily resolve all questions relating to the internal effect of an international agreement within the EU legal order,<sup>12</sup> the CJEU has recognized that the parties to an international agreement are free to agree the effects within their internal legal order.<sup>13</sup> In Article 4 WA, the EU and the UK do just that. Having confirmed that the provisions of the WA and the provisions of EU law made applicable by it shall produce the same legal effects for the UK as for the EU and its member states, Article 4(1) WA goes on to provide that ‘legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law’. This approach stands in direct contrast to the position under the Trade and Cooperation Agreement (TCA).<sup>14</sup>

It follows that, where provisions of the Protocol meet the conditions for direct effect under EU law, they too may be relied upon directly by legal or natural persons in the context of any disputes concerning the Protocol. Indeed, this extends further to the decisions adopted by the Joint Committee (JC) established under the WA. Article 166(2) expressly provides that such decisions are binding on the Union and the UK and that both parties shall implement those decisions, which shall have ‘the

<sup>10</sup> Art 182 WA. As a matter of EU law, on 30 January 2020, the Council of the European Union approved the WA, thereby allowing it to enter into force on 1 February 2020: Art 1, Council Decision (EU) 2020/135.

<sup>11</sup> Judgment of 30 April 1974, *Haegeman*, Case 181/73, EU:C:1974:41, para 5.

<sup>12</sup> See K Lenaerts, ‘Direct Applicability and Direct Effect of International Law in the EU Legal Order’ in I Govaere et al (eds), *The European Union in the World: Essays in Honour of Marc Maresceau* (Brill 2013) 45.

<sup>13</sup> Judgment of 26 October 1982, *Kupferberg*, 104/81, EU:C:1982:362, para 17.

<sup>14</sup> Arts 4 and 5 TCA.

same legal effect' as the Agreement itself.<sup>15</sup> In addition, and of considerable practical importance, Article 4(3) and (4) WA requires that the provisions of the Agreement (and by extension the Protocol) which refer to EU law be interpreted in a manner consistent with EU law.

The significance of the Protocol's status as an international agreement concluded by the EU is not confined to its binding character or its capacity to be directly effective. In the EU legal order, international agreements occupy an intermediate status between EU primary and secondary law: while they must comply with the Treaties, international agreements prevail in the event of conflict with EU secondary legislation.<sup>16</sup> Moreover, for member states such as Ireland, the principle of the primacy of EU law means that international agreements concluded by the EU, such as the Protocol, would prevail over any inconsistent domestic law, even of constitutional status.<sup>17</sup>

In short, the Protocol – as an integral part of an international agreement concluded by the EU – is endowed with the full force and effect of EU law within the Irish legal system. This greatly facilitates the application and implementation of the Protocol in Irish law. Given that most of the core obligations under the Protocol are directed at the UK, it remains to be seen to what extent disputes concerning the Protocol will arise before the Irish authorities and the Irish courts.<sup>18</sup> However, even if the direct implications for Irish law prove limited in practice, the Protocol will nonetheless have a broader influence on the Irish legal system, serving as a vital reference point in relations between Ireland and its nearest neighbour, in the context of both the CTA and the constitutional settlement under the 1998 Agreement.

<sup>15</sup> This is in line with the approach adopted by the CJEU to the decisions adopted by bodies established under Association Agreements: see, eg, *Sevince*, C-192/89, EU:C:1990:322; *Savas*, C-37/98, EU:C:2000:224; *Soysal and Savatli*, C-228/06, EU:C:2009:101.

<sup>16</sup> Judgment of 10 January 2006, *IATA*, C-344/04, EU:C:2006:10, para 35.

<sup>17</sup> Judgment of 9 March 1978, *Simmenthal*, Case 106/77, EU:C:1978:49; judgment of 4 December 2018, *Minister for Justice and Equality*, C-378/17, EU:C:1978:49.

<sup>18</sup> While no disputes concerning the Protocol have yet to come before the Irish courts, there have been a number of cases raising important issues in relation to the surrender arrangements between Ireland and the UK under the WA and the TCA: see, in particular, *Minister for Justice and Equality v Shahzad* [2021] IEHC 89; *Saqlain v The Governor of Cloverhill Prison & Ors* [2021] IEHC 208, which have since been the subject of appeals to the Supreme Court, which decided on 20 July 2021 to make a reference under Article 267 TFEU to the CJEU, *Hasnain Saqlain v The Governor of Cloverhill Prison & Salman Shahzad v The Governor of Mountjoy Prison* [2021] IESC 45 (unapproved judgment of Mr. Justice Clarke, Chief Justice, delivered 20 July 2021) (Irish Supreme Court). See further Chapter 23.

### 11.3 The Common Travel Area

While the Protocol may not require any specific implementing measures in Irish law, its presence can be felt in Irish law in the increasing formalization of the CTA between Ireland and the UK.<sup>19</sup>

At its core, the CTA allows Irish and UK nationals to enter and reside in each other's jurisdictions. Over time, this has been supplemented by arrangements providing for access to work, health care, social welfare, education, as well as other measures such as voting rights in local and parliamentary elections.<sup>20</sup> Although the CTA is long established, Brexit exposed its relatively fragile legal basis. In legal terms, the CTA has traditionally been based on 'a combination of informal administrative understandings and latterly more formal "sectoral agreements"' which are then reflected in domestic law and practice.<sup>21</sup>

When both Ireland and the UK were members of the EU and remained outside the Schengen system, this informal system gave rise to little difficulty. Indeed, Article 2 of Protocol No 20 to the TFEU – under which the UK and Ireland were entitled to control their own borders – allowed the two states to continue 'to make arrangements between themselves relating to the movement of persons between their territories ("the Common Travel Area")' while fully respecting the rights of persons exercising their right of free movement under EU law. However, with the departure of the UK from the EU, the status of the CTA became much more precarious.

From an early stage, there was a political commitment to preserving the CTA. This was confirmed in the Joint Report of the EU and UK negotiators in December 2017.<sup>22</sup> Later, in the Memorandum of Understanding and Joint Declaration of 8 May 2019, the Irish and UK governments reaffirmed their commitment to the CTA.<sup>23</sup> That political commitment was ultimately reflected in Protocol Article 3, which provides, first, that the UK and Ireland 'may continue to make arrangements

<sup>19</sup> See further Chapter 14.

<sup>20</sup> For an excellent overview of the CTA, see S de Mars, C Murra y, A O'Donoghue and B Warwick, *Discussion Paper on the Common Travel Area* (IHREC/NIHRC Joint Committee 2018).

<sup>21</sup> *Ibid.*, 14. See also I Maher, *The Common Travel Area: More Than Just Travel* (RIA/British Academy Brexit Policy Discussion Paper, 2017) and Chapter 14 in this volume.

<sup>22</sup> *Joint Report from the Negotiators of the European Union and the UK Government on Progress during Phase 1 of Negotiations under Article 50 TEU on the UK's Orderly Withdrawal from the European Union*, 8 December 2017, para 54.

<sup>23</sup> See the website of the Department of Foreign Affairs, [www.dfa.ie/brexit/getting-ireland-brexit-ready/brexit-and-you/common-travel-area/](http://www.dfa.ie/brexit/getting-ireland-brexit-ready/brexit-and-you/common-travel-area/).

between themselves relating to the movement of persons between their territories (“the Common Travel Area”), while fully respecting the rights of natural persons conferred by Union law’. Second, Article 3(2) requires the UK to ensure that the CTA and the rights and privileges associated therewith ‘can continue to apply without affecting the obligations of Ireland under Union law, in particular with respect to free movement to, from and within Ireland for Union citizens and their family members, irrespective of their nationality’. Article 3 thus strengthens the formal recognition of the CTA in EU law and permits its continued operation subject to its consistency with EU law and, specifically, the right of free movement.<sup>24</sup>

For its part, the Oireachtas (the Irish Parliament) has enacted a series of measures to place the CTA on a firmer legal footing in Irish law. The Minister for Health has been given the power to adopt measures providing for health care and reimbursement arrangements in accordance with the Memorandum of Understanding on the CTA.<sup>25</sup> The Minister for Social Protection is empowered to make an order providing for the implementation of the 2019 Convention on Social Security between the Irish and UK governments which ensures the continuity of social protection arrangements under the CTA.<sup>26</sup> The definition of ‘non-national’ in Irish law is amended so as to ensure that a UK citizen does not come within that definition, thereby retaining the legal basis for the exemption of UK citizens from passport checks within the CTA.<sup>27</sup> The enactment of this legislation to protect and maintain the CTA was described as ‘a key part of Ireland’s planning and preparations’ for Brexit.<sup>28</sup>

However, the greater formalization of the CTA in Irish and EU law is not without its challenges. With the departure of the UK from the EU, the scope for tension between the CTA and EU law increases. As the terms of Protocol Article 3 make clear, the CTA is permitted to continue subject to the requirement that it does not affect the obligations of Ireland under EU law, particularly in the context of free movement. If measures of Irish law afford non-EU citizens more favourable treatment than EU citizens in areas falling within the scope of the Treaties, they would be vulnerable

<sup>24</sup> Note in this regard Art 38(2) WA.

<sup>25</sup> Part 2 of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020.

<sup>26</sup> Part 14 of the Act.

<sup>27</sup> Part 17 of the Act.

<sup>28</sup> Department of Foreign Affairs, *Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Bill 2020 – Explanatory Memorandum*, October 2020.

to challenge.<sup>29</sup> Recent debates around travel-related restrictions necessitated by Covid-19 show that this concern is not merely academic.<sup>30</sup> While Protocol Article 3 may assist in justifying measures adopted as part of the CTA, it is far from a blanket defence. In conclusion, while the recognition of the CTA in the Protocol has reinforced its formal status in EU and Irish law, it also means that the continued existence and development of the CTA will be increasingly influenced by its consistency with EU law.

#### 11.4 The 1998 Agreement

Of even greater constitutional significance for Ireland is the Protocol's express affirmation of the 1998 Agreement. Since it was concluded, the 1998 Agreement has been the overarching framework governing relations across Ireland, the UK and Northern Ireland. The constitutional changes necessitated by the 1998 Agreement have been described as 'arguably the most momentous' since the adoption of the 1937 Irish Constitution.<sup>31</sup> By referendum, the Irish people voted to allow the state to conclude the British–Irish Agreement, the intergovernmental agreement which formed part of the 1998 Agreement, and to amend Articles 2 and 3 of the Irish Constitution. Whereas Article 2 in its original form had defined the national territory as consisting of 'the whole island of Ireland, its islands and the territorial seas', the new Article 2 recognized the entitlement and birthright of every person born in the island 'to be part of the Irish Nation'. For its part, the new Article 3 expressed 'the firm will of the Irish Nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions', while recognizing that a united Ireland could be brought about only 'by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island'. Although the 1998 Agreement as such does not directly form part of Irish law,<sup>32</sup> it occupies a central place in Ireland's constitutional landscape.

<sup>29</sup> See, eg, E Spaventa, *The Impact of Brexit in Relation to the Right to Petition and on the Competences, Responsibilities and Activities of the Committee on Petitions*, Study for the PETI Committee of the European Parliament, June 2017, 39–40.

<sup>30</sup> See, eg, N O'Leary and S Pollak, 'European Commission Contacts Ireland on "Concerns" over Hotel Quarantine' *Irish Times* (15 April 2021).

<sup>31</sup> G Hogan, G Whyte, D Kenny and R Walsh (eds), *JM Kelly: The Irish Constitution* (5th edn, Butterworths 2018) para 3.1.01.

<sup>32</sup> Although implementing legislation was also enacted, neither the constitutional amendment nor this legislation gave the British–Irish Agreement, or the 1998 Agreement more broadly, the force of law in Ireland. In a series of cases, the Irish courts have rejected

Prior to Brexit, the relationship between the 1998 Agreement and EU law might have been described as largely silent but mutually supportive. For its part, the 1998 Agreement makes very limited reference to the EU. The Preamble to the British–Irish Agreement refers to the close co-operation between Ireland and the UK ‘as friendly neighbours and as partners in the European Union’. Under Strand Two of the Multi-party Agreement, one of the tasks of the North–South Ministerial Council is to ‘consider the European Union dimension of relevant matters, including the implementation of EU policies and programmes and proposals under consideration in the EU framework’, with arrangements to be made ‘to ensure that the views of the Council are taken into account and represented appropriately at relevant EU meetings’.<sup>33</sup> Under Strand Three, EU issues are identified among the suitable issues for early discussion in the British–Irish Council.<sup>34</sup> Prior to the Protocol, however, the 1998 Agreement did not feature in any significant way within the wider body of EU law.<sup>35</sup>

However, the relative silence in formal terms belies the critical role of the EU in practice, both in the political backdrop to the 1998 Agreement and in its effective implementation.<sup>36</sup> As discussed in Chapter 1, common EU membership played ‘a positive part in providing an important supporting structure for several elements of the 1998 Agreement itself, as well as providing extensive funding of projects relating to the peace process and the Irish border.’<sup>37</sup> In many ways, the 1998 Agreement and the forms of co-operation which it set in train were premised on the continuing EU membership of the UK and Ireland.

With Brexit, this largely silent and invisible underpinning of the peace process has been forced to the surface. At its heart, the Protocol is a response to the ‘significant and unique challenge’ that Brexit presents

arguments that the 1998 Agreement, as such, forms part of Irish law: *Doherty v Governor of Portlaoise Prison* [2002] 2 IR 252; *O’Neill v The Governor of Castlereagh Prison* [2004] 1 IR 298; *Morelli v An Taoiseach* [2018] IEHC 215.

<sup>33</sup> Multi-party Agreement, Strand Two, para 17; see also para 3(iii).

<sup>34</sup> Strand Three, para 5.

<sup>35</sup> One notable exception is Art 15 of the Framework Employment Directive, Directive 2000/78, which makes special provision in respect of the police force and the employment of teachers in Northern Ireland.

<sup>36</sup> See, eg, D Litter, ‘Understanding the Role of European Council Summits in Reaching the Good Friday Agreement’ *LSE European Politics and Policy (EUROPP) blog* (26 March 2021) <https://blogs.lse.ac.uk/europpblog/2021/03/26/understanding-the-role-of-european-council-summits-in-reaching-the-good-friday-agreement/>.

<sup>37</sup> Chapter 1 in this volume.



for the island of Ireland and the peace process.<sup>38</sup> It is in this context that the EU and the UK expressly affirm that the 1998 Agreement ‘should be protected in all its parts’. The Protocol treads a careful path in this regard.

On the one hand, the Protocol recognizes that the constitutional status of Northern Ireland is not a matter of EU law.<sup>39</sup> Thus, in its first and second paragraphs, Protocol Article 1 provides that the Protocol is without prejudice to the provisions of the 1998 Agreement in respect of the constitutional status of Northern Ireland and the principle of consent and that the Protocol respects the essential state functions and territorial integrity of the UK.<sup>40</sup>

On the other hand, the whole purpose of the Protocol is to set out ‘arrangements necessary to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North–South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions’.<sup>41</sup> The commitment to the 1998 Agreement is reflected in the operative provisions of the Protocol: from Article 2, which protects the rights and values which underpin the peace process, through Articles 5 to 10, which seek to avoid a hard border on the island of Ireland, to Article 11, which aims to facilitate ongoing North–South co-operation and, of course, Article 18, which enshrines the principle of democratic consent in Northern Ireland within the Protocol. In this way, the Protocol provides a mechanism for ensuring that the continued application of the 1998 Agreement is not unduly impaired by the UK’s departure from the EU. Indeed, while the Protocol formally does not make it part of EU law, through both its affirmation of the 1998 Agreement and its substantive provisions, the Protocol gives the 1998 Agreement a mooring in EU law which may allow it to be relied upon, if only indirectly, in litigation before the national and EU courts.<sup>42</sup>

It follows that, even if the major constitutional questions concerning Northern Ireland do not come within its scope, the wider constitutional

<sup>38</sup> Protocol, Preamble, para 2.

<sup>39</sup> Note, however, that, on 29 April 2017, the European Council agreed that, in the event of a decision being taken on a united Ireland in accordance with the GFA, the entire territory of such a united Ireland would, in accordance with international law, be part of the EU: see D Staunton and P Leahy, ‘Brexit Summit: EU Accepts United Ireland Declaration’ *Irish Times* (29 April 2017).

<sup>40</sup> This echoes the language of Art 4(2) TEU.

<sup>41</sup> Protocol Art 1(3). See also Art 4 of Council Decision (EU) 2020/135.

<sup>42</sup> For a comprehensive discussion of the issues potentially arising in this regard, see A Rosas, ‘The Status in EU Law of International Agreements Concluded by EU Member States’ (2011) 35(4) *Fordham JIL* 1304–45.

significance of the Protocol should not be underestimated. It is within the framework of the Protocol that many important issues affecting Northern Ireland, including in the context of North–South co-operation, will fall to be determined in future. And within this framework – in the context of implementation, governance and dispute settlement – it is the EU institutions, rather than any individual member state such as Ireland, that will act as the primary interlocutor. The early experience with the Protocol – particularly in the context of the safeguards regime under Article 16<sup>43</sup> – offers a foretaste of some of the difficulties and sensitivities to which this changed framework may give rise.

As McCrudden has described the position, the Protocol has ‘to an extent, “Europeanised” the 1998 Agreement, meaning that upholding that Agreement has become an EU objective in the context of the WA, and no longer simply a UK–Irish objective’.<sup>44</sup> Just as the duties of good faith and sincere co-operation in Article 5 WA are likely to ‘play a significant role in future disputes between the UK and the EU over the application of the Protocol’,<sup>45</sup> the duty of sincere co-operation under Article 4(3) TEU – between the Union and Ireland as member state – is likely to take on very considerable importance in this legally and politically sensitive context. Close and continuous co-operation between the Commission and the Irish government will be essential to ensure the effective implementation of the Protocol in a manner which is consistent with the 1998 Agreement and which avoids its underlying objectives being undermined.

## 11.5 Conclusion

If, for the UK, Brexit has shifted EU–UK relations from the special regime of EU law to the looser bonds of international law, for Ireland, Brexit has served to reinforce and intensify the state’s membership of the EU. In doing so, it has placed Ireland’s relations with the UK within a more direct and increasingly important EU framework. In the context of Northern Ireland, this is exemplified by the Protocol, which seeks to address ‘the unique circumstances on the island of Ireland through a unique solution’. It is also reflected in the status and role of the Protocol in the Irish legal system. It is not simply that the Protocol

<sup>43</sup> See Chapter 25 in this volume.

<sup>44</sup> See Chapter 8.

<sup>45</sup> *Ibid.*

takes effect in Irish law as EU law, significant though this is. The Protocol has a much wider significance for Ireland in the post-Brexit era, in particular by providing a mechanism through which the long-standing arrangements in the form of the CTA and the constitutional settlement enshrined in the 1998 Agreement can be reconciled with Ireland's obligations under EU law. Legally, politically and practically, this will give the EU a greater role in the future of the peace process on the island of Ireland.

