



## Initial Comments on the Revised UK/EU Withdrawal Agreement

17<sup>th</sup> October 2019

- **Human Rights**

The principle of non-diminution of rights is retained in the revised protocol. However, this remains a weaker provision when compared with the commitment from the UK-EU December 2017 Joint Report which stated : ‘The United Kingdom commits to ensuring that no diminution of rights is caused by its departure from the European Union, including in the area of protection against forms of discrimination enshrined in EU law.’ In annex 1 the revised protocol replicates the six EU equality directives without any attempt at expansion. Moreover, there is no attempt to pull this article under the more robust supervision of the European Court of Justice as is the case for articles 5 and 7-10. Without this, there is a risk that interpretation of these equality provisions will fall out of step with EU standards. It is clear from our Rights at Risk report that alignment to EU equality and human rights law has been an important pull factor towards more progressive law in NI.

Similarly, in another missed opportunity, the EU and UK have chosen to replicate the commitment in the preamble to the revised protocol on the rights of Irish citizens to the enjoyment of their EU citizenship rights. However, this does not attempt to address the assurance from the Joint Report in 2017 that these rights will be enjoyed by Irish Citizens ‘including where they reside in Northern Ireland’.

- **Consent**

Article 18 of the revised Protocol and the UK’s Unilateral Declaration contain the outline of proposals whereby the consent of the NI Assembly will be sought to ensure the continued enforcement of the revised protocol. Following the implementation of this agreement the Northern Ireland Assembly will have to renew its consent on a regular basis. This approach risks a shift in how and why the principle of consent was originally envisaged as working within the Assembly structures. Given the way in which Brexit has reinforced political divisions between the two largest parties, this process of continued consent could also represent the foundation of ongoing political division and disharmony on all matters related to the EU, Brexit, North/South cooperation and other elements and operations of the B/GFA. It is worrying that fundamental provisions on how the consent process within the NI Assembly should

work for the purposes of this protocol have been developed without consultation in Northern Ireland.

- **Level playing field**

The revised protocol does not replicate the level playing field guarantees in the customs arrangements set out in article 5 which were originally set out in annex 4 of the previous version of this protocol. Under this framework, the UK had committed to a 'non-regression' guarantee in relation to environmental standards, fundamental rights at work, occupational health and safety, fair working conditions, employment standards and other provisions that have a direct impact on human rights. These level playing field safeguards protected against undermining environmental standards and a deregulated social and labour market, which in turn would undermine workers' rights to make the UK economy more 'attractive' than EU member states.

- **An East-West border**

The revised Backstop protocol keeps Northern Ireland aligned to EU rules in relation to good and ensures that there will no customs or regulatory checks at the Ireland/Northern Ireland border. However, as EU rules and the EU customs code will apply to goods in Northern Ireland, there will have to be checks between the Northern Ireland and the rest of the UK. The UK Government has made it clear that it is no longer pursuing the closest possible relationship with the EU and instead is working towards a standard Free Trade Agreement relationship. This means that these regulatory and customs borders would increase as the UK diverges from common EU standards post Brexit. While regulatory alignment is essential to ensuring that the all-island economy and supply chains are protected in Brexit, it risks the creation of an east-west border for goods that will increase over time.

- **Supremacy of EU law**

While the protocol has changed, it appears that the main text of the Withdrawal Agreement is retained. This includes the provisions which established that EU law would apply to the implementation of the Agreement (Article 2) and that 'The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States' (article 4). This continues to be of distinct significance in attempting to ensure some level of continuity as regards the protection of the rights elements of EU law which will fall within the dominion of the revised protocol.

- **UK-EU Future Relationship**

Unlike the previous version, this revised protocol is not designed as a temporary arrangement, but as a permanent solution for Northern Ireland's relationship with the EU. It is therefore unclear how the negotiations for the UK and EU future relationship will impact on the institutions and rules established under this protocol. Under the previous version the rules regarding rights, customs and goods were the baseline to the next stage of negotiations which were designed to ensure a close economic relationship between the UK and EU. This would have helped minimise the risks of

increased border checks between NI and other parts of the UK and Ireland. That is no longer the case.

Despite other changes to the language of the political declaration, the UK and EU have replicated the rather weak assurance that the UK remains committed to respecting the 'framework of the European Convention on Human Rights'. The framing of this language when coupled with the continued insistence of UK Ministers that repeal and revision of the Human Rights Act is not off the table, make it difficult to be reassured by this declaration.

- **Timeframe**

Brexit day is the 31<sup>st</sup> October. It is deeply worrying that the changes which are being envisaged within the revised protocol will have to be voted on in parliament and legislated for through the Withdrawal Agreement Bill have not yet been published but are expected to be enacted within the next 14 days. The revised protocol makes it clear that there are a number of unilateral measures which the UK must undertake to implement the Withdrawal Agreement un UK law, including legislating for the dedicated mechanisms to oversee the principle of non-diminution of rights and the new consent mechanisms. In order to ensure that these measures are adequately implemented the sufficient time must be allowed to ensure this law is properly scrutinised.