

Annex 1

Suggested new text in the main Withdrawal Agreement

Article 165A

Framework for future relationship

This Agreement takes full account of the agreed framework for the future relationship between the United Kingdom and the European Union, in accordance with Protocol [x].

Article 166A

Ireland and Northern Ireland

1. The Protocol on Ireland and Northern Ireland sets out specific provisions on the rights of individuals, the movement of persons, and border checks and economic cooperation.
2. Nothing in that Protocol or the remainder of this Agreement shall affect the national identity or territorial integrity of the United Kingdom or Ireland, or the Good Friday or Belfast Agreement of 10 April 1998, including that Agreement's provisions regarding the constitutional status of Northern Ireland and the principle of consent.

Comment: this suggested text would be a legal guarantee to reassure those concerned that the proposals are an attempt to "annex" Northern Ireland or create an economic division within the UK. The reference to "national identity or territorial integrity" reflects in part the wording of Article 4 TEU, and the other references are adapted from the preamble to the proposed Protocol.

Suggested text on customs in a new **Protocol on the framework of the future UK/EU relationship**

Annex – Protocol on the framework for the future relationship between the European Union and the United Kingdom

Section x

Customs

In accordance with Article 2b of the Protocol on Ireland and Northern Ireland, the arrangements to be negotiated as soon as possible after the exit day will comprise either:

- a) a customs partnership between the UK and the EU, in which, at the border, the UK would mirror the EU's requirements for imports from the rest of the world, applying the same tariffs and the same rules of origin as the EU for those goods arriving in the UK and intended for the EU, removing the need for customs processes at the UK-EU border. This would include a mechanism to ensure that the UK would apply its own tariffs and trade policy for goods intended for the UK market, and set out the modalities to ensure that both sides can trust the system, comprising a robust enforcement mechanism; or

- b) a highly streamlined customs arrangement, comprising joint implementation of a range of measures to minimise frictions to trade, together with specific provisions for Northern Ireland.

This would comprise general measures, as follows:

i) measures to ensure the requirements for moving goods across borders are as simple as possible, by waiving the requirement for entry and exit declarations for goods moving between the UK and the EU, and allowing goods moving between the UK and the rest of the world to travel through the EU without paying EU duties and vice versa;

ii) measures to reduce the risk of delays at ports and airports, including recognising each other's "trusted traders" schemes and drawing on the most advanced IT solutions so that vehicles do not need to stop at the border;

iii) continued cooperation to mitigate customs duty and security risks;

iv) measures to reduce the cost and burden of complying with customs administrative requirements, including by maximising the use of automation.

It would also comprise specific measures for Northern Ireland, as follows:

- i) exemption of micro, small and medium sized businesses;

- ii) a trusted trader scheme, as well as other streamlined processes, for larger traders;

- iii) a mechanism for alignment of relevant UK and EU regulatory standards.

Annex 2

*The following is the text of the **Protocol on Ireland and Northern Ireland** as proposed by the Commission. My comments are in italics; suggested amendments are in italics and underlined. I have not commented on the preamble.*

Protocol on Ireland/Northern Ireland

The Union and the United Kingdom,

HAVING REGARD to the historic ties and enduring nature of the bilateral relationship between Ireland and the United Kingdom;

RECALLING that the United Kingdom's withdrawal from the Union presents a significant and unique challenge to the island of Ireland, and reaffirming that the achievements, benefits and commitments of the peace process will remain of paramount importance to peace, stability and reconciliation there;

RECOGNISING that it is necessary to address the unique circumstances on the island of Ireland in order to ensure the orderly withdrawal of the United Kingdom from the Union;

AFFIRMING that the Good Friday or Belfast Agreement of 10 April 1998 between the Government of the United Kingdom, the Government of Ireland and the other participants in the multi-party negotiations (the "1998 Agreement"), which is annexed to the British-Irish Agreement of the same date (the "British-Irish Agreement"), including its subsequent implementation agreements and arrangements, should be protected in all its parts;

RECALLING the commitment of the United Kingdom to protect North-South cooperation and its guarantee of avoiding a hard border, including any physical infrastructure or related checks and controls, and bearing in mind that any future arrangements must be compatible with these overarching requirements;

RECALLING that the Joint Report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union of 8 December 2017 outlines three different scenarios for protecting North-South cooperation and avoiding a hard border;

HIGHLIGHTING that discussions on the other scenarios may continue to be pursued in parallel, but that this Protocol is based on the third scenario of maintaining full alignment with those rules of the Union's internal market and the customs union which, now or in the future, support North-South

cooperation, the all-island economy and the protection of the 1998 Agreement, and that it applies unless and until an alternative arrangement implementing another scenario is agreed;

RECOGNISING that cooperation between Northern Ireland and Ireland is a central part of the 1998 Agreement and is essential for achieving reconciliation and the normalisation of relationships on the island of Ireland, and recalling the roles, functions and safeguards of the Northern Ireland Executive, the Northern Ireland Assembly, and the North-South Ministerial Council (including cross-community provisions), as set out in the 1998 Agreement;

ACKNOWLEDGING that this cooperation across the full range of political, economic, societal and agricultural contexts relies to a significant extent on common Union legal and policy frameworks, as confirmed in the joint mapping exercise conducted by the Union and the United Kingdom, and that accordingly the United Kingdom's withdrawal from the Union gives rise to substantial challenges to the maintenance and development of North-South cooperation;

MINDFUL that the rights and obligations of Ireland under the rules of the Union's internal market and customs union must be fully respected;

RECALLING the commitment of the United Kingdom to protecting and supporting continued NorthSouth and East-West cooperation across the full range of political, economic, security, societal and agricultural contexts and frameworks of cooperation, including the continued operation of the North-South Implementation Bodies;

AIMING to support current and future common policies and approaches between Ireland and Northern Ireland in accordance with the 1998 Agreement;

RECOGNISING the need to respect the provisions of the 1998 Agreement regarding the constitutional status of Northern Ireland and the principle of consent;

DESIRING to create a common regulatory area on the island of Ireland in order to safeguard NorthSouth cooperation, the all-island economy, and protect the 1998 Agreement;

HAVING REGARD to the devolution arrangements between the United Kingdom and Northern Ireland in relation to the common regulatory area;

RECOGNISING that Irish citizens in Northern Ireland, by virtue of their Union citizenship, will continue to enjoy, exercise and have access to rights, opportunities and benefits, and that this Protocol should respect and be without prejudice to the rights, opportunities and identity that come with citizenship of the Union for the people of Northern Ireland who choose to assert their right to Irish citizenship as defined in Annex 2 of the British-Irish Agreement "Declaration on the Provisions of Paragraph (vi) of Article 1 in Relation to Citizenship";

NOTING that Union law has provided a supporting framework to the provisions on Rights, Safeguards and Equality of Opportunity of the 1998 Agreement;

UNDERLINING that part or all of this Protocol may cease to apply should a future agreement between the Union and the United Kingdom be agreed which addresses the unique circumstances on the island of Ireland, including by avoiding a hard border and protecting the 1998 Agreement in all its dimensions;

HAVE AGREED UPON the following provisions, which shall be annexed to the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community ("Withdrawal Agreement"):

Chapter I

Rights of individuals

Article 1

Rights of individuals

1. The United Kingdom shall ensure that no diminution of rights, safeguards and equality of opportunity as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.
2. The United Kingdom shall continue to facilitate the related work of the institutions and bodies pursuant to the 1998 Agreement, including the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland.

Comments: This text is based on paragraph 53 of the Joint Report, which also noted that "EU law and practice has provided a supporting framework" for such rules "in Northern Ireland and across the island of Ireland". Paragraph 1 adds the obligation to "implement this paragraph through dedicated mechanisms." The Annex referred to has not yet been filled in, but it is likely to include [Directive 2000/78](#), which prohibits discrimination on grounds of religion in employment. The specific names of the bodies listed in paragraph 2 have been added, as compared to the Joint Report.

Chapter II

Movement of persons

Article 2

Common Travel Area

1. The United Kingdom and Ireland may 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 natural persons conferred by Union law.

2. The United Kingdom shall ensure that the Common Travel Area and associated rights and privileges can continue to operate without affecting the obligations of Ireland under Union law, in particular with respect to free movement for Union citizens and their family members, irrespective of their nationality, to, from and within Ireland.

Comments: this text is based on paragraph 54 of the December joint report, with the clarification that it applies also to non-EU family members and the words "to, from and within Ireland".

[Proposed new Chapter IIa

Border checks and economic cooperation

Comments: The text proposed by the Commission for Chapter III of the Protocol does not respect the wording and structure of paragraph 49 of the joint report, which refers to the future UK/EU relationship and technical solutions as priority options for ensuring no hard border and North-South cooperation. The following text would more closely reflect what the UK and the EU27 agreed at that point.

Article 2a

Absence of border checks

The United Kingdom and the European Union shall refrain from installing any physical infrastructure or related checks and controls at the border between Northern Ireland and the Republic of Ireland.

Comments: This gives effect to the "no hard borders" part of paragraph 43 of the Joint Report. Unlike the Joint Report, it does not refer only to the UK's obligations.

Article 2b

Ensuring absence of border checks and North-South cooperation

1. At the latest by the end of the [transition] [implementation] period, the obligation in Article 2a shall be ensured by a [customs cooperation] [customs union] agreement to be negotiated before that date between the United Kingdom and the European Union in accordance with the principles in [section x of protocol x], which shall include any provisions necessary to ensure the absence of physical infrastructure or related checks and controls at the border and the protection of North-South cooperation on the island of Ireland.

Comments: This gives effect to the first option in paragraph 49: “The United Kingdom's intention is to achieve these objectives through the overall EU-UK relationship”. The first set of square brackets reflect the UK government and EU27’s different description of the period after Brexit Day. The second set of square brackets offers an alternative wording reflecting the current UK’s government’s position and a potential future Labour government position respectively. It may be possible to agree a customs treaty before the main trade agreement between the EU and the UK, so the text reflects this.

The withdrawal agreement could also include a joint declaration, as follows:

In order to give effect to Article 2b(1) of the Protocol on Ireland and Northern Ireland, the parties agree to enter into formal negotiations as soon as possible after the exit date on the basis of the draft [customs cooperation] [customs union] agreement proposed by the United Kingdom, which shall give effect to the principles in [section x of protocol x],.

This would give concrete effect to the first option in paragraph 49 of the Joint Report. It presupposes that the UK tables a draft treaty as soon as possible in 2018. The options in square brackets offer alternative wording reflecting the current UK’s government’s position and a potential future Labour government position respectively.

2. In the event that the agreement referred to in paragraph 1 is not concluded, the United Kingdom will propose specific solutions to address the unique circumstances of the island of Ireland, and the parties will negotiate in good faith on that basis to ensure the absence of physical infrastructure or related checks and controls at the border and the protection of North-South cooperation on the island of Ireland by the end of the [transition] [implementation] period.

Comments: Reflects the second option in paragraph 49.

3. In the absence of agreement pursuant to paragraphs 1 or 2 by the end of the [transition] [implementation] period, Chapter III of this Protocol will apply.

Comments: This reflects the third option in paragraph 49. Another option (as suggested in my previous blog post) is to defer this discussion until after Brexit Day, on the grounds that it: a) is premature in the absence of discussions of the other options; and b) increases the risk that no withdrawal agreement can be concluded, putting at risk the intention to avoid a hard border as well as all the other objectives of the agreement.

4. Each party will establish mechanisms to ensure the implementation and oversight of any specific arrangement to safeguard the integrity of the EU Internal Market [and the Customs Union].

Comments: Based on paragraph 51 of the Joint Report. The precise intention of that paragraph is not clear. The words in square brackets would be removed in the event of a Labour government.

Chapter III

Common regulatory area

Article 3

Establishment of a common regulatory area

A common regulatory area comprising the Union and the United Kingdom in respect of Northern Ireland is hereby established. The common regulatory area shall constitute an area without internal borders in which the free movement of goods is ensured and North-South cooperation protected in accordance with this Chapter.

Comment: the second sentence is apparently adapted from the wording of Article 26(2) TFEU: "The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties." However, it should be noted that the proposed commitments relate only to EU law on the free movement of goods, not other aspects of the single market. Without any direct reference to the EU Treaty clause, the obligation to follow the relevant case law in Article 12(2) of this protocol will presumably not apply.

The assumption behind the text is that a very extensive link with EU law on free movement of goods is required in order to satisfy the commitment in para 49 of the joint report to "maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement". This assumption is not, however, explained.

The wording of the text seems to contemplate a separation between Northern Ireland and the rest of the UK. This contradicts para 50 of the joint report, which stated that "the United Kingdom will ensure that no new regulatory barriers develop between Northern Ireland and the rest of the United Kingdom, unless, consistent with the 1998 Agreement, the Northern Ireland Executive and Assembly agree that distinct arrangements are appropriate for Northern Ireland. In all circumstances, the United Kingdom will continue to ensure the same unfettered access for Northern Ireland's businesses to the whole of the United Kingdom internal market."

Suggested amendment: a new paragraph could make clear that this chapter, if it is applied, does not necessarily separate Northern Ireland from the rest of the UK in economic terms: "2. Nothing in this chapter requires the United Kingdom to develop new regulatory barriers between Northern Ireland and the rest of the United Kingdom, or to fetter the access of Northern Ireland products to the whole of the United Kingdom internal market. In the event that this Chapter is applied, the United Kingdom,

in agreement with the Northern Ireland Executive and Assembly consistently with the 1998 Agreement, shall decide on whether its territorial scope is limited to Northern Ireland or applicable to the entire territory of the United Kingdom.” The suggested wording gives effect to para 50 of the December joint report.

Article 4

Free movement of goods

1. The provisions of Union law on goods listed in Annex 2.1 to this Protocol shall apply to and in the United Kingdom in respect of Northern Ireland.

Comment: the Annex is blank so far.

2. Customs legislation as defined in point (2) of Article 5 of [Regulation \(EU\) No 952/2013](#) of the European Parliament and of the Council as well as other provisions of Union law providing for customs controls of specific goods or for specific purposes listed in Annex 3 to this Protocol shall apply to and in the United Kingdom in respect of Northern Ireland. The territory of Northern Ireland, excluding the territorial waters of the United Kingdom (the "territory of Northern Ireland"), shall be considered to be part of the customs territory of the Union.

Comment: Article 5(2) of the Regulation referred to (which is the EU customs code) defines “customs legislation” as the following: “the Code and the provisions supplementing or implementing it adopted at Union or national level”; “the Common Customs Tariff”; “the legislation setting up a Union system of reliefs from customs duty”; and “international agreements containing customs provisions, insofar as they are applicable in the Union”. The mechanics of applying this provision at international level (ie ensuring that non-EU countries also accept that Northern Ireland is part of EU customs territory) are not spelled out. Note that Article 4 of the Code defines the EU “customs territory” as including not only the current Member States (with some exceptions, such as Greenland), but also Monaco and the UK bases in Cyprus.

3. Customs duties on imports and exports, and any charges having equivalent effect, shall be prohibited between the Union and the United Kingdom in respect of Northern Ireland. This prohibition shall also apply to customs duties of a fiscal nature.

Comment: this is apparently an adaptation of Article 30 TFEU, which provides that “Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature.” However, there is no cross-reference to that provision. Without any direct reference to the EU Treaty clause, the obligation to follow the relevant case law in Article 12(2) of this protocol will presumably not apply.

4. Quantitative restrictions on imports and exports and all measures having equivalent effect shall be prohibited between the Union and the United Kingdom in respect of Northern Ireland.

Comment: this is apparently an adaptation of Article 34 and 35 TFEU, which provide respectively that “Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States” and “Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States”. However, there is no cross-reference to those provisions. Without any direct reference to the EU Treaty clause, the obligation to follow the relevant case law in Article 12(2) of this protocol will presumably not apply.

5. The Union and the United Kingdom in respect of Northern Ireland shall not impose, directly or indirectly, on the products of the other party any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. Furthermore, the Union and the United Kingdom in respect of Northern Ireland shall not impose on the products of the other party any internal taxation of such a nature as to afford indirect protection to other products.

Comment: this is apparently an adaptation of Article 110 TFEU, which provides: “No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.” Without any direct reference to the EU Treaty clause, the obligation to follow the relevant case law in Article 12(2) of this protocol will presumably not apply.

This wording is also very similar to Article III:2 GATT, which will apply to the UK and the EU even in the absence of a trade agreement.

6. Paragraph 4 shall be without prejudice to the possibility for the United Kingdom, a Member State or the Union to take measures to prohibit or restrict the making available on its market of a good, or a category of goods, where and to the extent permitted by Union law. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Union and Northern Ireland.

Comment: the last sentence in this provision is apparently copied from Article 36 TFEU, concerning exceptions to the free movement of goods, which provides:

The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

The reference to ‘Union law’ here could cover the rest of Article 36, secondary EU law and the case law of the Court of Justice. Arguably the obligation to follow the relevant case law in Article 12(2) of this protocol will therefore apply, but it is unfortunate that the cross-reference is not more precise. If the intention is to refer to the EU legislation which will be included in the annexes, that should be made explicit.

7. For the purposes of the customs legislation and the provisions of Union law listed in Annex 2.2 to this Protocol, the United Kingdom customs authorities competent for the territory of Northern Ireland shall be considered as customs authorities within the meaning of point (1) of Article 5 of Regulation (EU) No 952/2013. By way of derogation from Section 7 of Chapter 2 of Title I of Regulation (EU) No 952/2013, customs controls as defined in point (3) of Article 5 of that Regulation shall be carried out jointly by the Union and the United Kingdom customs authorities competent for the territory of Northern Ireland. The Union and the United Kingdom shall determine the practical arrangements for carrying out such controls in accordance with paragraph 10.

Comment: The annex is blank. Article 5(1) of the customs code defines "customs authorities" as:

"the customs administrations of the Member States responsible for applying the customs legislation and any other authorities empowered under national law to apply certain customs legislation".

Article 5(3) of the Code defines "customs controls" as:

"specific acts performed by the customs authorities in order to ensure compliance with the customs legislation and other legislation governing the entry, exit, transit, movement, storage and end-use of goods moved between the customs territory of the Union and countries or territories outside that territory, and the presence and movement within the customs territory of the Union of non-Union goods and goods placed under the end-use procedure"

The customs code rules which would be derogated from (Articles 46-50 of the code) concern control of goods. There seems no convincing reason why "full alignment" with the relevant substantive rules should also entail joint carrying out of controls on goods. While the EU has a legitimate interest in ensuring that checks are being properly carried out in the UK, given that they would not be checked at the border, this could be ensured by means of administrative assistance (for instance, see the [EU/Swiss customs cooperation treaty](#), Article 18) and perhaps occasional spot-checks.

This provision has a distinct "annexation" tone; the Commission might want to inquire why neither the UK nor Ireland agreed to cross-border pursuit by police officers when they signed up to the Schengen police cooperation rules.

Suggested amendments for the second and sentences: "The Union and the United Kingdom customs authorities competent for the territory of Northern Ireland shall cooperate closely when carrying out customs controls as defined in point (3) of Article 5 of that Regulation. The Union and the United Kingdom shall determine the practical arrangements for such cooperation in accordance with paragraph 10."

8. The provisions of Union law on value added tax listed in Annex 2.3 to this Protocol concerning goods shall apply to and in the United Kingdom in respect of Northern Ireland.

Comment: This provision is blank. It is not known if the Commission thinks that the entirety of EU VAT law should apply, or just the provisions relating to goods crossing borders, which would seem more directly relevant to border checks issues.

9. The provisions of Union law on excise duties listed in Annex 2.4 to this Protocol shall apply to and in the United Kingdom in respect of Northern Ireland.

Comment: This provision is blank. Again, it is not known if the Commission thinks that the entirety of EU excise tax law should apply, or just the provisions relating to goods crossing borders, which would seem more directly relevant to border checks issues.

10. Specific arrangements for the proper implementation of this Article shall be determined by the Joint Committee, upon proposal from the Specialised Committee. Those specific arrangements may, as appropriate, include a mechanism for revenue collection and distribution.

Comment: the allocation of revenue could well be a contentious issue. The fairest way forward would be to base it on reliable estimates of the percentage of goods entering Northern Ireland ports which are destined for Ireland. Note that the objectionable Article 4(7) makes a cross-reference to this paragraph.

Article 5

Agriculture and fisheries

1. The provisions of Union law on sanitary and phytosanitary rules listed in Annex 2.5 to this Protocol shall apply to and in the United Kingdom in respect of Northern Ireland.

Comment: the Annex is blank. It seems likely, however, that ultimately it will include reference to legislation that would disappoint those who dream of bringing chlorinated chicken to British dinner tables.

2. The provisions of Union law on the production and marketing of agricultural and fisheries products listed in Annex 2.6 to this Protocol shall apply to and in the United Kingdom in respect of Northern Ireland.

Comment: the Annex is blank. It is not clear if it will refer to all legislation concerning the Common Agricultural Policy, or only some of it. As for fisheries, there is no reason why the EU fisheries policy rules on catches should apply, given that Article 4(2) of the Protocol defines the customs territory concerned as "excluding the territorial waters of the United Kingdom".

Article 6

Single electricity market

The provisions of Union law governing wholesale electricity markets listed in Annex 2.7 to this Protocol shall apply to and in the United Kingdom in respect of Northern Ireland.

Comment: the Annex is blank. It is not clear if it will refer to all legislation concerning the internal market in electricity. The Prime Minister's Mansion House speech expressed an interest in maintaining links in this area.

Article 7

Environment

The provisions of Union law for environmental protection concerning the control of the import into, export out of, release into, or transport within the Union of substances or material, or plant or animal species, listed in Annex 2.8 to this Protocol shall apply to and in the United Kingdom in respect of Northern Ireland.

Comment: the Annex is blank. Presumably it will not refer to all EU environmental law, since that legislation goes beyond the issue of the import, export and transit of plant or animal species, to include issues like air pollution.

Article 8

Other areas of North-South cooperation

1. Consistent with the arrangements set out in Articles 4 to 7 of this Protocol, and in full respect of Union law, this Protocol shall be implemented and applied so as to maintain the necessary conditions for continued North-South cooperation, including in the areas of environment, health, agriculture, transport, education and tourism, as well as energy, telecommunications, broadcasting, inland fisheries, justice and security, higher education and sport. In full respect of Union law, the United Kingdom and Ireland may continue to make new arrangements building on the provisions of the 1998 Agreement in other areas of North-South cooperation on the island of Ireland.

2. The Joint Committee shall keep under constant review the extent to which the implementation and application of this Protocol maintains the necessary conditions for North-South cooperation. The Joint Committee may, including on recommendation from the Specialised Committee, make appropriate recommendations to the Union and the United Kingdom in this respect.

Comment: this Article lists 14 general areas of North-South cooperation. However, it does not lay down any concrete legal obligation in relation to any of them. Nor is the Joint Committee given powers to adopt additional binding measures in these fields in para 2.

Article 9

State aid

The provisions of Union law on aids granted by States listed in Annex 2.9 to this Protocol shall apply to the United Kingdom in respect of Northern Ireland. For the purposes of those provisions, "in respect of Northern Ireland" means that only measures that affect trade between the territory of Northern Ireland and the Union shall be considered as aid within the meaning of Article 107(1) TFEU.

Comment: the Annex is blank, so it remains to be seen whether it includes all EU state aids law. State aids rules are not enforced by means of border checks, but presumably the logic is that this is linked to North-South cooperation. While the current UK government has no real objections to making commitments on state aids (see this [analysis](#) of the Mansion House speech on this issue), a Labour government would seek clarifications or exceptions.

Chapter IV

Institutional provisions

Article 10

Specialised Committee

1. The Specialised Committee on issues related to the island of Ireland established by Article 158 of the Withdrawal Agreement ("Specialised Committee") shall be composed of representatives from the Union and the United Kingdom.

2. The Specialised Committee shall

(a) facilitate the implementation and application of this Protocol;

(b) examine proposals from the North-South Ministerial Council, and North-South Implementation bodies set up under the 1998 Agreement concerning the implementation and application of this Protocol;

(c) discuss any point of relevance to this Protocol giving rise to a difficulty and raised by the Union or the United Kingdom;

(d) make recommendations to the Joint Committee as regards the functioning of this Protocol.

Comment: the powers of the Joint Committee are set out in Article 157 of the main agreement and, as regards Ireland/Northern Ireland issues, in Articles 4 and 8 of this protocol.

Article 11

Supervision and enforcement

1. As regards Chapter III, the institutions, bodies, offices, and agencies of the Union shall in relation to the United Kingdom, and natural and legal persons residing or established in the territory of the United Kingdom, have the powers conferred upon them by Union law. In particular, the Court of Justice of the European Union shall have jurisdiction as provided for in the Treaties in this respect.

2. Acts of the institutions, bodies, offices, and agencies adopted in accordance with paragraph 1 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.

Comments: At the very least, this clause should be amended to provide that it applies “In the event that Chapter III becomes applicable...” given that, as agreed, this chapter is a fallback option. It should be noted that the UK government wishes to remain linked to some EU bodies as regards the UK as a whole, so it seems presumptuous to assume at this point that no such arrangements will be agreed.

More broadly it is questionable why EU bodies and the Court of Justice need such extensive powers, given that the EU and Turkey agreed a customs union without equivalent provisions. There is anyway provision for the Court of Justice to rule in the event that a dispute cannot be settled pursuant to the dispute settlement process in Article 162 of the main agreement, and the Commission has not suggested why this is insufficient. (Article 12 of the Protocol means that Article 162 of the main agreement applies to the protocol too).

Suggested amendment: Replace entire Article with:

1. Specific arrangements for the implementation, administration and enforcement of this Chapter shall be determined by the Joint Committee, upon proposal from the Specialised Committee. Those specific arrangements may, as appropriate, provide that the institutions, bodies, offices, and agencies of the Union shall in relation to the United Kingdom, and natural and legal persons residing or established in the territory of the United Kingdom, have the powers conferred upon them by Union law. In that event, acts of those institutions, bodies, offices, and agencies 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.

2. By way of derogation from paragraph 1, the Court of Justice of the European Union shall have jurisdiction as provided for in the provisions of this agreement referred to in Article 12(1)(c) of this Protocol.

Chapter V

General and final provisions

Article 12

Common provisions

1. The following provisions of the Withdrawal Agreement shall apply to this Protocol:

(a) Article 2, the first subparagraph of Article 4(1) and Article 4(2) and (3), Article 5(2) and (3) and Article 6;

(b) Articles 100 and 104, Article 105(1), Articles 111, 115, 116 and 117 in respect of activities of the Union pursuant to this Protocol;

(c) Part Six, without prejudice to Article 11 of this Protocol.

For the purposes of this Protocol, any reference to the United Kingdom in those provisions of the Withdrawal Agreement shall be read as referring to the United Kingdom or the United Kingdom in respect of Northern Ireland, as the case may be.

Comments: Point (a) refers to: the definitions (Article 2 of the main agreement); the legal effect of EU law in the UK (Article 4(1), first subparagraph), but implicitly not direct effect or supremacy ((Article 4(1), second subparagraph); the obligation to implement by primary legislation (Article 4(2)); cross-references to EU law (Article 4(3)), but implicitly not ECJ case law (Article 4(4) and (5)), which is the subject of Article 12(2) of this protocol; some of the rules on cross-references to EU law (Article 5(2) and (3)), but not all (Article 5(1) is omitted, but see instead Article 12(3) of this protocol); and references to Member States (Article 6; but note Article 12(4) of this protocol, discussed just below).

Point (b) refers to official communications (Article 100), privileges and immunities (Articles 104 and 111), official secrecy (Article 115), discretion (Article 116) and access to documents (Article 117).

Point (c) refers to the final and institutional provisions, including dispute settlement. Note that in accordance with Article 168, this Protocol only applies from the end of the transition/implementation period.

2. The provisions of this Protocol referring to Union law or concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union.

This replaces the distinction in Article 4(4) and (5) between ECJ case law handed down before and after the end of the transition/implementation period. (The former binds the UK as such; the latter need only be taken into account). However, there is no convincing reason to drop this distinction for this Protocol, since the dispute settlement mechanism in Article 162, with its more limited role for the ECJ, can be applied to settle disputes about divergent implementation that may arise.

3. Where this Protocol makes reference to a Union act, and where that act is amended or replaced after the entry into force of the Withdrawal Agreement, the reference to that act shall be read as referring to it as amended or replaced.

The Joint Committee shall periodically revise the relevant references in this Protocol upon proposal from the Specialised Committee set up under this Protocol.

Comment: this is a more far-reaching rule than Article 5(1) of the main agreement, which only applies the obligation to “keep up to date” with amended EU law until the end of the transition/implementation period. It may be questioned whether such a strict requirement need be applied, or whether a more flexible process of discussion about new standards and equivalence similar to the [EU/Swiss veterinary standards rules](#) (Articles 12-14 in Annex 11 to the EU/Swiss agricultural trade agreement) could apply.

4. By way of derogation from point (a) of paragraph 1 of this Article and from Article 6 of the Withdrawal Agreement, representatives or experts of the United Kingdom or experts designated by the United Kingdom may, upon invitation and on a case-by-case basis, exceptionally attend meetings or parts of meetings of the committees referred to in Article 3(2) of Regulation (EU) No 182/2011 of the European Parliament and of the Council, of Commission expert groups, of other similar entities, or of bodies, offices or agencies where and when representatives or experts of the Member States or experts designated by Member States take part, provided that one the following conditions is fulfilled:

(a) the discussion concerns individual acts to be addressed during the period of application of this Protocol to the United Kingdom or to natural or legal persons residing or established in the United Kingdom;

(b) the presence of the United Kingdom is necessary and in the interest of the Union, in particular for the effective implementation of Union law made applicable by this Protocol.

During such meetings or parts of meetings, the representatives or experts of the United Kingdom or experts designated by it shall have no voting rights and their presence shall be limited to the specific agenda items that fulfil the conditions set out in point (a) or (b).

Comments: This clause is taken from Article 123(5) of the main agreement, concerning the UK’s role during the transition/implementation period. It’s excessive in that context, yet far more excessive here, given that the Protocol will apply indefinitely.

Suggested amendment: By way of derogation from point (a) of paragraph 1 of this Article and from Article 6 of the Withdrawal Agreement, representatives or experts of the United Kingdom, or experts designated by the United Kingdom, may attend, without voting rights, meetings or parts of meetings of the Council, of the committees referred to in Article 3(2) of Regulation (EU) No 182/2011, of Commission expert groups, of other similar entities, or of bodies, offices or agencies, where and when the subject matter of such meetings is Union law within the scope of this Protocol.

5. Authorities of the United Kingdom shall not act as leading authority for risk assessments, examinations, approvals and authorisation procedures provided for in Union law made applicable by this Protocol.

Comment: this copies Article 123(6) of the Agreement, which applies to the transition/implementation period. Since these provisions apply indefinitely, and the UK has an interest in involvement of many EU agencies, this provision is excessive. A better approach is to provide for decisions to be adopted pursuant to Article 11 to replace this rule.

Suggested amendment: “Unless otherwise provided in Joint Committee decisions adopted pursuant to Article 11, authorities of the United Kingdom...”

6. The provisions of Union law on the protection of personal data referred to in Article 66 of the Withdrawal Agreement shall apply in respect of personal data processed in the United Kingdom on the basis of this Protocol.

Comment: Article 66 of the main agreement refers to the General Data Protection Regulation, the Directive on law enforcement use of data, the e-privacy Directive, and “any other provisions of Union law governing the protection of personal data.” It is not clear why the Commission believes this clause is necessary; data protection law is not enforced by means of border checks and there is no explanation as to why this law would be linked to North/South cooperation. The limitation of scope “on the basis of this Protocol” is very unclear. If the intention is to refer to the implementation of substantive obligations in the Protocol, such as (for instance) the exchange of data on customs operations, this should be more clearly specified.

Note that Article 67 of the main agreement otherwise phases out the application of EU data protection law in the UK as of the end of the transition/implementation period, although the UK government’s policy is to seek continued close alignment with EU law, by means of an adequacy decision and links between the UK and EU data protection authorities.

7. Articles 346 and 347 TFEU shall apply to this Protocol as regards measures taken by a Member State or by the United Kingdom in respect of Northern Ireland.

Comment: These articles set out exemptions from EU law as regards internal security, national security, international relations and arms control. There is no reference to Article 348 TFEU, which sets out a special process in case these exemptions are invoked. In this context it should be noted that the ECJ has previously interpreted these provisions (then Articles 223 and 234 EEC) narrowly, when ruling on whether a ban on women in the Northern Ireland police was in breach of EU law ([Johnston v RUC](#)). In accordance with Article 12(2) of this Protocol, this case law will still be relevant.

Article 13

Safeguards

1. If the application of this Protocol leads to serious economic, societal or environmental difficulties liable to persist, the Union or the United Kingdom may unilaterally take appropriate measures. Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Protocol.

2. If a safeguard measure taken by the Union or the United Kingdom, as the case may be, in accordance with paragraph 1 creates an imbalance between the rights and obligations under this Protocol, the Union or the United Kingdom, as the case may be, may take such proportionate rebalancing measures as are strictly necessary to remedy the imbalance. Priority shall be given to such measures as will least disturb the functioning of this Protocol.

3. Safeguard and rebalancing measures taken in accordance with paragraphs 1 and 2 shall be governed by the procedures and dispute settlement arrangements set out in Annex 3 to this Protocol.

Comment: This text is effectively identical to the safeguards clause in Articles 112 and 114 of the [EEA treaty](#), which extends the EU's single market law (and certain other EU laws) to Norway, Iceland and Liechtenstein. Those EEA treaty provisions refer to a consultation and dispute settlement mechanism in Article 113 of that treaty; it remains to be seen whether Annex 3 to this Protocol sets up the same system, since it is not filled in yet.

Article 14

Protection of financial interests

The Union and the United Kingdom shall counter fraud and any other illegal activities affecting the financial interests of the Union or of the United Kingdom in respect of Northern Ireland.

Comment: Compared to the arguably excessive provisions of the rest of the Protocol, conversely this clause is arguably insufficient. It resembles Article 325 TFEU, which starts: "The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article...", but that provision is more detailed and is also a basis for legislation. Furthermore, ECJ case law also gives that Treaty article some legal effects of its own (most recently clarified in the Taricco II judgment, discussed [here](#)). In light of the perceived risk that customs fraud issues may increase in the Irish border context after Brexit, it would be appropriate to agree some additional rules to ensure that illegal activities within the scope of the Protocol are dealt with, perhaps following the example of the EU/Swiss [treaty](#) on combating fraud.

Article 15

Subsequent agreement

Should a subsequent agreement between the Union and the United Kingdom which allows addressing the unique circumstances on the island of Ireland, avoiding a hard border and protecting the 1998 Agreement in all its dimensions, become applicable after the entry into force of the Withdrawal Agreement, this Protocol shall not apply or shall cease to apply, as the case may be, in whole or in part, from the date of entry into force of such subsequent agreement and in accordance with that agreement.

Comments: this Article should be deleted as it does not reflect the agreement in the December joint report. See the proposed Article 2b above.

Article 16

Annexes

Annexes 1 to 3 shall form an integral part of this Protocol.

Annexes

Annex 1 in relation to protection against discrimination

Annex 2 in relation to the common regulatory area for ensuring the free movement of goods and protecting North-South cooperation

Annex 2.1 in relation to free movement of goods

Annex 2.2 in relation to customs controls of specific goods or for specific purposes

Annex 2.3 in relation to value added tax

Annex 2.4 in relation to excise duties

Annex 2.5 in relation to sanitary and phytosanitary rules

Annex 2.6 in relation to production and marketing of agricultural and fisheries products

Annex 2.7 in relation to wholesale electricity markets

Annex 2.8 in relation to environmental protection concerning the control of the import into, release into, or transport within the Union of substances or material, or plant or animal species

Annex 2.9 in relation to State aid

Annex 3 in relation to procedures and dispute settlement arrangements applicable to safeguard and rebalancing measure