



## The Centre for Cross Border Studies

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### ***Submission to the House of Commons European Scrutiny Committee Inquiry:***

### ***Dispute Resolution and Enforcement in the draft Withdrawal Agreement***

8 June 2018

This response has been prepared by the Centre for Cross Border Studies as a contribution to the House of Commons European Scrutiny Committee inquiry into the provisions of the draft Withdrawal Agreement between the UK and the EU in respect of dispute resolution and enforcement.<sup>1</sup>

#### **About The Centre for Cross Border Studies**

The Centre for Cross Border Studies (CCBS), based in Armagh, Northern Ireland, has a strong reputation as an authoritative advocate for cross-border cooperation and as a valued source of research, information and support for collaboration across borders on the island of Ireland, Europe and beyond.

The Centre empowers citizens and builds capacity and capability for cooperation across sectors and jurisdictional boundaries on the island of Ireland and further afield. This mission is achieved through research, expertise, partnership and experience in a wide range of cross-border practices and concerns (for more details visit [www.crossborder.ie](http://www.crossborder.ie)).

The response that follows, therefore, is closely informed by the Centre's particular knowledge of and experience in cross-border socio-economic development involving a range of sectors from both Northern Ireland and Ireland, including public bodies, business and civil society. **Crucially, it is also informed by the Centre's ongoing work on the potential impacts of the UK's withdrawal from the EU on the ability of administrations, public bodies, business and civil society to engage in mutually beneficial North-South cooperation post-Brexit.**<sup>2</sup>

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<sup>1</sup> This response was authored by Dr Anthony Soares, Deputy Director of the Centre for Cross Border Studies.

<sup>2</sup> The Centre has responded to a range of relevant parliamentary inquiries and produced a number of Briefing Papers, which can be consulted at <http://crossborder.ie/category/research-and-policy/policy/consultation-responses/> and <http://crossborder.ie/category/research-and-policy/policy/briefings/>.

Given the Centre's remit, this response will focus primarily on the provisions for dispute resolution and enforcement contained in the draft Protocol on Ireland/Northern Ireland, although with reference to relevant provisions within the main draft Withdrawal Agreement.

1. While according to Article 157 implementation and application of the overall draft Withdrawal Agreement will be the responsibility of the Joint Committee, Article 158 (1c) of the Withdrawal Agreement and Article 10 of the draft Protocol on Ireland/Northern Ireland set out the establishment of the Specialised Committee on issues related to the implementation of the Protocol on Ireland/Northern Ireland. **With both the Joint Committee and Specialised Committees' establishment coming into force on the date of the UK's withdrawal from the EU on 30 March 2019, as per Article 168, and bearing in mind that the text of Article 157 of the Agreement and Article 10 of the Protocol has been agreed, it is essential that as much preparatory work as possible is undertaken to ensure their efficacy.** This must include not only how to ensure effective interworking between the Joint Committee and the Specialised Committees, and between the Joint Committee and the Administrative Commission for the Coordination of Social Security Systems (Article 31 (4)), but also, in the specific case of the United Kingdom, how the Joint Committee and Specialised Committees – especially the Specialised Committee on issues related to the implementation of the Protocol on Ireland/Northern Ireland – will communicate with relevant Government Departments, Agencies and other organisations and bodies, identifying now who these may be, as well as the UK's devolved administrations.

2. Article 157 (4c) of the draft Withdrawal Agreement sets out how the Joint Committee shall “seek appropriate ways and methods of preventing problems that might arise in areas covered by this Agreement or of resolving disputes that may arise regarding the interpretation and application of this Agreement”. Article 10 (2c) and (2d) of the Protocol on Ireland/Northern Ireland charge the Specialised Committee on the implementation of the Protocol with the responsibility to “discuss any point of relevance to this Protocol giving rise to a difficulty and raised by the Union or the United Kingdom”, and to “make recommendations to the Joint Committee as regards the functioning of this Protocol”. The preventative roles envisaged here underline the importance of undertaking preparatory work, including on interworking and communications between the Joint Committee and Specialised Committees, and between these and the broad range of other bodies and institutions necessary to gather relevant intelligence to identify potential problems at the earliest possible stage, as outlined in the above paragraph. Moreover, the prevention of problems by the Joint and Specialised Committees would minimise the risk of needing to apply the dispute settlement mechanisms envisaged in Article 162 or the measures arising from non-compliance outlined in Article 163.

3. Where either the EU or the UK brings a dispute to the Joint Committee regarding the interpretation or application of the Agreement, which could include a dispute arising from the application of the Protocol on Ireland/Northern Ireland, Article 162 (2) states that the Joint Committee “may settle the dispute through a recommendation”. To this end, the Joint Committee “shall be provided with all information which might be of use in making possible an in-depth examination of the situation, with a view to finding an acceptable solution”. This leads to two questions. First, given the nature of the composite UK-EU membership of the Joint Committee, any recommendation it may issue to settle a dispute is likely to have to satisfy both parties, which may make it difficult for the Joint Committee to reach agreement on a recommendation – a difficulty that

could be exacerbated if it were then called to reach a decision on submitting the dispute to the Court of Justice of the European Union, in line with paragraph 3 of Article 162. Failure to make a recommendation or to submit the dispute to the CJEU would entail recourse to paragraph 4 of Article 162. Secondly, in order for the Joint Committee to make an in-depth examination of the problem giving rise to the dispute and to arrive at a recommendation, *who* will provide it with the necessary information, under what *domestic* legal standing, and will the Joint Committee be adequately resourced to undertake such in-depth examinations? **It should be a priority for Members of Parliament to carefully consider the extent to which and how to introduce domestic primary legislation to ensure the proper functioning of the UK's participation in the mechanisms for dispute resolution and enforcement set out in the Withdrawal Agreement and the Protocol on Ireland/Northern Ireland, including on the crucial channels of communication needed between the Joint and Specialised Committees and relevant UK Government Departments, agencies, and bodies.** Moreover, where necessary, the devolved administrations may also have to pass equivalent legislation.

4. Article 157 (1) of the draft Withdrawal Agreement states that the Joint Committee will be comprised of “representatives of the [European] Union and of the United Kingdom”, while Article 10 (1) of the draft Protocol on Ireland/Northern Ireland states that its Specialised Committee “shall be composed of representatives from the [European] Union and the United Kingdom”. **Without further detail on the composition and size of these committees, it is difficult to assess how well equipped they may be to properly discharge their various functions, including the Joint Committee's role in settling disputes brought before it by either the UK or EU,** as set out in Article 162 of the draft Withdrawal Agreement. In relation to the Protocol in particular, it does not make specific provision for the UK's representation to include representatives from Northern Ireland who would be best placed in terms of the specific circumstances pertaining to it and to its relations with the Republic of Ireland. **Whereas it may not be considered to be within the scope of the Withdrawal Agreement or of the Protocol to specify the UK's (and the EU's) representation on the Joint Committee and the Specialised Committee on Ireland/Northern Ireland, domestic legislation should be enacted to ensure the UK's representation on the Specialised Committee on Ireland/Northern Ireland include representatives from Northern Ireland, and that the Joint Committee include representation from the devolved regions.**

5. Article 4 (10) of the Protocol on Ireland/Northern Ireland states: “Specific arrangements for the proper implementation of this Article [on the free movement of goods] 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”. **Given the overarching scope and importance of this article, and the lack of detail regarding the contents of the relevant Annexes, there may be a significant risk the Joint Committee will face difficulties resulting in delays in agreeing and determining the specific arrangements necessary for implementation of this Article by the end of any Transition Period. Moreover, given that it will be the Specialised Committee proposing those specific arrangements to the Joint Committee, this will require the former having the necessary expertise and capacity to liaise with the relevant customs authorities and other agencies, which may – unless steps are taken to ensure otherwise – distort the nature of the Specialised Committee in such a way that it will lack the necessary direct knowledge and expertise relating to other areas.** Such an imbalance must be avoided.

6. Article 8 (1) of the Protocol on Ireland/Northern Ireland sets out how “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”. **It is unclear why other Articles, particularly Article 1, are not included as the legal frameworks for the arrangements to be implemented and applied to maintain the necessary conditions for continued North-South cooperation. Such cooperation would be placed at risk if the rights of individuals as per Article 1 were not upheld. Individuals make North-South cooperation possible; therefore, to underline the importance of such cooperation, the arrangements set out in Article 1 should be specifically included in this Article.**

7. Article 8 (2) of the Protocol states that 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”. **Given that North-South cooperation is an essential element of the 1998 Belfast/Good Friday Agreement, the membership of the Joint Committee, and especially the Specialised Committee, must include specific expertise and knowledge of such cooperation. This is an essential requirement not only in terms of the Committees’ role in reviewing the implementation and application of the Protocol in terms of maintaining the necessary conditions for North-South cooperation, but also to ensure that they are properly equipped to make their own proposals to the UK and Irish Governments for additional areas of cooperation on the island of Ireland.**

5. Article 10 (2b) of the Protocol on Ireland/Northern Ireland states that the Specialised Committee shall “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”. **Given the fact that the North-South Ministerial Council cannot function in the absence of a functioning Northern Ireland Assembly and Executive (as is currently the case), and that the North-South Implementation bodies may be to a certain extent limited by the fact that decisions on policy and action to be taken forward by them are made by the NSMC, it is absolutely imperative that the Specialised Committee be open to proposals from other organisations and actors involved in North-South cooperation, including local authorities and cross-border local authority-led networks, and therefore this must be included in any final Protocol on Ireland/Northern Ireland, and translated into domestic UK legislation if considered necessary.**

6. Article 1 (1) of the Protocol declares that the UK “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”. **As currently phrased, it is unclear whether any breach in terms of diminution of rights, safeguards and equality of opportunity as set out in the Belfast/Good Friday Agreement can only be challenged if it *directly* arises as a result of the UK’s withdrawal from the EU. The Protocol should be clarified to ensure no such restrictive interpretation of Article 1. Furthermore, it is of critical importance that the content of Annex 1 of the Protocol be made available for scrutiny at the earliest opportunity in order to provide certainty on the provisions of EU law to be included as protection against**

**discrimination, as well as to the precise nature of the implementation measures, and how these will be translated into UK domestic law.**

7. Article 12 (1a) specifies that the first subparagraph of Article 4 (1) of the Withdrawal Agreement will apply to the Protocol on Ireland/Northern Ireland. **It is unclear, in the light of the citizenship rights under the 1998 Belfast/Good Friday Agreement, why the second subparagraph of Article 4 (1) of the Withdrawal Agreement should not apply to the Protocol, and it is imperative that the potential implications of this omission are fully outlined and considered.**

8. Article 13 (1) of the Protocol provides for safeguarding measures to be put in place by either the EU or UK if the Protocol's application "leads to serious economic, societal or environmental difficulties liable to persist", while Article 13 (3) states that such safeguarding measures "shall be governed by the procedures and dispute settlement arrangements set out in Annex 3 to this Protocol". **Bearing in mind the fact the vitally important content of Annex 3 to the Protocol relating to the procedures and dispute settlement arrangements has not been published, it is difficult to exaggerate the risks of upsetting the delicate political and social balance in Northern Ireland by either party implementing safeguarding measures to address economic, societal or environmental difficulties perceived as arising from the application of the Protocol. Therefore, and in order to ensure proper measures are put in place to avoid creating social and/or political conflicts that could even lead to constitutional difficulties in the UK, the content of Annex 3 must be made available for scrutiny at the earliest opportunity.**