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Brexit and the Implementation of the Withdrawal Agreement

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1. Introduction

The Withdrawal Agreement (WA)¹, like a “divorce deal”, had to focus on dissolving the UK’s EU membership under Article 50 TEU. Yet, as in a real divorce, continuing bonds remain after a long relationship is formally dissolved. For the EU-UK relationship, two areas are particularly prevalent. First, the legitimate expectations of citizens who moved to the EU or the UK relying on the continuity of EU citizenship rights require special protection, which is awarded in Part Two WA. Second, Northern Ireland’s hybridity had to be protected. Although it was the Belfast Good Friday Agreement, which allowed for the territory to change allegiance from the UK to Ireland, and for its people to identify as British, Irish, neither or both, this territorial and individual hybridity rested on EU integration.² This challenge is addressed in the WA by the Protocol on Ireland/Northern Ireland (the Protocol).

Due to these continuing bonds, the WA’s implementation constitutes a long-term feature of the EU-UK relationship, alongside the Trade and Cooperation Agreement (TCA) of 24 December 2020³ and any future covenants between the EU and the UK. Moreover, the WA nurtures the hope that some degree of EU integration may be maintained post-Brexit: it not only preserves some EU citizenship rights and includes Northern Ireland in the EU’s internal market for trade in goods, but also maintains directly effective rights and supranational models of conflict resolution. This contrasts with the TCA’s ambition to unravel decades of integration by abolishing direct rights, re-building barriers to trade, except for tariffs and quotas, and relying on negotiation, arbitration, and retaliation as conflict resolution mechanisms. Implementing Part Two and the Protocol will thus constitute a permanent site of struggle not only between its signatories, but also between the EU and the UK and their respective citizens.

Exploring this tension, this chapter is structured as follows. Sections 2 gives a short overview of the ambivalent notion of implementation and resulting frictions and summarises the steps to implement

¹ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the Economic Atomic Energy Community, OJ L 29, 31.1.2020, p. 7-187, changed by Decision No 1/2020 of the Joint Committee [under Article 164 Withdrawal Agreement] (...) of 12 June 2020 amending the [Withdrawal Agreement] (...) OJ L 225, 14.7.2020, p. 53–54; consolidated version available from OJ L 225, 14.7.2020, p. 1–3 (GA)

² See also John Doyle and Eileen Connolly, ‘Brexit and the Northern Ireland Question’ In Federico Fabbrini (ed) *The Law & Politics of Brexit*, (OUP 2017), Colin Harvey, ‘The Irish Border.’ In Federico Fabbrini (ed) *The Law & Politics of Brexit: Volume II. The Withdrawal Agreement*, (OUP 2020), and Doyle & Connolly in this volume. On the notion of hybridity see Dagmar Schiek, ‘Brexit on the island of Ireland: beyond unique circumstances.’ [2018] NILQ, 367.

³ Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ L 444, 31.12.2020, p. 14–1462

the overall governance and enforcement institutions. Sections 3 and 4 analyse three issues for Part Two and the Protocol respectively: the challenges of implementation, what has and has not been achieved, and consequences of failure to implement, if any, with a focus on specific governance and conflict resolution rules. Finally, section 5 concludes on some critical junctures for continuing implementation.

2. “Implementation” under the WA: the institutional framework

2.1 Implementation, renegotiation, and rejection

The WA uses “implementation and application” as combined technical terms: The Joint Committee (JC) is responsible for implementation and application, supervising and facilitating both (Article 164 (3,4)). General language usage suggests that application refers to rules which are clear and unconditional, while implementation is required if rules are not self-enforcing.⁴

The EU and the UK tend to diverge in their understanding of implementation. On the one hand, the EU’s identity is based on its being a Community of Law, which suggests that rules are being followed. On the other hand, from a UK perspective implementation may include neglecting rules and finding a way to re-negotiate an agreement which already became law. The WA offers footholds for both perspectives. On the one hand, it presents itself as a legally binding international treaty, which creates directly effective rights (Article 4 WA). On the other hand, Article 164 (4) (f) empowers the JC, whose main tasks consists of implementation and application of the WA, to change the WA: General changes can be made until 31 December 2024 “to address situations unforeseen” at the time of ratification, as long as they do not change the “essential elements” of the agreement (Article 164 (5)(d)). In addition, Part Two and the Protocol abound with specific empowerments to change and adapt rules. Accordingly, the struggle on the implementation of these controversial parts will continuously trigger conflict on the extent to which implementation entails renegotiation.

The short history of implementing the WA is punctuated with incidents of the UK’s refusal to be bound by its terms. While these are exclusively related to the Protocol, they indicate the potential collapse of the implementation process overall. The first of these occurred in September 2020, when the UK government tabled the Internal Market Bill.⁵ Section 42 in the initially tabled version empowered the secretary of state to disapply any rules requiring export declarations for goods transported from Northern Ireland to Great Britain, contrary to Article 5 and Annexes of the Protocol, while section 43 empowered him to disapply Article 10 Protocol on State aid. Section 45 clarified that such decisions would have effect irrespective of any incompatibility with international law. This constituted a violation of the WA, which led the EU Commission to start an infringement action against the UK. However, in December 2020, the UK changed the bill responding to domestic pressure and in order to conclude the TCA. Section 47 of The Internal Market Act 2020⁶ still states that there must be no export declarations for products travelling from Northern Ireland to Great Britain but makes an exception for the exercise of a function if this “is necessary to secure compliance with, or to give effect to, any international obligation or arrangement to which the United Kingdom is a party (whenever the United Kingdom becomes a party to it)”. Section 48 states that Article 10 Protocol is to be applied in line with the Protocol itself and the JC decisions. Given the

⁴ More detail on this Kieran Bradley ‘Agreeing to Disagree: The European Union and the United Kingdom after Brexit.’ [2020] EUConsLR 379.

⁵ The different versions of the Bill, and the final legislation, can be retrieved here <https://bills.parliament.uk/bills/2775/publications>, for an overview see Issak Hallak *UK Internal Market Bill and the Withdrawal Agreement*. (European Parliament 2020).

⁶ UK Internal Market Act 2020 <https://www.legislation.gov.uk/ukpga/2020/27/contents>

UK decision to remove the offending clauses of the Internal Market Bill, the Commission mooted the infringement procedure. Nevertheless, in early March 2021, the UK again unilaterally decided that it would not feel bound by the Protocol. This decision was taken in the context of the necessity to apply the Union Customs Code to trade between Great Britain and Northern Ireland under Articles 5 and 7 Protocol with their Annexes. The UK had already issued unilateral declarations to phase in that application for specific products and methods of transport in January 2021.⁷ These had been accompanied by several commitments, which led to a reciprocal commitment by the EU Commission to refrain from taking infringement actions. While the commitments were not fulfilled, alleged threats with violence in Northern Ireland resulted in the withdrawal of staff in the port of Larne by NI authorities and the EU Commission.⁸ This was accompanied by increasingly belligerent rhetoric of DUP politicians, who demanded to repeal the Protocol,⁹ or announced guerrilla tactics. The events are reminiscent of a past in which “Northern Ireland was ungovernable (...) without the consent of Unionists”.¹⁰ Partially in response to this, the EU Commission and the UK government had started negotiating conditions under which a longer adaptation period for establishing a functioning control structure could be granted. Just before the JC meeting scheduled for early March 2021, however, the UK government announced the unilateral extension of the “grace periods” until October 2021. This can only be characterised as a clear breach of the Protocol. The EU Commission again considers starting infringement actions. The process may well impact on the adoption of the TCA, which is presently applied provisionally.

2.2 Implementing institutional provisions.

All this highlights the enhanced relevance of implementing the WA’s institutional provisions.¹¹ The JC established by Article 164 WA provides the overall implementation and application of the agreement, and is supported by four specialised committees, including the Specialised Committee on Citizenship Rights and the Specialised Committee for Ireland/Northern Ireland (Article 165 WA).¹² The latter is further supported by a Joint Consultative Working Group (JCWG), for which Article 15 of the Protocol requires monthly meetings. The Protocol also requires the JCWG and the Specialised Committee to cooperate with institutions established under the Belfast Good Friday Agreement, specifying the North South Ministerial Conference, and the Northern Irish Human Rights institutions, as well as the umbrella human rights institution for Ireland and Northern Ireland. These references mirror the fact that, due to the suspension of some of those institutions, the negotiators were acutely aware that under the Belfast Good Friday Agreements political parties designating as unionist (i.e., supporting remaining in the UK) or nationalist (i.e., pro unification with Ireland) can obstruct its institutions. The Protocol seeks to avoid such opportunities by rendering the periodic dysfunctionality the Belfast Good Friday Agreements’ institutions inconsequential.

⁷ See below text to n 68 to 72.

⁸ see reporting from RTE (<https://www.rte.ie/news/ulster/2021/0202/1194457-brexite-ports/>) and the Irish Times (<https://www.irishtimes.com/news/ireland/irish-news/ni-port-staff-told-not-to-attend-work-by-european-commission-after-threats-1.4473998> and <https://www.irishtimes.com/news/world/uk/gloating-gove-seeks-grace-period-as-protocol-problems-exceed-teething-troubles-1.4474454>). On the same day violence erupted in East Belfast, leaving a corpse behind (<https://www.rte.ie/news/ulster/2021/0202/1194686-belfast-incident/>).

⁹ <https://mydup.com/news/dup-free-us-from-protocol>

¹⁰ Colin Murray and Clare Rice, ‘Into the Unknown. Implementing the Protocol on Ireland Northern Ireland.’ [2020] *The Journal of Cross Border Studies in Ireland*, 17.

¹¹ See on these Jan Wouters, ‘The Institutional Dimension of the EU-UK Relationship After Brexit.’ [2020] *European Foreign Affairs Review*, 613

¹² See Joris Larik, ‘Decision-Making and Dispute Settlement.’ In Federico Fabbrini (ed) *The Law & Politics of Brexit: Volume II: The Withdrawal Agreement* (OUP 2020)

The JC and its subcommittees have been established without any discernible dispute. They meet at irregular intervals, reflecting the ups and downs of the EU-UK relationship. For example, the JC met more frequently in September 2020 and in February 2021.¹³ At the first occasion, the EU wished to discuss the UK's announcement to disregard specific provisions of the Protocol, at the second occasion the UK was incensed about the 24-hour period during which the EU Commission had invoked Article 16 Protocol without the correct procedure.¹⁴

The implementation of the Protocol's institutional infrastructure is not complete yet. There is no indication that the JCWG has met monthly: its rules of procedures were first proposed in October 2020,¹⁵ indicating that there was no meeting before that date. One meeting on 29 January 2021 has been confirmed, but no minutes have been reported.¹⁶ The Protocol's institutional framework so far only encompasses the securing of an adequate infrastructure for the EU Commission when supervising the application of the Protocol.¹⁷ While the EU had assumed that a specific dedicated office in Belfast would provide an adequate infrastructure, the UK insisted on a more ad-hoc constellation. In the end, on the basis of JC Decision 6/2020, the EU representatives will have access to adequate "workstations" and can stay in the UK under tax immunity. This indicates a continued presence of EU personnel in Northern Ireland, though the term Northern Ireland office was eschewed to placate British sensitivities.

2.3 Supervision and conflict resolution

The main supervision and conflict resolution system of the WA is modelled on international trade agreements (Part Six Title III):¹⁸ in case of dispute, the first step is resolution in the JC, followed by a drawn-out arbitration procedure, lasting up to 31 months. It starts with establishing an arbitration panel within three months, if necessary, supported by the Permanent Court of Arbitration. If the arbitration panel finds, discussing up to twelve months, that there was indeed a breach, the complaining party can demand another decision of the panel if the counterparty does not comply within twelve months. The panel can then specify a lump-sum payment as temporary remedy. If the breach persists for another six months, the complaining party may suspend parts of the WA, except that on citizens' rights. The arbitration panel must refer any interpretation of EU law or phrases in the WA resembling EU law to the Court of Justice. However, there is no specific provision on how that obligation will be enforced.

In late 2020 the JC implemented the provisions on arbitration, drawing a list of 25 persons willing to serve in the arbitration panels, which includes five persons which the EU and the UK have jointly agreed to be eligible as panel chairs. The ordinary panel members are drawn from lists for which each party nominates 10 persons. (Article 171 (1) WA) Those lists have been established by Decision

¹³ Joint Committee meetings are reported on the relevant EU Commission web page (here: https://ec.europa.eu/info/relations-united-kingdom/eu-uk-withdrawal-agreement/meetings-eu-uk-joint-and-specialised-committees-under-withdrawal-agreement_en) and, with some delay, also on the UK Government's web page (<https://www.gov.uk/government/collections/withdrawal-agreement-joint-committee#meetings-of-the-withdrawal-agreement-joint-committee>)

¹⁴ See on this the chapter by Eileen Connolly and John Doyle in this volume.

¹⁵ COM (2020) 636 final of 8 October 2020

¹⁶ Reported here <https://questions-statements.parliament.uk/written-questions/detail/2021-01-27/144736>

¹⁷ Decision 6/2020 of the Joint Committee (...) of 17 December 2020 providing for the practical working arrangements relating to the exercise of the rights of Union representatives referred to in Article 12 (2) of the Protocol (...) OJ L443 of 30 December 2020 pp 16-21.

¹⁸ See on this also Larik (n 12)

7/2020.¹⁹ Both Part Two and the Protocol contain additional, supranational components in the enforcement system, which will be specified in sections 3.2 and 4.2.

3. Citizens' Rights (Part Two WA)

3.1 Challenges of implementation

Part Two aims at mitigating some of the effects of "Brexit" on those EU citizens²⁰ who used their free movement rights to relocate to the UK or from the UK to another Member State through temporary or permanent residence or as frontier workers. The protection of rights is fractional.²¹ Title II protects rights to continue residing in the UK or the EU with current and still to be born family while enjoying full access to the employed and self-employed economic activity, housing, education, and social benefits on equal terms with the resident population, while Title III aims at mitigating detriments on statutory, but not occupational social security. Political rights remain unprotected,²² as well as the rights of those EU or UK citizens finding themselves in the other territory without ever having moved,²³ alongside rights of EU migrants against their former Member States upon return.²⁴

Both parts explicitly require dynamic adaptations in several areas. Procedures for recognition of professional qualifications are to be finalised beyond 31 December 2020 and the UK is given the access to the EU's information system free of charge until September 2021 (Article 28 WA). Future changes of EU regulations coordinating national security systems (i.e. Regulations 987/2009 and 883/2004) will be incorporated into the WA by JC decisions, for which purpose the UK is granted observer status in the Administrative Commission on social security. It will also participate in the electronic information exchange in the field, this time not free of charge (Articles 34,36 WA). The implementation of these clauses will only be observable in the future.

Presently, the focus is on implementing the provisions protecting residence status of former free movers (Article 18-20 WA). States can choose between a declaratory system of registration and a constitutive one. The former reflects the status quo in EU citizenship law, while the latter was introduced to assuage the UK's preferences, which also insisted on the option to only provide an electronic confirmation of residence status (Article 18 WA).²⁵ In relation to frontier workers, the EU position favouring physical documents prevailed (Article 26 WA). Provisions on equal treatment (Article 23 WA) including in areas such as housing, education, and social benefits for economically active persons, as well as full access to economic activity as worker or self-employed person (Articles 24-25 WA) still await specification in the future. It remains to be seen how a new generation of UK

¹⁹ Decision No 7/2020 of the Joint Committee [2020/2251] OJ L 443, 30.12.2020, p. 22–23

²⁰ Discussed by Catherine Barnard and Emilija Leinare, 'Citizens's Rights.' In Federico Fabbrini (ed) *The Withdrawal Agreement (The Law and Politics of Brexit - Volume II)* (OUP 2020), 107-130. Oxford: Oxford University Press; Steven Peers, 'The End - or a New Beginning? The EU/UK Withdrawal Agreement.' [2020] *Yearbook of European Law*; Eleanor Spaventa, 'The rights of citizens under the Withdrawal Agreement: a critical analysis.' [2020] *European Law Review*, 193; Herwig Verschueren, 'The complex social security provisions of the Brexit withdrawal agreement, to be implemented for decades.' [2020] *European Journal of Social Security* (online first: doi:10.1177/1288262720967948), see also European Commission. Guidance Note (...) Citizens Rights C(2020) 2939 final.

²¹ Gillian More, 'From Union Citizen to Third- Country National: Brexit, the UK Withdrawal Agreement, No-Deal Preparations and Britons Living in the European Union.' In Dimitry Kochenov and Elise Muir (eds) *European Citizenship Under Stress: Social Justice, Brexit and Other Challenges* (Brill 20202), 463-464

²² Carmen-Cristina Cîrlig, *EU and UK citizens' rights after "Brexit" - and overview*. EPRS Service. 2020

²³ European Commission (n 20), 6; contesting this position is beyond the scope of this chapter.

²⁴ Nicolas Bernard, 'Union Citizens' rights against their own Member State after Brexit.' (2020) MJ, 303

²⁵ More, (n 21), 466-467

administrators will cope with the strange or even “monstrous”²⁶ concept of EU citizenship, with which they are unfamiliar. Administrators in the EU will be able to draw on the ongoing experience with treating citizens from other EU countries equally with locals for extending the same rights to UK citizens protected under the WA.

3.2 Achievements and shortcomings

13 EU Member States followed the UK example and made registration of UK citizens constitutive of any rights under Part Two WA, while 14 Member States opted for the more favourable declaratory system.²⁷ The latter include three of the four Member States with the highest number of UK citizens (Spain, Ireland, and Germany). Accordingly, all EU citizens in the UK are subjected to a constitutive system, while most UK citizens in the EU profit from a declaratory system. UK citizens in the EU also receive a physical document certifying their protection by Part Two under an EU Commission implementing decision.²⁸ The UK’s insistence on merely electronic documentation aggravates EU citizens’ difficulties to convince private actors such as landlords, banks and employers that they are not risking liability under UK immigration law.²⁹

In the UK, Part Two is implemented through ministerial regulations under sections 7-16 of the EU Withdrawal Agreement Act 2020 (WAA 2020),³⁰ covering immigration rules as well as equal rights to continuous employment, self-employed activity, and education. In relation to professional qualifications and social security entitlements, the act empowers an “appropriate authority”, specifying in schedule 1 the division of competences between regional governments of Northern Ireland, Scotland and Wales and the UK government, acting for England. The only unambiguous statutory guarantee relates to a ban of expelling EU citizens on grounds of crimes committed before the end of the withdrawal period. A government explainer commits to full implementation of Part Two.³¹

In the EU, the WA’s implementation in the Member States is supervised by the EU Commission.³² While it is impossible to report all 27 national systems,³³ the relative high concentration of estimated 850,000 UK citizens living in EU Member States on 31 December 2020 means that most are living in

²⁶ Elspeth Guild *Brexit and its Consequences for UK and EU Citizenship - or Monstrous Citizenship* (Brill 2016).

²⁷ Belgium, Denmark, France, Latvia, Luxembourg, Hungary, Malta, The Netherlands, Austria, Romania, Slovenia, Finland, and Sweden opted for a constitutive system, while in Bulgaria, the Czech Republic, Germany, Estonia, Ireland, Greece, Spain, Croatia, Italy, Cyprus, Lithuania, Poland, Portugal, and Slovakia opted for the declaratory system.

²⁸ Commission implementing decision of 21.2.2020 on documents to be issued by Member States pursuant to Article 18(1) and (4) and Article 26 of [Withdrawal Agreement] C(2020) 1114 (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/document-security/docs/c2020_1114_commission-implementing-decision.pdf , 31 1 2021)

²⁹ For official remonstrations see letter by Maroš Šefčovič (EU Commission) to Michael Gove (UK Government) of 28 May 2020, European Parliament Resolution of 15 January 2020 on implementing and monitoring the provisions on citizens’ rights in the withdrawal agreement (2020/2505/RSP)

³⁰ See Part 3 of the European Union (Withdrawal) Act 2020 (<https://www.legislation.gov.uk/ukpga/2020/1/part/3/enacted>).

³¹ (<https://www.gov.uk/government/publications/withdrawal-agreement-explainer-for-part-2-citizens-rights>)

³² See, for example, its guidance for Member States (European Commission n 20)

³³ A sociological research project on the situation of British expats has been funded by the UK’s Economic and Social Research Council the project web-page is <https://brexitbritsabroad.org/> . For more critical coverage of the UK citizens retiring in Spain and France see Jordi Giner-Monfort and Raquel Huete, ‘Uncertain sunset lives: British migrants facing Brexit in Spain.’ [2021] *European Urban and Regional Studies*, 74; Fiona Ferbrache and Jeremy MacClany *The Political Agency of British Migrants. Brexit and Belonging*, (Routledge 2021), 18-34.

Spain, followed by Ireland, France and Germany.³⁴ Since the protection of British citizens in Ireland has a long tradition on the basis of the Common Travel Area,³⁵ which also is duly implemented in national law, their situation is disregarded here.

Since the Spanish constitution establishes a monist approach to international law,³⁶ the self-enforcing elements of Part Two, such as the equal treatment principle, became national law once the WA was published. Spain has implemented the residence rights by joint instruction of the directorates general of Migration and the Police.³⁷ It specifies that Spain uses a declaratory system of registration, and then goes on to spell out the process how to receive a physical document confirming that the person is protected by Part Two, if desired. The application must be tendered in person at a Spanish speaking public administration, though post-COVID adaptations have been made in the meantime. Protection of professional, employment and social rights has been legislated for by Royal Decree of December 2020.³⁸ The decree is based on the government's competence to adopt emergency legislation for unforeseen circumstances, which does not cover permanent rules. While it mainly confirms directly effective rights under Part Two, the rules on recognition of professional qualifications are partially constitutive and will need to be transferred into a permanent legislation.

France also operates a modified monism in relation to the EU.³⁹ As a result, implementation of Part Two was also only necessary in relation to those provisions which are not self-enforcing, i.e., the process of registration. The French implementing legislation was issued by ministerial decree of November 2020, referring to five substantive legislative acts⁴⁰ and fifteen regional ordinances and decrees relating to immigration and social rights. The decree constitutes a faithful reiteration of the provisions of the WA. The legislation is easily accessible on-line.⁴¹ However, the application still requires French-language forms. In contrast to Spain, France does not require EU citizens to register or obtain a residents' card. Accordingly, many UK citizens in France had to undergo the registration process for the first time due to Brexit. The French decision to introduce a constitutive registration system aggravates the risks connected to failure of correct registration.

³⁴ See Office of National Statistics

<https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/ad-hocs/10575estimatesofthenumberofbritishcitizenslivingintheeubycountry2018>

³⁵ See on this Imelda Maher, *The Common Travel Area: More Than Just Travel*. (Royal Irish Academy & British Academy 2017).

³⁶ Joan Solanes Mullor and Aida Torres Pérez, 'The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance.' In Anneli Albi and Samo Bardutzky (eds) *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law*, (Springer 2019), 578.

³⁷ Boletín Oficial de Estado No 184 of 4 July 2020 Section I, p. 47504-47517. The basis for this joint instruction consists of legislation empowering the relevant ministries to issue ordonnances on organising their work (see p 47506 with further references).

³⁸ Real Decreto-ley 38/2020, Boletín Oficial de Estado 340 de 30 December 2020, p 122960 - 122985

³⁹ Laurence Burgorgue-Larsen, Pierre-Vincent Astresses, and Véronique Bruck, 'The Constitution of France in the Context of EU and Transnational Law: An Ongoing Adjustment and Dialogue to be Improved.' In Anneli Albi and Samo Bardutzky (eds) *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law*, (Springer 2019), 1218.

⁴⁰ The Code of Social Actions and Family, the Construction and Housing Code, The Immigration Code, the Social Security Code and the Labour Code

⁴¹ www.service-public.fr supplements the legal sources under each individual heading, and language barriers are diminished somewhat by google. Translate.

Since Germany's constitution is mainly viewed as being based on moderate dualism,⁴² the WA had to be implemented for it to attain direct effect in German law. Legislation of November 2020 changed the Free Movement Act,⁴³ which regulates the legal status of EU citizens in Germany, by adding the category of UK citizens protected by Part Two WA, aiming to extend EU rights seamlessly. As Germany requires all nationals and foreigners to register with the local authorities, most beneficiaries will be registered already. Registration for the purposes of Part Two is declaratory only, and those already in possession of a residence document will receive the replacement automatically. Instructions for administrators⁴⁴ endeavour to clarify borderline cases, such as those of UK citizens having entered Germany as posted workers and subsequently based their stay also on EU citizenship rights, if they are students or obtain comprehensive health insurance. As in France and Spain, any necessary applications had to be tendered in person, and in German, before online procedures were facilitated due to the global pandemic.

3.3 Effective enforcement of rights?

The institutional framework for enforcing the WA, as discussed above, is longwinded,⁴⁵ which is particularly inadequate in cases of expulsion or destitution due to, for example, withholding benefits. This part focuses on the options for citizens to enforce their rights against the UK or the relevant EU Member State.

As mentioned, in the EU Member States the WA has the same effect as EU law, and their implementation is supervised by the EU Commission under the Treaties (Articles 17 TEU, Articles 158-159 TFEU), including through infringement actions. UK citizens in the EU have recourse to judicial protection under national law, which includes indirect access to the ECJ through the preliminary reference procedure. These institutional protections are not time limited.

To compensate for the lack of these procedures for the benefit of EU citizens in the UK, Article 159 WA requires the UK to establish the Independent Monitoring Authority (IMA), which mimics the role of the Commission for the Member States through investigating citizens' complaints and acting on its own initiative to secure the proper implementation of Part Two, if necessary, by taking cases to the national courts. National courts may refer cases to the ECJ for the next 8 years, but – in contrast to national courts in the EU – are under no obligation to do so. The protection by the IMA may also expire after 8 years if agreed in the JC.

The UK implemented this obligation through section 15 and schedule 2 WAA 2020.⁴⁶ The IMA consists of at least three and up to nine members, a chief executive and up to three other executive members. The IMA members are appointed by a secretary of state, without parliamentary involvement or other any other mechanism to ensure their independence. The secretary of state also determines the members' remuneration, the funding of the institution and terms and conditions of its employees. The Act further establishes that IMA can hear complaints, conduct investigations, and apply for review of acts based on the citizens' rights under the WA and intervene in proceedings commenced by others. The IMA has been established in December 2020.⁴⁷ Six board

⁴² Dieter Grimm, Matthias Wendel and Tobias Reinbacher, 'European Constitutionalism and the German Basic Law.' In Anneli Albi and Samo Bardutzky (eds) *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law*, (Springer 2019), 484

⁴³ BGBl I 53 of 28 November 2020, p 2416-2424

⁴⁴ Bundesministerium des Innern, für den Bau und die Heimat, Anwendungshinweise, 2020

⁴⁵ See above 2.3 with footnotes 18 and 19.

⁴⁶ European Union (Withdrawal Agreement) Act 2020, UK Public General Acts 2020 c 1, www.legislation.gov.uk/ukpga/2020/1/enacted/data.htm)

⁴⁷ <https://ima-citizensrights.org.uk/>

members have been inaugurated, one of which with experience in immigration law, employment rights or social rights. Complaints can only be made on-line, and any response offers no guidance how to effectively enforce one's rights.

While EU citizens' Part Two rights enjoy weaker protection than those of their UK counterparts in the EU, the implementation accentuates those weaknesses. It remains to be seen whether the activities of interest groups can counterbalance the lack of independence on part of the IMA.

4. Protocol on Ireland / Northern Ireland

4.1. Challenges of implementation

4.1.1 A particularly flexible system of adaptations, suspension and unilateral revocation "Brexiteer" constituted the proverbial withdrawing of the carpet under the feet of the Belfast Good Friday Agreement,⁴⁸ an international Treaty lacking any institutional dispute resolution mechanism to establish agreed interpretation of its provision. Its effectiveness thus depends on consensus and an overarching framework. The latter was constituted by Common EU membership of the UK and Ireland, which allowed hybridity of territory and people to evolve, especially after the Union Customs' Code had eliminated the necessity of border controls. The Protocol seeks to replace this support. Recognising that replacing the foundations of a peace treaty which one of the parties wishes to leave behind is susceptible to new conflict, the Protocol contains a particularly flexible system of implementation, adaptation, suspensions and revocation, in addition to the general provisions of the WA in this respect.

The JC is empowered to determine the precise content of provisions relating to movement of goods and state aid (Articles 5 and 10) and tasked with the permanent review of the protocol (Article 11). Both parties have the option to suspend parts of the Protocol (Article 16), while Articles 5-10 can be revoked, if democratic consensus under Article 18 in Northern Ireland is withheld. The UK must conduct a democratic consensus procedure in 2024, and every four or eight years thereafter. Article 18 renders Articles 5-10 a provisional body of rules, which may be subject to ongoing political debate, frustrating any hope of a permanent settlement when trading with Northern Ireland.

4.1.2 Rights of Individuals, Common Travel Area (Articles 2-3)

The Protocol's Articles 2 and 3 constitute a symbolic nod to the relevance of individual rights and movement of persons for the Belfast Good Friday Agreement:⁴⁹ The UK shall ensure that no diminution of rights, safeguards or equality of opportunity as set out in the Agreement⁵⁰ occurs, while facilitating the activities of institutions supporting human rights standards (Article 2), and the UK and Ireland may continue the Common Travel Area, while it is again the UK which must ensure that any consequences of the CTA do not conflict with Ireland's obligations under Union law (Article 3).

Article 2 is drafted in a misleading way, because the UK's withdrawal from the EU must lead to diminution of citizenship rights for UK citizens in Northern Ireland and will also impact on rights to economic and civic trans-border activity. Ireland can cushion these losses somewhat. It plans to offer students in Northern Ireland's universities the option to participate in the Erasmus programme via

⁴⁸ A neutral documentation can be found on the UN Peacemaker page (<https://peacemaker.un.org/uk-ireland-good-friday98>).

⁴⁹ On the substance see Harvey (n 2), 156-159, Schiek (n 2).

⁵⁰ The Belfast Good Friday Agreement comprises a section headed "Rights, Safeguards and Equality of Opportunity", covering four of its 32 pages.

Irish universities,⁵¹ but has refused to extend rights to vote for the European Parliament to Irish citizens in Northern Ireland, although the reapportioning of EP seats after Brexit resulted in two additional Irish MEPs. The UK's obligations under Article 2 are mainly limited to maintaining legislation implementing EU anti-discrimination law, as well as to facilitating the work of the human rights institutions established by the Belfast Good Friday Agreement.

In relation to Article 3 Protocol, and the explicit authorisation of Ireland to treat UK citizens, i.e., third country nationals, more favourable than EU citizens from other Member States in Article 18 WA, there remains a risk that the WA can be legally challenged, because such discrimination against EU citizens was not accepted in the past.⁵²

4.1.3 Northern Ireland's place between two internal markets

The Protocol's most controversial part ensures that Northern Ireland retains access to the EU's Internal Market in goods and applies the Union Customs Code (Article 5), while the UK remains free to allow "unfettered access" of Northern Irish products to the British market (Articles 4 and 6). Northern Ireland also applies technical regulations (Article 7), the EU VAT system (Article 8) and the state aid regime (Article 10).⁵³

This leads to accusing the Protocol of "endangering the UK Internal Market".⁵⁴ However, any frictions emerge from the combination of the Protocol with the TCA, which removes Great Britain from the EU Customs Union and any legally binding regulatory alignment with the EU. Thus, controls demanded by the Union Customs' code for composition of goods, as well as their compliance with central regulatory regimes must be conducted for goods flowing from Great Britain to Northern Ireland. Adjustments necessary at the ports of Belfast and Larne in Northern Ireland do not differ from those to be made at the ports of Dover or Portsmouth in England. While goods remaining in Northern Ireland are exempt (Article 5(2) Protocol), the necessity of separating loads and other formalities might lead to resourcing products to come from Northern Ireland or Ireland. Up to 2020, Northern Ireland had a trade deficit with Great Britain,⁵⁵ maintaining which might become uneconomical. A positive trade balance might even improve the socio-economic situation in Northern Ireland, if trade diversion⁵⁶ towards the EU compensates any supply shortfall.

The detailed provisions of the Protocol itself and Annexes 2-6, altogether 35 pages, render much of the UK's implementation a quasi-automatic process with limited scope for discretion. A recent example may serve as illustration. Annex 2 to Article 5 applies Regulation (EU) 2015/479 on common rules of exports⁵⁷ to Northern Ireland. This regulation establishes an information and consultation procedure and empowers the EU Commission to issue an implementing regulation subjecting exports of certain products to an export authorisation to prevent a "critical situation" in relation to

⁵¹ <https://www.gov.ie/en/publication/869e17-studying/#erasmus>

⁵² See ECJ case C-55/00 – Gottardo [2002] ECR I-413 on privileging Swiss nationals over French nationals in the Italian pension system (Paragraph 34). On extreme circumstances justifying discrimination of EU citizens see ECJ case C-307/97 St Gobain [1999] ECR I-06161, paragraph 59, see also paragraph 60.

⁵³ More detail Harvey (n 2), 159-161

⁵⁴ Stephen Weatherill, 'The Protocol on Ireland/Northern Ireland: protecting the EU's internal market at the expense of the UK's.' [2020] ELRev 222, 229-231.

⁵⁵ Northern Ireland Statistics and Research Agency. 2020. *Overview of Northern Ireland Trade*. Belfast: Northern Ireland Executive. <https://www.nisra.gov.uk/publications/overview-northern-ireland-trade-0>

⁵⁶ Marek Martyniszyn 'Deal or No Deal, there may be a Brexit Silver Lining for Northern Ireland.' *The Conversation*, 11 December 2020 .

⁵⁷ Regulation (EU) 2015/479 of the European Parliament and of the Council of 11 March 2015 on common rules for exports (codification) OJ L 83 of 27 March 2015 34-

“shortage of essential products” (Article 5). In January 2021, the Commission issued a regulation⁵⁸ requiring an export authorisation for vaccines against COVID-19. It was not necessary to mention Northern Ireland, let alone Article 16 of the Protocol, because the UK in respect to Northern Ireland is considered a Member State in relation to this regulation (Article 5(4) Protocol). Accordingly, transports of vaccines from Northern Ireland to Great Britain require an export authorisation, to be enforced by the UK authorities under the EU’s supervision. The draft regulation⁵⁹ suggesting that vaccines need to be stopped at the land-border on the island of Ireland was apparently issued without considering the full extent of the Protocol.

Other provisions require implementation by way of specifying the rules. Article 5(1) and (2) exempts goods moved to Northern Ireland which are not at risk of being traded into the EU from EU customs’ duties and formalities. Goods not commercially processed or destined for use by end consumers are not deemed at risk, with extensive competences for the JC to define and specify these notions. On VAT and excise, Article 8 requires the Joint Committee to review its implementation and application, and to “adopt appropriate measures as necessary”. Annex 6 to Article 10 on State Aid requires that the JC determines the initial maximum exempted annual level of support for agricultural producers in Northern Ireland which replaces the EU payments under the Common Agricultural Policy.

4.2 Achievements and shortcomings

4.2.1 Rights of Individuals, Common Travel Area

The UK has implemented Article 2 Protocol mainly through delegating competences to a minister of the crown, who under section 8c of the WWA 2020 may implement the Protocol by ministerial order or by changing legislation, including the act empowering him to do so.⁶⁰ The Northern Ireland Assembly received a residual competence (Schedule 2 Part 1 c), limited to devolved areas, while beyond devolved areas the minister and the Assembly may legislate together. The Assembly is prevented from limiting North/South cooperation or establishing border structures on the land border (schedule 10, “Patten amendment”), a provision which is viewed as not applying to section 8c.⁶¹ The Assembly (but not the minister) are prevented from creating frictions with Article 2 Protocol (Schedule 3 paragraph 2, change to Northern Ireland Act 1998). Schedule 3 also enhances the competences of the Northern Irish Human Rights Commission by imposing a duty on it to educate and inform the Northern Irish public about Article 2 Protocol.

Implementing Article 3, Ireland and the UK have started the process of placing the Common Travel Area on a secure footing in international law,⁶² which will not create direct effects in either country. Specific implementation is underway. For example, after Ireland initially offered to fund the extension of European Health Insurance cards for residents of Northern Ireland, the UK has now

⁵⁸ Commission Implementing Regulation (EU) 2021/111 of 29 January 2021 making the exportation of certain products subject to the production of an export authorisation.

⁵⁹ The regulation is no longer available. On the background and its content see John Curtis, *Northern Ireland Protocol: Article 16 and EU vaccine export controls*. (House of Commons Library. 2021)

⁶⁰ <https://www.legislation.gov.uk/ukpga/2018/16/section/8C>

⁶¹ Colin Murray and Clare Rice, ‘Beyond Trade: Implementing the Ireland/Northern Ireland Protocol’s Human Rights and Equality Provisions.’ [2021] NILQ forthcoming.

⁶² Links to the Memorandum of Understanding and the Joint Declaration are provided by both governments (Ireland: <https://www.dfa.ie/brexit/getting-ireland-brexit-ready/brexit-and-you/common-travel-area/> , UK: <https://www.gov.uk/government/publications/memorandum-of-understanding-common-travel-area-healthcare-arrangements-between-the-uk-northern-ireland-and-ireland>).

designed a “Global Health Insurance Card” for all UK residents, including residents of Northern Ireland.⁶³

4.2.2 Northern Ireland’s place between two internal markets

Despite the controversies around Articles 5-10 Protocol, the JC was able to agree on three crucial decisions implementing these Articles 5-10 Protocol.⁶⁴

Decision 3/2020⁶⁵ expanded the number of regulations under Annex 2 to Article 5 Protocol, and allowed cars imported for use in Northern Ireland only even if they do not comply with strict EU emission standards.

Decision 4/2020⁶⁶ specifies which goods moved from Great Britain to Northern Ireland are not at risk of being moved to the EU, and thus exempt from customs duties (Article 5(2) Protocol), due to lack of commercial processing or a limited value. Commercial processing is deemed to be absent if the importer’s annual turnover is below £500,000, or if the processing relates to selling foods to end-consumers, goods to be used as animal feed in Northern Ireland, or for direct provision to patients or persons cared for in Northern Ireland or is limited to integrating a product into a permanent structure located in Northern Ireland, (Article 2 Decision 4/2020). Article 3 defines exempted values, distinguishing between imports from Great Britain and the EU and from elsewhere. In the former case, goods are exempt if the customs’ tariff would equal zero, or if the importer has been authorised in line with Articles 5-7 of Decision 4/2020, while in the latter case it suffices if the customs duty is equal or less than that payable when importing to the UK. If external importers have an authorisation, the goods are also not at risk if the customs duty does not exceed 3% of their value. Article 5 regulates authorisation for bringing goods to NI for the purpose of sale to or final use by end-consumers as “trusted traders”. These are named persons, whose specific economic activities justify this status. Article 6 lists general conditions such as being established in Northern Ireland or in the UK with an indirect customs representation in Northern Ireland, and trading into Northern Ireland in relation to end consumers. Article 7 specifies more details of the application and past good conduct of the applicant, as well as the ability of the authorities to control the effective compliance. Article 8 and a detailed annex provide an even higher level of detail, requiring traders to produce various paper-based and electronic documents.

Decision 5/2020⁶⁷ determines the overall level of annual support for the agricultural and fisheries sector in Northern Ireland which shall be permitted as a compensation for the discontinuation of support under the EU agricultural policy in Northern Ireland for the purposes of Article 10 Protocol (application of EU state aid rules).

The JC has yet to adopt any decision on VAT rules (Article 8), or any decision under Article 11, potentially proposing amendments of the Protocol.

Implementation has not, however, been straightforward. Public pronouncements by the UK government that no formalities would ensue for transports from Northern Ireland to Great Britain and vice versa, combined with the protracted negotiations of TCA resulted in a difficult adaptation

⁶³ See information by both governments (Ireland: <https://www.gov.ie/en/policy-information/b42e94-health-and-brex/?referrer=http://www.health.gov.ie/brexit-contingency-and-preparedness-update/#european-health-insurance-card-rights-post-brex-for-northern-ireland-residents> , UK: <https://www.nhs.uk/using-the-nhs/healthcare-abroad/apply-for-a-free-uk-global-health-insurance-card-ghic/>

⁶⁴ On Decision 6/2020 see already text to n 17

⁶⁵ OJ L 443 of 20 December 2020, pp 4-5

⁶⁶ OJ L 443 of 30 December 2020, pp. 6-12

⁶⁷ OJ L443/13 of 30 December2020, p 13-15

process. While businesses developed methods to cope,⁶⁸ the UK had not put in place the necessary procedures to comply with its obligations under Article 12 Protocol, or to ensure that the implementing decisions outlined above were executed. Decision 4/2020 was thus complemented by four unilateral decisions dated 8 January, nick-named “grace periods”.⁶⁹ They allowed for the UK to take a lenient approach to pre-departure and export declarations under Articles 263(1) and 269(1) Regulation 952/2013 (EU Customs Code). Those declarations will “deemed to have been made” if equivalent information has been made available to the UK authorities electronically. The UK commits to make the equivalent information received available to the EU representatives under Decision 6/2020,⁷⁰ and to apply standard procedures under specific circumstances. These commitments are the condition for the EU Commission to refrain from infringement actions.⁷¹ The UK also applies two grace periods for movement of goods into Northern Ireland, 3 months for all food of animal origin or mixed origin including animal and plant products, and 6 months for fresh meat products. Regarding the former, the UK commits to ensure that the products are clearly packaged for end consumers, labelled with a ban of trading these outside Northern Ireland, enter Northern Ireland through a designated place and are monitored in line with regulation 2017/625 (SPS regulation).⁷² The UK also accepted to be bound by EU SPS legislation, and other relevant EU laws as of 1 April 2021, and recognised the “grace period” as non-renewable. The rules for certain fresh meat products are similar, and in addition contain a commitment that supermarkets will adjust to use other supply chains.

Two unilateral declaration by the EU concerns medicinal products and state aid. The former ensures that Northern Ireland remains in the EU acquis for those products, which enables EU products to be delivered to Northern Ireland. The latter reiterates that in applying the state aid rules to trade between Northern Ireland and Great Britain, the Commission will only consider real foreseeable effects, having due regard to Northern Ireland’s integration in the UK’s internal market. As specified in a notice to stakeholders,⁷³ this does not change the fact that state aid, including beneficial taxation schemes, to competitors in Great Britain may impact on trade in goods between Northern Ireland and EU Member States if the beneficiary of state aid operates in or trades with Northern Ireland.⁷⁴ This may become relevant in practice if and when the Northern Ireland Assembly enacts

⁶⁸ A qualitative study based on questionnaires established that frictions observed are much less severe than expected, and mainly due to the refusal of the UK government to give an orientation of what rules they would accept a little earlier than Christmas 2020. ManufacturingNI. “NI’s Manufacturers and the First Month of the NI Protocol.” Belfast 2021 (<https://www.manufacturingmonthni.com/wp-content/uploads/2021/02/Protocol-Report-February-Final.pdf>).

⁶⁹ These are documented on the EU Commission’s web page (https://ec.europa.eu/info/relations-united-kingdom/eu-uk-withdrawal-agreement/meetings-eu-uk-joint-and-specialised-committees-under-withdrawal-agreement_en) as well as on dedicated government web pages in the UK.

⁷⁰ Above footnote 17

⁷¹ See below section 4.3

⁷² Regulation (EU) 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products, OJ L 95, 7.4.2017, p. 1–142, consolidated version available from <http://data.europa.eu/eli/reg/2017/625/2019-12-14> .

⁷³ EU Commission’s Competition Directorate, dating from 21 January 2021 (https://ec.europa.eu/info/sites/info/files/notice-stakeholders-brexite-state-aid_en.pdf).

⁷⁴ There has been some criticism in Britain of this “reach back” principle, because it means that aggressive state aid or taxation schemes will have to be limited to companies not operating in or trading with Northern Ireland in those cases where the NI operation leads to trade into the EU (George Peretz, ‘EU Commission issues “Notice to Stakeholders” on Brexit and State aid.’ 21 January 2021, <https://eurelationslaw.com/blog/eu-commission-issues-notice-to-stakeholders-on-brexite-and-state-aid>, with further references.

legislation to reduce corporation tax, depending on the extent to which the losses for the Northern Irish budget are compensated.

4.3. Consequences in case of failure or decreasing consent.

While failure to implement the provisions of the protocol is subject to the procedures foreseen in the WA,⁷⁵ for Articles 5-10 there are specific provisions in several dimensions.

In addition to temporary remedies available under Article 178 WA, Article 16 Protocol specifically allows the EU and the UK to take recourse to “safeguards”. These presuppose “serious economic, societal or environmental difficulties,” or “diversion of trade”, and must be proportionate. While the safeguards are unilateral, under Annex 7 to the protocol the aggrieved party must notify the other party of their intent with all the relevant information and enter consultations in the JC for at least one month. This does not preclude immediate action in exceptional circumstances, though. Both parties have threatened “triggering Article 16”, though the UK has done so more frequently. In January 2021, the EU had published a decision specifying that Article 16 is triggered, without the relevant procedures being followed.⁷⁶

Finally, under Article 12 (4) the usual enforcement mechanisms under EU law apply in relation to Articles 5-10. Accordingly, the EU Commission can investigate potential infringements, and start infringement proceedings before the ECJ, as it has threatened in March 2021.⁷⁷

5. Conclusion

The detailed consideration of the implementation of the WA Part Two and the Protocol Ireland/Northern Ireland indicates a heightened potential for struggle and disruption in the relationship between the EU and the UK throughout this process. The question is what these procedures, and the permanent friction to be expected, entail for the credibility of the WA, the continued relationship between the EU and the UK and whether they ultimately endanger or support the constitutional quality of EU law as such.

Full answers for these questions will have to wait until more experience with WA implementation has been gained. However, the critical analysis of the implementation so far allows a few cautious conclusions.

First, there is potential for some pragmatic solutions which may enhance the flow of trade between Northern Ireland and Great Britain without endangering the EU internal market. As mentioned, the application of the Union Customs Code should have been fully IT based by now, obviating the need for paper declarations. With some extra investment, Northern Ireland could become a site of first application of these mechanisms. The application of TRACE and SPS rules constitute the larger administrative effort. In relation to the latter, maintaining regulatory alignment should help, at least until fully electronic checks are possible, and the traders in Great Britain have received the relevant training.

Second, there are some frictions that need to be overcome outside the application of the Protocol. Supervision and enforcement are so much more efficient when it comes to transport of goods, in comparison with citizens' rights. Some of the frictions related to citizens' rights can only be alleviated by unilateral action of the EU Member States, as is currently contemplated for services in the framework of musical and theatre performance. The situation of EU citizens in the UK will

⁷⁵ See above text with n 46

⁷⁶ See above text with n 57 to 59.

⁷⁷ See above text with n 8 to 10

deteriorate and require a constant endeavour to secure their rights. Member States can contribute, for example by allowing their citizens to attain dual citizenship where they desist this in relation to non-EU Member states. However, mainly the UK will have to be reminded that the rights of EU citizens should not be neglected.

Some aspects of the Protocol will need further development. For example, the critique that the Protocol fragments the EU Internal Market by opening only the goods-related partition for Northern Ireland is fully justified. Expansive application of Article 11 Protocol, which enables extension of its substantive coverage by changes to the WA, may be a first step towards achieving this. Ultimately, this would create a permanent relationship between the EU and the UK in relation to Northern Ireland which goes beyond the mandate of a WA. To avoid legal challenges, it would be advisable to place this on the footing of a separate Treaty.

Finally, the nuclear options contained in Article 16 and 18 of the Protocol should be defused. As regards Article 16, the JC could work on a Memorandum of Understanding how to establish an early warning system could be installed avoiding its activation. Article 18 will need to be amended if the constant politicisation of the protocol is to be avoided. These proposals will probably not appeal to politicians immediately. However, they would respond to business pleas to enhance stability in the application and implementation of the Protocol, which are increasingly voiced.