

Dr Sylvia de Mars – Written evidence on the role of the CJEU under the Protocol on Ireland/Northern Ireland

Evidence to the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland on the Role of the CJEU under the Protocol

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THE CJEU'S ROLE IN RELATION TO THE PROTOCOL

- [1] As ratified by the UK and the EU, the Protocol on Ireland/Northern Ireland ("Protocol") sets out several roles for the Court of Justice of the EU ("CJEU") in Article 12.
- [2] Article 12(4) Protocol sets out what we can call its "direct jurisdiction". It states that with respect to the provisions of the Protocol that apply EU law (Articles 5, and 7-10), the CJEU has "the jurisdiction provided for in the Treaties". The CJEU's jurisdiction under the EU Treaties referred to here are two-fold: it has jurisdiction with respect to breaches of EU law, and it has "preliminary reference" jurisdiction.
- [3] With respect to breaches of EU law, if the Commission finds that a Member State has failed to fulfil an EU law obligation, and the administrative stage of infringement proceedings under Article 258 TFEU (which take the form of an exchange of letters, in short) does not satisfy the Commission that any failure has been remedied, it can take a Member State to the CJEU and ask it to rule on the matter. The CJEU in these cases finds a breach (or not) in its judgment, with the expectation that the Member State in question amends the breach, if found.¹ Were it to not change its laws or practices in light of such a CJEU judgment, the Commission can request, under Article 260 TFEU, that the CJEU impose that the Member State pays a financial penalty (either in the form of a lump-sum or a penalty payment).²
- [4] Applying this process to Article 12(4) Protocol, it means that where the Commission finds that the UK, in respect of Northern Ireland, has breached one of the provisions that apply EU law in the Protocol (so, Articles 5 or 7-10), it can take the UK before the CJEU – and if the CJEU were to find in favour of the Commission regarding a breach, the UK would be expected to remedy its "failure to fulfil an obligation" under the Protocol. In the absence of such a remedy, the Commission could ask the CJEU to impose a financial penalty on the UK.

¹ Article 260(1) TFEU.

² Article 260(3) TFEU.

- [5] Preliminary references, under EU law, are the process by which national courts can (or must) ask the CJEU for an interpretation of EU law when resolving a dispute that involves EU law. The workings of the process are set out in Article 267 TFEU and make it clear that any national court can ask any question regarding interpretation of EU law of the CJEU, and will pause domestic legal proceedings until it receives such a binding interpretation. Courts of last resort, like the UKSC, *must* ask the CJEU for an interpretation of EU law where they cannot, with certainty, ascertain the meaning of any EU law provision.
- [6] Applying this process to Article 12(4) Protocol, it means that in any dispute in the UK that raises issues of the EU law in the Protocol (so that referred to by Articles 5, and 7-10), where a domestic UK court finds that it is not clear on the meaning of the EU law in that dispute, it can (or must) ask the CJEU for an interpretation of the EU law in question. It should be stressed that disputes involving the Protocol are most likely to be raised before the courts in Northern Ireland, but the wording of Article 12(4) is more general than that: there is nothing precluding business in any other part of the UK from starting a case where they are located if they experience difficulties in moving goods to or from Northern Ireland, and those other UK courts would likewise have the possibility or requirement to ask for an interpretation of EU law, if necessary to decide a dispute.
- [7] The CJEU also has “indirect jurisdiction” regarding the Protocol, where the CJEU (or its case law) plays a role in dispute settlement involving the UK but does not actually decide the disputes in question: first, via arbitration as set out in the Withdrawal Agreement (WA), and second, as it does via Article 13(2) Protocol.
- [8] Where the UK and the EU have a dispute regarding the “interpretation and application of provisions” of the WA, and cannot resolve their disagreement by consultations in the Joint Committee, the Withdrawal Agreement in Title III of Part Six WA sets out that the dispute will go to arbitration. An arbitral panel will decide the dispute in a binding manner – but if the dispute involves any provisions of the WA that refer to a concept of EU law, arbitration proceedings must be paused, and the provision must be sent to the CJEU for an interpretation, under Article 174 WA. This adaptation of the “preliminary reference” process does not involve any UK courts directly communicating with the CJEU, but nonetheless means that any disputes the UK and the EU have about the Protocol with an EU law component will involve the CJEU in an interpretative function.
- [9] Article 13(2) Protocol, meanwhile, requires that any interpretation of the Protocol’s provisions of EU law is in conformity with all relevant case law of the CJEU – including any cases decided after Brexit. I refer to this as “indirect jurisdiction” because while it does not require direct communication with the CJEU by any UK courts or legislatures, it does require UK courts and legislatures to be indefinitely aware of CJEU jurisprudence as it relates to the Protocol. This means that the CJEU will shape *indirectly* how the Protocol’s EU law contents functions.

UK GOVERNMENT CONCERNS ABOUT THE CJEU JURISDICTION IN THE PROTOCOL AS SET OUT IN THE COMMAND PAPER

- [10] There are two mentions of the CJEU in the July 2021 Command Paper.³ Paragraph 41 reads as follows:

*Thirdly, we should look to **normalise the governance basis of the Protocol** so that the relationship between the UK and the EU is not ultimately policed by the EU institutions including the Court of Justice. The existing arrangements are highly unusual and have not proven conducive to solving the issues that have arisen. We should return to a normal Treaty framework, similar to other international agreements including our Trade and Cooperation Agreement, in which governance and disputes are managed collectively and ultimately through international arbitration.* (emphasis not added)

- [11] Paragraph 67 adds to this a specific reference to Articles 12(4)-12(7) Protocol, and the Command Paper over the next few paragraphs reiterates that the dispute settlement agreements in the Protocol are “highly unusual” and that “these arrangements ... have not supported problem-solving in the context of a divided society – indeed they have arguably increased rather than reduced tensions”, as they add to a “false sense of separation” between Northern Ireland and Great Britain by having Northern Ireland subject to the EU Court’s oversight. In paragraph 69, the Command paper once more expresses a desire for a TCA-style arbitration system instead of what is set out in Article 12 Protocol.
- [12] It should be stressed that the Command Paper and subsequent UK concerns all seem concerned with the *first* form of “direct jurisdiction” that the CJEU has under the Protocol: its ability to hear Commission complaints about UK compliance with the relevant provisions in the Protocol.
- [13] The ultimate concern expressed in the Command Paper is regarding sovereignty, and in particular, the implications of the court of *one* party overseeing the legal commitments made in the Protocol. This appears a political concern more than a legal one; while it is unusual to have one party’s court in charge of an international agreement, there is no reason to assume that the CJEU, in its Article 12(4) role, would be biased against the UK. As far as the other concern expressed goes, there is nothing in the Command Paper supporting the assertion that the Article 12(4) role of the CJEU is a particular factor that needs addressing. Reporting suggests that Northern Ireland businesses, in any event, do not think of the role of the CJEU as one of the problems arising from the Protocol.⁴
- [14] An added point is that the CJEU’s jurisdiction under Article 12 is limited to the specific provisions of the Protocol that deal with references to EU law – and these relate primarily to the Single Market in goods. This is not an area of EU law that draws significant attention from the Commission in terms of infringement proceedings under Article 258 TFEU; and, specifically, research done in 2017 reveals that not a single Commission complaint about the UK regarding free movement of goods

³ *Northern Ireland Protocol: The way forward* (CP 502, 21 July 2021), available at <https://www.gov.uk/government/publications/northern-ireland-protocol-next-steps>

⁴ See, for example, <https://www.irishtimes.com/news/politics/businesses-not-raising-concerns-over-ecj-oversight-says-industry-group-in-north-1.4697576>

actually made it to the CJEU between 2003 and 2016.⁵ It is thus not only the case that the CJEU has not yet been involved in any dispute settlement under Article 12(4) – but it is unlikely to *become* involved if the UK applies the EU law in the Protocol. UK concern about the CJEU’s role thus seems political – not legal or practical.

SUBSEQUENTLY – HAS THE POSITION EVOLVED?

- [15] Lord Frost, who was until recently negotiating with the EU on the Protocol, made his position on the CJEU clearer in the months following July 2021. Where the CJEU was mentioned twice in the Command Paper, it appeared to become a bigger obstacle to agreement as the negotiations dragged on, and Lord Frost’s ultimate position was well-summarised by his evidence to the House of Lords European Affairs Committee on 26 October 2021:⁶

*The position is simplified by talking about the Court, but **the Court is simply at the apex of a system that imposes EU law in Northern Ireland without consent.** ... We do not think it is right, or likely to contribute to stability, that the Court of Justice should resolve disputes between the two sides. We cannot do anything about the fact that the EU makes this very expansive claim for the interpretive powers of the Court. ... We cannot do anything about that reality, and that raises the question of where EU law applies. Therefore, it takes us back to the beginning of that argument, which is that **the problem is that far too much EU law applies directly in Northern Ireland.** That is the core of the problem. We do not see that so much of it should apply, and therefore the interpretive role of the CJEU is also limited in that respect. (emphasis added)*

- [16] This changes the nature of the UK concerns: they are not about the CJEU, but rather about the autonomy of EU law as interpreted by the CJEU (see paragraph [18] below), and the fact that EU law applies under the Protocol. The removal of EU law from the Protocol would not have been possible to negotiate with the EU – the reality is that EU law applies under the Protocol because the Protocol addresses the management of the EU’s external border, and there is no reason to believe the EU would be willing to have its border managed by *other* law.
- [17] The UK government’s position appears to have changed between October and December. Lord Frost’s statement on the negotiations on 17 December 2021⁷ suggests that the CJEU remained an overarching issue – but on the same day, news briefings emerged that declared that the UK was willing to consider a compromise on the role of the CJEU under the Protocol.⁸ Lord Frost resigned in the aftermath of those briefings, suggesting that he disagreed with what has now become the government position. The Foreign Secretary’s recent comments that the CJEU

⁵ Raphael Hogarth and Lewis Lloyd, *Who’s Afraid of the CJEU?* (Institute for Government, December 2017) available at https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Brexit_ECJ_v10FINAL%20web.pdf

⁶ House of Lords European Affairs Committee, *Uncorrected oral evidence: The UK-EU relationship* (26 October 2021) available at <https://committees.parliament.uk/oralevidence/2904/pdf/>, question 7.

⁷ See <https://www.gov.uk/government/news/lord-frost-statement-on-the-protocol-on-ireland-northern-ireland-17-december-2021--2>

⁸ See, eg, <https://www.bbc.co.uk/news/uk-northern-ireland-59691427>

should not be the “final arbiter” of disputes between the UK and the EU fits with that possible compromise, which will be addressed below.⁹

THE EU POSITION ON THE CJEU’S JURISDICTION UNDER THE PROTOCOL

- [18] What Lord Frost describes as the EU’s “very expansive claim for the interpretive powers of the Court” is a reference to what in EU law is called the CJEU’s external doctrine of the autonomy of EU law. There is long-standing CJEU case law, starting with the CJEU’s rejection of the original EEA agreement because of its involvement of an EEA Court that would offer binding interpretations of the EU law in the EEA agreement¹⁰, that sets out that in international agreements that are binding on the EU and/or its Member States, the CJEU can be the *only* body to interpret the EU law in those agreements, in order to ensure that only a single interpretation of EU law applies to the EU Member States and bodies.¹¹
- [19] The EU would not negotiate an agreement that a) applied to the EU, or its Member States, or both; and b) contains references to EU law; that c) would not be ultimately interpreted by the CJEU. If it did, the CJEU is likely to declare that entire agreement contrary to EU law, as it did the original EEA agreement. There is as such no room for compromise on the basic point for the other EU institutions: where an agreement involving the EU contains references to EU law, that EU law must be interpreted by the CJEU.

ARTICLE 16 AND THE CJEU JURISDICTION

- [20] As discussed at the House of Lords Sub-Committee on the Protocol on 1 December 2021, the invocation of Article 16 can only take place on the basis of the *application* of the Protocol resulting in “serious economic, societal or environmental difficulties” or “diversion of trade” on a temporary basis. The problem with relying on Article 16 in light of the CJEU’s role under the Protocol is that that role has not actually been, as the Protocol puts it, *applied* – the CJEU has not issued any judgments on the EU law applicable under the Protocol, or under any alleged violation of Articles 5 or 7-10 of the Protocol by the UK.
- [21] If included in an Article 16 action, the actual complaint on the part of the UK would be that the mere *presence* of the CJEU in the Protocol causes problem – but Article 16 does not exist to address problems one party might have with the *content* of the Protocol that it ratified. An invocation of Article 16 on the ground that Article 12 gives a role to the CJEU would be contested by the EU in arbitration and would be extremely unlikely to succeed there. The EU response to such a claim would likely be firm, to the extent it can respond (as discussed on 1 December 2021).¹²

SCOPE FOR COMPROMISE ON THE CJEU’S JURISDICTION

⁹ See <https://twitter.com/trussliz/status/1473287015345098756?lang=en>

¹⁰ *Opinion 1/91* ECLI:EU:C:1991:490.

¹¹ See also *Opinion 2/13* ECLI:EU:C:2014:2454 and Case C-284/16 *Achmea* ECLI:EU:C:2018:158.

¹² House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland, *Corrected oral evidence: Legal implications of any invocation of Article 16, and of the current operation of the protocol* (1 December 2021) available at <https://committees.parliament.uk/oralevidence/3135/pdf/>

- [22] There are possible “middle ground” solutions on the matter of the CJEU’s “direct jurisdiction” to hear Commission complaints about UK compliance with the provisions of the Protocol.¹³
- [23] One solution clearly respects the wishes and needs of both the UK and the EU: it guarantees dispute resolution *by an independent court of tribunal*, as desired in the Command Paper, and the *autonomy of EU law*, as required under EU law. That way forward is to apply the structure that is described above in paragraphs [7] and [8] as the CJEU’s *indirect* jurisdiction to the Protocol as well as to the Withdrawal Agreement.
- [24] This would maintain the involvement of EU law in the management of the EU’s external border, and ensure that the CJEU would retain its oversight function regarding the *EU law* made applicable under the Protocol – but would introduce the UK’s desired ‘normality’ to dispute resolution, and remove the CJEU as what the Foreign Secretary has called the “final arbiter” on these disputes. The end effects of arbitration are ultimately not dissimilar from findings by the CJEU that a failure to fulfil obligations under EU law has taken place under Article 258 TFEU: financial penalties can be applied via a binding decision. There is, as such, nothing visible for the EU to lose here, and so such a compromise seems entirely within reach – provided the EU is willing to reopen negotiations of the Protocol.
- [25] What is less clear at this time is if the UK also objects to the CJEU’s other “direct jurisdiction”, whereby UK courts can send preliminary references to the CJEU when provisions of the Protocol that include references to EU law arise in domestic legal disputes. This function, of course, *mirrors* what has been agreed to under the Withdrawal Agreement – but applies it not only to disputes between the UK and the EU, but also between private parties and other public or private parties within the UK – and so it is possible that the UK does not deem a ‘domestic’ extension of that interpretative power controversial. However, in the absence of further details of the UK’s negotiating position on Article 12 Protocol, that cannot be assumed.

20 January 2022

¹³ See, in particular detail, Anton Spisak, *After Brexit: Making the Northern Ireland Protocol Work* (Tony Blair Institute, 2 December 2021) available at <https://institute.global/policy/after-brexit-making-northern-ireland-protocol-work>