

WRITTEN EVIDENCE TO THE EUROPEAN SCRUTINY COMMITTEE

PARLIAMENTARY SCRUTINY OF THE JOINT COMMITTEE AND THE APPLICATION OF THE NORTHERN IRELAND PROTOCOL

GEORGE PERETZ QC BL

I have concentrated on responding to questions where I have particular expertise (EU law including State aid and customs).

I should also say at the outset that Professor Stephen Weatherill was kind enough to send me a copy of the evidence he has given to the Committee. Since he and I are as one on most if not all issues concerning the interpretation of the Protocol, I was not surprised to find myself to be in complete agreement with what he says. I shall therefore confine myself to observations that add to the points that he has made rather than merely repeat them: where I say nothing in relation to a question he has answered I simply adopt his answer.

A. Effective Parliamentary scrutiny of the Joint Committee during transition and in relation to the Protocol

1. How important is the role of the Joint Committee in terms of decisions that need to be taken during the transition period? How can Parliament effectively scrutinise these?

2. How important is the role of the Joint Committee in terms of the application of the Protocol? In addition to the general powers of the Joint Committee set out in Article 164 of the Withdrawal Agreement, we note its specific powers in relation to the Protocol, provided in Articles 5, 6, 8, 10(2), 11, 12(3) and 13(4) of the Protocol.

I shall concentrate on the role of the Joint Committee (JC) in relation to the provisions on customs (Article 5) and State aid (Article 10), as there is occasionally some misunderstanding of what the JC can and cannot do to modify the effect of the Protocol¹.

As Professor Weatherill has pointed out (in answer to Q17), Article 5 contains “misleading advertising”: once you penetrate its convoluted structure, its actual effect is subject all GB to NI exports, and all exports from third countries to NI, to the full panoply of the EU Customs Code (tariffs, checks, and procedures) save for a carve-out exempting certain goods from general EU tariffs (but not EU trade remedy tariffs – see Annex 2, paragraph 5). That carve out covers only goods that (a) are not to be subject to “*commercial processing*” in NI and (b) are not “*at risk*” of being moved into the EU.

The JC plays an important role in defining the scope of both parts of that carve-out: under the third paragraph of Article 5(2) it has to establish the conditions under which processing is not to be considered to fall within the scope of the definition of “commercial processing” (which will allow some goods to benefit from tariff-free treatment even if they will be processed in NI) and it has to set out criteria for goods that are to be considered “not at risk” of being

¹ See, for example, the evidence of the Chancellor of the Duchy of Lancaster to the House of Commons Select Committee on the Future Relationship with the EU on 11 March 2020, <https://committees.parliament.uk/oralevidence/162/pdf/> at Q25, where it was suggested in relation to State aid that “*the effective working of the Protocol is a matter for the [JC] to resolve*”.

moved into the EU. In both cases, the Protocol sets out a list of factors which the JC is to take into account.

One possibly important point is what would happen if the JC were to fail to reach agreement on those matters. In my view, the language of Article 5(2) – and in particular Article 5(2)(b) – points to the conclusion that in the absence of any agreement, there will be no carve-outs: that is to say, that all GB/third country to NI exports would be subject to EU tariffs. That conclusion means that it will be very important for the UK Government to reach agreement with the EU in the JC on those issues: if it does not, there will be no carve-out from what is in fact the general rule that GB/third country exports to NI are liable to EU tariffs.

In relation to State aid (Article 10), the JC has only a minimal role: as set out in Article 12(4) and (5), the scope of what UK measures fall under Article 10(1) – and in particular the interpretation in practice of the key phrase “measures that affect that trade between Northern Ireland and the Union which is subject to this Protocol” – is to be decided by the Commission (in taking decisions on UK measures) and the UK courts (in dealing with private enforcement of that Article, for example by way of a judicial review challenge to a measure said to fall within the scope of the Article), subject in each case to the ultimate jurisdiction of the Court of Justice of the EU (see Professor Weatherill’s answer to Q10). There is no role for the JC there, save to the extent that it could agree (at most) slight modifications under Article 164(5)(d) (referred to in Q4). The JC’s role is otherwise limited to determining the precise scope of the carve-out for agricultural support measures in Article 10(2).

3. Do you have any suggestions for how Government can facilitate effective Parliamentary scrutiny of the activities of the Joint Committee as regards Northern Ireland? For information, this letter was sent by eight Select Committee Chairs to the Chancellor of the Duchy of Lancaster on 24 March 2020.

4. How can Parliament effectively scrutinise the application of the following provisions relevant to the Protocol:

> Article 164(5)(d) of the Withdrawal Agreement allows the Joint Committee to amend the Protocol, if such amendments are necessary to “correct errors, or to address omissions or other deficiencies”. Suggestions should go beyond the established powers of this Committee to scrutinise the EU position in the Joint Committee (see this letter from the Committee to Mr Gove of 18 June 2020).

> Article 13(3) of the Protocol provides for dynamic alignment with EU law applying under the Protocol, when it is amended or replaced. Article 13(4) provides for the Joint Committee to decide whether new EU law which falls within the scope of the Protocol applies in NI.

B. Application of EU Law

5. What is the extent of the application of EU law to Northern Ireland (NI) under the Protocol? What are the implications of this for UK Sovereignty?

6. Can you give examples of where EU law could also apply to Great Britain (GB) under the Protocol (see also the specific question in the State Aid section below)?

7. How will EU law apply under the Protocol, taking account both of Article 4 of the Withdrawal Agreement and the question of dynamic alignment with EU law?

8. To what extent, if any, does the application of EU law under the Protocol constrain the legislative freedom of the UK after the transition period?

In relation to State aid (where, as Professor Weatherill explains in answer to Q14, Article 10 is likely to catch many UK-wide and substantial numbers of GB-only measures) the effect will be that both EU State aid law and any UK domestic anti-subsidy regime are likely to operate in parallel and (in the absence of any carve-out from the UK regime) both regimes are likely to apply to many measures. That is, to put it mildly, somewhat unsatisfactory. Although it is a political issue rather than a legal one, it also strikes me that it could well be difficult for the Government to explain to voters why, after the United Kingdom has exited transition, important UK measures (for example on exemptions from or reduced rates of corporation taxes or other business taxes or Covid-19 related subsidies) are still being notified to the Commission for clearance (or why a UK court has ruled that they have to be so notified or are unlawful because they were not so notified). It therefore follows, in my view, that a UK Government negotiating priority should be to obtain the EU's agreement to replace Article 10: but that negotiating objective cannot possibly be secured unless the United Kingdom is prepared to offer legally binding commitments to operate a robust and effective anti-subsidy regime of its own – as Professor Weatherill points out in answer to Q15.

9. To what extent, if any, does the application of EU law to NI under the Protocol constrain the freedom of the UK to negotiate whatever trade deals it wants with other countries or how these deals will apply in NI?

10. What are the EU mechanisms for enforcement and supervision of the UK's obligation to apply the provisions of EU law applying to NI under the Protocol? How strictly do you expect them to be exercised?

The only addition I would make to Professor Weatherill's answer to this question is to emphasise that the Protocol creates rights on private parties that have (under Article 4 WA and section 7A of the Withdrawal Act 2018) to be enforced by the UK courts in the same way as the UK courts have been required to enforce EU law during the period of UK membership (including disapplying any contrary UK legislation if necessary). In the field of State aid, there has been an increasing tendency over recent years to rely on EU State aid rules as a way of challenging national and local government decisions in the courts, especially, but by no means only, in the tax field. There will be many cases where, because of the reach of Article 10, such cases can continue to be brought after the end of transition: and their success will depend on the way in which the UK courts, and ultimately the Court of Justice of the EU on a reference by the UK courts, interpret and apply that Article. That means that it is dangerous to rely on any "political" decision by the Commission not to adopt too strict a view of what is caught by Article 10: the Commission is not the only actor.

11. What is nature and extent of the jurisdiction of the Court of Justice (CJEU) under the Protocol?

12. How well-understood is the extent of Article 13(2) requirement to interpret EU law-based provisions or concepts in conformity with case law of the CJEU, including judgments delivered after the end of transition?

C. State aid in the Protocol

13. What is the nature and extent of the application of EU laws on state aid to NI under the Protocol?

14. Article 10 of the Protocol applies EU laws on state aid to UK measures which “affect trade” between NI and EU which is subject to the Protocol. To what extent could EU state aid laws also apply to GB, particularly considering the role of the CJEU in interpreting that concept?

I have little to add to Professor Weatherill’s analysis other than to add that, from a practitioner’s perspective, the effect on trade test (which is the key concept in Article 10 and which, as Article 13(2) makes clear, is to be interpreted in accordance with CJEU case-law on that concept) has rarely proved to be much of an obstacle to claims that a measure falls within the State aid rules: indeed, it is only in obviously trivial cases that I would advise clients that it is at all safe to rely on it as a basis for concluding that a measure is not State aid. It is true that in the recent case of *Credit Suisse v HMRC* [2019] EWHC 1922 (Ch) (in which I represented HMRC), at §73, Falk J declined to draw inferences that a particular tax measure had an effect on trade: but that was in a context where the claimants had produced no evidence at all on the point and where the Judge had in any event found that the measure was not selective (so that the question was academic): and it should be noted even there that the Judge did not rule out the possibility that she would have been prepared to base a conclusion on inferences had a stronger basis for those inferences been put before her.

15. How, if at all, could the state aid provisions in the Protocol be renegotiated or superseded as part of the future relationship negotiations (see Article 13(3)). Could alternative arrangements for NI-Ireland trade replace the Protocol?

I covered this issue in answer to Q8 above.

16. What, if any, flexibility will there be for UK state aid measures which may still need to be introduced in the wake of the COVID-19 crisis and which are caught by the Protocol?

The Commission has approved very large amounts of State aid under its Covid-19 Guidance². It should be noted that the Commission has accepted that Article 107(2)(b) TFEU (disaster aid) applies, so that aid that does no more than compensate undertakings for the losses flowing from the Covid-19 outbreak must be approved by the Commission. But, in addition, the Commission has, on a fast-track, approved very large amounts of aid across the EU under the more general provisions in Article 107(3). There is no reason to believe that the Commission would adopt any different approach to UK measures caught by the Protocol after the end of transition (as, in my view, all the UK measures that it has so far approved would be likely to be): indeed, any harder line adopted towards the United Kingdom than to

² https://ec.europa.eu/competition/state_aid/what_is_new/TF_consolidated_version_amended_3_april_8_may_and_29_june_2020_en.pdf. A list of approved measures can be found at https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html.

EU Member States would itself be a basis for the United Kingdom to challenge that decision before the General Court of the EU.

D. Legal certainty and potential disputes arising from the Protocol

17. What, if any, legal difficulties are created by the Protocol providing for NI being part of the UK customs territory, yet applying EU customs and goods-related law to NI?

I would add to Professor Weatherill's answer the observation that, in my view, it follows from his analysis (with which I entirely agree) that the Protocol in fact places NI in the EU customs territory, as "customs territory" is defined for the purposes of the General Agreements on Tariffs and Trade. That conclusion is strengthened by an analysis by Professor Alan Winters of Sussex University, which shows that the large majority of imports into NI will be subject to EU tariffs³. The fact that the Protocol *says* that NI remains within the UK customs territory is neither here nor there, given what it actually *does* (just as the fact that an agreement for a lease of property *says* that it is only creating a licence is irrelevant, if what it in fact *does* is to create a lease). The further consequence of that analysis is that, by entering into the Withdrawal Agreement, the current Government infringed the prohibition set out [in section 55 of the Taxation \(Cross-border Trade\) Act 2018](#) on entering into arrangements under which NI forms part of separate customs territory to Great Britain. Legally, that conclusion is now of no relevance, since a subsequent Act of Parliament has ratified the Withdrawal Agreement and made it part of our law: but it is perhaps concerning that the current Government felt free to enter into such an agreement despite the fact that the Parliament of the day had passed legislation prohibiting it from doing so.

18. What, if any, legal difficulties are created by the Protocol providing for protection of the UK internal market (unfettered market access for goods moving from NI to GB), yet allowing for regulatory divergence between NI and the rest of GB?

19. The UK and EU are taking different approaches to the question of when goods moving from GB to NI are "at risk" of onwards movement into the EU and therefore liable to tariffs. This also involves interpretation of the concept of "processing".

> **What are the respective legal merits of those approaches?**

> **The Joint Committee is tasked with deciding what are the "at risk" criteria. How easily can it reconcile the two conflicting approaches?**

I entirely agree with Professor Weatherill's answer. I would simply add – because the claim has been made in the Cabinet Office May 2020 paper as well as in other commentary – that it is simply wrong to say that goods moving from GB or third countries to NI are subject to EU tariffs (or to other aspects of the EU Customs Code) only if they are genuinely or substantially at risk of moving to the EU. The true position is (a) that the EU Customs Code always applies to such movements; (b) that as far as EU tariffs are concerned, goods that can be "established" (i.e. proved by the importer) not to be at risk of movement to the EU (and not to be commercially processed) are relieved from those tariffs; but (c) EU trade remedy tariffs will apply in any event. The words "genuine" or "substantial" appear nowhere in the text of Article 5, and I see no warrant for reading those words in – although I would agree that in laying down rules as to what classes of goods and movements will be taken to be not at risk, the JC should not consider fanciful or de minimis risks.

³ <https://www.dropbox.com/s/xd9fys72j3r97oe/WintersEvidence.docx?dl=0>

It is also relevant to this question that, in my view, any failure by the JC to reach agreement on “not at risk” criteria will mean that all imports from GB into NI will be considered to be “at risk” and hence subject to EU tariffs: see my answer to Q2 above.

20. The UK and the EU are taking different approaches to the need for export/exit summary declarations for the movement of goods from the NI to GB. What are the respective legal merits of those approaches?

21. Is it clear whether “services” are caught by the Protocol at all and if so, to what extent? For example, where EU law applicable to NI under the Protocol applies not only to goods but also to services? Is there any difference in the EU and UK positions on this?

In addition to Professor Weatherill’s observations, I would add that it is not hard to think of examples where a subsidy to a services supplier would be likely to have a sufficient effect on trade in goods between NI and the EU to fall within Article 10(1). Such examples would include: aid in the form of grants to service suppliers to provide free or discounted services to suppliers or manufacturers of goods in NI; aid to freight transport services in NI; or even aid to banks lending to NI goods companies (especially if the aid was conditional on lending behaviour).

22. Can you give other examples of where there is a lack of legal certainty in the Protocol?

23. To what extent are any of these issues specifically identified as a matter for the Joint Committee to determine under the Protocol?

E. Constitutional implications of the Protocol for the status of Northern Ireland

24. What is the potential for divergence between laws in NI and GB as a result of the Protocol and what implications does divergence have for the legal and constitutional coherence of the UK?

25. What implications do the differences in supervisory and enforcement systems as between the NI and GB have for the legal and constitutional coherence of the UK?

26. What are the implications of customs or regulatory checks on goods moving in either direction between the GB and NI for the legal and constitutional coherence of the UK?

GEORGE PERETZ QC BL

Monckton Chambers, London/Law Library, Dublin

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