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Rights, Safeguards and Equality of Opportunity in the Ireland/Northern Ireland Protocol: The Dedicated Mechanism

1 Introduction

In December 2019, a new Ireland/Northern Ireland Protocol was presented to the European Council in the context of the withdrawal of the UK from the European Union¹. The Protocol was intended to seek a solution to reconcile the different interests associated with the unique position of Ireland and Northern Ireland. Specifically, the Protocol aims to:

¹ Protocol on Ireland and Northern Ireland, European Commission, 31 January 2020: https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/eu-uk-withdrawal-agreement/protocol-ireland-and-northern-ireland_en.

- Avoid a hard border between Ireland and Northern Ireland, and safeguard the all-island economy and the Good Friday (Belfast) Agreement in all its dimensions;
- Preserve the integrity of the EU's single market, along with all the guarantees it offers in terms of consumer protection, public and animal health, or combatting fraud and trafficking,
- Maintain Northern Ireland in the UK customs territory so that it may benefit from future Free Trade Agreements (FTAs) that the UK may conclude with third countries.

Article 2 of the Protocol sets out certain commitments in relation to rights and equality.

This Note briefly summarises the role of the dedicated mechanism for monitoring the implementation of Article 2 of the Protocol.

2 Article 2 of the Ireland/Northern Ireland Protocol and the Dedicated Mechanism

Article 2 of New Protocol on Ireland/Northern Ireland between the UK and the EU states the following²:

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

The provisions of EU law listed in Annex 1 to the Protocol are listed at Appendix 1 to this Note.

In relation to 'no diminution of rights, safeguards and equality of opportunity', the UK Government has stated³:

We do not envisage any circumstances whatsoever in which any UK Government or Parliament would contemplate any regression in the rights set out in that chapter, but the commitment nonetheless provides a legally binding safeguard. It means that, in the extremely unlikely event that such a diminution occurs, the UK Government will be legally obliged to ensure that holders of the relevant rights are able to bring challenges before the domestic courts.

In respect of future developments, the UK Government states⁴:

In the event that certain provisions of EU law setting out minimum standards of protection from discrimination - those listed in Annex 1 to the Protocol – are updated

² New Protocol on Ireland/Northern Ireland, 18 October 2019: <https://www.gov.uk/government/publications/new-protocol-on-irelandnorthern-ireland-and-political-declaration>.

³ UK Government (2020): *Explainer: UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland*, 7 August 2020, paragraph 6: <https://www.gov.uk/government/publications/protocol-on-irelandnorthern-ireland-article-2>.

⁴ Ibid., paragraph 7.

or replaced by the EU, relevant domestic law in Northern Ireland will be amended, as necessary, to reflect any substantive enhancements to those protections.

The ‘dedicated mechanism’ is described in the same document in the following terms⁵:

The UK Government will implement its commitment to no diminution of rights, safeguards and equality of opportunity by establishing a “dedicated mechanism”. This mechanism is not a new structure in itself; rather, it is a framework for ensuring compliance with the commitment, comprising dedicated monitoring, advising, reporting and enforcement activities and drawing on the existing human rights and equality bodies established under the Agreement, namely the Northern Ireland Human Rights Commission (NIHRC) and the Equality Commission for Northern Ireland (ECNI), who will oversee the status of the rights, safeguards and equality of opportunity protections covered by the relevant chapter of the Agreement.

Section 23 of the European Union (Withdrawal Agreement) Act 2020⁶ provides for the implementation of Article 2(1) of the Protocol. Amendments to the Northern Ireland Act 1998⁷ are provided for in Schedule 3 of the 2020 Act in order to give new functions to the Northern Ireland Human Rights Commission and the Equality Commission to take on the role of the dedicated mechanism referred to in Article 2(1) of the Protocol⁸. The functions are to:

- monitor the implementation of Article 2(1) of the Protocol on Ireland/Northern Ireland in the EU withdrawal agreement
- report to the Secretary of State and the Executive Office in Northern Ireland on the implementation of Article 2(1)
- advise the Secretary of State and the Executive Committee of the Assembly of legislative and other measures which ought to be taken to implement Article 2(1)
- advise the Assembly (or a committee of the Assembly) whether a Bill is compatible with Article 2(1)
- promote understanding and awareness of the importance of Article 2(1)

The Schedule also provides for powers that the Commissions may:

- Bring judicial proceedings in relation to an alleged breach of Article 2(1)
- Intervene in legal proceedings in relation to an alleged breach of Article 2(1)
- Support individuals in relation to an alleged breach of Article 2(1)

⁵ Ibid., paragraph 17.

⁶ European Union (Withdrawal Agreement) Act 2020: <https://www.legislation.gov.uk/ukpga/2020/1/contents/enacted>.

⁷ Northern Ireland Act 1998: <https://www.legislation.gov.uk/ukpga/1998/47/contents>.

⁸ European Union (Withdrawal Agreement) Bill 2020, Explanatory Notes, p.11: <https://services.parliament.uk/Bills/2019-21/europeanunionwithdrawalagreement/documents.html>.

A role is also foreseen for the Irish Human Rights and Equality Commission⁹:

As provided for in the Agreement, the Joint Committee of NIHRC and the Irish Human Rights and Equality Commission (IHREC) acts as a forum for the consideration of human rights issues on the island of Ireland. In the context of the Article 2 commitment, ECNI, NIHRC and IHREC will work together to provide oversight of, and reporting on, rights and equalities issues falling within the scope of the commitment that have an island of Ireland dimension.

The 2020 Act also introduces a restriction on the legislative competence of the Northern Ireland Assembly and the powers of Northern Ireland Ministers and departments, preventing them from acting in a way which is incompatible with Article 2(1) of the Protocol.

The provisions in Schedule 3 are reproduced at Appendix 2.

The UK Government has committed to ensure that the two Commissions in Northern Ireland have the resources they need to carry out their new statutory functions as part of the dedicated mechanism¹⁰. The Commissions have reported that they will each receive around £400,000 for the remainder of 2020 and around £800,000 for the subsequent two years¹¹.

⁹ UK Government (2020): *Explainer: UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland*, 7 August 2020, paragraph 19.

¹⁰ UK Government (2020), *The UK's Approach to the Northern Ireland Protocol*, p.16:

<https://www.gov.uk/government/publications/the-uks-approach-to-the-northern-ireland-protocol>.

¹¹ Official Report: Minutes of Evidence, Committee for The Executive Office, meeting on Wednesday, 16 September 2020: <http://aims.niassembly.gov.uk/officialreport/minutesofevidencereport.aspx?AgendaID=23353&evetID=12201>.

Appendix 1: Provisions of Union Law Referred to in Article 2(1) of the Protocol

PROVISIONS OF UNION LAW REFERRED TO IN ARTICLE 2(1)

- Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services¹²
- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation¹³
- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin¹⁴
- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation¹⁵
- Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC¹⁶
- Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security¹⁷

¹² Council Directive 2004/113/EC: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32004L0113>.

¹³ Directive 2006/54/EC: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006L0054>.

¹⁴ Council Directive 2000/43/EC: <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:32000L0043>.

¹⁵ Council Directive 2000/78/EC: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32000L0078>.

¹⁶ Directive 2010/41/EU: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32010L0041>.

¹⁷ Council Directive 79/7/EEC: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31979L0007>.

Appendix 2: Provisions of Schedule 3 of the European Union (Withdrawal Agreement) Act 2020

SCHEDULE 3

Protection for certain rights, safeguards etc. in Belfast Agreement

1 The Northern Ireland Act 1998 is amended as follows.

2 In section 6(2) (legislative competence), after paragraph (c), insert—

“(ca) it is incompatible with Article 2(1) of the Protocol on Ireland/ Northern Ireland in the EU withdrawal agreement (rights of individuals);”.

3 In section 24(1) (restrictions on powers of Northern Ireland Ministers and departments), after paragraph (a), insert—

“(aa) is incompatible with Article 2(1) of the Protocol on Ireland/ Northern Ireland in the EU withdrawal agreement (rights of individuals);”.

4 In section 69 (functions of the Northern Ireland Human Rights Commission), after subsection (10), insert—

“(10A) For functions of the Commission in relation to Article 2(1) of the Protocol on Ireland/Northern Ireland in the EU withdrawal agreement (rights of individuals), see sections 78A to 78E.”

5 In section 71 of the Northern Ireland Act 1998 (restrictions on proceedings)—

(a) in subsection (2B), for “human rights proceedings” substitute “proceedings which rely on section 7(1)(b) of the Human Rights Act 1998”, and

(b) in subsection (2C), omit paragraph (a) (including the “and” at the end).

6 In section 74 (principal functions of the Equality Commission for Northern Ireland), after subsection (6), insert—

“(7) For functions of the Commission in relation to Article 2(1) of the Protocol on Ireland/Northern Ireland in the EU withdrawal agreement (rights of individuals), see sections 78A to 78E.”

7 After section 78 insert—

“Protections deriving from EU withdrawal agreement

78A NIHRC functions in relation to EU withdrawal agreement

(1) The Northern Ireland Human Rights Commission must monitor the implementation of Article 2(1) of the Protocol on Ireland/Northern Ireland in the EU withdrawal agreement (rights of individuals).

(2) The Commission must report to the Secretary of State and the Executive Office in Northern Ireland on the implementation of Article 2(1)—

(a) as soon as reasonably practicable after receipt of a general or specific request for such a report, and

(b) on such other occasions as the Commission thinks appropriate.

(3) A report under subsection (2) may require the Secretary of State or the Executive Office in Northern Ireland to reply in writing to any recommendations contained in the report, explaining what steps have been taken or are planned in response to the recommendations.

(4) On receiving a report under subsection (2)—

(a) the Secretary of State must lay a copy of it before Parliament, and

(b) the Executive Office in Northern Ireland must lay a copy of it before the Assembly.

(5) The Commission must advise the Secretary of State and the Executive Committee of the Assembly of legislative and other measures which ought to be taken to implement Article 2(1)—

- (a) as soon as reasonably practicable after receipt of a general or specific request for advice, and
 - (b) on such other occasions as the Commission thinks appropriate.
- (6) The Commission must advise the Assembly (or a committee of the Assembly) whether a Bill is compatible with Article 2(1)—
- (a) as soon as reasonably practicable after receipt of a request for advice, and
 - (b) on such other occasions as the Commission thinks appropriate.
- (7) The Commission must promote understanding and awareness of the importance of Article 2(1); and for this purpose it may undertake, commission or provide financial or other assistance for—
- (a) research, and
 - (b) educational activities.
- (8) The Commission may decide to publish its advice and the outcome of its research.
- (9) The Commission may, for the purposes of Article 14(c) of the Protocol, bring any appropriate matters to the attention of the Specialised Committee referred to in that Article.

78B ECNI functions in relation to EU withdrawal agreement

- (1) The Equality Commission for Northern Ireland must monitor the implementation of Article 2(1) of the Protocol on Ireland/Northern Ireland in the EU withdrawal agreement.
- (2) The Commission must report to the Secretary of State and the Executive Office in Northern Ireland on the implementation of Article 2(1)—

(a) as soon as reasonably practicable after receipt of a general or specific request for such a report, and

(b) on such other occasions as the Commission thinks appropriate.

(3) A report under subsection (2) may require the Secretary of State or the Executive Office in Northern Ireland to reply in writing to any recommendations contained in the report, explaining what steps have been taken or are planned in response to the recommendations.

(4) On receiving a report under subsection (2)—

(a) the Secretary of State must lay a copy of it before Parliament, and

(b) the Executive Office in Northern Ireland must lay a copy of it before the Assembly.

(5) The Commission must advise the Secretary of State and the Executive Committee of the Assembly of legislative and other measures which ought to be taken to implement Article 2(1)—

(a) as soon as reasonably practicable after receipt of a general or specific request for advice, and

(b) on such other occasions as the Commission thinks appropriate.

(6) The Commission must advise the Assembly (or a Committee of the Assembly) whether a Bill is compatible with Article 2(1)—

(a) as soon as reasonably practicable after receipt of a request for advice, and

(b) on such other occasions as the Commission thinks appropriate.

(7) The Commission must promote understanding and awareness of the importance of Article 2(1); and for this purpose it may undertake, commission or provide financial or other assistance for—

(a) research, and

(b) educational activities.

(8) The Commission may decide to publish its advice and the outcome of its research.

(9) The Commission may, for the purposes of Article 14(c) of the Protocol, bring any appropriate matters to the attention of the Specialised Committee referred to in that Article.

78C Power of Commissions to bring, or intervene in, legal proceedings

(1) The Northern Ireland Human Rights Commission or Equality Commission for Northern Ireland may—

(a) bring judicial review proceedings in respect of an alleged breach (or potential future breach) of Article 2(1) of the Protocol on Ireland/Northern Ireland in the EU withdrawal agreement;

(b) intervene in legal proceedings, whether for judicial review or otherwise, in so far as they relate to an alleged breach (or potential future breach) of Article 2(1).

(2) Subsection (1)(a) does not create a cause of action.

78D Power of Commissions to assist persons in legal proceedings

(1) This section applies to proceedings or proposed proceedings by a person in respect of an alleged breach (or potential future breach) of Article 2(1) of the Protocol on Ireland/Northern Ireland in the EU withdrawal agreement.

(2) Where the person applies to the Northern Ireland Human Rights Commission, or the Equality Commission for Northern Ireland, for assistance in relation to the proceedings, the Commission may grant the application, so far as it relates to the alleged breach (or potential future breach) of Article 2(1), on any of the following grounds—

- (a) that the case raises a question of principle;
- (b) that it would be unreasonable to expect the person to deal with the case without assistance because of its complexity, or because of the person's position in relation to another person involved, or for some other reason;
- (c) that there are other special circumstances which make it appropriate for the Commission to provide assistance.

(3) Where an application under subsection (2) is granted, the Commission in question may—

- (a) provide, or arrange for the provision of, legal advice;
- (b) arrange for the provision of legal representation;
- (c) provide any other assistance which it thinks appropriate.

(4) Arrangements made under this section for the provision of assistance to a person may include provision for recovery of expenses from the person in certain circumstances.

78E Collaborative working

1. The Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland may arrange for any of their functions under sections 78A to 78D to be carried out by one of them acting on behalf of the other (or by them acting jointly)."

8 In Schedule 3 (reserved matters), in paragraph 42, after paragraph (b), insert—

"(ba) in Part VII, sections 78A to 78E;".