



NORTHERN IRELAND
HUMAN RIGHTS
COMMISSION



NIHRC / ECNI Briefing on the Northern Ireland Protocol Bill

October 2022

Table of Contents

Summary of Recommendations	3
1.0 Introduction	5
2.0 Article 2 of the Ireland/Ni Protocol	6
3.0 The Protocol Bill and Article 2 of the Protocol	7
4.0 Consideration of compliance with Protocol Article 2.....	12

Summary of Recommendations

- 3.5** The Commissions recommend that Clause 20 be amended to ensure that it does not impact on the duty, under Protocol Article 13(2), on domestic courts and tribunals to interpret EU law relevant to Protocol Article 2 in conformity with the relevant case law of the CJEU.
- 3.8** The Commissions recommend that Clause 13 be amended to make clear that subsection 1 does not restrict the role of the CJEU where it is asked to give a ruling under Article 174 of the Withdrawal Agreement (Disputes raising questions of Union law), relating to the interpretation of EU law relevant to Protocol Article 2.
- 3.14** The Commissions recommend that Clause 15(3) be amended to supplement the restriction preventing Ministers from designating Protocol Article 2 as excluded provision, to ensure that Ministers are also prevented from designating as excluded provision, any provision of the Withdrawal Agreement or Protocol insofar as it affects the interpretation, implementation and/or enforcement of Protocol Article 2
- 3.19** The Commissions recommend that the Bill be amended to make clear that a Minister's powers under Clause 14(4), or any other Clause of the Bill, do not extend to taking any action that weakens the interpretation, implementation or enforcement of Protocol Article 2, either by excluding provisions of the Protocol or Withdrawal Agreement insofar as they relate to Protocol Article 2, or by any other exercise of delegated powers under the Bill.
- 4.2** The Commissions recommend that compliance with Protocol Article 2 be considered from the earliest stages in the development of policy and legislation.
- 4.3** The Commissions recommend that the UK Government and NI Executive ensure that Explanatory Memoranda on draft UK and NI legislative proposals that are likely to engage Protocol Article 2 set out what consideration has been given to ensuring conformity with Protocol Article 2.

4.4 The Commissions recommend that peers ask the UK Government to set out, in detail, what consideration was given to compliance with Protocol Article 2 in the context of the Protocol Bill; and recommend that Article 2 should be considered and complied with throughout its implementation and the development of regulations and guidance.

1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (NIHRC) pursuant to Section 69(1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in Northern Ireland (NI).
- 1.2 The Equality Commission for Northern Ireland (ECNI) is an independent public body established under the Northern Ireland Act 1998. Its powers and duties derive from a number of equality statutes providing protection against discrimination on the grounds of age, disability, race, religion and political opinion, sex and sexual orientation. Its remit also includes overseeing the statutory duties on public authorities on the promotion of equality of opportunity and good relations under Section 75 of the Northern Ireland Act 1998.
- 1.3 NIHRC and ECNI, pursuant to section 78A(1) and 78B(1) of the Northern Ireland Act 1998 respectively, monitor the implementation of Article 2(1) of the Protocol on Ireland/Northern Ireland (Protocol Article 2) in the EU Withdrawal Agreement. The Commissions offer the following advice in accordance with these functions.
- 1.4 The Commissions have welcomed assurances by the UK Government of its commitment to Protocol Article 2 and its acknowledgement that the commitment is ‘non-controversial’.¹ However, the Commissions have identified a number of concerns about the impact of the Bill on the implementation of Protocol Article 2, the commitment by the UK Government to ensure no diminution of certain rights, safeguards and equality of opportunity protections, as a result of the UK’s withdrawal from the EU.
- 1.5 Protocol Article 2 is afforded a degree of protection under the Bill. It is not deemed ‘excluded provision’ and Clause 15 does not permit Ministers to make regulations to define it as such. While this is welcome, the Commissions are concerned that the logic of Clause 15 is not fully reflected in other Clauses of

¹ UK Government, ‘NI Protocol: the way forward’, (UK Gov, 2021), at para 37. See also Letter from Conor Burns MP, Minister of State in the NI Office to Lord Jay of Ewelme, Chair of the House of Lords EU Affairs Committee Sub Committee on the Ireland/ Northern Ireland Protocol, 24 November 2021.

the Bill and that this will weaken the implementation, interpretation and enforcement of Protocol Article 2 if not addressed. Clause 20 is a particular cause for concern but Clauses 15, 13, 14 and 22 require consideration also.

- 1.6 It is vital that the Protocol Bill does not result in changes that would result in a weakening of either the Protocol Article 2 commitment or rights, safeguards and oversight mechanisms relating to this commitment; or the creation of powers by Ministers that would permit a future weakening of Protocol Article 2 or its associated rights, safeguards and oversight mechanisms.

2.0 Article 2 of the Ireland/NI Protocol

- 2.1 Protocol Article 2 states:

“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.”

- 2.2 Protocol Article 2 means that the UK Government must ensure there is no diminution of rights, safeguards and equality of opportunity, as set out in the relevant chapter of the Belfast (Good Friday) Agreement 1998, resulting from the UK’s withdrawal from the EU.²

- 2.3 Protocol Article 2 includes a commitment to ‘keep pace’ with EU law developments falling within the six EU Equality Directives listed in Annex 1 to the Protocol.³ That means that if the minimum standards in the Annex 1

² Belfast (Good Friday) Agreement 1998.

³ Council Directive 2004/113/EC, ‘EU Council Directive implementing the principle of equal treatment between men and women in the access to and supply of goods and services’, 13 December 2004; Directive 2006/54/EC, ‘EU Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation’, 5 July 2006; Council Directive 2000/43/EC, ‘EU Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin’, 29 June 2000; Council Directive 2000/78/EC, ‘EU Council Directive establishing a general framework for equal treatment in employment and occupation’, 27 November 2000; Directive 2010/41/EU, ‘EU Directive 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

Directives are updated or replaced, the UK Government must ensure that domestic legislation in Northern Ireland reflects any substantive enhancements in relevant protections.⁴

- 2.4 In addition to the six Directives, there is other relevant EU law that underpins rights set out in the relevant chapter of the Belfast (Good Friday) Agreement. The UK Government has identified that these include, but are not limited to, the Victims' Directive; the Parental Leave Directive; and the Pregnant Workers' Directive. The UK Government has committed to ensuring that there will be no diminution of protections as were contained in relevant EU law on 31 December 2020.⁵
- 2.5 The UK has incorporated the Withdrawal Agreement, including the Protocol, into domestic law through the EU (Withdrawal Agreement) Act 2020. Section 7A EU (Withdrawal) Act 2018 provides that all rights, obligations and remedies from the Withdrawal Agreement, including Protocol Article 2, are recognised and available in domestic law. The Commissions have been given additional powers to oversee the UK Government's commitment under Protocol Article 2.⁶ The Commissions are responsible for providing advice to government and monitoring, supervising, enforcing and reporting on the ongoing implementation of this commitment.

3.0 The Protocol Bill and Article 2 of the Protocol

Clause 20

- 3.1 Clause 20(2)(a) of the Bill states that domestic courts and tribunals are "not bound by any principles laid down, or any decisions made, on or after the day on which this section comes into force by the European Court". No exception is made for Protocol Article 2. This is a serious omission because of the 'keeping

86/613/EEC', 7 July 2010; Council Directive 79/7/EEC, 'EU Council Directive on the progressive implementation of the principle of equal treatment for men and women in matters of social security', 19 December 1978.

⁴ Northern Ireland Office, 'UK Government Commitment to "no diminution of rights, safeguards and equality of opportunity" in Northern Ireland: What does it mean and how will it be implemented?', (NIO, 2020), at para 13.

⁵ Ibid.

⁶ Sections 78A-E, Northern Ireland Act 1998

pace' obligation associated with Protocol Article 2, by virtue of Protocol Article 13 (Common Provisions).

- 3.2 Protocol Article 13(3) states that references to EU law in the Protocol are to that law "as amended or replaced". Six equality directives related to Protocol Article 2 are listed in Annex 1 to the Protocol.⁷ The law in NI therefore has to provide at least the same level of protection as that provided under any of those directives; and standards must be raised as required if those Directives are amended or replaced to enhance protections.
- 3.3 Protocol Article 13(2) stipulates that provisions of the Protocol referring to EU law shall "be interpreted in conformity with the relevant case law of the Court of Justice of the EU" and distinguishes this obligation from the timebound requirement under Article 4 of the Withdrawal Agreement. This means there is an ongoing interpretive duty as regards jurisprudence relating to the Annex 1 Directives. Therefore, under the Protocol, the standards set out in the six Directives must be interpreted by domestic courts to ensure at least the same level of protection as is available under CJEU interpretation.
- 3.4 Failure to make an exception for Protocol Article 2, in the text of Clause 20(2)(a), may suggest that domestic courts need not adhere to the interpretive requirement in Protocol Article 13, contrary to the Protocol and inconsistent with Clause 15 of the Bill.
- 3.5 The Commissions recommend that Clause 20 be amended to ensure that it does not impact on the duty, under Protocol Article 13(2), on domestic courts and tribunals to interpret EU law relevant to Protocol Article 2 in conformity with the relevant case law of the CJEU.**

⁷ Council Directive 2004/113/EC, 'EU Council Directive implementing the principle of equal treatment between men and women in the access to and supply of goods and services', 13 December 2004; Directive 2006/54/EC, 'EU Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation', 5 July 2006; Council Directive 2000/43/EC, 'EU Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin', 29 June 2000; Council Directive 2000/78/EC, 'EU Council Directive establishing a general framework for equal treatment in employment and occupation', 27 November 2000; Directive 2010/41/EU, 'EU Directive 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/EEC', 7 July 2010; Council Directive 79/7/EEC, 'EU Council Directive on the progressive implementation of the principle of equal treatment for men and women in matters of social security', 19 December 1978.

Clause 13

- 3.6 Clause 13(1) states that any provision of the Protocol or Withdrawal Agreement is excluded provision so far as it confers jurisdiction on the CJEU in relation to the Protocol or the Withdrawal Agreement, whether the jurisdiction relates to excluded provision or any other matter.
- 3.7 This may be relevant to Protocol Article 2. Under Article 164 of the Withdrawal Agreement, the UK and the EU, through the Joint Committee, supervise and facilitate the implementation of the UK-EU Withdrawal Agreement. The Joint Committee can adopt decisions and make appropriate recommendations to the UK and EU. Such decisions shall be agreed by mutual consent between the parties, have the same legal effect as the Withdrawal Agreement and are binding on both parties. Where there is a dispute on the application and interpretation of the UK-EU Withdrawal Agreement that cannot be resolved through the Joint Committee, it will be subject to arbitration and any decision of the arbitration panel will be binding on both parties. Under Article 174 of the Withdrawal Agreement, where a dispute relates to specified matters, including the interpretation of EU law, an arbitration panel must ask the CJEU to provide its interpretation and the CJEU's interpretation will be binding. To the extent that Clause 13 of the Bill would restrict the CJEU's interpretive role in disputes relevant to Protocol Article 2, the Commissions would regard this as a weakening of the non-diminution commitment.
- 3.8 The Commissions recommend that Clause 13 be amended to make clear that subsection 1 does not restrict the role of the CJEU where it is asked to give a ruling under Article 174 of the Withdrawal Agreement (Disputes raising questions of Union law), relating to the interpretation of EU law relevant to Protocol Article 2.**

Clause 15

- 3.9 While, as mentioned, Clause 15(3) protects Protocol Article 2 insofar as it states that Ministers may not use the powers conferred in the Clause to define Protocol Article 2 as 'excluded provision', it does not protect other aspects of the Protocol which are relevant to the implementation of Protocol Article 2.

- 3.10 Article 14(c) of the Protocol provides that the UK-EU Specialised Committee on the Protocol shall “consider any matter of relevance to Article 2 of this Protocol brought to its attention by 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”.
- 3.11 Clause 15 does not explicitly protect Protocol Article 14(c) from becoming excluded provision. Nor does it protect Protocol Article 15 (Joint Consultative Working Group), in the context of its relevance to Protocol Article 2, which is to “serve as a forum for the exchange of information and mutual consultation”, and which is also important for the effective operation of Protocol Article 2.
- 3.12 As referenced further below, the extensive regulation-making powers granted to Ministers under the Bill reinforce the need for clarity on the face of the Bill in respect of these matters.
- 3.13 In addition, Clause 15(2) (a) also provides for an extensive delegated power stating that a Minister “may, by regulations, provide for any provision of the Northern Ireland Protocol or any related provision of the EU withdrawal agreement to become excluded provision wholly or to any other extent...”.
- 3.14 The Commissions recommend that Clause 15(3) be amended to supplement the restriction preventing Ministers from designating Protocol Article 2 as excluded provision, to ensure that Ministers are also prevented from designating as excluded provision, any provision of the Withdrawal Agreement or Protocol insofar as it affects the interpretation, implementation and/or enforcement of Protocol Article 2.**

Delegated Powers

- 3.15 The Commissions note the strong concerns expressed by the House of Lords Delegated Powers and Regulatory Reform Committee which stated that the Bill “confers on Ministers a licence to legislate in the widest possible terms” and is “unprecedented in its cavalier treatment of Parliament, the EU and the Government’s international obligations”.⁸

⁸ 7th Report of Session 2022-23, HL Paper 40

- 3.16 By way of example, Clause 14(4) provides an extensive delegated power, stating that the Minister may “make any provision which the Minister considers appropriate in connection with any provision of the Northern Ireland Protocol and other parts of the EU withdrawal agreement to which this section relates.” While Clause 14 does not *relate* directly to Protocol Article 2, subsection (2) of the Clause does refer to Articles of the Protocol and Withdrawal Agreement which are important for the interpretation, implementation and enforcement of Protocol Article 2. Protocol Article 13 is referenced which, as set out above, provides for domestic courts to follow certain CJEU case-law on an ongoing basis; and Withdrawal Agreement Article 4 is referenced, which provides the basis for individual redress.
- 3.17 Further, Clause 9 provides that a Minister ‘may, by regulations, make any provision about regulation of goods which the Minister considers appropriate in connection with the Northern Ireland Protocol’. Under Clause 10, this includes the production and use of goods, putting goods into service and making goods available on the market. The Commissions are of the view that there are a number of EU Directives and Regulations which relate to accessibility standards of goods and products for disabled people and which are within the scope of Protocol Article 2.⁹ We consider that the Bill should not permit a Minister, by way of regulations relating to goods, to reduce rights for disabled people in Northern Ireland that are underpinned by EU law in force on or before the end of the Brexit transition period, and which fall within the scope of Protocol Article 2.
- 3.18 Clause 22 (Regulations) is also very broadly scoped. While it does not grant additional powers, it provides detail as to the potential extent of Regulations which may be made under other provisions of the Bill. It states, for example, that Regulations may include provisions incompatible with the Protocol or Withdrawal Agreement and that they may repeal domestic law giving effect to the Protocol or Withdrawal Agreement. Again, neither Protocol Article 2, nor other provisions essential to its operation, are excepted.
- 3.19 The Commissions recommend that the Bill be amended to make clear that a Minister’s powers under Clause 14(4), or any other Clause of the Bill, do not**

⁹ For example, [Directive \(EU\) 2016/797](#) of the European Parliament and of the Council of 11 May 2016 on the interoperability of the rail system within the European Union

extend to taking any action that weakens the interpretation, implementation or enforcement of Protocol Article 2, either by excluding provisions of the Protocol or Withdrawal Agreement insofar as they relate to Protocol Article 2, or by any other exercise of delegated powers under the Bill.¹⁰

4.0 Consideration of compliance with Protocol Article 2

- 4.1** The Explanatory Notes to the Protocol Bill make no reference to any consideration given to compliance with Protocol Article 2. The Commissions have previously recommended that this should be the case regarding all relevant legislation.¹¹
- 4.2** **The Commissions recommend that compliance with Protocol Article 2 be considered from the earliest stages in the development of policy and legislation.**
- 4.3** **The Commissions recommend that the UK Government and NI Executive ensure that Explanatory Memoranda on draft UK and NI legislative proposals that are likely to engage Protocol Article 2 set out what consideration has been given to ensuring conformity with Protocol Article 2.**
- 4.4** **The Commissions recommend that peers ask the UK Government to set out, in detail, what consideration was given to compliance with Protocol Article 2 in the context of the Protocol Bill; and recommend that Article 2 should be considered and complied with throughout its implementation and the development of regulations and guidance.**

¹⁰ See, for example, Clause 22 on the scope of delegated powers under the Bill.

¹¹ See also recommendations in 'Legislative Scrutiny and the Dedicated Mechanism for Monitoring Article 2 of the Ireland/Northern Ireland Protocol', Paul Evans, Alexander Horne and Tasneem Ghazi (ECNI, 2021).

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