



# Briefing on: The Protocol on Ireland/Northern Ireland

(As settled and released on 14 November 2018)

Sylvia de Mars, Colin Murray, Aoife O'Donoghue, Ben Warwick

This briefing paper was prepared by Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick, as part of the [Constitutional Conundrums](#) project. We have been supported in this work by ESRC grant reference ES/S006214/1. Dr Sylvia de Mars is a Senior Lecturer at Newcastle Law School, Newcastle University; Mr Colin Murray is a Reader at Newcastle Law School, Newcastle University; Professor Aoife O'Donoghue is a Professor at Durham Law School, Durham University; and Dr Ben Warwick is a Lecturer at Birmingham Law School, University of Birmingham. This Briefing Paper was finalised on 16 November 2018.

## PREAMBLE

The revised preamble aims at recognising that all concerns, from every side, are addressed within the terms of the [Protocol on Ireland/Northern Ireland](#). While reactions to the text call into question whether it has succeeded, the modifications made from the first published draft in March 2018 are probably meant to give confidence that the new text recognises all anxieties then expressed. However, it must be noted that preambles, under international treaty law, are not binding; at most they can be used to interpret the object and purpose of the text.

The Preamble begins as the earlier published draft did, acknowledging that it is history that creates the necessity of this Protocol and that the specific impact that the UK's withdrawal from the EU will have on the entire island of island is significant, but it is hereafter that the two texts begin to depart.

The next part of the text refers not only to the unique circumstances on the island but also the unique solutions that are required to resolve the issues that come from Brexit, foregrounding what is the entirely exceptional trade arrangement that comes with the backstop. It then immediately declares that Article 50 TEU is not about the permanent future relationship but rather is a temporary solution. This focus on its provisional status is intended to placate those that argue that either transition or the backstop could become indefinite, focusing on the idea that this is not the object or purpose of this Protocol or the Article 50 process. A commitment to replacing the backstop with a future relationship based on 'ambitious customs arrangements' that fully respects both the UK and the EU's legal orders is intended to re-assure readers of the impermanence of the backstop and the Protocol. It is rare to find a treaty that is so definite about its short-lived nature, even if it stresses that it is 'temporary' only by noting that it will be in place 'unless and until' replaced. The Preamble differs from the earlier draft, which was more light-touch regarding the future negotiations that would follow the conclusion of the Withdrawal Agreement.

The Protocol again specifically affirms that the [Good Friday/Belfast Agreement](#) – referencing the UK and Irish Governments as well as the other parties to the Treaty – will be protected in all its parts. This is more explicit language than before which simply said it should be protected. The use of will, rather than should, within international law is a more definitive commitment.

The preamble as before references the normalisation of life on the island since the Good Friday Agreement's passing, the co-operation it has fostered and the role of the Executive, Assembly and the North-South Ministerial Council and cross-border provisions. It also highlights the role of EU law in assisting this process, and expressly comments on retaining the provisions of Rights, Safeguards and Equality of Opportunity under the Good Friday Agreement. Later the preamble also references the extensive mapping exercises that have been undertaken by both parties that demonstrate the extent to which EU law and policy does assist North-South cooperation and that withdrawal does make such co-operation more difficult. It also acknowledges that both North-South and East-West cooperation on political, economic, security, societal and agricultural contexts is important.

The preamble once again references the guarantee of avoiding a hard border but now includes a commitment that nothing in the Protocol will halt market access for goods from Northern Ireland into Britain while at the same time stating that any controls at ports and airports in Northern Ireland will be avoided as much as is possible. This acknowledges that the regime going East-West will not be the same as West-East. It once again reassures parties that the Joint Report outlined three scenarios to avoid the hard border and that while the Protocol is based on the third scenario, this is a contingency and not the intended outcome of the parties. The preamble also includes a commitment by the UK to facilitate transit of goods from Ireland to other Member States and third countries, a concern that many in Ireland have had.

It reiterates that Irish Citizen's in Northern Ireland will continue to enjoy, exercise and have access to EU citizenship and rights including the right to assert their right to Irish citizenship which is significant given the ongoing review of cases that have come before the Home Office on this matter. It also once again references the definition of 'the people of Northern Ireland' from the Good Friday Agreement. The preamble also references the continuation of PEACE and INTEREGG funding into the future beyond the current round of funding.

The preamble also references the fact that the transition may be extended by mutual consent. This idea of mutual consent is repeated to allay fears of those who argued against the EU being the sole decision maker. Unilateral withdrawal from the Protocol, however, is not explicitly alluded to here. As with all treaties, unilateral withdrawal remains possible even without an article setting out a way to withdraw – but doing so would be an act of bad faith act violating the principle of *pacta sunt servanda*/good faith, and would make any future negotiations with the EU, and possibly others wishing to complete trade deals, more difficult.

Finally, the preamble discusses the need to implement the Protocol to ensure North-South cooperation is maintained and the possibility of new arrangements but that these need to be in accordance with the 1998 Agreement. This opens the possibility of alteration, but always within the confines of the Good Friday Agreement.

As the Preamble draws to an end, it refocuses on day to day life on the island and how this Protocol is not intended to impact on the lives on anyone living there; it ends with a reminder that Ireland will be staying in the EU and its obligations must also remain at the forefront of this Protocol.

## **TRADE**

Articles 6 through to 12 outline the so-called backstop arrangements, which differ from the earlier published draft Withdrawal Agreement in significant ways. Article 6 sets out the basics of how a border-eliminating 'backstop' will operate, if no alternative solutions can be negotiated by July 2020.

It establishes a 'single customs territory' that is comprised of the entirety of the EU and the entirety of the UK. This means that there will be no tariffs, quotas, or checks on rules of origin between Britain and Northern Ireland (Article 7 of the Protocol) and between the UK and the EU. How this will operate in detail is contained in Annexes to the Protocol, particularly Annex 2.

There will also be what has been described as a 'level playing field' between the UK and the EU which means one side will not have a competitive advantage over the other due to the unique nature of the backstop, the details of which are contained in Annex 4 of the Protocol. The level playing field ensures non-regression from current levels of protection, or a 'copying' out of existing EU rules, in the areas of competition law; state aid law; standards of taxation; environmental standards; and labour and social protection.

While the 'single customs territory' eliminates a substantial number of barriers to trade between the UK and the EU, it does not cover regulations that may impose trade barriers. There are two separate ways in which the Protocol minimises the extent to which different regulations will introduce barriers to trade between either Northern Ireland and the EU, or Northern Ireland and Great Britain.

First, if the Backstop activates, the UK will legislate to ensure Northern Ireland remains aligned to those rules of the Single Market that will avoid a hard border between Ireland and Northern Ireland. As such, the EU's Custom's Code will apply in Northern Ireland and so goods from there will be able to access the EU single market directly. The UK will ensure that Northern Ireland also remains aligned as regards to legislation on goods, sanitary rules on veterinary controls, agriculture rules, VAT and state aid rules (Articles 6, 8 and 9, 12). The UK has agreed to harmonize its commercial policy with the EU's common commercial policy to the extent needed to continue the single custom's territory. Under Article 11 the single electricity market is protected which will at least ensure the lights stay on.

The consequence of the backstop activating is that Northern Ireland will be subject to different rules than the remainder of the UK is *obliged* to follow. Article 7(1) declares that the UK will act to ensure that this will not introduce any barriers for goods moving from Northern Ireland to Great Britain. The reverse, however, cannot be promised outright—it is only Northern Ireland that is fully aligning to the relevant Single Market rules. However, recognizing that Northern Ireland has an 'integral place' in the UK internal market, the parties have agreed that they will use their best endeavours to ensure that trade from Great Britain to Northern Ireland is facilitated in every possible way. This includes a commitment to avoid, as much as possible, any border checks on goods. The Commission's FAQ on the Withdrawal Agreement makes clear that there will be only minimal *new* checks introduced in the Irish Sea; agricultural products are already checked at ports under the current rules, and industrial goods can by and large be checked within Great Britain, rather than at the ports. This suggests that risk-based spot checks at the Irish Sea are the only change to current movement of goods in the UK internal market.

The backstop is unique in trade terms. An analogy that has been put forward is that the arrangement is like a swimming pool, with Britain and Northern Ireland at opposite ends of the pool. Northern Ireland is at the deep end, which means that it almost matches the EU (and, as such, Ireland) with regard to trade; but Britain is nearer the shallow end, only somewhat sharing the same space as the EU and Northern Ireland and able to adopt different rules in other areas. The UK can decide to move Britain closer to the deeper end (and to a large extent not differ from the EU or Northern Ireland), or it could over time retreat into the shallow end of the pool, retreating from relevant EU legislation and resulting in very different rules Northern Ireland and Britain. The latter would result in increased controls; the former would reduce them further.

## THE UK'S CONSTITUTIONAL INTEGRITY

Even if it is rapidly swept away in the rip tides of political debate around Brexit, it is worth pausing for a moment to appreciate that the skill involved in the legal drafting of the draft Withdrawal Agreement. It had to deliver on the UK's promises over a backstop in the December 2017 Joint Report (which Theresa May flirted with shirking in July when she called on the EU to "evolve" its position), and navigate the traps Brexiteers set in legislation such as section 55 of the [Taxation \(Cross-border Trade\) Act 2018](#), where they pushed through amendments requiring that Northern Ireland not be a separate customs territory from the UK (a restriction that cannot be repealed whilst the Government is reliant upon the DUP).

Some are already [declaring](#) that the Protocol seems more complex than the Good Friday Agreement. But that should not be surprising. Ireland and the UK's shared EU membership provided the ecosystem in which the Good Friday Agreement and successor agreements could function. The Good Friday Agreement did not need to deal with border arrangements, regulation of goods or the detailed substance of cross-border cooperation, because EU law provided the necessary framework. If the Ireland/Northern Ireland provisions seem complex, it is because they need to maintain that ecosystem.

Under Article 5 of the Withdrawal Agreement's [Protocol on Ireland/Northern Ireland](#), the EU provided space for Ireland and the UK to maintain and develop the Common Travel Area arrangements (provided Ireland's EU law obligations are met). This allows Ireland and the UK to firm up these arrangements bilaterally (as we have recently suggested, this would benefit from a [formal treaty](#)). The negotiating teams have arrived at a solution which navigates these challenges. As a result, its impact on the UK Constitution will unfold in slow motion.

Article 1 of the Withdrawal Agreement's [Protocol on Ireland/Northern Ireland](#) is at pains to emphasise that the Backstop arrangements which will kick in at the end of the transition period are intended to be temporary and would be superseded by an agreement on the future UK/EU relationship which fulfils (and even improves upon) all of the Backstop's requirements. It is explicitly designed in light of the Good Friday Agreement principle that Northern Ireland's status as part of the UK cannot be altered without the [consent of the people of Northern Ireland](#). Plans, however, can change, and from Article 2 onwards there is an acknowledgement that the backstop might not be wholly superseded by the future EU/UK agreement.

One element of the Backstop is Article 6, the UK-wide element. The UK and EU will, after the transition period ends, remain a single customs territory until a more comprehensive UK/EU Agreement is concluded. This provision facilitates trade in goods across the whole of the UK and EU and prevents the need for customs checks either at the land border in Ireland or at ports such as Cairnryan or, for that matter, Dover (and address many regulatory barriers to trade too). Article 7 also allows the UK to grant frictionless access for goods moving from Northern Ireland into Great Britain (but there is scope for restrictions in the other direction).

The subsequent provisions of the Withdrawal Agreement (and in particular with regard to the Single Market in Goods, Article 7(4) and Annex 5), however, establish that Northern Ireland is tied more deeply into EU law, across more sectors, than the remainder of the UK. This is being called a "[swimming pool](#)" arrangement, with Northern Ireland in the deep end of integration with the EU

Single Market and the Great Britain in the shallow end. If these arrangements are triggered, they could well look something like a deep end and a not-much-shallower end.

The provisions applying to Northern Ireland, notably, have more effective locks around them than the whole-UK provisions. There is an important role for the Good Friday Agreement institutions to contribute to discussions on altering the backstop after it comes into effect under Article 20; but this is consultative, and would not amount to the Assembly having a veto even if it was functioning. Moreover, in Article 4 and 16 the importance of the Good Friday Agreement institutions like the [Northern Ireland Human Rights Commission](#) is repeatedly referenced. The NIHRC comes out of the Withdrawal Agreement with a vital guardianship role (and potentially in place of direct democratic input to how EU law will continue to apply to Northern Ireland, as there are not provisions in the draft Agreement which operationalise EU election rights for EU citizens living in Northern Ireland).

It is possible to see how the whole-UK Backstop arrangements, and the extent to which the [CJEU](#) will continue to exert jurisdiction over those elements of EU law extended to the Great Britain through them, will chaff with Brexiteers if the Backstop is ever to be implemented (Protocol, Article 14(4)). Under Article 20, the UK and the EU can agree that this Protocol ceases to apply, in whole or in part. One scenario, advanced in the document outlining the [UK-EU Future Relationship](#), would be that a comprehensive UK-EU Agreement comes into effect and negates the need for the Backstop.

In short, the Withdrawal Agreement delivers on the December 2017 Joint Report's acknowledgement that after Brexit special rules might have to apply to Northern Ireland in order to satisfy the Good Friday Agreement's requirements. It also allows for a considerable degree of alignment between Great Britain and Northern Ireland in light of Unionist concerns about the UK's integrity. There are, however, plenty of Westminster politicians who do not regard maintaining GB-NI alignment as vital to their long-run vision of Brexit. The considerable degree of NI-GB alignment envisaged by the Withdrawal Agreement if the Backstop comes into effect could be temporary.

If a fulsome future arrangement proves difficult to construct, and the Backstop is in effect, Article 20 allows for the UK and EU to agree that Great Britain can diverge at some future point, potentially when the DUP is less of a factor in Westminster arithmetic. This would allow, for example, the UK Government to pursue trade deals applying to Great Britain. This is why the DUP are so vociferously opposed to these arrangements (as [Sammy Wilson](#) asked Theresa May in Parliament, 'is this not a case of Northern Ireland being put on a platter and abject surrender to the EU?').

Down the line, when the UK Government is not reliant on the DUP's votes in Parliament, the initial high degree of NI-GB alignment can be eroded. Permitting a "whole UK" backstop was an EU concession to the UK during negotiations, and an element that the EU might therefore allow the UK Government to bring to an end if it so desired. A future UK deal with the EU could drop the Withdrawal Agreement's whole-UK backstop elements. The awkward provisions of the [Taxation \(Cross-border Trade\) Act 2018](#) could be repealed, just like any other statute. The shallow end of the swimming pool could be bricked up. But UK institutions could not act unilaterally to unpick the Withdrawal Agreement arrangements applying to Northern Ireland, and would likely not find the EU receptive to any such a change unless a new deal matched the Backstop's protections.

## **ALL-ISLAND DIMENSIONS**

Ireland comes out of these arrangements having protected much of the Single Market in goods on the Island of Ireland (Protocol, Article 6 and 7(4)), protected the rights for individuals provided under the

Good Friday Agreement (Protocol, Article 4) and kept arrangements like the Single Electricity Market (Protocol, Article 11) and for broader North-South Co-operation under the Good Friday Agreement intact. The Irish Government can claim that it fulfilled its Good Friday Agreement role as a guarantor of the peace process in reaching this position. The DUP have complained that the Irish Government has not been '[passive](#)' in the Brexit process, and they have not been. Nor should they have been; the Good Friday Agreement obliges them to protect its terms.

The Withdrawal Agreement creates the basis for a future united Ireland by preventing some extreme dislocations which would result if there was considerable divergence between Ireland and Northern Ireland, but importantly does not oblige any progress towards this end. The Withdrawal Agreement enables Northern Ireland manufacturing and agriculture to access EU markets. It potentially makes it more attractive for some companies to locate there than if the Backstop was not in place (it gives a certain baseline on which to base investment decisions). But it does not keep Northern Ireland in the entire of the Single Market, and Ireland can potentially attract service providers on a more competitive basis than Northern Ireland after Brexit under these arrangements. Claims that Dublin has been acting as "[the enemy](#)" in the process fly in the face of the limits to economic alignment that have been achieved.

## COMMON TRAVEL AREA

The status of the Common Travel Area is mentioned in the Protocol, and it is noted that the CTA can continue following Brexit insofar as the EU obligations of Ireland are not impacted by it (Protocol, Article 5). The CTA will underpin fundamental aspects of the UK's post-Brexit relationship with Ireland. Its importance, however, belies the fact that its specific requirements remain, at best, indistinct, and has no status in international law. In the settled Withdrawal Agreement, the provision is only a permissive one (it would be impossible for the EU to obligate the UK to make a particular treaty with Ireland in any case) and does not specify any content for the CTA. There is therefore no protection for individuals from this provision.

This is crucial as we discuss in a [recent report](#), because there is not a single legal agreement establishing the CTA. The core arrangements for travel and residence between the CTA's members can be altered by any one of them without breaking international law and the rights and obligations which are so often linked to it can be altered by domestic legislation by any CTA member. In short, the CTA's protections for individuals are written in sand, and its terms are much more limited than is often believed to be the case.

At this point, it is worth noting that the UK Government position is that Irish citizens living in the UK do not need to sign up for retained EU citizenship rights because of the CTA protections that they enjoy. Without international measures underpinning these rights, however, they are liable to being eroded in the face of domestic UK priorities after Brexit. At present, registering for retained EU citizen protections provides Irish citizens in the UK with a more secure method of protecting some of the rights which they currently enjoy than simply trusting to the continued operation of the CTA. That said, some of the statements by UK Government ministers regarding CTA rights and Irish citizens not needing to register for retained EU rights, could give rise to actionable legitimate expectations within administrative law.

## CATEGORIES OF RIGHTS HOLDER

The December Joint report pointed towards some [nine different categories of rights](#) for people in Northern Ireland (even before residence and the Common Travel Area were taken into account). This, as was highlighted at the time (figure 1), gave rise to a risk of administrative complexity (especially with the placing of immigration enforcement in the hands of non-experts such as landlords); did damage to the principle of parity of esteem (with those with full EU rights living next to those with only UK national rights); and would require a substantial set of EU monitoring and enforcement mechanisms to apply within Northern Ireland to ensure the rights of Irish EU citizens were being properly vindicated.

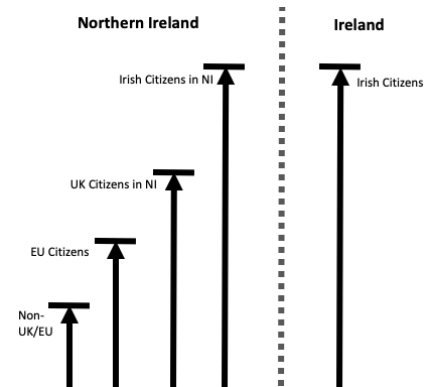


Figure 1: December Joint Report

Much of this complexity, we suggested could be resolved by ‘levelling up’ the rights afforded to all within Northern Ireland, to reduce or remove disparities between those living there and to ensure that Brexit did not result in a reduction of rights (figure 2).

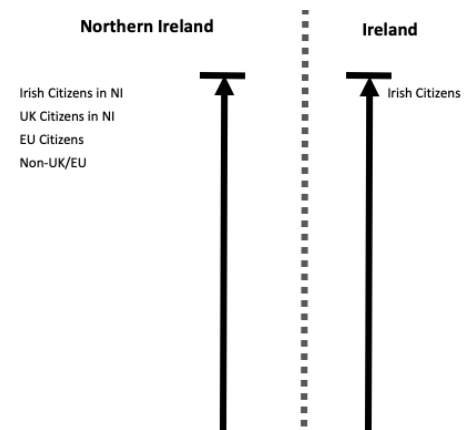


Figure 2: 'Levelling Up'

The settled Withdrawal Agreement takes a different approach and reduces rights to a lower level (figure 3). In other words, Irish nationals in Northern Ireland (to whom the December Joint Report had promised full EU rights) will now not enjoy their EU rights while in Northern Ireland and will instead be treated in the same way as other EU nationals in the UK. EU nationals outside of the EU can exercise [very few](#) EU rights at all (think, for example, of an EU national in Canada seeking to rely on their EU rights). This position fails to address the special position of Northern Ireland.

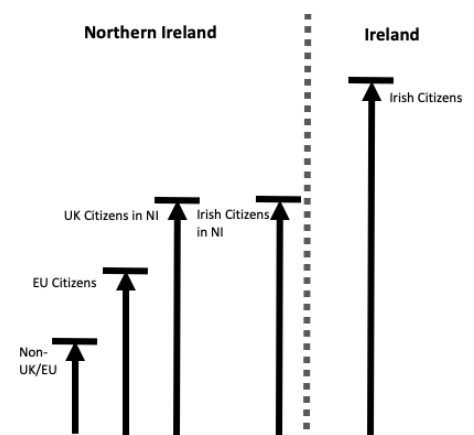


Figure 3: Levelling Down (current Withdrawal Agreement)

The first and most important way in which this does not address Northern Ireland’s position is in its failure to maintain an equivalence of rights North and South of the border. This is required by the Good Friday Agreement. There will now be *a hard border for rights protections* where the people of Northern Ireland leave many EU-based protections behind when they cross from the South of the border to the North. This will be of especial significance for border communities (in particular those who assert Irish citizenship) who will find themselves with different employment, equality and civil rights depending on which side of the border they happen to be at a particular point in time. This is disruptive to an idea of all-island living and the position of Northern Ireland as a hybrid space of governance.

While there would of course be difficulties in constructing a regime that would allow the vindication and monitoring of EU rights within a part of a third country (i.e. Northern Ireland/the UK), it would be considerably less complex than the trade, customs and regulation aspects of the negotiations which has consumed much attention and for which something quite unique has been proposed.

The Withdrawal Agreement promises that the Ireland/ Northern Ireland Protocol ‘should respect and be without prejudice to the rights, opportunities and identity that come with citizenship of the Union

for the people of Northern Ireland who choose to assert their right to Irish citizenship as defined in Annex 2 of the British-Irish Agreement "Declaration on the Provisions of Paragraph (vi) of Article 1 in Relation to Citizenship".' However, it clearly fails in both its Good Friday Agreement promise and its EU 'rights, opportunities and identity' promises by not providing for those Irish citizens in Northern Ireland to exercise an important part of the rights and identity that form part of Irishness; EU rights.

It is possible that in the midst of a contentious and complex negotiation that has often been overwhelmed by trade negotiations, the EU and Ireland have moderated their ambitions and focussed in on the task of guaranteeing the Good Friday Agreement. This has allowed them to set aside many of the more complex questions about individual rights, but in doing so, the requirement of an equivalence of rights, the need to protect border communities, and the ability to be fully Irish while living in Northern Ireland have all been compromised.

What remains in the settled Withdrawal Agreement is a commitment to non-diminution. In a general sense, this ties the UK to ensuring that the rights afforded to people within Northern Ireland are not reduced following Brexit. However, in particular the Withdrawal Agreement commits the UK to ensuring that there is no diminution to the rights guaranteed by the Rights, Safeguards and Equality of Opportunity section of the Good Friday Agreement *resulting from its departure from the EU*. This contextual aspect is important. It indicates – in line with the general approach of the Protocol, certainly in relation to rights – that the agreement is concerned with EU competences and what is currently EU law, and not with underwriting broader commitments or standards for post-Brexit Northern Ireland.

In other words, Rights, Safeguards and Equality of Opportunity rights that the UK could currently reduce within the EU (even if such a reduction would be in breach of the Good Friday Agreement) are not covered by this commitment. There is a further (quite dubious step of logic in this approach) which leads to the selection of the area of non-discrimination and the six directives on equality identified in Annex 1 of the Protocol as those aspects of EU law that have a bearing on that part of the Good Friday Agreement (the logic is depicted at figure 4). This is therefore the place that the UK's hands are tied by its non-diminution guarantee.

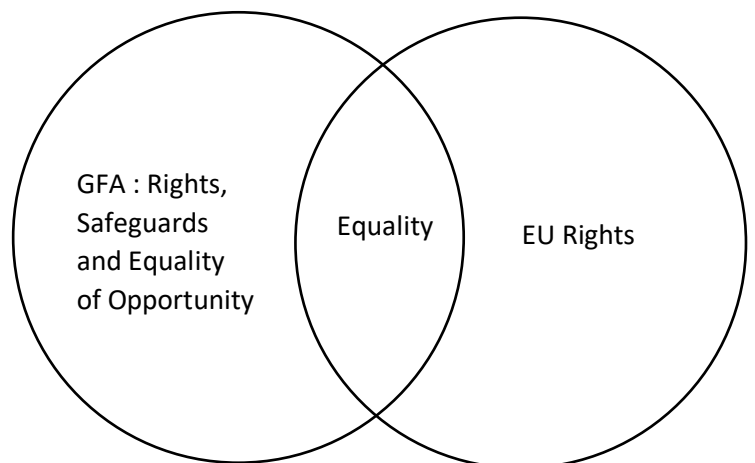


Figure 4: The logic of Article 4 of the Protocol

There are two an additional implication following from this. The first is that it freezes the substantive content of the non-diminution guarantee in time. If the EU add additional equality guarantees in future, it does not appear that these will capture the UK. This would only serve to widen the gap between the North and the South of the island of Ireland. The second implication is that the UK will be tied to affording equality rights in Northern Ireland that it is not obligated to provide to (many of) those in Great Britain.

The content of this non-diminution guarantee becomes all the more significant in light of the levelling down that has taken place in respect of Irish citizens in Northern Ireland. Many of them – like UK citizens in Northern Ireland – will rely on the extent of the non-diminution guarantee rather than the full EU rights that were suggested in the December Joint Report.