

Response to Northern Ireland Affairs Committee 'Future of the Land Border with the Republic of Ireland' Inquiry (November 2016)

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ESRC Project - Constitutional Conundrums: Northern Ireland, the European Union and Human Rights:

The authors are engaged in an ESRC-funded project examining the impact of the Brexit Referendum on the relationship between Ireland and the United Kingdom (and in particular Northern Ireland). This evidence is presented in a personal capacity and does not represent the views of the ESRC or of Newcastle, Durham or Birmingham Universities.

Relevant Outputs:

Sylvia de Mars, Colin RG Murray, Aoife O'Donoghue and Ben TC Warwick, 'Policy Paper: Brexit, Ireland and Northern Ireland (2016).

Colin RG Murray, Aoife O'Donoghue and Ben TC Warwick, 'Policy Paper: The Place of Northern Ireland within UK Human Rights Reform' (2015).

Introduction

[1] UK Government ministers maintain with regard to Brexit's impact on the Ireland-Northern Ireland border that there will be 'no "hard" border with Ireland'¹ and that there will be no 'return to the borders of the past'.² There is certainly no appetite for the return of the fortified border posts which were so emblematic of the Troubles. But such claims also attempt to downplay the day-to-day impact which Brexit will have on the island of Ireland. A hardening of border does not necessarily involve the installation of guard towers and razor wire, it can be characterised by the imposition of administrative processes which curtail trade in goods and services, or investment flows, or which make cross-border travel more difficult for people.

[2] This contribution evaluates the restrictions on movement which will be the subject of negotiation during the Brexit process. It outlines how different overall models for Brexit will have distinct implications in terms of the degree to which they harden the Ireland-Northern Ireland border. It also explains the limits on bilateral negotiations between Ireland and the UK in this context. In spite of the apparent desire on the part of both governments to maintain a more open arrangement than a post-Brexit UK would appear to be willing to grant the remainder of the EU, most of these issues involve EU competences and would have to be negotiated through Brussels.

The Border with regard to Goods

[3] Customs controls between the UK and Ireland were a fact of life for much of Ireland's existence as an independent state. Indeed, the "trade war" of the 1930s showed how easily both governments could manipulate tariff barriers when relations between them were less than cordial. These controls were first scaled back in the context of the UK-Ireland Free Trade Agreement in 1965 and were progressively reduced following the accession of both countries to the then-European Economic Community in 1974. With the "completion" of the internal market, customs posts at Newry and Dundalk were only finally closed in 1993.³

[4] The nature and shape of customs controls at the Ireland-Northern Ireland border after Brexit will be largely dependent upon the nature of the UK's new relationship with the EU. If the UK establishes a Customs Union with the EU after Brexit (or exits into the EEA), the overall impact of new tariffs and enforcement mechanisms will be minimised, whereas if the UK deals with all EU countries on the basis of WTO rules much more substantive mechanisms will need to be put in place. Under a Customs Union the UK would, however, have to maintain a

¹ David Davis, 'We don't want hard border post Brexit, Northern Ireland still open for business' *Belfast Telegraph* (1 Sep 2016).

² 'Theresa May on NI post-Brexit: "No-one wants return to borders of the past" *BBC News* (25 Jul 2016).

³ S. Royle, 'Ireland' in G. Baldacchino (ed.), 'The political economy of divided islands: Unified geographies, multiple polities' (Palgrave, 2013) 119, 130.

regulatory regime which aligns with that in place in the EU and will not be able to negotiate separate trade agreements with non-EU member states. Bespoke arrangements for access to the single market will have a variable impact in terms of tariffs and enforcement processes depending upon the products which are covered by these agreements and the nature of the access which is granted.

[5] None of these scenarios maintain the same level of free circulation of goods throughout the island of Ireland as exists at the moment. Even under the Customs Union scenario, which characterises the EU's relationship with Turkey in terms of the movement of manufactured goods, all products are not necessarily covered by such an agreement. Agricultural products, for example, were not covered by the Turkey-EU Customs Union when it came into being and only limited extensions for processed agricultural products have since come into effect. Border checks at specific approved customs crossings still exist on movement of goods from Turkey into the EU to make sure that they are covered by the agreement.

[6] More light-touch models of customs enforcement (limited spot checks and electronic filing of customs documentation) are practiced on EU borders with EEA countries, but even in such a scenario Ireland will still have to comply with the requirements of the Union Customs Code.⁴ Even if a light-touch enforcement model is adopted, many of the costs with administering this system will be passed on to exporters, who will have to apply to the EU for authorised economic operator status to take advantage of such processes.

[7] The more classes of product that are not covered by a Customs Union arrangement the more onerous the border is more likely to become in terms of tariffs and enforcement arrangements, simply because there will be more diverse arrangements which need to be policed. But it is also necessary to note that even if the UK and Irish Governments express preferences in terms of light-touch enforcement regimes, given that external trade arrangements are an exclusive EU competence, Brussels will be the focal point of these negotiations.⁵

The Border with regard to People

[8] In 1952, following wartime upheavals to travel arrangements between the UK and Ireland, a Common Travel Area (CTA) was agreed. At present this area covers the two states, the Isle of Man and the Channel Islands. The CTA enables UK and Irish nationals to travel between the two states without legal restrictions (although many ferry and airline providers will in practice require travellers to present passports).

⁴ See T. Walsh, *European Union Customs Code* (Kluwer Law International, 2015).

⁵ See P. Foster, "'Hard Brexit' would be unworkable for Ireland, country's foreign minister warns Theresa May" *Telegraph* (2 Nov 2016).

[9] Upon Brexit, the UK-Ireland border would become an external border to the EU as a whole. There are no other 'external' EU borders that are not accompanied by border controls upon individuals. In the period since the Brexit Referendum much has been made of the openness of the Sweden-Norway border, and the freedom of travel between both states afforded to their nationals (under the Nordic Passport Union) even though Sweden is an EU member state and Norway is not. In terms of the movement of people, however, this is not for all intents and purposes, an 'external' border because Norway is part of the Schengen free-movement area.

[10] An interesting case study in this respect is the Faroe Islands, which declined to join Schengen when all other members of the Nordic Passport Union did. The consequence of this refusal has been that all Nordic Passport Union countries within Schengen have adopted stringent border controls vis-à-vis the Faroe Islands: individuals from the Faroe Islands are passport-checked when entering any other Nordic Passport Union states, even though individuals from the other Nordic Passport Union states can still travel without controls to the Faroe Islands. The EU ensured the protection of its external border, notwithstanding the pre-existing 'special relationship' between the Faroe Islands and the other Nordic countries, and regardless of the small number of individuals involved.

[11] At present the CTA could potentially continue to operate because Ireland is not covered by Schengen.⁶ As a result, bilateral travel arrangements between the UK and Ireland in terms of movement of persons do not affect other EU countries. Once the UK leaves the EU, however, Ireland will become the only EU country which is not covered by Schengen or a Schengen candidate country. As Ireland continues to integrate with the remainder of the EU, pressure to end this anomaly will increase. If Ireland ever does join Schengen, then Brussels would, in keeping with the Nordic Passport Union example, seek to ensure that Ireland enforce passport checks on travellers from the UK even if, bilaterally, the UK and Ireland would rather no such restrictions existed.

[12] Some concern has been expressed that, post-Brexit, the CTA arrangements will make Ireland a "back door" into the UK even if leaving the EU allows the UK to introduce new immigration protections for travellers arriving from other EU member states.⁷ In terms of EU citizens, reports of bilateral negotiations suggest that the UK Government is not concerned about the prospect that the CTA will allow many EU nationals to cross the Ireland-Northern Ireland border without specific checks being conducted because onward travel into the remainder of the UK can be controlled at ports and airports. This approach seems to presuppose that Northern Ireland is, and will remain, unattractive to what would become illegal migration by non-Irish EU citizens.

⁶ See B. Ryan, *ILPA EU Referendum Position Papers 8: The implications of UK withdrawal for immigration policy and nationality law: Irish Aspects* (18 May 2016).

⁷ See H. McDonald, 'Britain to push post-Brexit UK immigration controls back to Irish border' *Guardian* (9 Oct 2016).

[13] In terms of non-EU citizens, Ireland and the UK already maintain common travel visas for Indian and Chinese travellers and proposals were on the table to extend these joint arrangements to travellers from other countries prior to Brexit.⁸ Bilateral harmonisation of Irish and UK visa arrangements for other non-EU countries might appear to offer a means of closing the “backdoor” to the UK without the need for intrusive measures at the land border, but issues remain. First, such arrangements depend upon strong bilateral cooperation between Ireland and the UK. Far from the UK “taking back control” with regard to its borders, an important element of its policy will rely upon the practices of another state. Second, Ireland as an EU state does not control its own visa arrangements with regard to many non-EU countries. Where EU-third country visa waiver schemes are in place, the UK will have to agree to come into line with EU policy if it is to make an arrangement with Ireland work.

The Border with regard to Services and Capital

[14] The other two fundamental freedoms of the European Union are in the peculiar position of neither sitting neatly in the category of traditional ‘goods-based’ trade, nor falling under the banner of the CTA, which—under Protocol 20, permitting the CTA’s existence within the EU—only covers the movement of *people*. The free movement of services and of capital exist solely on the basis of EU law—and the UK’s exit from the EU consequently means there is no pre-existing or alternative arrangement for the UK and Ireland to fall back on.

[15] The free movement of services is of an importance to the overall UK economy that cannot be understated; this is particularly the case for financial services. The EU Treaty provisions governing services make it possible for any EU national to travel to a different Member State to receive a service, as well as to provide a cross-border service *to* another Member State. Post-Brexit, some forms of service provision or receipt between the UK and Ireland would not be problematic providing the CTA continues to operate. For instance, a UK national from Northern Ireland who wishes to go to the Republic of Ireland to receive a service such as a haircut or financial advice would be travelling under the CTA; their specific reason for *being* in the Republic of Ireland would not be relevant.

[16] Difficulties arise, however, when considering post-Brexit travel between Northern Ireland and the Republic of Ireland for the specific purpose of setting up a service to be provided there – or, for instance, in considering the legal regime applicable to Northern Irish service providers who wish to use the internet to launch their particular service in the Republic of Ireland. EU law guarantees that there are no restrictions placed on these types of initiatives unless they can be justified on very narrow public policy or public security grounds.⁹ Outside of EU and EEA law, however, the movement of these types of services is covered only by the WTO rules, and these are significantly less permissive: they operate on a sector-by-sector basis, and treat different *forms* of service-provision as distinct. Ireland has, under the

⁸ See P. Hosford, ‘It’s going to be easier for tourists to come to Ireland and the UK from today’ *Journal.ie* (6 Oct 2014).

⁹ See Articles 49-62 TFEU.

EU's WTO commitments, significant restrictions in place regarding the ability of non-EU countries to set up commercial presences in Ireland.¹⁰

[17] Should the CTA be altered post-Brexit, the effects of the WTO rules will be felt even by individual professionals temporarily crossing the border for business purposes: barring specifically exempted highly skilled workers, the EU's WTO commitments have left it free for all the Member States to introduce border controls on service providers.¹¹ As with free movement of persons, all potential restrictions on the freedom to either temporarily provide or establish a service in Ireland would consequently need to be negotiated by the UK in a manner that is both EU-law and WTO-law compliant. A free trade agreement focusing on services would need to be expansive in order to be exempted from the WTO rules.

[18] Free movement of capital is perhaps the forgotten 'freedom', in that in all the discussions about border consequences of Brexit, very little has been said about it. However, for the functioning of UK industry at large as well as for private persons, it potentially has significant effects. The EU Treaty provisions generally prohibit the Member States from imposing any restrictions on capital movement or payment between both other Member States *and* any third party states.¹² This prohibition is limited only where free capital movement poses a significant risk to the operation of the Eurozone.¹³ Given that the European Court of Justice has confirmed that the notion of capital covers virtually all financial transactions within a Member State beyond taxation-related policies, Ireland could not generally impose restrictions on the movement of capital or payments on the UK post-Brexit.¹⁴

[19] However, there is nothing to stop the UK from imposing such restrictions on Ireland in UK domestic law or in the traditional understanding of coverage of the CTA. Given the tremendous importance of the financial services sector to the overall UK economy, it is not wholly inconceivable that such restrictions could be imposed in order to 'protect' domestic financial services in the UK from competition from elsewhere in the EU. The knock-on effects of capital and payment controls set in Westminster would obviously impact business in Northern Ireland even if the ultimate aim of such measures was to protect the City of London.

¹⁰ See the GATS Schedule of Commitments for the EU, available in consolidated format at http://trade.ec.europa.eu/doclib/docs/2012/november/tradoc_150087.pdf.

¹¹ *Ibid*; see also J. Kategekwa, *Opening Markets for Foreign Skills: How Can the WTO Help?* (Springer 2014), Chapter 5.

¹² Article 63 TFEU.

¹³ Article 66 TFEU.

¹⁴ See, *inter alia*, Case C-446/04 *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue* [2006] ECR I-11753 [174]-[188] (referencing Directive 88/361's non-exhaustive list as indicative of what 'capital' is).

Post Brexit: Rights of Irish Nationals in the UK and UK Nationals in Ireland

[20] Since Ireland's independence both states have treated each other's citizens all but identically for most purposes. For example, UK citizens resident in Ireland and Irish citizens in the UK have the right to vote in local, national and European elections. Both sets of citizens enjoy unfettered access to employment, social welfare and healthcare.¹⁵ The few exceptions to this equal treatment are political in nature: though Irish citizens can run for the UK Parliament, UK citizens cannot be elected to the Dáil, nor can they vote in constitutional referenda or Presidential elections. These reciprocal rights exceed the rights enjoyed by other EU citizens in the UK and Ireland.

[21] Pre-referendum negotiations between the UK and Irish Governments covered the possibility that any potential post-Brexit welfare restrictions imposed upon EU citizens would not apply to Irish nationals.¹⁶ David Cameron pointed to an EU provision, Protocol 20, permitting the UK's grant of 'special treatment' for Irish nationals under the CTA.¹⁷ This provision, however, covers the arrangements for the 'movement of persons' between the two countries. It does not mention welfare arrangements, and although the special electoral law arrangements for Irish citizens have not been subject to challenge, it is optimistic to think that Brussels would permit this protocol to remain in effect in the event of Brexit.

[22] EU law requires equal treatment between all EU nationals and explicitly prohibits discrimination against EU citizens purely on the grounds of nationality. It therefore requires that EU citizens are not treated less favourably than non-EU citizens in terms of the benefits they enjoy under the laws of the EU country in which they reside.¹⁸ This requirement of EU law could oblige Ireland to curtail the rights enjoyed by UK citizens within Ireland by bringing them into line with those enjoyed by other EU citizens. This would put considerable strain on the maintenance of the (currently reciprocal) rights of Irish citizens within the UK.

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¹⁵ See Ireland Act 1949, s.2.

¹⁶ See D. Staunton, 'State seeks to exempt Irish in Britain from welfare restrictions' *Irish Times* (19 Feb 2016).

¹⁷ Treaty on the Functioning of the European Union, Protocol 20.

¹⁸ See C-55/00 *Gottardo v Istituto Nazionale della Previdenza Sociale* [2002] ECR I-413, [34].