

Response to Exiting the EU Committee: The UK's Negotiating Objectives with Regard to Northern Ireland

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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).

Aoife O'Donoghue and Ben TC Warwick, 'Constitutionally Questioned: UK Debates, International Law, and Northern Ireland' (2015) 66(1) Northern Ireland Legal Quarterly 93.

Roger Masterman and Colin RG Murray, *Exploring Constitutional and Administrative Law* (Harlow: Pearson, 2013).

Sylvia de Mars, 'Economically Inactive EU migrants and the United Kingdom's National Health Service: Unreasonable Burdens without Real Links?' (2014) 39(6) *European Law Review* 770.

Summary of Key Points

- i. The overriding objective of the negotiations should be to negotiate a settlement which is equally advantageous in all parts of the UK including the three devolved regions.
- ii. The negotiations should ensure that the particular historical, political and social contexts of Northern Ireland are kept in mind as part of the Brexit negotiations alongside other broader constitutional changes.
- iii. In this regard, the key objective for the negotiations from the perspective of Northern Ireland should be to conclude an arrangement for the land border between NI and ROI that reflects the particular economic relationships on the island, the nature of the border region and the historical significance of the border.
- iv. Such an agreement will be particularly necessary should the UK leave the single market as a re-negotiation of the Common Travel Area will at that point be necessary.
- v. The impact on the business environment in NI needs to be considered if the UK chooses to leave the single market and complicate access to the EU market; particularly, the negotiations should have as an objective to minimise the negative impact on the agri-food sector and consumer costs in NI.

The UK's Negotiating Objectives

[1] The overriding objective of the negotiations should be negotiating a settlement which is equally advantageous in all parts of the UK. This submission will particularly focus on Northern Ireland. It is essential that impacts are not assumed to be homogeneous. To achieve this, it is crucial that negotiations are not led by overly centralised entities to allow proper cognisance to be taken of the differing impacts upon NI and the other devolved nations of the UK.

[2] The Committee should not set out its EU negotiating objectives issues in isolation. Many interconnected constitutional changes are currently being discussed or introduced, including increased powers for devolved governments (in the aftermath of the Scottish Independence referendum); English Votes for English Laws; devolution within England; reform of the upper chamber; and changed relationships with the Council of Europe. With such diverse, complex and (in some cases) radical changes taking place there is a danger that the cumulative impact of the changes affecting Northern Ireland will not be considered.

[3] The particularities of the NI situation (historical, political and geographical) mean that constitutional change requires specialised attention. Key underpinning terms and themes of the Brexit negotiations such as control of borders, diplomatic relationships with neighbouring states, and free movement and access to foreign markets resound differently in the NI context and will have an added (positive or negative) connotation for many living in NI. For instance, while the political/diplomatic relationships with neighbours might change for all parts of the UK, those changes will be of a qualitatively different nature for NI given its relationship with the ROI.

[4] The land border between the ROI and the UK is over 300 miles long. During the 'Troubles', travel between the two countries typically involved long queues to allow security checks. Before the 1965 Anglo-Irish Free Trade Agreement, customs checks also took place. Currently, neither the ROI nor the UK is part of the Schengen area, both having secured an opt-out in the EU Treaties when the area was enacted.¹ The border between the ROI and Northern Ireland is completely open, which is made possible by both states retaining border controls with other EU states. The Irish Republic's decision to remain outside Schengen was based on two rationales: the high proportion of its trade conducted with the UK, and the presence of a land border with its neighbour. Should the UK leave the single market, the ROI may re-evaluate whether to join the Schengen area. When the UK exits the EU, and in particular if it chooses to leave the single market, the need to re-introduce customs checks would have implications for both states, particularly in areas such as agriculture and tourism where there are currently many cross-border arrangements.

[5] The negotiated settlement between the UK and the EU on the border between the ROI and the UK will have substantial impacts on the passage of goods, people and services, as will be discussed below. A key objective of the negotiations should be to minimize these impacts as far as possible.

The Border with regard to Goods

[6] 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

¹ EU Treaty of Amsterdam 1997, 140–1.

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 1993.²

[7] 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. However, if the UK deals with all EU countries on the basis of World Trade Organization (WTO) rules, much more substantive mechanisms will need to be put in place.

[8] If it maintains a Customs Union of some form with the EU, the UK would have to maintain a 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.

[9] 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 might be analogous to the EU’s relationship with Turkey, which allows the movement of manufactured goods), all products would not necessarily be 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.

[10] 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.³ Even if a light-touch enforcement model is adopted, many of the costs with administering this system will be passed on to UK exporters, who will have to apply to the EU for authorised economic operator status to take advantage of such processes.

[11] 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.⁴

[12] From the perspective of Northern Ireland, a substantially closed border—under the WTO rules—would have the most significant negative impact, both in terms of ease of passage of goods and costs of border controls. The objective of the negotiations should consequently be to avoid a WTO-only outcome.

² S. Royle, ‘Ireland’ in G. Baldacchino (ed.), ‘The political economy of divided islands: Unified geographies, multiple polities’ (Palgrave, 2013) 119, 130.

³ See T. Walsh, *European Union Customs Code* (Kluwer Law International, 2015).

⁴ See P. Foster, “‘Hard Brexit’ would be unworkable for Ireland, country’s foreign minister warns Theresa May” *Telegraph* (2 Nov 2016).

[13] A further objective should be to ascertain with clarity what border arrangements flow from various negotiating positions. Ongoing public dialogue and awareness of any new arrangements (rather than shock implementation) within NI and Ireland will be important to ensuring stability (socially, politically and economically).

The Border with regard to People

[14] 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).

[15] 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.

[16] 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.

[17] Upon a Brexit where the UK also left the Single Market, the CTA could potentially continue to operate because Ireland is not currently covered by Schengen.⁵ 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 neither in Schengen nor 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.

[18] 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.⁶ Reports suggest that the UK Government is not concerned about the prospect of the CTA allowing EU nationals to cross the

⁵ 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).

⁶ See H. McDonald, 'Britain to push post-Brexit UK immigration controls back to Irish border' Guardian (9 Oct 2016).

Ireland-Northern Ireland border without specific checks being conducted at that border. The logic behind this approach is seemingly because onward travel into the remainder of the UK (i.e. the mainland) can be controlled at ports and airports between Northern Ireland and the UK mainland. This approach seems to presuppose that Northern Ireland is, and will remain, unattractive to what would become illegal migration by non-Irish EU citizens. The approach also seems to set aside the difficulties that can arise for regulation, policing and business from such free-flowing but illegal migration.

[19] For 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.⁷ Bilateral harmonisation of Irish and UK visa arrangements for other non-EU countries might appear to offer a means of partially 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.

[20] In terms of negotiating objectives for the UK, from the perspective of Northern Ireland it is infinitely preferable that the CTA be preserved in the aftermath of Brexit. Should this not prove possible due to EU concerns about a third country having an open border with an EU member state, a new arrangement that permits ‘as free as possible’ travel between the UK and the ROI should be pursued. With each proposed option, the particular impact upon those in NI who will potentially be subject to more restrictions and identity checks, needs borne in mind. Those living in border communities or the large proportion of the population who travel across the border regularly will feel any changes most acutely and negotiations must take account of this.

The Border with regard to Services

[21] 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.

[22] 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 (whether it be as simple as a haircut, or as potentially complex as financial or legal advice) would be travelling under the CTA; their specific reason for being in the Republic of Ireland would not be relevant.

⁷ 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).

[23] 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.⁸ 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 EU's WTO commitments, significant restrictions in place regarding the ability of businesses in non-EU countries to set up a commercial presence that provides services in Ireland.⁹

[24] Should the CTA be altered post-Brexit, the effects of the WTO rules could 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 Member States to introduce border controls on service providers.¹⁰ 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.

[25] Negotiating objectives in terms of services are of UK-wide concern, rather than specific Northern Ireland concern; nonetheless, the impact of restrictive movement of services in the UK will be keenly felt by businesses in Northern Ireland especially where there is a significant cross-border dimension to their activities. The objective of the negotiations should thus be to retain free movement of services with the EU in as many sectors as is possible.

The Business Environment in Northern Ireland

[26] Clear descriptions of a post-Brexit business environment are difficult to construct as much depends on the arrangements struck between the UK and the EU. For instance, if the UK remains in the European Economic Area (EEA), the free movement of goods and services between Ireland and the UK would be maintained, though the UK could set its own border tariffs. But, as is likely, a more comprehensive withdrawal would mean that UK goods and services would become subject to the EU's external tariffs. This option, often accompanied by references to the World Trade Organization (WTO), would increase import and export costs for a significant number of products as well as imposing a plethora of restrictions to cross-border movement of services. Any of these options would also mean an end to Common Agricultural Policy (CAP) payments to farmers, which would naturally have a knock-on effect on the UK agri-food sector.

[27] It is easy to assume that changes to the Northern Ireland business environment post-Brexit will only hit business and not the private consumer; however, this is only a partial view. For instance, just as gifts above a certain value from the US are subject to customs, packages sent between relatives in

⁸ See Articles 49-62 TFEU.

⁹ 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.

¹⁰ Ibid; see also J. Kategekwa, *Opening Markets for Foreign Skills: How Can the WTO Help?* (Springer 2014), Chapter 5.

Ireland and Northern Ireland would also trigger customs duties. Personal items are ordinarily exempted from border charges; but anyone operating a small business, or moving products across the border for work purposes, would need to declare what those products are and pay levies on them according to the EU's WTO tariffs.¹¹ While many products come with a 0% tariff, not all sectors benefit from 'free' imports and exports. Cigarettes and cigars, for instance, are hit with a 33-58% import duty. A wide variety of consumer products, such as make-up and personal hygiene items, textiles and basic building construction items (such as doors and windows) face import charges of between 4 and 8%. Clothing is generally met with import duties ranging from 8 to 17%, and cars face import duties of 10-20% depending on their size and purpose. In the end, as import tariffs are always pushed onto the consumer within the purchasing price, many products moving across the border could suddenly become anywhere from 5% to 25% more expensive.

[28] The impact upon the agri-food and farming sector is particularly revealing. Most agricultural products and livestock are subject to EU import tariffs of between 6% and 22%. UK agri-food products would find it difficult to compete with heavily subsidised EU produce on the global market without reducing their basic costs in order to be competitively priced. Even within the UK, it is likely that suppliers will use the cheapest available option which, due to CAP subsidies, may be EU products even though tariffs will apply to their importation into the UK. Statistics from the NI Department of Agriculture and Rural Development demonstrate that direct EU payments to farmers represent 87% of annual farm income in Northern Ireland.¹² While the UK Government has stated that it would initially match CAP support in event of Brexit, reform proposals indicate that such subsidies are unlikely to match the current levels of funding and/or would require more from farmers in return for support, for example in environmental protection.

[29] It must here also be stressed that agri-food represents a disproportionately large segment of the Northern Ireland economy in comparison to the remainder of the UK. In 2015, DAERA estimated that agri-food represented 3.2% of the Northern Ireland GVA, but only 2.3% of the UK GVA. Similarly, employment in agri-food represented 5.5% of total Northern Ireland employment, but only 2.4% of total UK employment. Impacts upon UK-wide agri-food would consequently have a disproportionate effect on Northern Ireland.¹³

[30] Real limitations will also be imposed upon those who are hoping to establish a business in, or send employees to, parts of the EU. Under the EU free movement of services rules, both to set up a business abroad and to work (whether for a day, a week, or a year) in many sectors is relatively straightforward. Post Brexit, under the WTO, these will be covered by the General Agreement on Trade in Service (GATS) which is significantly less open to services movement than the EU is. Non-EU nationals temporarily staying and working in the EU, unless they are in senior management, will be subjected to more barriers to travel. Post-Brexit, virtually all UK nationals would need to satisfy national immigration requirements to temporarily stay and work in any of the 28 EU Member States, including Ireland. For instance, Ireland permits access for the provision of computer-related data entry work, but has not opened up any access for those hoping to provide real estate-related services.¹⁴ Such rules vary in each of the 28 states. Establishing a commercial presence in an EU

¹¹ See GATT Tariff Schedule for the European Union; the latest available applied tariffs are available at http://stat.wto.org/idbdata/idb_eec_last_e.zip.

¹² See DAERA, 'Farm Incomes in Northern Ireland 2013-2014', available at <https://www.daera-ni.gov.uk/sites/default/files/publications/dard/farm-incomes-in-northern-ireland-2013-2014.PDF>, p. 15.

¹³ See the DAERA, 'Northern Ireland – Agri-Food Sector Key Statistics 2016', available at <https://www.daera-ni.gov.uk/sites/default/files/publications/daera/Northern%20Ireland%20Agri-food%20Sector%20Key%20Statistics%202016%20Final.pdf>, Table 4.

¹⁴ See the GATS Schedule of Commitments for the EU.

Member State also becomes complicated as the WTO does not contain a single 'rule' on setting up a business.

[31] It is impossible to say with certainty what a post-Brexit UK business environment will look like but what is clear is that for many areas, and in particular the agricultural and services sectors, it will be more complicated and expensive for anyone wishing to conduct business outside of the UK. Even within the UK, competing against certain imported products, especially in the agricultural sector, will almost certainly be harder. While the UK could take a protectionist route and increase tariffs to protect its home-produced goods and services, this seems to be the opposite of pro-Brexit plans to make trade deals with the world. In the event of Brexit, all areas of business will have to recalibrate their strategies to meet the new legal and commercial environment. This will be particularly burdensome on NI.

[32] Minimising the impact of Brexit on the business environment should be a key negotiation priority for the UK government; from the perspective of Northern Ireland in particular, a 'soft' landing for the agri-food sector and ongoing permissive cross-border business arrangements with the Republic of Ireland need to be guaranteed to prevent severe damage to the Northern Ireland economy. The ideal outcome for Northern Ireland and indeed, the UK as a whole, will be a transitional arrangement permitting such a 'soft' landing. It seems unlikely that Northern Ireland can suitably alter its entire business environment in only two years' time, especially as ongoing negotiations will characterise the majority of those two years with uncertainty.