

Written Evidence submitted by Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick for the Northern Ireland Affairs Committee's inquiry into the land border between Northern Ireland and Ireland (ILB0003)

Response to Northern Ireland Affairs Committee 'Future of the Land Border with the Republic of Ireland' Inquiry (October 2017)

Note: this is an update to the response submitted by the below authors for the 2016 inquiry on the same topic – it has been updated in light of developments within the UK and the EU and in terms of the focus of the inquiry.

Author Biographies:

Sylvia de Mars is a Lecturer in Law at Newcastle University. Her current research interests centre on EU Law, particularly the interplay of the EU free movement of persons rules and the organisation of public healthcare in the Member States.

Colin Murray is a Senior Lecturer in Law at Newcastle University. His current research is focused in the fields of national security law, legal history and public law. In 2013 he served as specialist adviser to the UK Parliament's Joint Committee on the Voting Eligibility (Prisoners) Bill.

Aoife O'Donoghue is a Professor in Law at Durham University. Her current research interests centre on public international law, constitutionalism and international institutions. She is a founding member of Law and Global Justice at Durham.

Ben Warwick is a Lecturer in Law at the University of Birmingham. He has research interests across human rights, gender and international law. He previously taught at Durham University where he served as Deputy Convenor of the Durham Human Rights Centre. He is an Associate Fellow of the Wolfson Research Institute.

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: Northern Ireland and the Brave New World of Brexit' (2017).

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 could 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 submission evaluates the distinct implications of Brexit on the Irish land border on two separate fronts: in terms of trade, and in terms of citizens' rights. On trade, it considers what leaving the Single Market and the Customs Union implies for the border; how other EU Member States with an external land border operate those borders; and what this suggests as the best negotiating outcome for the Irish land border in trade terms. It also considers the reciprocal rights of Irish and UK citizens as part of the legislation and practice that make up the Common Travel Area, and considers how Brexit impacts both on the Common Travel Area and its rights, and on the EU citizenship rights that Irish nationals in Northern Ireland currently hold.

The Irish Land Border and Trade Post-Brexit

Consequences of Departure from the Single Market and Customs Union

[3] A departure from the EU Single Market and the EU Customs Union (EUCU) changes the basis on which the UK, and necessarily Northern Ireland, trades regionally and globally. The nature of the Northern Ireland border therefore becomes significant. The UK cannot unilaterally decide that it does not wish to operate a border; in being a World Trade Organisation (WTO) member, the UK will be obliged to follow the agreements it has struck with all other WTO members, as well as the overarching WTO non-discrimination principles.

[4] In practice, this means that the WTO will require the UK to have a list of its tariff rates for each product and each trade barriers for all services. Each tariff or barrier set for a product and service is subject to negotiation with each other member of the WTO. The UK currently does not have its own schedules; instead, it trades as an EU Member State, and is subject to the EU schedules.

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).

[5] Furthermore, the WTO requires states to apply their individual schedules, and non-tariff rules on packaging or licensing etc., in a *non-discriminatory way*. This non-discrimination breaks down into two basic rules: Most-Favoured Nation and National Treatment. Under Most-Favoured Nation, a country's 'best treatment' of foreign products must be extended to all WTO member states. For example, if a country cut the tariff on imports of copper from 10% to 5% for exporters from one country, it would have to charge 5% to every other country as well. Under National Treatment, countries cannot adopt internal measures that disadvantage imported products – for instance, if domestic products are not required to have specific warnings on dietary content, imported products cannot be required to have such a warning either.

[6] These requirements are set out in detail in the WTO's core treaties: GATT (General Agreement on Tariffs and Trade), GATS (General Agreement on Trade in Services) and TRIPs (Trade Related Intellectual Property Rights). There is, however, an important exception. Parties to a customs union or free trade agreement can treat products and services produced within that area better than they treat those of other WTO members. The EU is an example of a customs union. EFTA is an example of a broad free trade agreement.

[7] A point worth highlighting here is that most trade in the world does not actually take place under the WTO's 'default' rules. The EU, for example, has an extensive number of free trade agreements with other economies; and under those WTO-exempt free trade agreements, these countries and the EU trade under more advantageous conditions with each other than they do with all other WTO members. This is essential in terms of the consequences of Brexit on the Irish land border: a 'pure' departure from the Single Market and the EUCU would result in the UK and the EU trading with each other on the basis of their respective schedules. This is a tremendous change, both in terms of tariffs and barriers, from what membership of the Single Market and the EU Customs Union offers – but is also significantly less advantageous than the conditions under which most *other* countries trade with the EU.

[8] There are practical considerations at play in determining just *what* a 'pure' departure of the Single Market and the Customs Union would mean, however. Primary amongst those is that the UK does not currently have its own schedules, and it is not immediately obvious how the EU's schedules would be adapted in order for the UK to trade in the WTO on its own again.

[9] One option is a simple replication of the EU schedule for the UK. However, this requires the agreement of *all other WTO members*. It is not clear that they will accept that, for instance, the tariff quotas agreed to for the EU as a whole are also appropriate for only one small 'segment' of the EU. Indeed, in terms of agricultural products, various WTO Members have already indicated that a 'copy' of the EU schedules on agriculture may not be acceptable to them.³

[10] The alternative to 'copying' the EU schedules is extensive negotiations with all WTO members, and significant uncertainty for business across the United Kingdom, who will in the interim (as WTO members) be trading on the basis of the WTO 'default' rules with all

³ A preliminary deal was drawn up between the UK and the EU over how to split the EU's existing tariff rate quotas (TRQs) - agreed under the World Trade Organisation - but it was rejected by the US, Canada, New Zealand, Argentina, Uruguay, Brazil and Thailand in a co-signed letter.

(<https://tradebetablog.files.wordpress.com/2017/10/us-et-al-letter-on-trqs.pdf>)

other WTO members – but it will not be clear to all other members on what basis they will be trading with the UK. There is no precedent for this type of situation; countries have either had to arrange for bilateral trade *outside* of the WTO before becoming members, or have become members and thus set out their trading ‘defaults’ – but there is no example in history of a country being a Member of the WTO but not having a clear schedule of ‘default’ tariffs and rules applicable.

[11] However, even if the UK’s Schedules for Goods and Services remain identical to those of the EU for a period of time, until renegotiation takes place, this does not eradicate problems at the Irish land border. The sudden application of the EU ‘default’ rules at that border will have significant impact on both business and may also have an impact on private consumers.

[12] For instance, just as gifts above a certain value from the US are subject to customs duties, packages sent between relatives in Ireland and Northern Ireland would also incur duties. Personal items of low value are ordinarily exempted from border charges; but small businesses, or even service providers who are moving goods for work purposes, would need to declare what those products are and pay levies on them according to the EU’s WTO tariffs.

[13] While a lot of 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.⁴

[14] 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.

[15] 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 either have to compete with heavily subsidised EU produce on the global market by reducing their basic costs in order to be competitively priced, or target sales within the UK to avoid import duties. It is likely that suppliers will use the cheapest available option which, due to CAP subsidies, may very well still be EU products, even with the imposition of UK tariffs on imports from the EU.

[16] Crucially, however, beyond tariffs there are other measures such as Sanitary and Phytosanitary Measures (SPS) that most countries require for the export of both live produce and agri-food products.⁵ To maintain access, it may be that third countries require that the UK maintains the standards it had with the EU to continue access – and guarantee that products which have to adhere to lower standards – for instance coming from the US – do not transit through the UK and ‘become’ UK produce. An example, perhaps, would be US chlorine-washed chicken transiting through the UK into the EU market and undercutting local equivalents such as Moy Park.

⁴ Details on the EU’s tariff schedules can be found here: https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm.

⁵ HM Government, *Position Paper: Northern Ireland and Ireland* (16 August 2017) para. 57.

[17] A triple element of jeopardy might be added for such global companies with complex supply chains: if they wish to export their final product back into the EU or global markets, they might be hit by import tariffs to get their product to its final destination. Bombardier, Caterpillar, Fujitsu and DuPont are all examples of companies in exactly such a position. The rules of origin with the WTO are quite complex but are clear in requiring a determination of where a product is actually made in order to apply the correct rules and tariffs to it. While free trade agreements usually contain their own rules on how rules of origin apply, and how tariffs on products are treated when part of a supply chain, a 'pure' departure from the EU Single Market and Customs Union would not leave such an agreement in place.

[18] Services are obviously a key sector for the London economy and are critical to the national economy. Under the EU free movement of services rules, both to set up a business abroad and to work in many sectors is relatively straightforward. Post Brexit, under the WTO, these would be covered by GATS which is significantly less open to services movement than the EU is. Non-EU nationals living in the UK and temporarily staying and working in the EU, unless they are in senior management, will find far 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 27 EU Member States.

[19] In principle this could be the Republic of Ireland, but the CTA may assist in this specific regard for Irish nationals moving to the UK. However, it will not necessarily cover services provision by UK nationals in Ireland, as the EU's acceptance of the CTA does not necessarily make it compliant with the WTO's GATS. Elements of the CTA, with EU agreement, consequently permit some differences within Ireland but this will be the subject of tricky negotiations and will have to satisfy the criteria of a Free Trade Area under WTO rules to be a permitted exception to the UK's GATS concessions (if different with regard to service provision to other countries).

[20] In conclusion, leaving the Single Market and the Customs Union and resorting to the default WTO rules would have an immediate and significant impact on Northern Ireland, both on industry and consumers. Even with the maintenance of the CTA and of EU citizenship rights for individuals born in Northern Ireland, trade in goods and services, particularly agricultural and agri-food products, will be affected.

[21] The assumption persists that the UK will be able to retain existing trade deals negotiated whilst it was part of the EU after Brexit. But other WTO member states could object to such arrangements even if the UK and EU are in agreement on this position. Only if the UK pursues a model of Brexit which sees it maintain the Single Market and EU Customs Union can these risks be averted.

The UK's Current Negotiating Position on the Irish Land Border

[22] The UK's current negotiation positions are mutually exclusive; it is not possible to simultaneously exit both the EUCU and the Single Market and fully avoid a physical border. The desire for no special treatment for Northern Ireland in terms of the EUCU makes this more complicated. By maintaining this red line, the UK as a whole will have to set up highly EU-compliant customs arrangements; not merely a customs agreement, but one that obviates the need for any border controls, in order to keep the border fully 'open'. The EU does not have such an arrangement with any third party, and were it to establish one with

the UK it would probably require the UK signing up to the EU regulatory regime but without any particular input into that regulatory regime. This is not just a customs regulatory issue; other questions such as data protection to ensure access to data sharing/information exchange and e-customs systems will also come into play.

[23] Regulatory differences create borders. Differences in agricultural or environmental standards will have significant impact on import/export ability – not only in the sense of it becoming more expensive, but in the sense of permissibility. Mutual recognition of standards – or regulatory equivalence – would need to become part of any future FTA between the UK and the EU in order for a border to be fully ‘avoidable’.

[24] Customs does not cover mutual recognition of standards. The EU and Turkey have a customs union; it does not preclude border checks on a wide variety of Turkish products. Even the EEA/EFTA countries, which are within the single market to a significant extent, do not fully escape having physical borders with EU member states. These borders differ in how ‘hard’ to ‘light touch’ they are – but infrastructure would need to be there, because even where negotiations permit most products to cross borders, it would need to be verified on an ongoing basis that the relevant products meet the agreed-upon standards.

[25] The concerns over chlorine-washed chicken which surfaced in the summer of 2017 are illustrative. This US agricultural practice is not permitted in the EU. Chlorine-washed chicken consequently cannot enter the EU. If the UK loosens that restriction subsequent to Brexit in any trade deal with the US, it will find trading with the EU significantly more complicated – businesses seeking to move chicken from the UK into the EU would have to prove it was EU-appropriate chicken. Therefore chlorine-washed chicken and all other chicken – if they could in technical terms be kept separate – would need to be distinguishable, or alternatively the EU would have to start accepting chlorine-washed chicken (which is highly unlikely in terms of its established animal welfare standards).⁶

[26] Differences in environmental standards could have further knock-on consequences, as they may also impact heavily on the ability for UK companies – including from Northern Ireland in projects in Ireland – to participate in other EU projects. For instance, environmental considerations can be taken into account in the award of public procurement contracts, and if the UK did not sustain EU-level environmental standards in the future, a system would need to be developed to ensure that individual contractors could prove they met the EU standards (and were not therefore able to undercut EU suppliers on this basis). This, again, is a trade barrier. It is not one that can be negated outside of mutual recognition of standards, which would disappear if EU and UK policy in any area started to differ.

[27] At present the UK Government promises to have appropriate regulations but this is not the same as being legally bound to have those regulations. The EU Treaties mandate that those regulations apply within member states. But given that the UK is aiming to have regulatory independence, another source of law will need to replace the EU Treaties but be of an equally binding nature in order to guarantee to the EU that UK products meet the agreed-upon requirements. This will, undoubtedly, involve another form of Treaty – which will require a supervisory authority of some kind. And, where such bilateral agreements exist between the EU and third countries, there are always custom checks to ensure that the agreements that exist operate appropriately in practice.

⁶ See S. Dawson, ‘Chlorine-washed chicken Q&A: food safety expert explains why US poultry is banned in the EU’ The Conversation (2 August 2017).

[28] A Seanad Report suggested the following measures for the Ireland/Northern Ireland border post Brexit:

1. a pre-clearance model for goods as part of a solution, whereby trucks and drivers can pass through the UK land-bridge without incurring duties or checks.
2. A system of pre-registering loads online and tracking using GPS or number plate recognition is a possible solution for trade with Britain and Northern Ireland.⁷

But even with these solutions anti-abuse measures need to be put in place, including mobile spot-checks of goods to check compliance.

[29] The UK Government currently proposes a ‘cross-border trade exemption’ for small businesses.⁸ This would require all traders to be identifiable in one way or another and to be ‘sorted’ according to what level of checks are required for them at, presumably, the border. Such a scheme may also be heavily sectoral and will be dependent on definitions of ‘small traders’ – does this include farmers, and if so, what size of farm will count as ‘small’? Moreover, small businesses regularly rely upon large courier companies to make cross-border deliveries, which makes policing such an arrangement particularly complex. There will be significant regulation in place to make such an ‘exemption’ workable and to ensure that the products in question meet the EU standards needed for import to be at all possible. Even under such an arrangement small businesses will therefore experience increased regulation, even if it is not at the border.

[30] Any approach which does not involve the UK remaining within the EU Single Market and the EU Customs Union will result in the imposition of some physical border controls because the legal guarantees of regulatory equivalence, mutual recognition, and non-barriers will require checks. The extent of these checks depends upon both the solution found for Northern Ireland and the relationship the rest of the UK has with the EU. Currently, there is no technology out there that could replace the need for spot checks given the UK Government’s wish to leave the Single Market and Customs Union. The extent of the border remains negotiable, but given the UK’s current negotiating position and ‘red lines’, it is very difficult to perceive a route towards a seamless border.

Lessons from Approaches to EU External Land Borders

[31] The UK negotiating position has floated the possibility of the EU ignoring the Northern Ireland/Ireland land border for external tariffs (as happens at the EU’s borders with micro states). But this would create a back door into the EU market and prevent the EU from fulfilling its WTO obligations. Examples of EU border arrangements with third countries which are larger economies give more realistic pictures of post-Brexit possibilities:

[32] **Turkey and the EU:** This approach does not cover all goods and requires extensive checks on the cross-border movement of goods (relying on transport permits).⁹ It does

⁷ Seanad Special Select Committee on Withdrawal of the United Kingdom from the European Union, *Brexit: Implications and Potential Solutions* (June 2017) 18.

⁸ HM Government, *Position Paper: Northern Ireland and Ireland* (16 August 2017) para. 42.

⁹ See World Bank, Evaluation of the EU-TURKEY Customs Union (2014). https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/financial_assistance/phare/evaluation/2014/20140403-evaluation-of-the-eu-turkey-customs-union.pdf.

provide for common external tariffs, however, and the UK would have to agree to these as part of a customs agreement solution.¹⁰

[33] **Sweden/Norway:** The EEA does not cover agricultural goods which would present a considerable difficulty for Northern Ireland's cross-border supply chains in the agri-food industry. When it comes to border management, the EEA agreement provides for customs cooperation and mutual assistance, including detailed provisions on issues such as common standards and mutual recognition as regards customs security measures. In the context of the land border between Norway and Sweden, a bilateral agreement dating from 1959 (and applicable subsequent to Sweden's EU accession¹¹) aims at reducing bureaucracy and duplication while still managing border crossings effectively: for example, providing for a common border zone where each country's customs authorities can operate freely across both territories.¹² However, it is clear from the Norway example that EEA membership does not negate border checks altogether – there are multiple customs check points at border crossings, and these do not only engage in spot-checks for commercial traffic.

[34] **Switzerland/Germany:** Switzerland has a special starting position in that it is a member of the Schengen area albeit it is not part of the European Union Customs Union. Due to this fact, customs controls continue. Both countries carry out some checks at the crossings – even on goods transported by individuals on vacation, to ensure they do not violate the personal allowances permitted under the EUCU and Swiss law. Even though technically Switzerland does not control the movement of people, the line between controlling traffic of people and goods is hard to draw – stopping a truck for customs reasons is likely to also result in an ID check for its drivers. Beyond that, because of the dual role of Swiss customs officials, who also act as border police, they are required to carry out ID checks for security issues, and not just at fixed border points but also via mobile units that operate along the border.¹³

[35] **Bosnia Herzegovina/Croatia:** When Croatia joined the EU in 2013, the bloc's external frontier was redrawn along the country's borders with Serbia, Bosnia and Herzegovina, and Montenegro. The border with Bosnia and Herzegovina has proved particularly troublesome. Both were once republics of Yugoslavia, and 15% of Bosnian citizens are ethnic Croats, most of whom have Croatian EU passports. All non-EU citizens (including most Bosnians) are subject to passport controls at this border to the EU. However, the EU agreed to a system of permits allowing locals unhindered travel across the border. Prime Minister Theresa May has argued that examples like this show that the EU shows imagination in dealing with tricky border issues in the past – but this example does not indicate the absence of a border. Croatia, upon accession, had to build new border posts and is required to perform numerous checks on goods from Bosnia. Exceptions also do not come without strings attached: for Bosnia to benefit from an EU-permitted exception to border controls so that it can easily access its primary port (which is now in Croatian territory) to export agricultural goods, Bosnia has had to agree to comply with the relevant EU regulations on those agricultural products.¹⁴

¹⁰ HM Government, *Position Paper: Northern Ireland and Ireland* (16 August 2017) para. 48.

¹¹ See now the bilateral Agreement on customs cooperation in the form of an Exchange of Letters between the European Community and the Kingdom of Norway [1997] OJ L 105/17.

¹² See <http://ec.europa.eu/trade/policy/countries-and-regions/countries/norway/>.

¹³ See <https://www.ezv.admin.ch/ezv/en/home/topics/schengen.html>.

¹⁴ See http://europa.eu/rapid/press-release_SPEECH-13-557_en.htm and Commission Implementing

[36] **East/West Germany:** The Irish Seanad’s report on Brexit considered a protocol that then-West Germany negotiated following the ratification of the Treaty of Rome in 1957: this protocol permitted trade between East and West Germany to be treated as ‘internal’ trade, rather than cross-border trade. Subsequent treaties, including ones establishing the European [Union] Customs Union, did not negate this protocol; it became obsolete once Germany was reunified.¹⁵ The Senead suggests this may be a potential precedent for Northern Ireland, as a protocol could be drafted to designate Northern Ireland as being part of an ‘internal’ trade area with Ireland. However, such an accommodation would be very difficult politically and given the terms of the GFA with regard to the people of Northern Ireland determining their own future status, it would likely be contested.

[37] **The UK remaining within the EU Single Market and the EU Customs Union after Brexit would be the best outcome in terms of minimising friction at the EU’s new external border in Northern Ireland. The UK Government currently rejects this option, but its proposed solutions do not take account of the EU’s need to protect its international obligations with regard to its trading borders. The UK Government’s hints towards mutual non-enforcement of these rules (or an enforcement regime curtailed by loopholes) is tantamount to asking the EU to ignore its own legal duties. It is an illusory, rather than “imaginative”, solution to the border.**

[38] **In the alternative, a special status for Northern Ireland whereby it – separately from Great Britain – remains within the EU Single Market and the EU Customs Union would resolve the problems that may arise at the Irish land border observed above. This, of course, would result in a ‘border’ existing between Northern Ireland and Great Britain, as the Irish Sea would then be the point at which the EU’s regulatory regime would have to be applied. Again, the UK government currently rejects this option, but has not offered an alternative that can fully avoid physical infrastructure (whether at the border or near the border) near the Irish land border.**

Reciprocal Citizens’ Rights Post-Brexit

Preserving the Common Travel Area

[39] The CTA, which (as is repeatedly stated) pre-dates EU membership, is based on the idea that the UK and the Republic can decide for themselves who their citizens are and who the people are who they treat like citizens (but who technically are not). So, this enables Irish citizens in the UK and *vice versa* to carry on their lives as if they are citizens of each country. This has been the case since the foundation of the Free State.

[40] There is nothing inherent to Brexit that precludes this reciprocity from continuing. The EU has no competence on matters relating to nationality or citizenship within the Member States, let alone outside of it. The EU recognises, however, that some of the advantages granted to Irish nationals in the UK and UK nationals in Ireland go ‘beyond’ what EU

Regulation (EU) No 556/2013 of 14 June 2013 amending Regulations (EC) No 798/2008, (EU) No 206/2010, (EU) No 605/2010 and (EU) No 28/2012 as regards the transit of certain products of animal origin from Bosnia and Herzegovina Text with EEA relevance [2013] OJ L 164/13.

¹⁵ Seanad Special Select Committee on Withdrawal of the United Kingdom from the European Union, *Brexit: Implications and Potential Solutions* (June 2017) 20-21.

citizenship carries as rights – and it accepts these differences via a protocol attached to the EU Treaties, which permits the CTA to continue to operate.

[41] Following Brexit, this Protocol will not automatically lapse. While the UK will have no further obligations under EU law following Brexit, Ireland’s EU law obligations obviously continue to apply. This will have some consequences on how the Irish and UK administrations interact with each other following Brexit.

[42] For example, with regard to social security coordination, the exemption under Protocol 20 does not negate that there is an obligation under EU law for all EU member states to extend benefits stemming from bilateral agreements that fall within the scope of EU law to *all EU nationals*.¹⁶ In other words, if an Irish worker travels to the UK (under the CTA) and collects social security there and that social security collection is transportable back to Ireland for aggregation purposes, the same would have to happen to a French or a German worker in the UK who collects social security (under UK law) and then moves to Ireland. This will require social security coordinating mechanisms that are very similar to those currently required under EU law in the UK as well as in Ireland, so the information can be easily passed on.

[43] Any further ‘firming up’ of the CTA will similarly have to be weighed against Protocol 20 – the Protocol permits *better* treatment for UK nationals in Ireland and Irish nationals in the UK than for all other EU nationals, but where rights extended are equivalent to those applicable under EU law, they have to then be mirrored out to all other EU nationals.

[44] The EU’s position remains that preservation of the CTA depends upon the will of the UK – if it chooses to set up hard borders, the CTA becomes more difficult to operate; if it does not, the CTA will survive as it is not incompatible with EU law at the moment (and there is an exemption in Protocol 20 at the moment). This really would only change if the UK wished to prevent movement of non-Irish EEA nationals in the future at the border. The UK Government’s current proposals point away from border enforcement and instead indicate that the internal enforcement of the ‘end of free movement’ will take place in the UK (through mechanisms such as landlord and employer checks on rights to work or to residency).¹⁷

[45] Critically, the UK and Irish Governments have now spent a tremendous amount of time unpicking the CTA and although some questions remain over what legal provisions relate to the CTA and what do not, the obligations owed to each other’s nationals are perhaps the clearest they have been since 1921. As it stands the CTA is a tangle of statutes, statutory instruments, practice and one treaty limited to social security provision. To ensure its longevity and to provide security for Irish people resident in the UK (including those from Northern Ireland only holding Irish passports and not wishing to claim their UK passport) and UK citizens from Britain in Ireland, the legal obligations contained in the CTA should now be placed into a treaty between the UK and Ireland.

[46] It took many months to ascertain the full scope of the CTA post-Brexit. The CTA in its uncodified form is ripe to be misunderstood and some policy makers continue to speak as if it is all that is necessary to maintain an open border between Ireland and Northern

¹⁶ C-55/00 *Gottardo* ECLI:EU:C:2002:16, para. 39.

¹⁷ HM Government, *Position Paper: Northern Ireland and Ireland* (16 August 2017) para. 33.

Ireland after Brexit. The full extent of the CTA urgently needs to be clarified in a bilateral treaty between the UK and Ireland.

EU Citizenship Rights in Northern Ireland

[47] The UK Government's paper on Northern Ireland maintains that the UK welcomes the commitment in the European Commission's directives that these EU rights should continue to be respected following the UK's departure from the EU: "Full account should be taken of the fact that Irish citizens residing in Northern Ireland will continue to enjoy rights as EU citizens".

[48] The problem with this as a legal starting point is that it fails to consider the actual impact of Brexit on EU citizenship rights – where it is not the status of EU citizen that is at risk, but rather the ability to *exercise* the relevant citizenship rights. Irish citizens residing in Northern Ireland will have EU citizen rights – but they will be resident outside of the EU. An analogous example could be a UK national currently living in the United States (or any non-member state), in which case they have no ability to exercise their EU citizenship rights for as long as their residency of a non-member state continues.

[49] In terms of the four freedoms, the United States example indicates passive enjoyment at best. Post Brexit, an Irish citizen living in Northern Ireland retains the right to live elsewhere in the EU – and once they exercise that right to move, the full ambit of the four freedoms and EU citizenship rights will apply to them again. However, while they remain resident in Northern Ireland, there is very little in EU citizenship rights that they can concretely benefit from.¹⁸ In fact, nearly all rights stemming from the EU's 'four freedoms' are conditional upon such an individual moving to another Member State: see, for instance, the freedom to establish a business in another Member State.¹⁹ Those few rights that do not require movement to another Member State will no longer apply to EU nationals resident in Northern Ireland once it is no longer part of a Member State. Key here is the freedom to provide services, which is contingent on living in a Member State and providing a service to another Member State.²⁰ While service provision might be covered under the CTA and bilateral agreements vis-à-vis Ireland, as discussed in paragraph 19 above, individuals from Northern Ireland will not be able to provide services to the rest of the EU unless they are resident in an EU state with Irish nationality – as opposed to resident in the UK with Irish nationality, or resident in Ireland with UK nationality.

[50] While not exactly analogous, the position of Faroe Island residents demonstrates the consequences of Brexit for Irish passport holders in the UK. While they possess Danish passports, they cannot exercise EU citizenship rights unless resident in Denmark (or elsewhere in the EU). Having an EU passport while residing outside the EU, in a location like the Faroe Islands, does not enable individuals to exercise their EU rights fully.

[51] All of this means that while Irish citizens living in Northern Ireland would have 'dormant' free movement rights that a UK citizen would not have, these rights have very

¹⁸ See Article 20(2) TFEU, which sets out the primary EU citizenship rights: to 'move to and reside in' any other EU Member State, and to 'vote in and stand for' European Parliament elections and local elections in their Member State of residence.

¹⁹ See Article 49 TFEU, on freedom of establishment.

²⁰ Article 56 TFEU.

limited impact within Northern Ireland. The one possible exception here is European Parliament voting rights – where Ireland could make this right available to Irish nationals living outside of Ireland, but currently does not. This means that even this EU citizenship right, which does not have to be limited by residency in a Member State, would not continue to be enjoyed by Irish nationals living in Northern Ireland.

[52] A possible alternative to this ‘loss’ of EU rights for those resident in Northern Ireland is a bespoke arrangement with the EU in which Northern Ireland will be treated *as if* a territory of a Member State. This would be unprecedented, but if successfully negotiated, it results in further, rather than fewer, problems for UK-Irish relations. For one, the principle of consent under the Good Friday Agreement precludes changes to the territorial status of Northern Ireland without agreement from both Irish and Northern Irish voters, so pushing through such a ‘status’ change via a treaty may be ill-advised.²¹ Secondly, the equivalence of rights mandated by the Good Friday Agreement would run into significant problems if those born in Northern Ireland choosing to hold an Irish passport had the full extent of EU citizenship rights, but those born in Northern Ireland choosing to hold a UK passport did not. Finally, it is also highly doubtful that the EU would agree to extend such treatment to Irish passport holders in Northern Ireland without demanding it be replicated for all other EU nationals resident in Northern Ireland. The loss of ‘active’ EU citizenship rights for Irish nationals in Northern Ireland, consequently, seems to be the simpler solution – but must be adequately prepared for and communicated to those Irish nationals sooner rather than later.

[53] Clarity on what the EU and the UK understand to be the consequence of Irish nationals in Northern Ireland retaining their EU citizenship is urgently needed. If these Irish nationals will, like all EU nationals residing outside of the EU, have primarily ‘dormant’ rights that they could choose to exercise by moving to the EU, this must be specified by both parties as soon as possible so those dependent on EU rights like the free movement of services for business purposes can prepare. If, on the other hand, the EU and the UK wish to negotiate a special status for Northern Ireland whereby its territory will be treated as if it were a Member State, the consequences of this for both the Good Friday Agreement and all other EU nationals resident in Northern Ireland must be anticipated by those negotiations.

30 October 2017

²¹ Northern Ireland Act 1998, s1.