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Brexit and the Irish Border: Legal and Political Questions

A Royal Irish Academy – British Academy Brexit Briefing

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About this Series

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Introduction

Brexit presents a number of challenges in relation to the Irish Border. There are legal and political dimensions to these and, in particular, a series of constitutional questions concerning Northern Ireland. While it is common case that many of the wider discussions about Brexit and Ireland concern economic matters – notably at the level of the free movement of persons and goods – Northern Ireland raises specific issues because of its geographical location and the ongoing “peace process” there under the Good Friday Agreement of 1998. This paper seeks to explain in more detail what those issues are and how they might be addressed within the framework of EU law, UK law, and Irish law. It also outlines some of the suggestions that have already been made for dealing with the border, where the European Council has made clear its preference for “flexible and imaginative solutions” to the “unique circumstances on the island of Ireland ... while respecting the integrity of the Union legal order”.¹

The paper divides into three sections. The first addresses the current (pre-Brexit) nature of the border, where the Common Travel Area (CTA), EU membership, and the Good Friday Agreement have each diminished its practical significance. The second section notes some of the post-Brexit options for the border, including the idea that Northern Ireland’s unique circumstances (sometimes spoken of in terms of “special status”) might be given specific recognition in any withdrawal agreement between the EU and the UK. While it will be seen that such recognition might go some way towards reflecting the fact that 55.8% of people in Northern Ireland voted “remain” in the Brexit referendum, it will also

be seen that this might give rise to complicated questions both in international law and under the Good Friday Agreement. The third section thus considers those (and other) questions and some of the rules that underlie them.

The pre-Brexit border

The first point that might be made under this heading is that the Irish Constitution of 1937 did not historically recognise the border between Northern Ireland and Ireland as a constitutional fact, even if it acknowledged it as something of a working reality. Article 2 of that Constitution, in its original terms, provided that “The national territory consists of the whole island of Ireland, its islands and the territorial seas”. This “claim of legal right”, as it was later described, was a source of some controversy amongst unionists in Northern Ireland, and it was to be amended in the light of the Good Friday Agreement. However, even before that amendment was made, the Irish Constitution had already (arguably) acknowledged the border insofar it referred, in Article 3, to the future “reintegration of the national territory”. The border, in that sense, was perhaps implicit (if also contested) in the Irish Constitution.

Whatever the historical status of the border, its practical significance has long since been overtaken by a range of legal and political agreements. The longest standing such arrangement is the CTA, which has been in place in various forms since the partition of Ireland. The effects of the CTA, which regulates travel between Ireland, the UK, the Channel Islands, and the Isle of Man, are well-known – Irish and British citizens are able to move freely within the CTA

¹ *European Council (Art 50) guidelines for Brexit negotiations*, para 11, available at <http://www.consilium.europa.eu/en/press/press-releases/2017/04/29-euco-brexit-guidelines/>.

zone; Irish citizens enjoy a unique status in UK law including as relates to voting rights; and the Irish and UK authorities co-ordinate immigration practices so as to protect the CTA. Both the UK and Irish governments have, since the Brexit vote, confirmed their wish to retain the CTA, and the European institutions have indicated that they will respect any bilateral agreement on the matter.

The free movement of persons is, of course, also one of the defining characteristics of EU membership, and Irish citizens, as well other EU citizens and persons living in EEA countries, enjoy movement rights that transcend the Irish border (it should also be noted that the Good Friday Agreement allows people born in Northern Ireland to apply for Irish – and thereby EU – citizenship). In the schema of the EU Treaties, such rights are linked to other rights that include the free movement of capital, goods and services, and this is inevitably the area in which Brexit will have some of its most far-reaching implications. However, its effects will not end there and will extend to other areas that are relevant to the border – the environment and human rights providing two particularly prominent examples.

The impact that the Good Friday Agreement has had on the border can be understood with reference to two main points. The first concerns the so-called “consent principle” that governs changes to Northern Ireland’s constitutional status. According to that principle, it is accepted (a) that Northern Ireland is a part of the UK but that (b) it will form a part of a United Ireland should that become the expressed wish of the majority of the Northern Ireland electorate and that in Ireland. The principle, which was endorsed North and South in parallel referenda on the Good Friday Agreement, thus gives constitutional (if contingent) recognition to the border. It takes legal form in section 1 of the Northern Ireland Act 1998 and in (the amended)

Article 3 of the Irish Constitution, which now reads, “... a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island”.

The second point concerns the operation of the North/South Ministerial Council (NSMC) and “implementation bodies” that were envisaged in the Good Friday Agreement and which work in areas of “mutual interest” (Waterways Ireland; Food Safety Promotion Board; Trade and Business Development Body; Special European Union Programmes Body; the Language Body; and the Foyle, Carlingford and Irish Lights Commission). These institutions formalise North/South co-operation by bringing together Ministers from Northern Ireland and Ireland “to develop consultation, co-operation and action within the island of Ireland ... on matters of mutual interest within the competence of the Administrations, North and South”. In legal terms, the institutions are creatures of international law, as they have their origins in the UK and Irish governments’ commitments under the Good Friday Agreement and in a further British Irish Agreement from 1999 (as subsequently implemented in domestic law). However, they also have an obvious political significance to Irish Nationalists in the sense that they embody an all-Ireland dimension to the governance of Northern Ireland (an “East-West” dimension, preferred by Unionists, is provided for by the British-Irish Council). The corresponding relevance of Brexit lies in the fact that co-operation often occurs in areas that are governed by EU law and policy, where the Good Friday Agreement provides that the NSMC should “consider the EU dimension of relevant matters, including the implementation of EU policies and programmes ... Arrangements [are] to be made to ensure that the

views of the [NSMC] are taken into account and represented appropriately at relevant EU meetings”. While Brexit will not mean that the NSMC cannot discuss matters arising from EU law – indeed, the Northern Ireland institutions might wish to shadow EU law and policy in some areas – it will mean that Northern Ireland Ministers will not formally be bound by EU law. It might therefore be expected that Brexit will dilute at least some aspects of North/South co-operation. (It is to be noted that the work of the NSMC is presently complicated by the fact that the Northern Ireland Executive is not convening – political efforts to restore the Executive are ongoing.)

The post-Brexit border and its challenges

At the time of writing this paper (early October 2017), UK government proposals for addressing the issue of the Irish border have not really progressed beyond the suggestion that technology might be used to minimise any post-Brexit effects on the movement of goods (it has also been said that there should be no physical infrastructure at the border). The absence of more detailed proposals is, of course, one consequence of a general lack of certainty about Brexit and whether it will be “hard” or “soft” in form. Nevertheless, it is also clear from public statements that have been made by the EU institutions and the Irish and UK governments that there is a shared concern to avoid legal, political and economic difficulties on the island of Ireland. Northern Ireland’s First and Deputy First Ministers have also previously stated their view that the border should not be allowed to develop into an impediment on the island, not least because it might become a catalyst for illegal activities.

The anticipated effects of a hard border are well-known, and it is expected that it would have far-reaching implications for, among other things, the CTA, the free movement of goods, and some of the institutions of the Good Friday Agreement. In relation to the CTA, this would be a result of the UK government’s wish to exert fuller control over immigration patterns, as border checks may be needed to monitor the entry into the UK of non-Irish nationals. Moreover, the imposition of (for instance) tariffs on goods crossing the Irish border would also require border controls of some kind, even if the UK government is hopeful that advanced technology might render the border almost invisible. The challenge for the NSMC, noted above, might be how to develop co-ordinated policy initiatives when Northern Ireland Ministers would apparently be able to develop preferences that would be at one remove from the EU policies that would apply in Ireland.

The alternative option – of a soft Brexit – would inevitably lessen some of these impacts. However, even if a soft Brexit is not pursued, it has been suggested that Northern Ireland might be accorded a unique position under any EU-UK withdrawal agreement, for instance by remaining within the single market and the customs union. Although the idea of separate treatment for Northern Ireland is potentially controversial (as discussed further below), it emphasises Northern Ireland’s legal and political uniqueness and the potential for finding, to use the language of the European Council, an “imaginative solution”. In reality, the search is for a hybrid outcome whereby Northern Ireland would remain a part of the UK but in circumstances that would not unsettle the existing balance of relations in Ireland.

One such hybrid proposal has been made by a group of academics and lawyers writing through

the European Policy Centre. Titled *Northern Ireland and Brexit: the European Economic Area option*,² the document focuses primarily on the possibility that Northern Ireland might become a member of the European Economic Area and that this is perhaps “the most obvious way to mitigate some of the key impacts of Brexit on Northern Ireland” (the UK government has apparently ruled out membership of the EEA either for the UK as a whole or for Scotland). In developing this proposal, the document notes that EEA membership would allow Northern Ireland “to participate in the EU single market, i.e. the free movement of goods, services, capital and people, and [to observe] EU norms and standards in that context”, whilst being outside the customs union and the jurisdiction of the European Court of Justice. This, it is said, would mean that “the economic situation and trading environment that EU membership has delivered would remain substantially unchanged, allowing much of the status quo regarding the single market to be maintained as far as Northern Ireland is concerned”. On the matter of how Northern Ireland membership of the EEA might be achieved, two possibilities are noted: (i) for the UK to become a signatory to the EEA Agreement and to limit its application to Northern Ireland; and (ii) for Northern Ireland itself to become a member of the EEA. The document adds that this second approach would mean that the “EEA Agreement would need to be amended to allow Northern Ireland as a sub-national entity to participate in the EEA and the EEA bodies”.

Constitutional questions

Any arrangement that will recognise Northern Ireland’s unique circumstances – whether through the EEA or some other arrangement within a UK-EU

withdrawal agreement – will give rise to complex constitutional questions. Five such questions are noted here.

The first concerns Northern Ireland’s existence as a sub-national entity and the competence of its institutions in international law. The European Policy Centre paper’s statement about the need to amend the EEA Agreement to facilitate Northern Ireland’s membership reflects the fact that treaties are typically signed by sovereign states (the WTO is one example of something that is more nuanced, where Hong Kong is included as a member). Plainly, Northern Ireland is not a sovereign state, and the question therefore is whether amendment of the EEA Agreement might open something of a “Pandora’s box” in terms of regional demands for recognition in other organisations – a point that might grow in importance given recent events in Spain. If it might, political anxiety might well frustrate any process of amendment, assuming that such amendment would be possible within the terms of the EEA. (Another option, from the perspective of UK constitutional law, might be to amend the legislation that devolves power to the Northern Ireland institutions to allow them to sign the EEA Agreement – though it is highly unlikely that this would happen given that international relations are exclusively and expressly a matter for central government under UK constitutional law.)

The second question concerns EU law. As noted above, the European Council has identified the need for “flexible and imaginative solutions” to the challenge of the Irish border so long as they respect “the integrity of the Union legal order”. Of course, this raises the question of what the Union

² Available at http://www.epc.eu/pub_details.php?pub_id=7576&cat_id=17.

legal order permits in the context of Article 50 TEU negotiations where such negotiations are being carried out for the first time. The answers are far from clear, though it may be that EU law would not be able to accommodate a hybrid option if that would allow the UK more broadly to benefit from hybridity in respect of one of its component parts. To put the point differently, Member States join the European Union in their entirety, and Article 50 TEU envisages that they leave on the same terms. A hybrid option that allows Northern Ireland to remain a part of the UK whilst also having special rights as regards the EU might challenge that rule (and this says nothing about the UK government's wish to safeguard the UK's own internal market post-Brexit and to be able to pursue international trade deals). Any particular accommodation of Northern Ireland might also give rise to a number of other difficult questions – who would represent Northern Ireland within the EU? Who would pay for Northern Ireland? Etc.

The third question concerns the consent principle that is found in the Good Friday Agreement. As was outlined above, that principle entails that Northern Ireland is a part of the UK and that it cannot become a part of a united Ireland without a majority vote in favour of unification in both Northern Ireland and Ireland. In the Brexit case that was heard by the UK Supreme Court in late 2016,³ it was held that this principle was relevant only to the specific matter of Irish unification and that it had no application in relation to EU withdrawal. While this would suggest that there would be no legal obligation to hold a referendum on any specific post-Brexit arrangements for Northern Ireland, it might be asked whether a vote

would be held as a matter of democratic prudence. The point here is that some unionist politicians have already expressed the view that any agreement (or “special status”) cannot result in a weakening of Northern Ireland's position in the UK and that they would oppose such a change if it would have such effects. It may therefore be that a referendum would be held and that it would test how far the 55.8% “remain” vote would translate into a related vote on unique arrangements for Northern Ireland.

The fourth question is whether any UK-EU withdrawal agreement (which might include particular arrangements for Northern Ireland) would need to be approved by referendum in Ireland. This is not the same question as is posed directly above, but rather one that concerns the reach of the Irish Supreme Court's ruling in the celebrated *Crotty* case from the 1980s.⁴ While this question might become live only if the withdrawal agreement would need to be ratified by the EU and by each of its 27 member states – there is also the point that *Crotty* seems to apply only to amendments to the EU treaties – it might present a further democratic complication in the withdrawal process. The border question is, after all, one that is relevant to the electorates both North and South, and the Irish electorate may well wish to reject any agreement that it would regard as unfavourable to its interests.

The fifth question concerns the possibility that the Good Friday Agreement might be appended to any withdrawal agreement. This possibility was recently noted by Guy Verhofstadt, and it would provide a further means of recognition for the Agreement and

³ *R (Miller) v Secretary of State for Exiting the European Union; In re McCord; In re Agnew* [2017] UKSC 5, [2017] 2 WLR 583, available at <http://www.bailii.org/uk/cases/UKSC/2017/5.html>.

⁴ *Crotty v An Taoiseach* [1987] IESC 4, [1987] IR 73, available at <http://www.bailii.org/ie/cases/IESC/1987/4.html>.

the values that it incorporates. An option of this kind might also further “internationalise” the Good Friday Agreement in the sense that it would be appended to an international Treaty between the EU and the UK. In that circumstance, there would doubtless be interesting questions about how far the Agreement could be enforced in international law, EU law, Irish law and/or UK law.

About the Author

Gordon Anthony is Professor of Public Law in the School of Law, Queen’s University Belfast. He has held visiting positions at institutions in Greece, Holland, France, Portugal and the United States. His main research interests are in the areas of judicial review, public authority liability, and the relationship between UK law and European Law. Professor Anthony is a member of the *Conseil’ d’Orientation de la Chaire Mutations de l’Action Publique et du Droit Public*, Sciences Po, Paris and of the Executive Committee of the UK Constitutional Law Association. He is also a member of the European Group of Public Law, Athens, Greece, where he is Director of the Academy of European Public Law. He was called to the Bar of Northern Ireland in 2011.

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