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The Common Travel Area: More Than Just Travel

A Royal Irish Academy – British Academy Brexit Briefing

Professor Imelda Maher MRIA

About this Series

The Royal Irish Academy-British Academy Brexit Briefings is a series aimed at highlighting and considering key issues related to the UK's withdrawal from the EU within the context of UK-Ireland relations. This series is intended to raise awareness of the topics and questions that need consideration and/or responses as the UK negotiates its exit from EU.

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The Common Travel Area (the CTA) is one of the key issues in the current Brexit talks. In principle, it now allows free movement for British and Irish citizens (only) between the two states. There is cooperation on immigration also so EEA citizens' and those nationals who do not require visas for both states benefit (McGuinness and Gower, 2017). In fact, it goes much further, with a number of additional rights arising without the need for permission or, particularly important in Northern Ireland, without the need to assert British citizenship (Meehan, 2011). These are the rights to reside, work, study, access social welfare entitlements and benefits (to a greater extent than under EU law), health care and the right to vote in local and parliamentary elections.² In essence, British and Irish citizens' rights in the two countries are almost indistinguishable (the inability to vote in referenda and Presidential elections in Ireland being one of the very few differences).

Hotch-Potch of Laws

The CTA reflects practice following Irish independence in 1922, when no attempt was made to alter border arrangements between the two states. No passport was required for citizens travelling between the two states, and those who were originally aliens legally in one state could freely travel to the other (Ryan, 2001: 856; de Mars et al, 2016). The CTA was recognised for the first time in UK law in the Ireland Act 1949, s. 2(1) which states that Ireland is not a foreign country for legal

purposes. Irish citizens are not viewed as aliens and under the 1948 British Nationality Act the law was to apply to them in the same way as British citizens. World War II restrictions were relaxed through an informal (and secret) exchange of letters in 1952 (Ryan, 2001: 858). The UK Immigration Act 1971 now governs the CTA, with immigration controls not applying to those arriving from Ireland, subject to exceptions mainly regarding those from states who require visas. In Ireland, British citizens were exempted from the Aliens Act 1935 under a statutory instrument³, and that exemption survives the Immigration Act 2004 (Ryan, 862; Butler, 158).

Other Citizens

The full range of rights under the CTA only applies to British and Irish citizens. Irish immigration officers have the power to treat those from outside the EU and EEA coming from the UK as though they have come from elsewhere. In the UK certain categories of traveller coming from Ireland require leave to enter, mainly those who require visas or are deemed a security threat.⁴ Both states have their own visa and immigration rules, with high levels of practical cooperation and policy coordination (ICIBI, 2011; Joint Ministerial Statement, 2011). Nonetheless, the lack of immigration controls can cause problems for the naïve traveller.⁵ EU and Schengen states' citizens are formally exempted from any visa requirements and common visa arrangements are in place for India and China – essentially to promote tourism. Ireland also

1 The EEA consists of all the Member States of the EU and Iceland, Liechtenstein, Norway with Swiss citizens having similar rights.

2 For the UK see Representation of the People Act 1983. For Ireland the Electoral Act 1992.

3 The Citizens of the United Kingdom and Colonies (Irish Citizenship Rights) Order 1949.

4 For Ireland see Aliens (Amendment No. 3) Order 1997; for UK see Immigration (Control of Entry through Republic of Ireland) Order 1972, (as amended).

5 See e.g. *Pachero v. Minister for Justice* [2011] IEHC 491

unilaterally permits some short stay visa holders to the UK to visit Ireland without a visa (McGuinness and Gower, 2017: 10).⁶

Borders: Invisible and Present

The land border is invisible but border checks are common between Ireland and Great Britain. Some form of identification that shows citizenship is necessary for access to Ireland at (air)ports. In the UK, checks may be carried out under anti-terrorism legislation, with Irish flights treated like domestic flights. In Irish airports all passengers from outside the state must pass through passport control, so identity must be shown. In the UK, passengers originating from Ireland arrive through domestic channels or designated Irish flight arrivals (depending on the size of the airport), and there may be checks on identity where there is an anti-terrorism purpose (ICIBI, 2011).

The CTA and the Good Friday Agreement

The CTA predates the EU and the Good Friday Agreement. Under EU law it is recognised in Protocol 20, which allows the UK and Ireland to maintain border controls in the light of the CTA. There is no reference to the CTA in the Good Friday Agreement but it is part of the context of the Agreement. Under that Agreement, the people

of Northern Ireland can identify themselves as Irish, British or both.⁷ EU citizenship does not exist independently of citizenship of a member state, so those in Northern Ireland who choose only British citizenship will not be EU citizens, while those who choose to identify as Irish or Irish and British will be EU citizens living outside the EU, albeit in their country of origin. This status has some similarity to that of citizens of Moldova and Ukraine, both non-EU states, who may be afforded Romanian citizenship without having to live in Romania if they are descendants of Romanians (Dumbrava, 2013). Also, Hungarian law gives preferential citizenship to anyone who is of Hungarian descent and whose knowledge of the Hungarian language is proven (Tóth, 2010). However, the analogy is limited given the context of the Good Friday Agreement and the importance it gives to respect for the rights, opportunities and identity for the people of Northern Ireland who choose to assert their right to Irish citizenship.

The CTA and Schengen

Across much of the EU and some other European states there is a common travel area: a Europe without borders with a common external frontier, common visa, asylum and immigration policies.⁸ Originally set up by the Schengen Convention, implementing measures were incorporated into EU law by the Amsterdam Treaty. Ireland and the UK have remained outside Schengen, retaining the CTA instead, under Protocol 19 TEU. Ireland is likely to stay outside the Schengen area in order to maintain the CTA.

⁶ SI 473/2014 Immigration Act 2004 (Visas) Orders 2014.

⁷ Article 1(vi) and Annex 2. The people here means those born in Northern Ireland and having, at the time of their birth, at least one parent who is a British citizen, an Irish citizen or is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence.

⁸ Bulgaria, Croatia, Cyprus and Romania have signed but are not yet fully incorporated into the Schengen area. Iceland, Lichtenstein, Norway and Switzerland are not in the EU but are members of Schengen.

Maintaining the CTA: A Common Purpose

The maintenance of the CTA is a priority, with a dialogue on Ireland/Northern Ireland issues between the UK and EU negotiating teams. The UK government indicated it wants to protect the CTA and associated reciprocal arrangements (2017). For the EU, the maintenance of the CTA is also a priority as seen in the 2017 Council, Parliament and Commission documents. The Irish government also sees it as a priority, wishing to maintain the CTA in conformity with EU law (2017: 24). The CTA as a pre-existing agreement could be maintained without change. This would be ideal, as it is a legally scattered quasi-administrative arrangement that has an inherent flexibility that has worked well for British and Irish citizens. One of the most anomalous characteristics of the CTA is the relative lack of legal formality, although this lack of a clear statutory footing did not prevent it securing a ringing endorsement from the Irish High Court in the *Kweder* case (Butler, 161).⁹ The maintenance of the CTA is a likely outcome as it is one of the less contentious issues in the Brexit negotiations.

Maintaining the CTA: The Challenges

Even if the CTA can be maintained, the complexities raised by the British withdrawal from the Single Market and the customs union pose challenges. The Irish government qualifies the maintenance of the CTA with the explicit caveat that it be in conformity with EU law. Compliance with EU law would be

required in any event in so far as the agreement raises issues as to the free movement of EU citizens and the extent to which the Irish state can treat non-EU nationals (post-Brexit British citizens) more favourably than EU citizens (Spaventa, 2017).¹⁰ The tensions between the EU and UK can be seen in the contrast between how the UK in its August 2017 position paper emphasises the importance of reciprocity and the need for detailed joint work in devising how to achieve a frictionless border in relation to goods, and the September 2017 European Commission guiding principles which boldly state that ‘[T]he onus to propose solutions which overcome the challenges created on the island of Ireland by the United Kingdom’s withdrawal from the European Union and its decision to leave the customs union and the internal market remains on the United Kingdom’ (at 2).

(1) The Seamless Land Border

Crossing into the other state is seamless between Ireland and Northern Ireland: there is indeed an invisible land border with the only evident indication of change of jurisdiction being the shift from/to kilometres/miles and from/to bilingual/monolingual signs. There are about 110 million person-crossings per annum, with the majority in private cars, with 0.9 million via rail and a smaller number via ferry and air. Across the 15 principal crossing points alone there are 118,000 vehicle crossings each day, with around 43 million estimated annually. Students from primary school to university can move across the border for the purpose of study (UK government, 2017a). The challenge is how to retain an invisible border when there are two states with different customs regimes. This is relevant for the CTA as customs are classically addressed at the frontier; the border on the island will be an EU frontier after Brexit.

⁹ *Kweder v Minister for Justice* [1996] 1 I.R. 381.

¹⁰ C-55/00 *Gottardo*, EU:C:2002:543

There is some technology already in place e.g. in relation to vehicle registration recognition. This, and related technologies, are only partial or supplementary solutions to physical inspections to check goods and to curtail a rise in smuggling and illegal activities around what was a violently but is now a peacefully contested border (Hayward and Komorova, 2016). In the Nordic Union, there are custom checks between Norway and Sweden even though they are in a passport union and allow free movement of their citizens. This is because Norway is outside the EU and customs union even though it is in the EEA (de Mars et al, 7). In any event, the nature of any technologies or inspections required at the EU/UK border depends on the agreement as to the future trade arrangement between them.

(2) EU Citizens

Ireland has continued its frontier controls and, assuming the CTA is maintained, will continue to do so for EU and EEA citizens. In fact, all EU/EEA citizens including British and Irish citizens must provide identification (Irish and British) when entering the state by air or sea. EU citizens could continue to be able to enter the UK temporarily, facilitating their entry from Ireland to the UK. Should they wish to extend their stay beyond three months or take up employment, the UK already has extensive 'border' controls in place through places of employment, study or tenancies for non- EU/EEA citizens and these could be extended to EU/EEA citizens, other than the Irish. The EU would have to agree to British citizens having more favourable treatment in Ireland than EU citizens. This, however, should not be a problem given the commitment to, and sensitivity towards, the identity issues in the Good Friday Agreement (European Commission, 2017), provided British nationals travelling temporarily to

other EU member states are treated the same way as EU/EEA citizens visiting the UK.

Conclusion

The CTA can be maintained post-Brexit in a narrow and technical sense of allowing British and Irish citizens free movement, and even the more extensive rights associated with it. The threat to the CTA is the broader context of the withdrawal of the UK from the customs union, potentially requiring regulation of imports and exports at the one shared land border between the UK and the EU: that between Ireland and Northern Ireland and at ports. The land border is the only border where the CTA reaches its full potential, is the most fragile politically and is a key achievement of the Good Friday Agreement. An invisible border is not possible where goods cannot move freely and customs requirements need to be addressed. Some technical and ad hoc inspections at some distance from the physical border can be achieved but are not full solutions, raising the spectre of a physical border that could have implications for the movement of people as an indirect consequence. A border in the Irish Sea would be a functional solution for the land border, but is unattractive economically given Northern Ireland and Ireland both have far more trade with Great Britain, although production and supply chains are heavily integrated on the island e.g. through the common energy market. It is also unattractive politically to unionist parties in Northern Ireland. However, the alternative of customs controls at the land border is unattractive to nationalists in Northern Ireland and is potentially politically destabilising for the Good Friday Agreement. The continuation of the UK in the customs union and the single market would maintain the seamless border but without that, even if the CTA continues, some disruption to free movement of people as an unintended consequence of Brexit is likely without

special arrangements, which are possible as the CTA itself, reflecting the distinct relationship between British and Irish citizens.

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About the Author

Imelda Maher is the Dean of Law and the inaugural Sutherland Full Professor of European Law, University College Dublin. She is also the Humanities and Social Sciences Secretary of the Royal Irish Academy. She previously held posts at the London School of Economics, the Australian National University, Birkbeck College and Warwick University. Her work focuses on the relationship between law and governance, especially in economic spheres. She has published extensively in competition law and on EU governance. She served as general editor of *Legal Studies* from 2012-2017 and is a member of the editorial boards of the *European Law Journal* and the *Irish Yearbook of International Law*.

**The Royal Irish Academy/
*Acadamh Ríoga na hÉireann***

19 Dawson Street
Dublin 2, D02 HH58

www.ria.ie

T: +353 1 6762570

The British Academy

10-11 Carlton House Terrace
London, SW1Y 5AH

www.britishacademy.ac.uk

T: +44 (0)207 969 5235