

Brexit and Ireland – Legal, Political and Economic Considerations

Constitutional Affairs



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Brexit and Ireland – Legal, Political and
Economic Considerations

STUDY

Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, describes the legal, political and economic relations of the two parts of Ireland and the United Kingdom, and possible arrangements for dealing with "Brexit". The paper discusses several specific issues, in particular the Common Travel Area between Ireland and the United Kingdom, the consequences of an "invisible" border between the two parts of Ireland, and trade in agricultural products.

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To contact the Policy Department for Citizens' Rights and Constitutional Affairs or to subscribe to its newsletter please write to: poldep-citizens@europarl.europa.eu

Research Administrator Responsible

ERIKSSON Eeva
Policy Department for Citizens' Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
E-mail: poldep-citizens@europarl.europa.eu

AUTHOR

Dr John TEMPLE LANG, Solicitor; Adjunct Professor, Trinity College, Dublin; Senior Visiting Research Fellow, Oxford

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EXECUTIVE SUMMARY

Background

The future trade relationship between the European Union (EU) and the United Kingdom (UK) will be very important for both parts of the island of Ireland. That relationship, whether it is simply the result of EU-UK relations or a relationship specially devised for the Irish circumstances, does not depend on the nature of the "border" between the two parts of Ireland, and no border, visible or invisible, can create a satisfactory result if the economic arrangements are unsound. That is why the Irish government is saying that the UK, or at least Northern Ireland, should remain in the single market and the customs union.

In fact, the future economic prosperity of Northern Ireland depends on three future UK policies even more than on EU-UK trade arrangements. The three policies are the UK's future agricultural policy, its policy on bilateral trade arrangements with third countries (and whether this leads to imports of cheap food into the UK), and the willingness of the UK government to continue to make large fiscal transfers to Northern Ireland.

A "visible" border between the two parts of Ireland will certainly be unavoidable, however politically unwelcome it may be, if there is no trade agreement between the EU and the UK, if the UK adopts a cheap food policy, or if the UK lowers phytosanitary standards or other quality standards for agricultural or industrial products. If an economic border is needed for any of these reasons, it cannot be avoided by electronic surveillance methods. Since it seems likely that the UK will wish to be free to choose its future policies in these respects, a "visible" border will come into existence unless the UK is willing to adopt a free trade area solution, such as the European Economic Area or something like it, at least for Northern Ireland.

1. INTRODUCTION

This paper assumes that the UK will not remain in the EU customs union or the single market. The paper makes no assumptions about the arrangements that might be made for EU-UK trade and other relationships, although the author has expressed the view that rational UK negotiators would be likely ultimately to arrive at results similar to the European Economic Area ¹. The paper makes no attempt to predict what will happen, but considers the possible impact of Brexit on the legal measures that it might be necessary to adopt, and that would be of particular importance for the two parts of Ireland.

The paper discusses several specific issues:

- the Common Travel Area between Ireland and the UK;
- the consequences of an "invisible" border between the two parts of Ireland;
- trade in agricultural products.

The paper does not discuss the series of papers that have been published by the EU and the UK, or what interim arrangements might be useful.

1.1. Some basic facts²

The land border between the two parts of Ireland is 499 kilometres long. There are 40 towns on or near the border. There are approximately 300 formal border crossings, and many more informal ones. An estimated 1,851,000 cars cross the border per month. Approximately 20,000 people commute across the border daily.

Agri-food supply chains are highly integrated on a cross-border basis. Annually over 800 million litres of milk and 400,000 lambs are exported from Northern Ireland into the Republic, and 400,000 pigs are exported from the Republic into Northern Ireland.

Direct trade between the Republic and Britain is much greater in both industrial and agricultural products than the trade between the two parts of Ireland. This means that for the Republic it is more important to maintain free trade with Britain than with Northern Ireland.

According to the UK Office for National Statistics in 2017, Northern Ireland fiscal transfers from the UK exchequer amount to UK£ 5437 per capita more than tax revenues, making it one of the biggest recipients of fiscal transfers anywhere. Budgetary transfers represent over 30 per cent of Northern Ireland's regional output.

Northern Ireland received £2.5 billion of CAP Single Farm Payments between 2005 and 2014. Approximately 87 per cent of farm incomes is made up by CAP payments.

1.2. The Good Friday Agreement

The Good Friday Agreement is an international treaty made in 1998 between the Republic of Ireland and the UK, resulting from long multiparty negotiations. It specified provisions to be included in Irish and British legislation. It set up an Assembly in Northern Ireland, an

¹ Temple Lang, Can the UK negotiate a new kind of free trade arrangements? (2017, Institute of International and European Affairs, Dublin). See Annex.

² Blair Horan, The Island of Ireland: options for Northern Ireland, in O Ceallaigh (ed.), Brexit : a Status Report (2nd ed., May 2017, Institute of International and European Affairs, Dublin).

Executive, and a North/South Ministerial Council. The Agreement recognises the legitimacy of whatever choice is freely made by a majority of the people of Northern Ireland with regard to its status, whether in union with Britain or in a United Ireland. The Executive and Legislative Authority of the Assembly is subject to safeguards to protect the rights and interests of all sides of the community. The safeguards include the European Convention on Human Rights, and arrangements to ensure that decisions and legislation do not infringe the Convention. Any measures infringing the Convention would be null and void. Key decisions are to be taken on a cross-community basis. UK legislation was to incorporate the Convention into Northern Ireland law with direct access to the courts, and remedies for breach of the Convention, including power to overrule Assembly legislation inconsistent with the Convention.

This Agreement ended almost thirty years of tension and violence between the communities in Northern Ireland. It is both a peace agreement and the basis for the government of Northern Ireland with the consent of both communities.

2. POLITICAL, ECONOMIC AND LEGAL CONSIDERATIONS

KEY FINDINGS

- Northern Ireland voted by 56 per cent to Remain in the EU. Brexit will cause Northern Ireland to lose the benefits of EU agricultural policy and structural funds. Brexit does not seem to involve a breach of the Good Friday Agreement, but it entirely changes the economic basis of the Agreement. In 2016 the two main political parties joined in expressing their concern to the UK government, and these concerns are still valid. It is agreed by everyone that the Good Friday Agreement must not be altered, but should be fully carried out. It is also agreed by everyone that it is essential to avoid creating a "visible" border (involving a physical infrastructure) between the two parts of Ireland.
- The longer term economic effects of Brexit for both parts of Ireland will depend primarily on (i) the future EU-UK trade relationships, (ii) any special arrangements for Northern Ireland (iii) the future UK agricultural policy (iv) the future UK bilateral trade agreements, and whether they lead to cheap agricultural imports into the UK and (v) whether the UK maintains the present high level of fiscal transfers to Northern Ireland. The EU can directly influence only the first two.
- Brexit will mean that the UK will no longer have an obligation under EU law to carry out the Good Friday Agreement, and EU law principles will no longer protect rights given under the Agreement, in particular the rights under the Charter of Fundamental Rights, the right to have legislation inconsistent with EU law set aside, and the right to compensation for loss caused by breach of EU law.
- The Common Travel Area of Ireland and the UK means that individuals move freely between the two countries without immigration controls. It is agreed that this should continue, and this means that future UK immigration controls must be internal.

2.1 Political considerations

2.1.1 Political considerations – Northern Ireland

Northern Ireland in the UK referendum voted to remain in the EU, by a majority of 56 per cent. The effect of Brexit has been to unsettle political arrangements that have been working reasonably well, in spite of the fact that the Northern Ireland Executive broke down in 2017, for reasons unrelated to Brexit.³ Northern Ireland, with a large subsidy from the UK exchequer, has been modestly prosperous. The EU, and cross-border trade between the two parts of Ireland, have contributed to economic progress, and to a more relaxed atmosphere. The need for the UK government to rely on the support of the Democratic Unionist Party in Westminster after the UK election in 2017 has complicated matters by putting the government in a situation of conflicting interests. But the uncertainty created by Brexit is the main cause of concern.

³ Ó Dochartaigh, Hayward & Meehan, *Dynamics of Political Change in Ireland: making and breaking a divided Ireland* (2017, Routledge).

One unfortunately probable consequence of Brexit is that the UK fiscal transfers to Northern Ireland will be greatly reduced. There are several reasons why this seems likely. English nationalists are likely to resent the fact that Northern Ireland is more heavily subsidised than any other part of the UK. The UK, after Brexit, is not likely to be able to maintain the transfers at previous levels. This would seriously affect the economy of Northern Ireland. In spite of transfers, total output per head is already lower, relative to the rest of the UK, than it was twenty years ago. Northern Ireland will anyway lose all the benefits of EU agricultural policy and EU structural funds, and it seems clear that the UK will not fully replace or compensate for this. Reduced prosperity will aggravate the tensions that are always there, especially if the decline is blamed on the UK. There is a risk that Brexit may set Northern Ireland back to the situation as it was before the Good Friday Agreement. This is possible in particular because the wishes of the 56 per cent of the Northern Ireland voters who voted to remain in the EU will be frustrated. Many of them will feel that Northern Ireland is unimportant in the UK's eyes.

The most immediate and most obvious issue arising as a result of Brexit in Northern Ireland is the question whether a "visible" border, that is, one with a "physical infrastructure" will be re-established between the two parts of Ireland. This question is discussed below, but it is not the most important aspect of EU-UK relations for Northern Ireland.

It was unfortunate that there was no Northern Ireland Executive during 2017, as a result of disagreements between the Democratic Unionist Party (DUP) and Sinn Fein. This meant that there was little or no useful discussion between the political parties about the solution needed to solve or minimise the problems for Northern Ireland caused by Brexit. The DUP unfortunately missed the opportunity, when the DUP promised to support Mrs May's government, to insist on getting a lasting arrangement of any kind. The two nationalist parties, the SDLP and Sinn Fein, together with the Alliance Party, had asked for some unspecified kind of special arrangement, which led the DUP to reject any such arrangement. But in 2016 the First Minister and the Deputy Minister (members respectively of the DUP and Sinn Fein) had jointly written to the UK government to express their concerns about a "hard" border interfering with movement of people and goods, and becoming a catalyst for illegal activity. They also stressed the special problems of the agri-food industry, with its cross-border supply chains. These concerns are still valid.

No assurances have been given by the UK about its future agricultural policy for Northern Ireland.

The 1998 Good Friday Agreement between Ireland and the UK⁴ governs the relationships between the communities in Northern Ireland, and everyone agrees that it should not be altered or interfered with. When it was signed it was assumed by both countries that the UK would remain in the EU. Brexit does not seem to be a breach of the Agreement, but unfortunately it clearly alters the economic basis for it. As the Queen's University Belfast paper "Northern Ireland and Brexit: the European Economic Area Option"⁵ says "joint membership of the EU provides an important mechanism by which concerns over nationality and sovereignty are reduced". Because the Agreement requires the European Convention on Human Rights to be part of Northern Ireland law, it would be a breach of the Agreement if the UK were to withdraw or modify its acceptance of the jurisdiction of the European Court of Human Rights, as was suggested by Mrs May when she was Home Secretary. Because of the long history of discrimination in Northern Ireland, the principle of equality is regarded as the most basic fundamental legal and political right. The European Convention is considered crucial in this respect, in particular because it is broader in scope than the EU Charter of Fundamental Rights. This is in spite of the fact that the Convention deals with the rights of individuals, and only indirectly with the collective rights of communities, which are provided for by the Good Friday Agreement.

⁴ McCrudden, *The Good Friday Agreement, Brexit and Rights* (2017, British Academy and Royal Irish Academy).

⁵ See Footnote 8, below.

If the Northern Ireland Executive were not re-established, there would be direct rule from London. One result would be to end the prospect of negotiating any special treatment for Northern Ireland, except whatever might be done about an "invisible" border. In my opinion, the UK government has been unable to explain the trade arrangements that it wants for the UK, and will not spend time trying to devise special solutions for Northern Ireland, however necessary they may be.

The UK government has not said whether powers withdrawn from the EU as a result of Brexit should be devolved or retained by parliament in London. The UK is anxious to maintain its own single market within the UK, so will not devolve powers likely to be used to interfere with that single market. Presumably some of the powers withdrawn from the EU will be devolved to Scotland, Wales and Northern Ireland. The effect would be to increase the powers of the Northern Ireland Assembly, and so to increase the importance of safeguards limiting those powers.

2.1.2 Political considerations – The United Kingdom

Before the Brexit referendum, relations between the UK and Ireland were better than they had ever been, for hundreds of years. This was graphically symbolised by the visit of Queen Elizabeth II to Ireland, and by the singing, by a largely Irish crowd, of the UK national anthem at an international rugby match in the stadium of the Gaelic Athletic Association. Ireland felt, for the first time, that it was on friendly and equal terms with the UK.

The immediate effect of Brexit on the relationship of the Republic of Ireland with the UK has been largely due to the position of Northern Ireland, and specifically the need to avoid any "visible" border between the two parts of Ireland, which would be likely to provoke sabotage by extremist nationalists in Northern Ireland. To my mind, everyone agrees that this must be avoided, but the UK has wholly failed to suggest how it might be avoided, and it seems that the UK does not know.

Brexit is universally regretted in Ireland, and is regarded as a huge mistake and a serious self-inflicted injury by the UK. The Irish government has repeatedly said that the UK should remain in the UK customs union and the EU single market, but the UK has so far refused, although without suggesting any meaningful alternative. In my opinion, this has led to some degree of exasperation with the UK because, although the implications of Brexit for both parts of Ireland are greater than for any other region in Europe, the UK is not giving Irish concerns much attention. I think that Irish people understand, with regret, that the decision to leave was not the result of a carefully considered assessment by UK politicians, but an instinctive ideological choice based on prejudice, ignorance and nostalgia. That being so, it may be impossible to devise economic solutions to what are basically political problems, but the effort must be made.

Ireland and the UK need to cooperate closely on many matters, and it has been helpful and convenient to do so within the context of the EU. Ireland is a much more self-confident country than it was, and it will have to work out new ways of cooperating with the UK. However, the UK seems likely to become more isolationist, and is likely to adopt policies after Brexit that will be harmful to both parts of Ireland. These policies are mentioned elsewhere in this paper.

One thing is clear. After Brexit, Dublin will continue to be the capital city of an EU Member State, and London will not be. UK governments will take time to become accustomed to having no significant influence over EU affairs.

It is at least possible that there will be a Labour government again in the UK in the next few years. The Labour party is not committed to Europe, but it will be well aware that its supporters are mostly young, and the young people voted Remain. A Labour government would therefore be likely to renegotiate any EU-UK agreement made by Mrs May's government, to obtain a close relationship, perhaps even to rejoin the EU single market. Labour would have little interest in promoting the interests of the UK financial industry. It might want to retain the only economic benefit obtainable from Brexit, a cheap food policy. Labour would be less concerned that this would harm UK farmers, who are not important Labour supporters. By the time the Labour government is established, UK farmers should have understood how valuable the EU agricultural policy was to them. Labour would have no reason to be grateful to the DUP for supporting Mrs May's government. So Labour would be unlikely to arrange generous terms for UK farmers or for Northern Ireland. No doubt the policies of a Labour government would be greatly influenced by the extent and the speed of the harm done by Brexit to the UK economy. It would also be well aware that Scotland voted Remain by an even larger percentage (62 per cent) than Northern Ireland (56 per cent), and that Labour would need to be pro-European to avoid losing support to Scots Nationalists. A Labour government would want to control immigration, but would be less likely to share Leavers' irrational prejudices against the European Courts. Indeed, in general Labour would probably be more practical and realistic than the UK Conservative party.

2.1.3 Political considerations – the European Union

Brexit will have no direct or formal consequences for Ireland's relations with the EU. Ireland will continue to be an EU Member State. But Ireland will be more affected, economically, than any other Member State. No doubt the EU understands this, and will do what it can to help, in particular with the problem of Northern Ireland.

In the EU, the policies of the Republic of Ireland have frequently been similar to UK policies on various issues (though not on agriculture), and to that extent Brexit will mean that Ireland has one less ally in the EU. In particular, the UK has been an influence in favour of free trade and against excessive regulation, and this will be missed. The UK has always been strongly opposed to any EU measures limiting the freedom of Member States to alter their tax laws. Ireland has occasionally benefited from analysis of EU proposals by the UK authorities. In future, Ireland will have to carry out for itself the kinds of analyses of EU proposals that were done by the UK, and from which Ireland benefited even if it did not always agree.

Ireland has always understood the importance, for the smaller Member States, of the European Commission, and of the "Community Method"⁶. It seems likely that the smaller Member States will be agreed on this, and that France and Germany will be expected to maintain it. Ireland has consistently argued that each Member State should always nominate one member of the Commission. So Ireland is likely to argue that the Community method should apply in further measures of integration in the future.

The UK, if it had remained in the EU, would always have been a constraint on further economic, financial and fiscal integration, even within the Eurozone. This constraint is now being removed. However, there is no particular reason to think the Ireland would object to further integration, although Ireland would prefer to avoid Treaty changes that might necessitate a referendum to amend the Irish Constitution.

⁽⁶⁾ Temple Lang & Gallagher, *The Role of the Commission and Qualified Majority Voting*, (1995, Institute of European Affairs, Dublin), Occasional Paper No. 7, 31pp.

In a joint paper in 2017 the foreign ministers of France and Germany called for closer cooperation on defence, security and intelligence gathering, joint patrolling of external borders, a common migration and asylum policy, Eurozone reforms, and harmonisation of company tax. Closer EU cooperation on defence might cause discomfort in Ireland because of Ireland's traditional view of itself as a "neutral" country. Harmonisation of company tax would certainly cause concern, both because it might make Irish company tax less favourable for foreign investors and because it might result in a reduction in Irish tax revenues. However, the leaders of France and Germany have not backed such far-reaching suggestions.

Ireland, like all the other EU Member States, will need to reconsider its alliances within the Council and Parliament, both on far-reaching proposals of these kinds and on more immediate and technical issues. Ireland has interests in common with the Netherlands, Belgium, and the Nordic and Baltic countries in maintaining and promoting liberal approaches to trade and free movement. But these interests need to be developed.

2.2 Economic considerations

The adverse effects of Brexit will be greater for Ireland than for any other EU Member State. There will be substantial job losses. Brexit will upset the existing economic links between the Republic of Ireland and the UK, and in the longer term will lead to less trade between them. The existing cross-border trade between the two parts of Ireland in agricultural products will be disrupted and perhaps halted, in particular, if, as I have been asked to assume in this paper, the UK does not remain in either the EU customs union or the single market. The UK economy will be adversely affected by Brexit, and this (and the fall in the value of Sterling) will cause a fall in Irish exports to the UK. In addition, Brexit will have serious consequences for the economy of Northern Ireland, and this will harm the economy of the rest of Ireland.

The longer term economic effects of Brexit for both parts of Ireland will depend primarily on four influences: the future EU-UK trade relationships, any special arrangements for Northern Ireland, the future UK agricultural policy, and UK relationships with third countries. In particular, if the UK adopts a policy of cheap agricultural imports from third countries, the economic consequences for both parts of Ireland would be very serious. The economic effects will also depend on three other factors: how the UK economy develops, whether the UK maintains the present level of fiscal transfers to Northern Ireland, and how the Euro-sterling rate of exchange alters. None of these seven influences can be foreseen with confidence or precision at present. These will not all be direct results of Brexit, but the results of future UK decisions and policies, none of which seem likely to be favourable to either part of Ireland. (No future EU-UK relationship would be as favourable to both parts of Ireland as the UK's full membership of the EU). It will be noticed that of these seven elements, only the first two are capable of being influenced directly by the EU. The future economic well-being of Northern Ireland depends on UK government policies, even more than on EU-UK trade arrangements.

2.3 Legal issues

2.3.1 Judicial cooperation, justice and home affairs

Existing EU rules on police and judicial cooperation, justice and home affairs will cease to apply in the UK after Brexit, and will need to be replaced by EU-UK agreements or by bilateral Ireland-UK agreements, or both. These arrangements are particularly important in Ireland because of organised crime in Northern Ireland, and because of the free movement

of individuals within the Common Travel Area. The UK will presumably want to continue to use the European Arrest Warrant system.

After the UK leaves the EU, Ireland will be the only common law Member State, and presumably common law will influence EU law less than it has during the 44 years since Ireland and the UK joined. The common law has made valuable contributions to EU law, and no doubt Irish lawyers will continue to make useful contributions as EU law develops. The Irish courts have been very willing to refer questions of EU law to the European Court of Justice, and these references have led to some of the most important judgements of the Court in recent years. Irish lawyers have enthusiastically accepted EU law, unlike a significant proportion of UK lawyers.

As a direct result of Brexit, one important principle of EU law will no longer apply in Northern Ireland, or in the rest of the UK. This is the principle that on certain conditions compensation may be claimed by individuals for losses caused by national measures that are contrary to EU law (the "Francovich" principle). This means that individuals suffering losses as a result of any breach by the UK of its obligations under future EU-UK agreements will only be able to claim whatever compensation, if any, they would be entitled to under UK law. This principle is in addition to the duty of courts under EU law to disapply any rule of national law that is contrary to EU law, which of course will no longer apply either.

2.3.2 EU Charter of Fundamental Rights

There are also broader legal issues. Due to Brexit, the EU Charter of Fundamental Rights will no longer apply in Northern Ireland. This is an important lessening of the protection given, within the EU law sphere, to the rights given by both the Charter and the European Convention on Fundamental Rights. This is because the Charter is directly applicable in national courts, and questions of the interpretation of the Charter can be referred to the European Court of Justice by national courts. There is no equally effective procedure for enforcing the Convention. The Charter, of course, was not in existence when the Good Friday Agreement was negotiated, but it nevertheless became an important element in the legal system of Northern Ireland, which is now being taken away.

The EU paper "Guiding Principles for the Dialogue on Ireland/Northern Ireland" said that there should be no "diminution of rights" in Northern Ireland as a result of Brexit, including the rights that are given by EU law to be protected against forms of discrimination. As just mentioned, one of rights given by EU law is the right to have disapplied any national measure that is inconsistent with EU law, and the right to obtain compensation for loss caused by any such national measures. After Brexit, to avoid "diminution", corresponding rights would need to be given by UK legislation referring to the rights given by the future EU-UK agreement. This legislation would need to be immunised from modification, as far as UK constitutional principles allow. The relevant principle is that the UK Parliament cannot bind its successors, so that the legislation could provide only that the rights given by the EU-UK agreement would always prevail over later UK legislation unless the latter expressly provided the contrary. It is not clear that the UK's dualist constitution makes any better safeguards possible, or allows a higher status to be given to any international agreement. But if the right to compensation were not given, or if courts were not given a duty to disapply measures contrary to the EU-UK agreement, there would clearly be a diminution of rights.

2.3.3 Good Friday Agreement

The EU has done much to help with the problems of Northern Ireland, and has strongly supported the Good Friday Agreement. Peace and prosperity in Northern Ireland is clearly an objective of the EU, as well as being an objective of the Irish and UK governments. It is

this that entitles the EU to insist that there should be no diminution of the rights given by the Good Friday Agreement. Because maintaining that Agreement is an EU objective, the UK now has a legal duty under the principle of sincere co-operation stated in Article 4(3)⁷ TEU to maintain and promote it. Article 4(3) will cease to apply to the UK after it leaves the EU, and this in itself involves a diminution of the rights given or guaranteed by the Agreement. No doubt the future EU-UK agreement should include provisions imposing mutual obligations of sincere co-operation, corresponding for Article 4(3). (The EEA Agreement, Article 3, is similar). But even if such a provision is included in the future agreement, it would presumably be limited to cooperation for the objectives of that agreement, and would not apply to the broader objectives of the EU. So the future EU-UK agreement should include a specific duty of sincere co-operation to maintain and promote the objectives of the Good Friday Agreement. Even if this is included, there will be some diminution of the rights now given by EU law, because the future EU-UK agreement will be enforced in the UK primarily by the UK courts, which have been reluctant to apply the principle of sincere co-operation. Even if the EU-UK agreement is enforced by another tribunal, as seems essential, there would be a diminution of rights if the tribunal's judgements were not directly effective in UK law.

As long as the UK is in the EU, it is bound by the duty of sincere co-operation stated in Article 4(3) TEU. As just explained, this includes a duty to maintain and respect fully the Good Friday Agreement. That Agreement imposes on the governments of the UK and the Republic of Ireland the duty of strict impartiality and neutrality in all their dealings with the communities in Northern Ireland. But unfortunately, the UK government in 2017 made an agreement with the Democratic Unionist Party, to obtain the support of the DUP in Westminster. This agreement, because it was inconsistent with the UK's duty of impartiality, was a breach of the UK's obligations under Article 4(3) TEU, as well as being a breach of the Good Friday Agreement.

These formal distinctions may be important. A breach of the Good Friday Agreement would be subject to the jurisdiction of the Irish or UK courts, and if necessary to the International Court of Justice, if both Ireland and the UK consented to its jurisdiction. A breach of Article 4(3) would be subject to the jurisdiction of the European Court of Justice, as long as the UK is within the EU. A breach of any future EU-UK agreement would be subject to the jurisdiction of whatever tribunal was given the responsibility of interpreting that agreement, and presumably also to the jurisdiction of national courts, if the agreement was directly applicable or was given direct effects.

The legal rights resulting from the Good Friday Agreement are comprehensively and convincingly discussed in a paper by Christopher McCrudden, *The Good Friday Agreement, Brexit and Rights*, referred to above. That paper deals, among other things, with some issues directly related to EU law which are not analysed here. Professor McCrudden correctly points out that Brexit will end e.g. all the labour and employment rights derived from EU law. These rights are not discussed in the present paper because there is no reason to believe that the UK will radically alter many of these rights when it is free to do. However, there is already pressure in the UK to modify some of them in the UK as a whole, and McCrudden discusses a number of rights-related issues that may arise in the future in relation to Northern Ireland.

These issues may become important because it is not clear that any surveillance authority set up under a future EU-UK trade agreement would be given the task of monitoring the application of the Good Friday Agreement.

⁷ Temple Lang, Article 10 EC – the most important “general principle” in Community Law, in *Brexit's Negotiations and Conduct* (eds.) General Principles of EC law in a process of Development (2008, Kluwer): Temple Lang, The Principle of Loyal co-operation and the Role of the National Judge in Community, Union and EEA Law, ERA Forum (2006-4), Journal of the Academy of European law, Trier. Temple Lang, The Development by the Court of justice of the Duties of Co-operation of National Authorities and Community Institutions under Article 10 EC, 31 Fordham International Law Journal (2008) 1483-1532

2.3.4 The Common Travel Area

The Common Travel Area is a convenient phrase to describe a number of arrangements and practices existing between the authorities in Ireland and the UK. It is not the result of any single agreement or measure, and it has never been codified or officially summarised. It is sufficient for the purposes of this paper to say that in practice it means that individuals travel between the two parts of Ireland, and between Ireland and the UK, without any formalities or controls. Both countries' citizens have unrestricted access to employment, social welfare and healthcare in the other country. In particular, individuals move freely overland between the two parts of Ireland by road, on foot, or by rail. Air travellers moving from the Republic of Ireland into the UK in practice carry passports, but are not always asked to produce them.

It should be remembered that:

- Ireland is not in the Schengen area. This was because of the need to maintain unrestricted freedom of movement in the Common Travel Area. If Ireland stays out of Schengen, there will continue to be checks on entry into Ireland from the rest of the EU.
- Many residents of Northern Ireland are entitled to obtain Irish (and therefore EU) passports.
- The UK has unfortunately ruled out the possibility of controlling movement of persons by sea and air from the island of Ireland into Britain, since that would require residents of Northern Ireland to produce identification of some kind while moving within the UK. This would be a more satisfactory solution.
- UK and Irish visa requirements for nationals of most third countries are not identical, although Ireland and the UK have common travel visas for Indian and Chinese travellers.

The UK has said that it wishes to maintain the Common Travel Area. It has not said how far or how it proposes to control or restrict immigration from any sources. It has not tried strictly or comprehensively to limit immigration from e.g. India, Pakistan, Bangladesh or the Caribbean, which it has always been free to limit.

The UK accepts that it would be impossible to control movement overland between the two parts of Ireland. There are too many roads and too much local movement. It proved impossible to control movement in the 1970s when it was desirable to do so for security reasons. The UK is therefore compelled for unavoidable practical reasons to allow individuals to enter Northern Ireland freely from the rest of Ireland. That being so, little would be achieved by controlling individuals arriving in the UK from the Republic of Ireland by sea and air, since the backdoor would be open between the two parts of Ireland.

It follows that the UK will have to limit or regulate immigration, insofar as it may wish to do so, by a visa or work permit system, or by internal measures on employment, welfare and security. The UK could e.g. reduce the incentives for immigration by reducing or eliminating non-contributory social welfare benefits. The UK authorities could exercise or increase their existing powers to deport foreign nationals considered undesirable. Administrative residence checks could be imposed, and access to the National Health Service restricted. Stricter rules could be adopted for immigration of families. It would also be theoretically possible to oblige employers and landlords in the UK to provide information about their employees and tenants, making employers and landlords into unpaid immigration officials. Any such regime would be cumbersome, ineffective and unpleasantly reminiscent of totalitarian regimes.

However, the UK has not provided any clear description of what internal measures might be adopted, even if e.g. a comprehensive system of visas for visitors, or of work permits, were chosen. It is not obvious that the UK would think it worthwhile to limit immigration from Europe if no strict and comprehensive measures were being taken to limit immigration from Asia, where there are many more potential immigrants.

2.4 The following questions arise:

- What internal measures would the UK adopt? This cannot be answered at present, the UK does not know.
- If the UK proposed to limit immigration from the EU but not from the Republic of Ireland, would this be acceptable to the EU? Probably, because of the historic links.
- Would Ireland be allowed to give UK citizens more favourable treatment than EU citizens? This would not be necessarily prohibited by EU law.
- Should Ireland enter the Schengen area? Yes, provided that the UK regarded this as compatible with the Common Travel Area, that is, provided that the UK was willing to control immigration by internal measures, which would apply wherever the immigrant arrives. Otherwise the Irish immigration officials would become the agents of the UK immigration authorities.
- Would it be necessary to coordinate Irish and UK immigration policies? Some alignment, and close co-operation, would clearly be desirable.

3. THE CONSEQUENCES OF AVOIDING A "VISIBLE" BORDER BETWEEN THE TWO PARTS OF IRELAND

KEY FINDINGS

- Avoiding a "visible" border would make it impossible to control imports into the Republic of Ireland of agricultural products unless Northern Ireland (or the UK as a whole) was continuing to comply with EU animal health and food safety rules. A visible border would also be unavoidable if there were no trade agreement between the EU and the UK; Imports could not be effectively controlled by even expensive and sophisticated electronic methods.

Since not even the basic elements of a future EU-UK relationship are yet clear, a wide variety of possible questions need to be considered. This paper analyses only the principal issues. A "visible" border would be one with a physical infrastructure of e.g. customs posts, electronic customs devices, border patrols and checks. The question that arises is whether any kind of border can be devised that would be so inconspicuous that extremists would see no reason to interfere with it, but would be effective enough to prevent smuggling.

Some preliminary comments are necessary:

- At present there is a great deal of trade in agricultural products between the two parts of Ireland. This exchange will be seriously disrupted, and perhaps halted, as a direct result of Brexit.
- Brexit will mean that the EU agricultural policy and structural funds will no longer apply in Northern Ireland. It seems unlikely that the UK will provide any payments comparable to the EU funds. (The UK already gives an estimated £10 billion subsidy to Northern Ireland annually). So Northern Ireland farmers will suffer a very serious loss of income.
- A customs border, whether visible or "invisible", is relevant to goods but in general not to services, which therefore give rise to fewer of the questions discussed here.
- It would not be necessary for the solutions adopted by the EU for dealing with imported goods to correspond precisely to those adopted by the UK for goods imported from the Republic of Ireland, which are not discussed in detail. The UK would have to deal with goods entering the UK over an "invisible" border, which would raise questions corresponding to those discussed here. However, if regulatory standards were lower in the UK than in the EU, or if the UK tariffs were lower than EU tariffs, the UK might be more willing than the EU to accept less-than-satisfactory solutions.

The basic question analysed here is whether and if so how it might be possible to avoid a "visible" border between the two parts of Ireland, while maintaining the legal order of the EU, the unity of the single market, and the security of the customs union.

It is useful to state the difficulty frankly. If there were no effective border between the two parts of Ireland, goods could enter the Republic of Ireland from Northern Ireland without paying any tariffs that would otherwise be applicable, and even more important without complying with EU quality standards and technical requirements or with EU certification. In other words, there would be a gap in the EU customs and importation regime. This would

obviously be unacceptable to the EU. It is therefore necessary to consider whether it is possible to devise satisfactory substitute mechanisms or procedures to replace all the controls that would normally be applied at the point of entry to goods being imported into the EU customs union. If they are not imposed at the EU frontier, by definition these mechanisms or procedures would need to operate inside the EU, in the Republic of Ireland.

The scale or extent of these kinds of problems would depend on:

- How far the UK law comes to differ from the law in the EU on e.g. quality standards. This is not foreseeable.
- Whether the future EU-UK trade arrangements involve the application of EU tariffs to goods imported from the UK into the EU. This will not be known until the final EU-UK trade arrangements are made.
- Whether a situation arose in connection with e.g. infectious diseases of farm animals, in which it was thought necessary to prohibit all physical importation of farm products into the EU from the UK. If this situation arose, a "visible" border would be essential. However, if this situation arose, it would probably be necessary or desirable to treat the island of Ireland as a single unit.
- What arrangements, if any, might be adopted under which there would be quantitative limits on goods entering the EU from the UK. This might arise as a result of the allocation of international quotas for agricultural products between the EU and the UK.

3.1 The situations that arise:

For clarity it may be useful to recall the principal sets of circumstances that arise, and will need to be dealt with:

- goods originating in the Republic of Ireland and moving into the UK, or moving through the UK to destinations in the EU,
- goods originating in the UK and moving into the Republic of Ireland, whether to remain there or to travel onward elsewhere in the EU,
- goods originating in third countries (i.e. not in the UK or the EU) and moving into Ireland.

All the substantive economic requirements for movement of goods between the UK and any part of the EU should be the same whether the goods are moving to or from Ireland or directly between the EU and continental Europe. But the formalities and procedures might be different, to avoid or minimise the consequences of an "invisible" border between the two parts of Ireland.

3.2 A Value-added Tax Border

The border between the two parts of Ireland would be a value added tax border, because sales across it would be export sales. Even assuming that the UK kept the existing VAT system, new arrangements would be needed because no part of VAT collected in the UK would be payable to the EU. This would necessitate, at least, additional documents for both

exporters and importers. This would be an inconvenience, but probably without much economic significance, except for small firms.

3.3 Verification at the point of first sale in the importing region

One possible solution to at least some of these problems would be to use the first sale within the EU of goods imported from Northern Ireland as the occasion for verifying that the goods comply with EU requirements. In essence this would mean that when VAT was paid on the first sale in the importing region, the VAT authority would also be obliged to verify the origin of the goods, and their compliance with EU quality standards and certification requirements and other possible technical barriers to trade.

This possibility, whatever the details might be, calls for a number of comments which it is convenient to make as practical as possible:

- It would not apply if there were no sale after importation, e.g. if the goods were used by the importer without being resold, or if the sale was not reported to the VAT authority.
- It would not enable the goods to be inspected before being allowed to proceed. It would not enable the VAT authorities to verify the accuracy of the information given to them, because they would receive whatever documents were required only after the sale had taken place. Physical inspection is often necessary to verify the origin of goods. So use of the "first sale" mechanism would need to be supplemented by routine inspections on the premises of first buyers, as a substitute for inspections at the border.
- It would require all VAT officials to be sufficiently aware of all EU customs and importation requirements under the Union Customs Code to be able to apply them to all kinds of goods. In effect, VAT officials would be obliged to act as all-purpose customs officials.
- The "first sale" mechanism would not deal with cases in which e.g. goods imported from Northern Ireland into the Republic of Ireland were exported to e.g. France without being sold in the Republic. Since there would normally be no verification at the point of importation into France, the VAT officials in France would be required to verify the correctness of the information provided, since they could not assume that the goods were lawfully in free circulation in the Republic of Ireland.
- Reliance on the first sale in the importing region might need to be supplemented by random checks within the region. There might be random checks at border crossings, or restrictions on goods that might be taken across borders. But these would not be "invisible". Companies with large volumes of goods could get "authorised economic operator" status, but that would not deal with companies that were less willing to comply with the rules. Widespread and routine checks within the importing region without evidence of smuggling could hardly be regarded as compatible with the single market.
- When goods imported into the Republic of Ireland from Northern Ireland are to be exported to e.g. France, the exporter might be required either to produce confirmation that the goods had been cleared by Irish VAT officials or to obtain confirmation before the goods were exported. This however would require clearance at the point of export at an intra-EU frontier, which would be incompatible with the single market. The same objection would apply to a practice of systematic checking

at or near the point of export, which would be more convenient and more effective than random checks throughout the region.

- Electronic surveillance equipment on main roads used by goods moving between the two parts of Ireland would not solve these problems. This is discussed below.
- Whatever the details might be, even an "invisible" border inevitably results in administrative paperwork, which can seriously inconvenience small and medium sized enterprises such as many of those that trade between the two parts of Ireland
- There is organised crime today on both sides of the border between the two parts of Ireland. It would be undesirable, for reasons that have nothing to do with politics, to establish any kind of border that provided opportunities for smuggling and tax evasion. These opportunities might be increased further by changes in the rate of exchange of sterling. Profits from smuggling would be likely to be used for illegal paramilitary purposes, or for organised crime.
- Any arrangement for trade between the two parts of Ireland, or between Ireland and the UK, must deal with products originating in third countries. If goods originating in e.g. China arrive in Northern Ireland on the way to the Republic (assuming that the UK is not in the EU customs union), there must be a procedure for ensuring that any EU tariffs are paid, and any other EU requirements complied with. If this procedure does not operate at a "visible" border between the two parts of Ireland, a watertight procedure would have to be worked out to achieve the same result in some other way after the goods have entered the EU. It seems unlikely that the solutions outlined here would be regarded as watertight enough.
- If the EU were to prohibit importation of certain products, whether on environmental grounds or when coming from countries that are subject to sanctions, the UK might not adopt corresponding restrictions. If it did not, the EU would need to adopt measures applying within the Republic of Ireland to identify any goods illegally imported through Northern Ireland. It is not easy to see what measures would be sufficiently effective.

3.4 Special arrangements

It has been suggested that special arrangements might be made for small enterprises in Ireland to be exempted from at least some customs formalities. It seems that there are several possibilities:

- Reciprocal exemption from tariffs for small companies in both parts of Ireland
- Arrangements allowing goods exported from one part of Ireland into the other to be imported and re-exported without having to pay two sets of tariffs. This would help to maintain existing cross-border supply chains.

Any such arrangements would involve treating enterprises in Northern Ireland differently from those elsewhere in the UK. They would do nothing to resolve differences in quality standards, technical specifications, or regulatory approvals.

3.5 Imports of agricultural products into the EU from the UK – two serious problems

EU agricultural policy requires animal health inspection of all imports into the EU. However, the need for physical inspection at the border between the two parts of Ireland could be avoided if Northern Ireland (or the UK as a whole) were shown, on a continuing basis, to comply with EU animal health and food safety rules. However, the UK is unlikely either to agree to an animal health or phytosanitary border between Britain and the island of Ireland, or to agree that the UK will copy and apply all future EU rules, even though the UK applies the same rules at present. The UK might wish in future to lower its standards as part of a trade agreement with a third country, such as the USA. The UK may need to decide whether to give priority to its trade with the EU or with the USA.

The UK has given no clear indication of what its future agricultural policy will be. However, it seems very likely that the UK will adopt a policy of importing cheap food from low-cost third countries such as Australia, New Zealand, Brazil and Argentina. If this occurred, it would be necessary to restrict imports of agricultural products from Northern Ireland into the Republic, since unrestricted cheap imports would undermine the EU common agricultural policy. EU tariffs could not be imposed without customs posts and a physical frontier.

In other words, a UK cheap food policy, or lowered phytosanitary standards, would be clearly incompatible with an "invisible" border between the two parts of Ireland.

3.6 If there is no EU-UK Trade Agreement

If there were no EU-UK trade agreement, the border between the two parts of Ireland would be the frontier of the EU, and customs posts would be necessary. The UK might choose to lower its tariffs, but would be likely to do so only as a result of bilateral trade agreements that would result in cheap products entering the UK from third countries. This would also make exports into the UK unprofitable, and would necessitate a visible border to prevent EU agricultural price levels being undermined.

In addition, if there were no trade agreement between the EU and the UK, a visible border would be needed to prevent imports from the UK of what might be heavily subsidised goods or services. Free trade is possible only if there is a level playing field.

3.7 Goods moving through the UK

A different kind of problem would arise when goods are carried by road from the Republic of Ireland through the UK for export to continental Europe. It will be necessary for lorry drivers to carry proof of the Irish (i.e. EU) origin of the goods. This could probably be provided electronically, so that the lorry could identify itself on arrival in France. A large volume of goods move through the UK.

3.8 A sophisticated solution?

It has been suggested that it might be possible to devise a sophisticated high technology solution that would make it possible to do without a "visible" border. In essence most of these possible solutions involve electronic recognition of individual vehicles crossing the border, either by visual number plate recognition or laser marking of the vehicles, at each cross-border road. It is proposed that vehicle operators would report electronically to give whatever information is required.

For companies with a sufficient volume of cross-border traffic, such a system is clearly possible if they wish to operate it. However, there are several difficulties:

- Any such system, whatever the details, would involve electronic devices to identify and record every vehicle crossing the border. These devices could be easily put out of action, sabotaged, or destroyed, just as traditional customs posts could be.
- Any such system would have to deal with vehicles that were not equipped to cooperate with the system. They would need to be identified and traced. Recognition only by number plates would be insufficient: number plates can be easily changed or falsified. In theory, all vehicles could be marked automatically by laser, and it is suggested that non-reporting vehicles could be traced by satellite telemetry, or by random checking on the ground to identify laser-marked vehicles. But any such system would involve a significant lapse of time between the time of crossing the border and the time when the vehicle was inspected, if it ever was. During that time the goods could be concealed. Even if satellite telemetry were regarded as feasible, it would merely locate the vehicle, and it would still be necessary to reach it on the ground for inspection. In short, any such system would necessitate a considerable degree of physical surveillance within the importing region, and could not be relied on to be effective to control smuggling.
- The third objection to any such system would be the cost, both of the electronic equipment and of the manpower needed for surveillance within the importing region. It would be hard to justify any such system when traditional customs posts on all roads crossing the border, however unacceptable or unattractive politically, would be cheaper. It would be impossible to justify any such system if, as well as being expensive, it could not be shown to be effective.

3.9 The cost of a sophisticated solution

If any solution were adopted that involved considerable expense, the question would arise: who should pay for it? The EU would be unlikely to pay for an expensive system of questionable effectiveness, designed merely to verify that EU requirements were duly complied with. It would not necessarily be reasonable to say that the authorities in each region should pay for the system in their own region, for several reasons. Since the UK, by choosing Brexit, has caused the problem, the UK should pay a larger proportion of the total cost. Since the UK has no legal duty to any other State to establish a watertight system, the UK might be willing to accept a less effective solution (and therefore a cheaper solution) than the EU would need to insist on. Undeniably the need for an "invisible" border arises from the internal politics of Northern Ireland, for which neither Ireland nor the EU could be held responsible. On the other hand, the UK could argue that it is already providing a very large subsidy for the Northern Ireland economy, and that the cost of an "invisible" frontier should be regarded as part of the overall cost of the region. The UK might also argue that because EU tariffs are likely to be higher and EU requirements stricter than corresponding UK measures, the EU should pay more.

However, if it is finally decided that an expensive solution is unnecessary or unwise, the question of cost should be more easily resolved.

3.10 The “visible” border is not the most important economic problem

As already mentioned, for the Republic of Ireland trade with Britain is more important than trade with Northern Ireland, and trade with Britain is not dependent on the nature of the border between the two parts of Ireland. As explained above (under “Economic Considerations”), the economic consequences of Brexit for both parts of Ireland depend on at least seven factors which have nothing to do with the nature of the border. These consequences cannot be avoided by technical solutions or by any kind of border.

4. WHAT ARE THE IMPLICATIONS IF AN "INVISIBLE" BORDER IS NOT FEASIBLE?

KEY FINDINGS

- Since it is agreed that a "visible " or "hard" border must not be set up between the two parts of Ireland, it is essential to consider the possibility, suggested by a group of professors from Queen's University Belfast, that Northern Ireland should be enabled to join the European Economic Area, or a free trade area very similar to the EEA, even if the UK does not do so.

If, as is suggested here, an "invisible" border is not satisfactory, two entirely different conclusions might be drawn. The first possible conclusion is that a traditional border with customs posts and physical checks should be re-established. That would be directly contrary to what has been said consistently by the EU, the UK, and the government of the Republic of Ireland. If such a border were established, a long-lasting source of potential violence and tension would be established in a region not lacking in such sources. Politically this conclusion should be excluded.

The second conclusion is that the possibility of Northern Ireland joining the European Economic Area⁸ should be seriously considered, apparently for the first time, by the UK authorities. Until now this possibility has been rejected, apparently without much consideration, by the UK government and by some of the politicians in Northern Ireland. However, if the only alternative were a "visible" or "hard" border, it should be obvious that the EEA option needs to be taken seriously.

The economic arguments in favour of the EEA (or some new free trade area, which would be very similar to the EEA) as the solution for the problem of Northern Ireland in Brexit are overwhelming. Joining the EEA would maintain the economic status quo in almost every respect, and allow Northern Ireland to continue to trade freely with both the EU (including the rest of Ireland) and with the rest of the UK. But Brexit has never been based on economic considerations. This is true in England; it is also true in Northern Ireland.

There is essentially one objection to Northern Ireland joining the EEA. It is said that Northern Ireland should not be treated differently from the rest of the UK, even for strong reasons and even if the EEA involved no change in the constitutional position in Northern Ireland. This instinctive view may not be susceptible to argument or analysis in either London or Belfast, but it is necessary to consider it. If Northern Ireland were to join the EEA, that could only be as a result of an agreement with the UK and as a result of measures adopted by the UK parliament. Parliament would clearly not intend to alter the constitutional position, and would regard the EEA as simply a trade arrangement, although one that would be very beneficial for Northern Ireland. Since the EEA would allow Northern Ireland to trade freely with both the EU and the rest of the UK, there would be no significant change in the economic position of Northern Ireland as it is today. Northern Ireland could be withdrawn from the EEA at any time. It is true that joining the EEA might

⁸ Doherty, Temple Lang, McCrudden, McGowan, Phinnemore and Schiek, Discussion Paper, Northern Ireland and the European Economic Area Option, (2017, European Policy Centre). This is an important paper that makes detailed proposals for dealing with the situation of Northern Ireland.

The UK has rejected the idea of joining the EEA on the grounds that it would involve capping EU measures with no voice in drafting them. However, something like this would be essential if the UK were to remain in the EU single market, and a State that has chosen to leave the EU cannot expect to be able to influence EU measures subsequently. The EEA is comprehensively dissected and analysed in Baudenbacher (ed.), *The Handbook of EEA Law* (2016) Springer).

make it appropriate for additional powers to be devolved to Northern Ireland, but that would have no more constitutional significance than any other adjustment of powers devolved to Northern Ireland, Scotland or Wales. Conferring an economic advantage cannot weaken a constitutional position.

In any case, the special position of Northern Ireland has repeatedly been recognised by the EU, the UK and the Republic of Ireland. It is recognised in the international agreements between the UK and the Republic of Ireland, in particular of course the Good Friday Agreement. The powers devolved to Northern Ireland are not the same as those devolved to Scotland or Wales, and nobody has ever suggested that they should be.

Joining the EEA would strengthen the economy of Northern Ireland and thereby strengthen its constitutional position in the UK. It would be less dependent on subsidies from London, and more self-reliant. It would be less of a burden to the UK exchequer. It would benefit, in the same way as the rest of the UK, from the UK's future trade arrangements with third countries, while continuing to benefit from free trade with the EU and the rest of Ireland. Improved prospects would confirm and strengthen Northern Ireland's position in the UK, not weaken it. It would avoid or minimise the harm to Northern Ireland that would otherwise result from Brexit, which otherwise will be blamed on the UK.

However, joining the EEA would not solve the problem of agriculture, although it would not make it more difficult or more serious.

4.1 The Need for Rules of Origin

Only one complication should be recognised. If Northern Ireland were in the EEA, it would be necessary to ensure that goods originating in third countries and entering Northern Ireland from the EU were not allowed to go on to Britain without paying any tariffs that might be due. This would necessitate some controls at airports and harbours in Britain. Goods from third countries entering the UK, when they were exported into the Republic of Ireland, would be liable to EU tariffs and other restrictions. These could perhaps be adequately enforced, without a "visible" border, by spot checks, inspections of buyers and by arrangements by which the UK would report imports from third countries to the Irish and EU authorities.

5. CONCLUSION - AN "INVISIBLE" BORDER

In short, any EU regime designed to accompany an "invisible" or "frictionless" border between the two parts of Ireland would be complicated and unsatisfactory, and would be difficult to develop and operate. Wise lawyers distrust metaphors. If the UK at any time in the future adopts a cheap food policy or lowers its food safety standards, a physical border will be essential.

However, there is a solution that could be adopted if the UK would agree to it. Either the UK as a whole or Northern Ireland as a separate trading entity could enter a free trade area with the EU. This would not solve all these problems, but it would solve most of them. Such a free trade area would not need to be the European Economic Area, although it would no doubt be similar to it, as explained in the Annex. The possibility of Northern Ireland joining the EEA separately is discussed in another paper, circulated by professors in Queen's University Belfast.⁹

In other words, the solution lies not in trying to invent satisfactory substitutes for a visible frontier, but in ensuring that there is no economic frontier for trade purposes.

In a free trade area, the problem of agricultural products would remain to be resolved, and so would the need to apply rules of origin to goods from third countries. Those problems could be avoided if, contrary to the assumptions made in this paper, the UK remained in both the EU customs union and the single market, and continued to accept at least some elements of the EU common agricultural policy. But if it were to remain in the customs union, the UK would have to give up the ability to make bilateral trade agreements with third countries.

To my mind, the EU may not be able to persuade UK politicians to adopt a reasonable solution to the problem that the UK has created. But the EU should ensure that whatever arrangements may ultimately be made are workable and minimise the economic harm that unfortunately seems unavoidable.

(⁹) See footnote 8, above.

ANNEX

Can the UK Negotiate a New Kind of Free Trade Arrangement?

**By John Temple Lang,
Solicitor; Adjunct Professor, Trinity College, Dublin; and Senior
Visiting Research Fellow, Oxford.**

This paper considers the possible post-Brexit aims of the UK, and analyses the likelihood of achieving them. The main conclusion is that it would be difficult or impossible to negotiate a special new agreement, but that all the UK's legitimate objectives would be achieved if the UK would join the European Economic Area. The EEA offers the best, and perhaps the only, solution, both for the UK as a whole and for Scotland and both parts of Ireland.

Introduction

In the UK referendum on Brexit, a small majority in the whole UK voted to leave the EU, but those who advocated leaving had never made considered suggestions about what should be done. There was no serious discussion, and certainly no consensus, even among the Leavers. Such an immensely important national decision has never been undertaken with so little consideration.

A year later, there is still no clear agreed description of what Leavers want. This is in spite of the economic harm caused by continuing uncertainty, the increasing exasperation of the other EU Member States, the loss of respect which the UK is now suffering, and the general agreement of almost all well-informed people that Brexit, whatever its results may be exactly, is from an economic standpoint an extremely serious mistake.

In the light of this uncertainty, it seems useful to consider what objectives the UK might try to achieve, and to see if there is a realistic chance that they might be obtained. There has been very little public discussion on these lines, and still less analysis of the possible objectives, although both discussion and analysis are particularly necessary because the UK government, insofar as it has discernible ideas, is envisaging an EU-UK agreement that would not fit into any recognised category.

“A year later, there is still no clear agreed description of what Leavers want.”

The UK prime minister has said that she does not want to reveal her negotiating position. It is normal in negotiation not to disclose the minimum that one would ultimately accept. But it makes no sense, and is clearly contrary to universal practice in international negotiations, not to give general indications of what is intended, so as to find out how far, and subject to what conditions, it (or something like it) might ultimately be agreed. Useful dialogue is not possible on any other basis.

So far, the UK government has used only meaningless phrases. This lack of professionalism can be explained as the result of several factors. The politicians concerned are inexperienced in international negotiations. They do not know what they want. They have failed to listen to their experienced advisers. They suffer from ignorance and confusion

about the basic principles of the EU customs union and single market, and of the constraints resulting from World Trade Organisation rules.

The complications of negotiating free trade in services are less clearly understood than trade in goods, although services are now more important, in particular to the UK. (For example, for services the UK would need to accept constraints both on undue laxity in the regulation of UK companies and on excessive obstacles for EU companies providing services in the UK).

The politicians also suffer basic principles of the EU, dislike of the EU in the Scots are different) were participants in the EU, or share the wish to

“The English were always reluctant participants in the EU...”

from ignorance of the due to the long-standing UK. The English (the always reluctant and did not understand cooperate to ensure

peace, prosperity, and human rights in Europe. Lastly, the UK is facing the impossible task of trying to deal with non-economic prejudices by devising economic solutions.

There is a further complication for the EU-UK negotiations, when they get going. The EU negotiators will be well aware that UK companies, even if there is no EU-UK agreement, will be free to set up subsidiaries in the EU. When they do so, and providing that the subsidiaries comply with EU law, they will be able to get all the advantages of the single market. On the other hand, if there is no EU-UK agreement, the EU companies will be guaranteed almost no corresponding rights in the UK. (For example, subsidiaries in the EU will be protected from unfair State aids by EU State aid rules, but EU companies would be protected from UK State aids, if at all, only by WTO rules). It will be one of the aims of EU negotiators to counterbalance this lack of symmetry.

In spite of all these complications, and at the risk of speculating unduly, this paper considers the possible aims of the UK, and analyses the likelihood of achieving them. Readers may be surprised to find that some conclusions can be suggested. In brief, the main conclusion is that it would be difficult or impossible to negotiate a special new agreement, but that all the UK's legitimate objectives would be achieved if the UK would join the European Economic Area. The EEA offers the best, and perhaps the only, solution, both for the UK as a whole and for Scotland and both parts of Ireland, because it would enable them to sell freely in both the EU and the UK, substantially as at present.

The EU Customs Union

The customs union is essentially a border around the EU. Goods entering the EU pay any applicable EU tariffs when they cross the border. Goods produced in the EU are inside the border, and it is not relevant for them. EU Member States all must apply the same tariffs and customs procedures. They are not free to make bilateral trade arrangements with non-EU States. Once inside the border, goods may circulate freely.

The UK wishes to be able to make bilateral trade agreements with non-EU States, and so must leave the customs union. It is not possible to be partly in the customs union, or in it for some products and not for others.

The UK wants to be able to make trade agreements with non-EU States because that would enable it to import cheap food from outside the EU, and to seek trade concessions in return for doing so. Since this policy would benefit UK consumers at the expense of UK farmers, it is never mentioned officially.

The single market

Unlike the EU customs union, the single market is not the result of a single EU measure. The phrase describes the result of all the EU rules that have been adopted to produce

conditions of competition that are similar or equal throughout the EU, as far as legislative and other State measures are concerned. These rules deal, among other things, with State aid, harmonisation of legislation on services and technical barriers to trade, mutual recognition of approvals and certification, harmonised rules on solvency of banks, and reciprocal enforcement of court judgments. In short, the single market is intended to be a level playing field for freedom of movement of goods, services, capital, establishment and individuals.

The single market is therefore the package resulting from the progressively evolving body of EU measures designed to eliminate or minimise obstacles to free movement throughout the EU.

Companies that comply with the requirements of the single market benefit by being able to offer their goods and services throughout the EU. The UK apparently would like UK companies to be able to do this ("to have access to the single market") without having to comply with the EU requirements. The intention would be to allow UK companies to have all the benefits of the single market while simultaneously having all the competitive advantages of being unregulated or less strictly regulated in the UK. It should be obvious that this would be unacceptable to the EU. The single market is the result of many years of negotiations designed to lead to compromises providing broadly balanced results for all Member States; There could be no question of allowing a non-EU State, such as the UK after Brexit, to get all the benefits of the single market without undertaking any of the corresponding obligations.

Some UK politicians believe that it would be possible to negotiate arrangements under which the UK would get some of the benefits of the single market in return for accepting some of the obligations. This is discussed below.

If the UK were not in the single market, it could remain in the customs union, if it were willing to do without the power to make trade agreements with non-EU States. This would mean that there would be no tariffs on trade between e.g. the UK and the Republic of Ireland. But goods and services originating in the UK would still have to comply with all the EU single market requirements when they were imported into the Republic.

"There could be no question of allowing a non-EU State to get all the benefits of the single market without undertaking any of the corresponding obligations."

"Surprisingly, [Free Movement and the oversight of the ECJ] are thought to outweigh the economic benefits of the single market."

The UK has apparently decided not to remain in the single market, for two reasons. To remain, the UK would have to accept greater freedom of movement of persons than the UK apparently wants. The UK would also have to accept the jurisdiction of the European Court of Justice. Surprisingly, these two features are thought to outweigh the economic benefits of the single market.

The European Economic Area

Free trade areas may be set up under World Trade Organisation rules. In a free trade area, each member can trade with the other members without tariffs or quotas, and is free to make bilateral or multilateral trade agreements with other countries. There is no common external tariff.

The European Economic Area (EEA) is a free trade area, of which Iceland, Norway, Liechtenstein and the EU are members. The EEA is however more than a free trade area, because it has been designed to allow the three non-EU States to be in the single market. For this purpose they are expected to adopt and to continue to copy all EU single market measures, so as to provide "homogeneity", that is, economic regimes essentially the same as those in the EU. The EEA has its own small equivalent to the Commission (the EFTA Surveillance Authority) and its own court, the EFTA Court. Unlike the European Commission, the EFTA Surveillance Authority has no policy-development role; it is

concerned only with the application of EEA rules. The EFTA Court usually follows the case law of the European Court of Justice, but deals very efficiently where necessary when new issues arise. EEA arrangements do not apply to agricultural products, but they provide for free movement of goods, services, establishment, capital and individuals. The EEA has no common policies for agriculture, fisheries, taxation, security or energy. These are dealt with, insofar as international arrangements are concerned, by separate agreements.

The effect of "homogeneity" is that the three non-EU States are in the single market, but not in the EU customs union. If the UK were willing to join the EEA, it would essentially remain in the single market also. (Rules of origin would be needed to deal with goods originating in other countries so a customs frontier will be needed for this purpose). However, it seems that the UK is not willing to do this, for three possible reasons:

- The EEA would oblige the UK to accept greater freedom of movement of persons from the EU than the UK is apparently willing to accept;
- Being in the EEA would mean that the UK would have to copy all EU single market measures without being able to influence them; and
- The EEA would also mean that the UK would be subject to the jurisdiction of the EFTA Court, and it is not clear that the UK would consider this very much better than the European Court of Justice.

From a purely economic point of view, the EEA would give the UK both the freedom to make bilateral agreements with non-EU States and the benefits of being in the single market. The same thing would apply to Northern Ireland if it were enabled to join the EEA separately, as proposed in a paper circulated by professors in Queen's University Belfast.

The EEA solution would not deal with agriculture, fisheries, energy or security. They would have to be dealt with by specific agreements. However, adapting the EEA solution would not make it any more difficult to deal with these issues.

The World Trade Organisation rules

At present the EU makes trade agreements exclusively on behalf of EU Member States, as a single member of the World Trade Organisation. When the UK leaves the EU, it will no longer have the benefits of any of the agreements that have been made by the EU. Because of the EU's size and bargaining strength, these benefits are very great, and the loss of them will be very serious for the UK.

If no new trade agreement is made between the EU and the UK, they will each be bound by the rules of the WTO. There are several rules that are relevant. One is that the EU will be obliged to treat the UK as any other non-EU State, and impose the existing EU external tariff on imports from the UK into the EU. A second rule would oblige the UK to continue to apply the tariffs that it now applies (that is, the EU external tariff) until the UK reduces them, on a non-discriminatory basis, in accordance with WTO principles. The UK will presumably do this, to obtain low cost agricultural imports, and to get some trade concessions from the low cost countries in return for doing so. The UK will need to negotiate new trade agreements with every country in the world with which it wishes to trade, and until it has done so it will only have the same rights as any other WTO member to sell to those countries. The UK would have lost all the trading advantages to which it is now entitled as an EU State.

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Another WTO rule that may prove to be important prohibits subsidies for exports. This would mean that the UK would not be free to compensate UK companies for loss of the ability to export tariff-free into the EU. The UK apparently promised to do this, illegally, if the situation arose. If the UK gave export subsidies, the importing countries or the EU could impose countervailing duties.

Another WTO rule that may prove to be even more important is the rule that States must give one another most-favoured-nation (non-discriminatory) treatment. Any EU-UK agreement that is not for a free trade area or a customs union, insofar as it concerned goods, would need to comply with this principle. This would mean that any concession given by the EU to the UK would automatically have to be extended to all WTO members, which would make any such concession impossibly expensive for the EU. This means that many of the ideas discussed below would be excluded for this reason, even if they were otherwise acceptable.

Free movement of persons

Free movement of individuals, whether as employees, self-employed persons, or as investors or owners of businesses, is an essential component of the "four freedoms" (goods, services, persons and capital) that are the basis of the single market.

The UK wishes to control, limit and regulate immigration. It says it cannot control immigration from the EU States while it is in the EU, because controls would be inconsistent with the EU rules on free movement. However, the UK has never strictly or comprehensively controlled immigration from non-EU States, although it has always been legally free to do so. It is therefore not clear how or how far it wishes to control immigration from EU States. It is not even clear whether the UK envisages controls at the UK frontier (harbours, airports) or by some other method of controlling individuals before they have entered the UK.

If the UK were willing to accept some limits on its freedom to restrict immigration from the EU, it should be possible to find a reasonable solution involving "managed free movement".

Until the UK has decided what it wants to do, and how and how far to do it, nobody can say whether its proposed future policy could be reconciled with EU principles. In other words, it is not even clear that the UK needs to leave the EU for this reason. However, one has to assume that it does. If the UK were willing to accept some limits on its freedom to restrict immigration from the EU, it should be possible to find a reasonable solution involving "managed free movement". If the UK's proposed policies, when they have been decided upon, are known, and if they are considered to be incompatible with EU rules, that would mean that the UK cannot be in the single market, either in the EEA or in some newly negotiated free trade agreement

The UK government has said that it wants to negotiate a new "ambitious and comprehensive" kind of free trade agreement. Although the UK has not said so, several things are clear.

- It would need to be comprehensive, as required by WTO rules;
- It would need to deal with services, in particular financial services, because they are so important to the UK economy;
- It would need to deal with non-tariff barriers, because they are more important than tariffs in modern trade;
- It would have to limit the extent to which the UK could subsidise its industry; and

- It would have to include a legally binding mechanism for dispute resolution.

No clear indication has been given to say precisely what, if anything, the UK has in mind. There is no obvious precedent, theme or concept for such an agreement. The descriptions

“No clear indication has been given to say precisely what, if anything, the UK has in mind.”

might mean anything. Philip Hammond and David Davis have expressed different views, but neither of them is precise or clear. The impression given by UK civil servants is that they are not confident that there is any clear idea (they are not merely saying that they are not free to reveal it).

The EU negotiating guidelines (para 20) make it clear that any free trade agreement cannot amount

to participation in the single market, "or in parts of the single market".

In theory, the UK might be thinking of several possibilities. These are laid out below.

1. An agreement applying to some sectors of business only. However, this would not be "comprehensive" as Hammond suggests and as WTO rules require. The EU would not agree to free trade only in sectors in which the UK thought British industry is most competitive. No UK government could defend an agreement that gave some sectors (e.g. financial services) the benefits of free trade and gave other sectors nothing. An agreement only on services and not on goods would not be "wide ranging" as the EU guidelines require, and would benefit London and not the rest of Britain, increasing the economic divisions within the UK. It would be technically difficult to define the sectors to be liberalised, and this would lead to disputes over the scope of the agreement, which would lead to litigation. It would benefit the EU States with the sectors being liberalised, and do nothing for the other EU States. The EU is not now satisfied to allow Switzerland to continue to have a large number of separate arrangements on specific sectors or issues, so it would not agree to the UK obtaining a similar set of arrangements, even under a single umbrella agreement.

2. In theory, an agreement that was not confined to specific sectors might be limited to specific obligations and benefits. Obligations might be narrower in scope, or expressed loosely or vaguely, or with ineffective enforcement procedures. For example, the agreement might, in theory, be written in such a way that the UK undertook no obligations in respect of public supply or service contracts, or undertook no obligations to limit State aid or subsidies by tax or otherwise. Public enterprises might be excluded from the UK's obligations, or "services of general economic interest". The UK might try to obtain "passporting" or mutual recognition rights without accepting an obligation to maintain harmonised legislation.

No such exclusion or omission would be acceptable to the EU. It would be an "unfair competitive advantage", ruled out by the EU guidelines (para 20). It would inevitably create a serious imbalance, which no competent EU negotiator could accept. It would mean that the UK would get the benefits of the single market without the corresponding obligations. This would be so in particular because any of these omissions could be used to create a competitive advantage for almost any sector in the UK at any time in the future. It is relevant that before the UK joined the EU in 1973 there was evidence that the UK was not complying with its obligations in respect of public contracts for aeroplanes and computers. All this would be particularly important if the UK government seeks to promote economic change through State measures.

The UK might propose to accept only obligations expressed loosely, vaguely or ambiguously. Ambiguous language to cover real disagreement is well known in English history. This would be bad legal drafting, which the EU would not accept. The UK will be reminded that it must agree to a dispute settlement procedure

ultimately involving a court, and courts ought not to be required to clarify deliberately defective language.

The UK might propose a comprehensive agreement, but one under which disputes would be subject only to consultations and settled only by mutual agreement, without recourse to a court. This approach has been ruled out by the EU in the case of Switzerland, and it is impossible to imagine that the EU would accept any version of it in the case of the economically much more important UK. Decisions on EU-UK disputes must be legally binding and enforceable. Any such approach would be regarded as a retrograde step, back to WTO practice, which is widely regarded as insufficient.

3. The UK might propose to accept all or most of the present EU single market measures except those dealing with free movement of persons. This would be unacceptable to the EU, for several reasons. First, the single market measures have always been designed as a balanced package of which free movement of persons is an essential part. Such a UK proposal would deprive workers of one of the principal benefits of the EU. It would deprive the inhabitants of the less developed regions of the EU of the right to move to areas offering better opportunities. Second, the UK could restrict or frustrate freedom of establishment and services, and free movement of capital, if it were free to prevent companies from the EU States from bringing their key employees with them when they wished to establish operations or provide services in the UK.

4. A free trade agreement that said little about services would bring little benefit to either the EU or the UK. But most economically important services are regulated, so there would have to be constraints on the way or the extent to which they could be regulated. Even if the UK were willing to agree to such constraints, it would be extremely difficult if not impossible to define the permissible limits of regulation of a wide range of services for the future.

5. The UK might agree to accept all the existing EU single market measures but undertake no obligations to copy future measures. Such a proposal would fall short of the EEA arrangements, and would not be accepted by the EU. It would mean that the EU-UK arrangement became progressively out of date, and that the UK had accepted no obligation to deal with new problems as they arise.

6. Another suggestion that has apparently been made is for the UK to make a large contribution to the EU budget, and in return for the EU to give UK financial institutions the right to do business in the EU, while being subject to less strict UK regulation. This would be a subsidy by the UK taxpayer for the UK financial institutions, and a subsidy for the UK financial institutions by the EU financial institutions. The mere fact that this suggestion, which is clearly unacceptable, has been made, shows how little thought has been given by the UK to EU-UK relations.

Conclusion

In short, it seems unlikely that the UK's efforts to negotiate a completely new kind of agreement will be satisfactory or successful. Indeed, it is hardly necessary to spell out the difficulties in as much detail as has been done here.

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None of this should be surprising. There are clear and well-known economic and legal reasons why any "ambitious and comprehensive" trade agreement ends up looking very

like either the EU or the EEA. A State that wants fewer obligations than EU Member States cannot expect to obtain greater benefits than EU States. Well-designed trade agreements provide balanced benefits and obligations, and the UK's wish to get the benefits without the obligations was never realistic. In fact, Brexit was always based on a combination of ignorance, prejudice and nostalgia. Leavers knew nothing of the history of the EU or the EEA. Trade negotiations have their own inescapable logic that limits the number of possible solutions.

"A State that wants fewer obligations than EU Member States cannot expect to obtain greater benefits than EU States."

Inexperienced or ignorant negotiators cannot create new solutions by starting with naive and mutually contradictory aims. Those who advocated Brexit have consistently disregarded all the evidence, all the arguments, and all the weight of opinion of people who know what they are talking about. The impression that the UK has no clear and obtainable vision of what it wants is not misleading: it has not. Obtaining a clear and reasonably satisfactory result depends on the UK negotiators coming, however slowly, to understand this, and to abandoning some or all of their original objectives. Success is not guaranteed. The UK may end up with the World Trade Organisation "for slow learners". That would make Brexit very much more damaging to the UK economy than it will be anyway. Everything depends on how obstinate and unrealistic the Leavers prove to be. The detailed discussion, above, of hypothetical possibilities shows that the only realistic alternative to EU membership that is satisfactory for the UK from an economic viewpoint is the EEA. Everything therefore depends on whether and how soon the UK can get over what seem to be its objections to the EEA: freedom of movement of persons, a court, and the need to copy EU measures. Once it is understood that any substantial and worthwhile free trade agreement between the UK and the EU will involve an administrative body like the EFTA Surveillance the

Authority and a court, it will be seen that it would be foolish to duplicate the institutions of the EEA. Even if the UK is slow to abandon these objections for the UK as a whole, it should be willing to abandon them in relation to Northern Ireland, as suggested by the Queen's University professors, to avoid serious damage to the economy there.

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This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, describes the legal, political and economic relations of the two parts of Ireland and the United Kingdom, and possible arrangements for dealing with "Brexit". The paper discusses several specific issues, in particular the Common Travel Area between Ireland and the United Kingdom, the consequences of an "invisible" border between the two parts of Ireland, and trade in agricultural products.

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