

Brexit and the Future of Northern Ireland

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Abstract

The paper examines Brexit and the Northern Ireland question, arguing that the withdrawal of the UK from the EU creates tremendous difficulties for the region. As the paper explains, the border between Northern Ireland and Ireland is the only physical frontier between the EU and the UK, and the introduction of a hard border would have huge impact: first, on free movement of goods, with implications for the economy; second on free movement of people, with effect on the Common Travel Area which has existed there since the 1920s; and thirdly on the peace process, potentially threatening the endurance of the 1998 Good Friday Agreement, which put an end to over 40 years of sectarian conflict. As the paper underlines, given the peculiar situation of Northern Ireland, specific solution ought to be identified – and a number of options can be considered. In terms of free movement of goods, the paper points to the Cyprus model, where good produced in Northern Cyprus can enter into Cyprus without custom duties. In terms of free movement of people, it suggests that, given the insular nature of Ireland, immigration controls could be moved into the Irish Sea. And in terms of the peace process, it recommends that the spirit if not the letter of the Good Friday Agreement be preserved, notably by avoiding any symbol of division (such as a hard border) which may catalyze opposition. As the paper concludes, however, both the UK and the EU seem fully cognizant of the sensitivity of the Northern Irish question, which raises some optimism on the possibility of finding a pragmatic solution for the region.

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1. Introduction

Northern Ireland, although it voted as a region to remain in the European Union by a 10% margin in the UK wide ‘Brexit’ referendum in June 2016, faces the inevitability of leaving the EU and also the problem of having the UK’s only land border with the EU. This will create difficulties for trade and mobility on the local level and at the inter-state level, but more importantly, it also raises serious concerns for the future stability of the Northern Ireland ‘peace process’. The 1998 Good Friday Agreement, on which the peace process is based, that put an end to 30 years of armed conflict, was signed in the context of EU membership and the increasing degree of openness and cooperation with the rest of the island of Ireland that the EU framework provided.¹ The proposed withdrawal of the UK from the EU creates a set of conditions for Northern Ireland that will weaken the capacity of the political system to maintain peace and build economic development. The result of the referendum vote alone indicated that the internal political divisions in Northern Ireland are being reinforced by the changed relationship of the UK to the EU. In the referendum campaign the two major Irish nationalist parties, Sinn Féin and the Social Democratic and Labour Party (SDLP) along with the leadership of the Ulster Unionist Party (UUP) and the moderate pro-union Alliance Party supported the ‘remain’ position, while the largest unionist party the Democratic Unionist Party (DUP) supported Brexit. As a result the overwhelmingly majority of Irish nationalists voted to remain in the EU while Ulster unionists voted 60-40 to leave. During the Brexit negotiations these divisions will become more pronounced, as a key part of this discussion will include the location of the EU/UK border and the right of Northern Ireland, as part of a future United Ireland, to automatic membership of the EU.²

Ireland has historically shared a common travel area with the UK, and abandoning this will be both politically and socially disruptive. A benefit of the common travel area, especially following the peace process, has been close trading and business links with the Republic of Ireland, Northern Ireland’s largest ‘export’ market. The loss of the economic benefits of EU membership, including open borders, is likely to have a more severe impact on Northern Ireland

¹ For background on the conflict and the peace process see Brendan O’Leary, *The Politics of Antagonism: Understanding Northern Ireland* (2nd edition, Athlone Press 1996); John Doyle, ‘Governance and Citizenship in contested states: the Northern Ireland peace agreement as internationalised governance’ (1999) 10 *Irish Studies in International Affairs*, 201-219.

² See formal Government of Ireland press release on Brexit strategy, 2 May 2017 – referencing as priorities, the land-border, the Common travel area with the UK and the peace process (para 2). http://www.taoiseach.gov.ie/eng/News/Government_Press_Releases/Government_Statement_on_Brexit_Preparations.html; see also European Council statement on Article 50 negotiation guidelines, 29 April 2017, which also include references to these three issues. <http://www.consilium.europa.eu/en/press/press-releases/2017/04/29-euco-brexit-guidelines/>

than on the rest of the UK as its economy is still in a weak post-conflict condition, with the public sector representing approximately 60% of GDP. The small scale of the private sector in Northern Ireland and the continued importance of agriculture for the economy are the economic legacy of conflict and Northern Ireland's future stability also rests on improving economic development and employment. Avoiding a hard land border would help mitigate, at least in the short term, the negative economic impact of Brexit on Northern Ireland.

The question of the location of the border between the EU and the UK is the single most significant question not only for the development of Northern Ireland's economy but also for its future political stability. That a 'hard' border is necessary is beyond doubt, as the withdrawal of the UK from membership of the single market will necessitate the EU insisting on a hard customs border³ and the UK government's focus on controlling migration, will also require a hard border. A hard land border will impact negatively on the economy but it will also threaten the existence of the Good Friday agreement and exacerbate existing political conflicts. The alternative of a negotiated sea border (between the islands of Ireland and Britain), that defined Northern Ireland as a special case, and places it outside the core UK territory, would be strongly resisted by Unionists. For nationalists the imposition of a hard land border on the island of Ireland would be equally unacceptable. The issue of the location of the future border between the UK and the EU was a key issue for unionists⁴ during the referendum campaign and the division on the location of the 'border' has the capacity to increase internal political tensions and to undermine the Good Friday Agreement which is premised on an open land border. The increased pressures on the relatively fragile polity of Northern Ireland, as a result of Brexit, will inevitably deepen political divisions and weaken its capacity to maintain a power-sharing executive.

This chapter analyses the political impact of alternative outcomes of the Brexit negotiations on Northern Ireland, through a discussion four interrelated issues - political divisions in Northern Ireland; the single market; the common travel area; and the Good Friday Agreement. It firstly discusses the Brexit referendum, and the observable polarisation in the voting patterns of the Irish nationalist and unionist communities on EU membership and all-island integration. It places

³ EU Chief Negotiator with the United Kingdom, Michel Barnier, in a speech to the Irish *Oireachtas* (parliament), 11 May 2017 said 'Customs controls are part of EU border management. They protect the single market. They protect our food safety and our standards'. <https://static.rasset.ie/documents/news/michel-barnier-address-to-the-oireachtas.pdf>

⁴ For the most comprehensive post referendum survey see John Garry, 'The EU referendum Vote in Northern Ireland: Implications for our understanding of citizens' political views and behaviour' *Northern Ireland Assembly Knowledge Exchange Seminar Series, 2016-17* (Northern Ireland Assembly 2016).

this polarisation in the context of a significant change in the balance of communal politics in Northern Ireland following the Good Friday Agreement. Secondly it explores the impact of the disruption of leaving the single market for Northern Ireland. It considers possible solutions including the adoption of a flexible arrangement, based on the Cyprus accession model, allowing Northern Ireland produced goods to be exported via the Republic of Ireland as EU goods. The following section analyses the potential impacts of ending the policy of open borders and the Common Travel Area, which has existed between Ireland and the UK since Irish independence in 1922. It details the negative impacts of a ‘hard border’ land border and the alternative of a sea-border between the island of Ireland and Britain as the de-facto point of security and migration control. The final section outlines the direct impacts of Brexit on the Good Friday Agreement. It analyses the way in which the peace process, and the structures that it put in place, were underpinned by an assumption of a EU framework and the political challenges which the UK withdrawal from the EU presents to the future of the Agreement.

2. The Referendum

The ‘remain’ vote in the referendum in Northern Ireland was 56%, but this average conceals major differences between the two main political traditions, reflecting views on the ‘national question’.⁵ A survey of 4,000 adults in Northern Ireland by the ‘Northern Ireland Assembly Election Study’⁶ found that 85% of those “brought up” as Catholics voted to remain in the EU, of those ‘brought up’ as Protestants only 40% supported this position. When same question was put to respondents who were asked to self-define as Irish nationalist, as unionist, or as neither, the impact of an individual’s political views on whether or not they voted to remain became more pronounced. The result for self-defined Irish nationalists was slightly higher than for ‘Catholics’ as 88%, voted to remain in the EU, but for self-defined unionists, 66% voted to leave

⁵ Political divisions in Northern Ireland, while rooted in the colonial settlement and largely reflecting traditional religious communities of Catholic and Protestant, are focused on the key political question of whether Northern Ireland should remain part of the UK or join the rest of Ireland in a all-island state. The partition of Ireland in 1922, and the creation of ‘Northern Ireland’ reflected the largest land mass in which the UK could command a secure majority in favour of UK membership, but it contained a minority of Irish nationalists making up one third of the population, who were systematically discriminated against in employment, public services and even voting rights over the following 50 years. The armed conflict, which erupted in 1969, was eventually brought to an end with the 1998 ‘Good Friday Agreement’, which set up a devolved Assembly and Executive based on a power-sharing or consociational model, along with structured North-South (all-island) cooperation and integration, and a programme of equality measures, policing reform and demilitarisation. Voting patterns continue to reflect the fundamental political division, with Irish nationalists now making up 40% of voters and a majority of those under 25 years of age.

⁶ John Garry, ‘The EU referendum Vote in Northern Ireland: Implications for our understanding of citizens’ political views and behaviour’, *Northern Ireland Assembly Knowledge Exchange Seminar Series, 2016-17* (Northern Ireland Assembly 2016).

compared to 60% of ‘Protestants’, and 70% of those who chose to identify as ‘neither’ voted to stay in the EU.⁷ This voting behaviour reflects the positions of the Northern Ireland political parties⁸. The two major Irish nationalist parties, Sinn Féin and the Social Democratic and Labour Party (SDLP), called for a vote to remain in the EU as did the two smaller pro-union parties, the Ulster Unionist Party (UUP) and the centrist Alliance Party. The major unionist party the Democratic Unionist Party (DUP) and the small and more conservative, Traditional Unionist Voice, campaigned to leave. The political parties campaigning for remain polled just over 58% in the May 2016 Northern Ireland Assembly elections and this was reflected in the 56% that voted to remain in the referendum. However, the results of the Brexit vote includes a significant bloc of unionist voters who did not follow their parties’ lead. While the more moderate unionist UUP called for a vote to remain - 58% of their voters voted for Brexit and 25% of DUP supporters meanwhile voted to remain, despite their party being the leading voice in the local Brexit campaign.

During the referendum campaign in Northern Ireland, the issues that dominated the debate were different from those that engaged the rest of the UK. In spite of the media dominance of BBC, ITV and Sky TV news bulletins, the campaign was largely fought on the specific impacts of Brexit on Northern Ireland.⁹ Immigration was not a major issue of debate, and the public discourse was dominated by the impact of Brexit on the peace process; the economic impact of withdrawal from the single market; the feasibility of continuing a common travel area; and the implications for social policy and the protection of human rights. Sinn Féin, which aligns with the *European United Left/Nordic Green Left (GUE/NGL)* block in the European Parliament, had in the past opposed EU membership, but over a period of time has shifted their position to one that they describe as ‘critical engagement’.¹⁰ This was defined as being ‘against the kind of Europe’ exemplified ‘in recent years in the appalling treatment of the Greek people; or of a fortress Europe which turns its back on refugees’. Sinn Fein argued that the ‘possibility that a part of our nation could end up outside the European Union while the other part stays in is not a situation that will benefit the Irish people.’¹¹ During the campaign Sinn Féin focused on the threat of restricted mobility across the border; the negative economic impact; the loss of civil

⁷ John Garry, ‘The EU referendum ...’

⁸ All of the significant political parties in Northern Ireland are local and none of the mainstream UK parties have any significant electoral support in Northern Ireland.

⁹ Gerard McCann and Paul Hainsworth, ‘Brexit and Northern Ireland: the 2016 referendum on the United Kingdom’s membership of the European Union’, *Irish Political Studies* Vol. 32 , Iss. 2, 2017, pp. 327-342.

¹⁰ Statement from Party President Gerry Adams TD, 9 June 2016. <http://www.sinnfein.ie/contents/40268>

¹¹ Adams, statement 9 June 2016.

rights; and the undermining of the peace process. Martin McGuinness, then Northern Ireland Deputy First Minister, stated that Brexit would be ‘bad for Ireland, bad for business and trade, bad for our farmers and bad for human rights and workers' rights’.¹² The SDLP focused on their long-term commitment to European integration, stressing the economic benefits of EU membership, including direct EU transfers to the region and the impact of the EU in encouraging Foreign Direct Investment in Northern Ireland.¹³ The Ulster Unionist Party leader Mike Nesbitt was clearly pro-EU, but the party as a whole ran a low-key campaign, reflecting the divisions within the party on this issue. As the only large party campaigning for Brexit, the Democratic Unionist Party’s campaign reflected its long-standing opposition to European integration. It was also the party in Northern Ireland that engaged with the UK-wide Brexit debates on sovereignty and UK ‘independence’ and from this position it focused on rejecting the argument of those who wanted remaining in the EU that the negative economic impact on Northern Ireland would be greater than for the rest of the UK if Brexit proceeded.¹⁴

Given the close cultural ties between Northern Ireland and Scotland the linking of Scottish independence, to the desire of the majority of Scots to remain in the EU, inevitably impacted on the debates in Northern Ireland. In Scotland there was a strong vote to remain, at 62%¹⁵, and as this vote followed the narrow defeat for Scottish nationalists in the referendum on independence in 2014, it gave the question of independence a new impetus and strengthened the demand for a second referendum on independence. The implications of this for the integrity of the UK was recognised by Mike Nesbitt (UUP) who characterized Brexit as an ‘existential threat to the United Kingdom should there be an overall vote for Brexit but with Scotland voting to remain.’¹⁶ Scottish nationalists project a solution to their problems with Brexit, through independence and re-joining the EU. If the result of Brexit was to increase the demand for independence in Scotland, even in the case where the Scottish conservatives increased their support in the face of the collapse of Labour and the Lib Dems, it would undermine the current construction of Unionist identity, which has culturally defined itself as closer to Scotland than to England.

Independently of debates in Scotland, the question of the reunification of Ireland has surfaced as a solution to the problems that arise from placing Northern Ireland outside the EU. It is not

¹² Martin McGuinness, 3 June 2016. <https://www.rte.ie/news/2016/0603/793106-brexit-campaign/>

¹³ Colum Eastwood SDLP Party Leader, 7 March 2016. <http://www.sdlp.ie/news/2016/eastwood-addresses-ni-affairs-committee-on-eu-referendum/>

¹⁴ For example, party adverts and statements by party Leader Arlene Foster *Belfast Telegraph* (Belfast, 17 June 2016).

¹⁵ Sionaidh Douglas-Scott, ‘Brexit and the Scottish Question’ in this volume.

¹⁶ http://uup.org/news/4128#.WNuq_BlrK-o

surprising that Sinn Féin during the campaign identified Irish unity as the route through which Northern Ireland could remain in the EU arguing that in the event of a UK referendum result for leaving the EU, with a Northern Ireland majority for remaining, ‘there would then be a democratic imperative for a border poll to provide Irish citizens with the right to vote for an end to partition and to retain a role in the EU’.¹⁷ In the aftermath of the Brexit result the Irish Government diplomatic effort with other EU member states, in addition to prioritising the issues of the peace process, an open land-border and the Common Travel Area with the UK, also devoted considerable time to seeking a formal decision that in the event of a future vote for Irish unity, Northern Ireland would be deemed to be automatically within the EU without the need for a Treaty agreement or a vote of other members, relying heavily on the German precedent. The Irish Government was successful in this effort, with agreement reached at the same European Council of 29 April 2017, which agreed the Article 50 negotiation guidelines.¹⁸

In the short term, the divisions within Northern Ireland, on the Brexit referendum mirror the core political divisions in Northern Ireland and the vote has the potential to destabilise the idea of incremental progress embodied in the Good Friday Agreement. The potential also exists for increased instability to be deepened by the worsening economic situation for Northern Ireland in a post Brexit world.

3. Northern Ireland and the Single Market

The economy in Northern Ireland since its foundation has been comparatively weak. Economic underdevelopment combined with a history of employment discrimination against Irish nationalists, resulted in the large-scale emigration of people from the nationalist community, which lasted up to the end of the 1980s. This weakness was characterised by Rob Rowthorn and Naomi Wayne as a ‘workhouse economy’ where most of the population were either involved in policing the ‘other’ or in providing services, primarily to their own community.¹⁹ The dominance of security factors and the impact of the conflict itself, has meant that the public sector still continues to be a very significant part of the economy – providing approximately 60% of Gross Value Added.²⁰ Levels of poverty are among the highest of all UK regions.²¹

¹⁷ Gerry Adams, *Irish Independent*, 18 June 2016.

¹⁸ *The Irish Times*, 29 April 2017.

¹⁹ Bob Rowthorn and Naomi Wayne, *Northern Ireland: The Political Economy of Conflict* (Polity Press 1988).

²⁰ Nevin Economic Research Institute, *Quarterly Economic Observer*, Spring 2017, pp. 9-11.

http://www.nerinstitute.net/download/pdf/qeo_spring_2017_final_version.pdf

²¹ Feargal McGuinness, *Poverty in the UK: Statistics, House of Commons Library Briefing Paper*, Number 7096, 2 May 2017.

Agriculture and Fisheries, supported by EU policies and subsidies, continue to play a comparatively important role in the economy, given the weak state of the industrial sectors. EU funding, including subsidies from the Common Agricultural Policy and the designated Peace Funds, from 2007 to 2013 was equivalent to approximately 8.4% of Northern Ireland's GDP.²² Brexit will inevitably mean a significant loss to an already weak economy.

Brexit will also disrupt both Northern Ireland's high levels of integration with the economy of the Republic of Ireland, and the Northern Ireland economy's reliance on EU markets. In the ten years up to 2014, exports to the EU have remained at approximately 60% of all Northern Ireland's exports, whereas for the UK as a whole this EU/non-EU export balance has converged to approximately 50:50. Between 2004 and 2014, in all but one year, Northern Ireland has exported more to the EU than it has imported from it, in contrast to the UK where this balance is reversed.²³ Northern Ireland is now more reliant on the EU as an export market than the UK as a whole and the region is therefore much more exposed to the withdrawal of the UK both from the EU and from the Single Market.²⁴ Within the exports to the EU market, the Republic of Ireland, as might be expected, is by far the largest single destination, accounting for 21% of all exports and 37% of EU exports from Northern Ireland, illustrating the importance of integration on the island.²⁵ One analysis conservatively estimates that the impact of a UK exit from the Single Market would be a 3% reduction in Northern Ireland's GDP compared to an estimated 2% reduction in UK GDP, a significant drop for a fragile economy.

When the UK leaves the Single Market and the Custom Union, it will necessitate the creation of a hard border. According to Peter Sutherland, a former Director General of the World Trade Organisation, as the customs union requires a common external tariff to be maintained by all EU countries, this tariff will apply to the UK following its withdrawal, therefore goods 'will have to be checked at borders' and this 'will require a hard Border between north and south in Ireland.'²⁶ Similarly if the UK were outside the European single market and also outside of EU environmental and labour protection standards, this would be an additional reason for the EU to insist on a closed border. In these circumstances, given the importance of cross border trade for

²² Budd, L, 'The Consequences for the Northern Ireland Economy from a United Kingdom exit from the European Union', *Briefing note: Committee for Enterprise, Trade and Investment* (Open University March 2015).

²³ Aidan Stennett, 'The EU referendum and potential implications for Northern Ireland' Northern Ireland Assembly, Research and Information Service, NIAR 32-16 Research Paper (2016), pp. 7-9.

<http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2016/eti/2116.pdf>

²⁴ Catherine Barnard, 'Brexit and the EU Internal Market', in this volume.

²⁵ UK Parliament, Northern Ireland Affairs Committee, '*Northern Ireland and the EU referendum*' (2016)

<http://www.publications.parliament.uk/pa/cm201617/cmselect/cmniaf/48/4804.htm#footnote-104>

²⁶ *The Irish Times*, 2 September 2016.

the underdeveloped private sector, it would be in Northern Ireland's interests to seek a special deal. This approach was effectively confirmed by Michel Barnier, in his speech to the Irish *Oireachtas*.²⁷ The Scottish Government has also raised the issue of a special deal for Scotland in the Single Market²⁸ but the UK Government has expressed its absolute resistant to a special deal for Scotland, even if the EU were willing to allow it. This is reflected in the fact that Scotland was not mentioned in Prime Minister May's Article 50 TEU letter, while the relationship with the Republic of Ireland and the Northern Ireland peace process was explicitly highlighted. This indicates that the UK may be more flexible on a special deal for Northern Ireland. The EU has also expressed concerns about the impact of Brexit on Northern Ireland and in its negotiation guidelines explicitly state that nothing in the final agreement with the UK should 'undermine the objectives and commitments set out in the Good Friday Agreement' and that negotiations should 'in particular aim to avoid the creation of a hard border on the island of Ireland', while respecting the union legal order.

A number of factors make agreement of a separate deal on Northern Ireland that would allow it to remain within the Single Market possible. In the first place, the Irish Sea is an obvious place to control trade access between the UK and the EU without the negative consequences of closing the Irish land-border. The geographical context would also make any agreement between the UK and the EU likely to be judged as compatible with the 'frontier traffic exception' of Art. XXIV. 3 of GATT.²⁹ Secondly, EU special status for Northern Ireland could be presented as a response to the peace process, the particular circumstances of Northern Ireland and the UK's international commitments under the Good Friday Agreement. Thirdly, there is the question of scale: the small size of Northern Ireland and in particular its private sector, can allow it to be situated amongst the wide range of other flexible territorial arrangements, which the EU has already agreed, from Greenland to the Channel Islands to the French Overseas Territories.³⁰ Fourthly, there is the precedent of Cyprus, which although not identical, is also a result of disputed sovereignty in the context of seeking a settlement.³¹

²⁷ Barnier, FN 3.

²⁸ Scottish Government. *Scotland's Place in Europe*. Edinburgh, 2016.

²⁹ See Giorgio Sacerdoti, 'The Prospects for the UK after Brexit: How can Britain trade with the EU and the World?', in this volume.

³⁰ D Kochenov (ed), *On Bits of Europe Everywhere. Overseas Possessions of the EU Member States in the Legal-Political Context of European Law* (Kluwer Law International 2013).

³¹ Nikos Skoutaris, *From Britain and Ireland to Cyprus: Accommodating 'Divided Islands' in the EU Political and Legal Order* (Florence: European University Institute, Academy of European Law, AEL 2016/02, 2016).

http://cadmus.eui.eu/bitstream/handle/1814/42484/AEL_2016_02.pdf?sequence=1

There are a number of technical ways in which Northern Ireland could remain, or largely remain, within the single market after Brexit. The maximalist position is advocated by Sinn Féin, which wants Northern Ireland to remain inside the EU as a special region.³² This was also the view of the Irish parliamentary committee on European Affairs.³³ It has been referred to as a ‘reverse Greenland’, following the EU acceptance that Greenland could leave the Union while the rest of Denmark remained inside the EU.³⁴ This approach would mostly fully safeguard Northern Ireland’s position, but it seems unlikely the UK will agree to this, though they have not explicitly ruled it out. A second option would be for Northern Ireland to join the European Economic Area (EEA). This would exclude Northern Ireland from schemes such as the Common Agricultural Policy and Research Funding, but would allow access to the single market.³⁵ It is likely that the UK would also object to this approach, as it would separate Northern Ireland from the rest of the UK in a way that makes its international status ambiguous.

An alternative solution could be found in the accession agreement for the Republic of Cyprus to join the EU, which could be used either in conjunction with EEA membership or instead of it. The accession agreement not only recognised the Government of the Republic of Cyprus as the sovereign power for the island as a whole, it also very pragmatically, allows goods produced in Northern Cyprus to enter EU markets as ‘EU goods’, once they are certified as being produced in Northern Cyprus by the Turkish Cypriot Chamber of Commerce.³⁶ This organisation was chosen and accepted by the Government of the Republic of Cyprus to avoid any implied recognition of the Turkish Republic of Northern Cyprus, a position which would have been vetoed by Greece. Goods originating in Northern Cyprus are deemed to have originated in Cyprus/EU and are not subject to customs duties.³⁷ This ‘Green Line Regulation’ deals in a flexible way with the de facto Cyprus border, including the provision that, goods which are allowed to cross the line should not be subject to export formalities.³⁸ A similar arrangement could empower the Northern Ireland Executive to identify goods as originating in Northern Ireland (and not simply travelling through Northern Ireland from the UK or a third country). As

³² Sinn Féin, *The Case for the North to achieve Special Designated Status within the EU* (Sinn Féin 2016).

³³ Joint Oireachtas Committee on European Union Affairs. *Report on the implications of Brexit for Ireland* (Irish Parliament June 2016).

³⁴ Adam Ramsey, A reverse Greenland: the EU should let Scotland stay. <https://www.opendemocracy.net/uk/adam-ramsay/reverse-greenland-letting-scotland-stay>

³⁵ Brian Doherty, John Temple Lang, Christopher McCrudden, Lee McGowan, David Phinnemore and Dagmar Schiek. *Northern Ireland and Brexit: the European Economic Area option* (European Policy Centre, 7 April 2017). http://www.epc.eu/documents/uploads/pub_7576_northernirelandandbrexit.pdf

³⁶ Art. 2, Protocol 10 to the Act of Accession.

³⁷ Commission Decision 2004/604/EC of 7 July 2004 on the authorisation of the Turkish Cypriot Chamber of Commerce according to Article 4(5) of Council Regulation (EC) No 866/2004, [2004] OJ L 272/12.

³⁸ Art 5., Council Regulation (EC) No 866/2004, [2004] OJ L 161/1.

part of a Brexit deal, the EU could allow certified good from Northern Ireland to enter the EU market via the Republic of Ireland and to be treated as EU goods. At the same time the UK could allow such goods enter the UK market as ‘domestic goods’, and this would allow the UK to present this arrangement as a symmetrical one, meeting the needs of both nationalists and unionists, and therefore acceptable to the unionist parties and to pro-Ulster Unionist conservatives. Such an agreement would require considerable political will to achieve, but given the small scale of the Northern Ireland economy, and the benefits of avoiding a closed Irish border, it is within the sphere of what could be envisaged. Such an arrangement still requires a hard border with border checks; but it opens the question of where that border will be.³⁹

4. The Common Travel Area and Open Borders

Currently no hard border exists on the island of Ireland pursuant to the Common Travel Area between Ireland and the UK. The UK and Ireland have operated a common travel area since Irish independence, preceding the States’ entry into the EEC in 1973, by 50 years. Article 2, Protocol no. 20 to the EU Treaties, explicitly recognises the Common Travel Area. In practice this means that citizens of either state, moving from one state to another, have not only a right of entry without requiring a visa, but also have the right to work, access health and welfare services and even to vote. While its historic origins were a result of the limited UK recognition of Irish sovereignty in 1922, the common travel area became normalised and any restrictions on the free movement of people between the two countries would be both practically disruptive and politically sensitive. Even though there is no legal requirement to show a passport when travelling between Ireland and the UK, this provision only applies to people born in Ireland or the UK and who are citizens of one of the states, therefore in theory individuals can be asked to prove their citizenship when crossing between the two states. Airlines operating between the islands of Ireland and Britain, require passengers to have a photo ID, most insist on a passport, and the UK also officially advises UK Citizens to carry a passport when travelling to Ireland even though it is not strictly required.⁴⁰ In practice, therefore, a passport is carried by most people when moving from the island of Ireland (including Northern Ireland) to Britain. However, a passport is not required to travel between the two jurisdictions on the island of Ireland, and since the creation of the Single market in 1992 and the implementation of the peace process there has been no visible border between the two parts of the island. When the UK leaves the EU, it

³⁹ James Anderson, *The Irish Times*, 22 March 2017.

⁴⁰ <https://www.gov.uk/foreign-travel-advice/ireland/entry-requirements>.

will inevitably impact on this agreement, opening up the possibility of restriction on the freedom of movement across the Irish land-border. While Prime Minister Theresa May's letter to the EU on the triggering of Article 50 TEU says the UK wants 'to avoid a return to a hard border ... and ... to be able to maintain a Common Travel Area' between the UK and Ireland. The UK government did not suggest any way in which this could be achieved and as this is only one of many objectives of the UK government it may lose out to other priorities, during negotiations.

Sealing the 499km Irish land border will be difficult, as was demonstrated by the experience of the Northern Ireland conflict. During the conflict, as a security measure the British Army closed more than 200 of the smaller roads crossing the border, by a mixture of destroying bridges, creating physical barriers and cratering roads. There were also major security installations on the official crossing points, which existed even after the creation of the single market in 1992, and were only gradually removed in the aftermath 1998 Good Friday Agreement. However, even with a presence of over 30,000 troops at the height of the conflict, the border was never 'sealed' from a security point of view – and it never successfully preventing the IRA from moving members and equipment across it.⁴¹ However, road closures and border checks were very disruptive for business, including agriculture, as many farmers had land on both sides of the border. Frequent delays at crossing points, together with the negative experience of a heavy British Army security presence, discouraged cross-border traffic and trade.

The UK's insistence on the absolute control of migration as a non-negotiable issue means stricter monitoring at ports and airports to implement this policy, and therefore it will not be possible to leave open this potential route from continental Europe to Britain via Ireland.⁴² Even if the border were not initially closed to the free movement of people, the use of the route by illegal migrants would inevitably lead to demands for physical controls. This has been clear to political actors in Northern Ireland from the moment the referendum was called. Managing both migration and the flow of goods across the Irish Sea from three airports and two ports is a simpler operation than policing a nearly 500 km land border. However, for a majority of unionists, having a de facto security and migration 'border' between Northern Ireland and Britain is ideologically difficult to accept. The issue of the location of a post-Brexit border including the suggestion that pragmatically this border might be in the Irish Sea – as the much easier place to secure – leaving Northern Ireland inside the UK, but outside the de facto

⁴¹ See resource on Irish Border from Queen Mary University, London.
<http://www.irishborderlands.com/living/roadclosures/index.html>.

⁴² James Anderson, *The Irish Times* (Dublin, 22 March 2017).

migration and security border, was a subject of contentious debate.⁴³ For example, the Ulster Unionist Party manifesto for the Northern Ireland Assembly elections in May 2016, conceded that ‘bitter experience makes clear it is not possible to fully secure the border’ but that ‘there will need to be a hard border’ and that as ‘it will not be on the actual border, it is likely to be at Great Britain’s ports and airports – Cairnryan, Gatwick, Heathrow’ - a prospect that was not welcome to them.⁴⁴ Having the control of migration take place across the Irish Sea is the more practical option. The three small airports and two small ferry ports already have a security infrastructure in place that can be enhanced, and freight checks can happen at a small number of specialist facilities, rather than requiring a mix of fixed and mobile customs checks covering approximately 300 roads. Most crucially it would still be possible, as at present, to drive across the border on the Dublin-Belfast motorway at 120kph and there would be no physical infrastructure on the border (with a required security presence) to act as a target for armed groups opposed to the peace process.

This solution has practical and political difficulties. The practical problem that would need EU-UK agreement would be acceptance of the continuing de-facto freedom of movement of EU citizens into Northern Ireland. This is politically achievable. Under the Good Friday Agreement, the right of the people of Northern Ireland ‘to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.’⁴⁵ Therefore there is no practical barrier to any Irish or UK citizen in Northern Ireland having the legal right to enter the EU or the UK, as everyone is legally entitled to both passports. For other persons, in order to get to the Irish land border, a person must have already entered either the UK or the Republic of Ireland. The Irish Government could agree measures to monitor illegal immigrants coming into Ireland to meet UK concerns, and this may not be a major problem given the existing tight migration controls put in place by the Irish government. The more significant challenge would be around EU citizens who have a right to travel to Ireland, or non-EU citizens who might have been granted a visa to come to Ireland, but who do not possess a UK visa. Such individuals could enter Northern Ireland, a part of the UK, thus circumventing UK immigration rules. This is the de facto situation currently, but in practice illegal immigration to Northern Ireland via Ireland is not a significant problem, and as a result migration hardly featured as part of the Brexit debate in Northern Ireland. The UK would still be

⁴³ James Anderson, *The Irish Times* (Dublin, 22 March 2017).

⁴⁴ UUP Manifesto for 2016 NI Assembly Election (Belfast UUP 2016). See also post Brexit call from SDLP leader Colum Eastwood for any border controls imposed post-Brexit to be imposed between the islands of Ireland and Great Britain.

<http://www.londonderrysentinel.co.uk/news/eastwood-impose-border-with-britain-not-on-island-1-7448357>

⁴⁵ Good Friday Agreement, Constitutional Issues para1(vi).

able to exercise control at ports and airports and prevent any attempts by either EU or non-EU citizens to enter Britain via Northern Ireland, as is the case in the pre-Brexit world. The major challenge of not having a land border, however, is the political issue of the symbolic significance of the location of the ‘border’ for Northern Ireland’s unionists (and some English conservatives). An Irish Sea border would place Northern Ireland outside the UK border control area and create a sense for Ulster unionists that their link with the UK had been weakened.

5. Brexit and the Peace Process

It is the issue of the existence of a hard border, and all that it implies in both economic and political spheres, irrespective of where it is located, that is central to the impact of Brexit on the Northern Ireland peace process. The 1998 Good Friday Agreement reflected a bi-national polity, imbedded in its system of consociational power-sharing; in the special position accorded to the Irish Government; in the requirement for 50:50 nationalist/unionist recruitment to the new Police Service; and in the legal commitment from the UK Government to legislate for Irish unity should concurrent voting majorities exist in Ireland, North and South. The Good Friday Agreement is rarely referred to as a peace settlement, and never by nationalists or the Irish Government. It is an agreement, part of a wider peace process.⁴⁶ The 1998 Agreement was designed to consolidate the IRA ceasefires, and contained an integrated programme for regional government, North-South (on the island of Ireland) cooperation and increasing integration, and a programme of demilitarisation, human rights and equality. Many issues could not be agreed at that time of signing, but have, over time, been substantially achieved. This included major issues such as the transformation of policing; the destruction of IRA weaponry; and the withdrawal of the British army from security operations.⁴⁷ As part of this process setting up the political institutions took time and it was 2007 before local governance was consolidated after a number of failed starts. Some issues have still not progressed, including the question of how to deal with ‘the past’. This demonstrates that the Good Friday Agreement did not establish an end point but began a process.

⁴⁶ See speech by Pat Doherty, then Sinn Féin MP, at an Irish Unity conference, London, (20 February 2010) <http://cain.ulst.ac.uk/issues/politics/docs/sf/pd200210.htm>; James W. McAuley, Fantasy Politics? Restructuring Unionism after the Good Friday Agreement *Éire-Ireland*, Volume 39:1&2, Earrach/Samhradh / Spring/Summer 2004, pp. 189-214.

⁴⁷ See John Doyle (ed.) *Policing the Narrow Ground: lessons from the transformation of policing in Northern Ireland* (Royal Irish Academy 2010).

The ceasefires and the destruction of IRA weapons were premised on a peaceful, but evolving process, which had no predetermined outcome. As part of the referendum endorsing the Good Friday Agreement, in the Republic of Ireland, the Irish Constitution was amended to change the wording on Irish unity from a declaration of territorial claim to a wording which both guarantees the entitlement to Irish citizenship for everyone born on the island of Ireland (including within Northern Ireland) and also to assert the ‘firm will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland’ while accepting that a united Ireland can only come about by the consent of the people in both jurisdictions.⁴⁸ The Irish Government, or the Irish nationalist community were not asked to abandon their political objective of Irish unity, they simply agreed to pursue it by exclusively peaceful means. While accepting that the majority of the population in Northern Ireland at that time wanted to maintain Northern Ireland’s membership of the UK, the 1998 Agreement affirms that

if, in the future, the people of the island of Ireland exercise their right of self-determination ... [on the basis of separate and concurrent majorities North and South] ... to bring about a united Ireland, it will be a binding obligation on both Governments to introduce and support in their respective Parliaments legislation to give effect to that wish;⁴⁹

This fluidity, and for nationalists a sense of progress, is essential to the success of the peace process.⁵⁰ This position has been opposed from a range of political perspectives, those with a vested interest in supporting the union with Britain including pro-agreement unionists⁵¹ and academic analysts such as Murray and Tonge have argued that it is a settlement in which nationalists have accepted Northern Ireland’s place in the UK.⁵² Similarly opponents of the peace process, who see it as abandoning the objective of a united Ireland have characterized the agreement as a static acceptance of the status quo.⁵³ Irish nationalists, who support the agreement, recognise that the fluidity of the Agreement on the ultimate end point is central to its success. It has allowed both unionists and nationalists to work within its framework, and this was

⁴⁸ Constitution of Ireland, Articles 2 and 3.

⁴⁹ The Northern Ireland Peace Agreement. ‘The Agreement reached in the multi-party negotiations 10 April 1998’ (The Good Friday Agreement), Constitutional Issues para 1 (iv).

⁵⁰ Todd, Jennifer, ‘Nationalism, Republicanism and the Good Friday Agreement’ in Jennifer Todd and Joe Ruane eds. *After the Good Friday Agreement*. (Dublin: UCD Press 1999)

⁵¹ Paul Bew *The Irish Times* (Dublin, 15 May 1998).

⁵² Murray, Gerard and Jonathan Tonge, *Sinn Fein and the SDLP: from alienation to participation* (O’Brien Press 2005).

⁵³ Anthony McIntyre, ‘Modern Republicanism and the Belfast Agreement’ in Rick Wilford ed. *Aspects of the Belfast Agreement* (Oxford University Press 2001); Ed Moloney, *A secret history of the IRA* (Penguin, 2003).

also facilitated by the integration of the Irish state and the UK within the EU, including the open borders and cross-border co-operation that is part of that wider EU integration process. Nationalists argue that increased functional co-operation through cross-border institutions will create a political dynamic towards unity—a point also feared by unionists.⁵⁴

Since the signing of the agreement in 1998, the internal political dynamics of Northern Ireland have shifted in a way that has reinforced the saliency of integration on the Island of Ireland. The 2017 elections to the Northern Ireland Assembly resulted, for the first time since partition, in a representative assembly in Northern Ireland which does not contain a majority of members who could be described as unequivocally Unionists, that is those committed in every circumstance to Northern Ireland remaining in the United Kingdom. In that election only 45% of the population voted for traditional unionist parties; 40% voted for parties committed to Irish unity, with just under 15% voting for smaller parties and independents, many of them defining themselves as ‘cross community’, or campaigning on other issues such as ‘anti-economic austerity’, the environment etc. This is a historic event that reverses the experience of the first 50 years of Northern Ireland, during which time the percentage of the population of Northern Ireland that was Irish nationalist had remained static at one-third. This change began in the late 1980s with a major reduction in nationalist migration, partly as a response to new anti-discrimination legislation. Conversely from this period Unionist migration increased as the public sphere in Northern Ireland shifted to create a space for Nationalist identities in addition to Unionist identities. The fact that less than 50% of the population voted for parties for whom opposition to Irish unity is a core policy, is a significant symbolic and practical change, all the more so as it reflects on-going demographic change.⁵⁵

This change of political dynamics has been visible from the early stages of the peace process, at which time unionist politicians expressed their fears that reform based on ‘parity of esteem’ between nationalism and unionism, allied with North-South links, would weaken support for unionism among elements of their own community.⁵⁶ Drawing on ideas of European Union functionalism, unionist politicians have argued that North-South bodies would inevitably develop deep and wide roots and that the people involved in them would ‘go native’ and lose

⁵⁴ See for example Robert McCartney, Northern Ireland Assembly, 22 November 1982.

⁵⁵ Northern Ireland Executive, *Statistical - Labour Force Survey Religion report 2015* (Belfast, 2017).

⁵⁶ e.g. Cedric Wilson, NI Forum, 13 June 1997, vol. 34, p.41.

their allegiance to unionism.⁵⁷ In this context Unionist political elites have been openly critical of leading employers and business organisations from their own community, seeing them as less than wholehearted in their support for the positions adopted by mainstream unionism and willing to, at least partly, shift their allegiance or their political practice for the economic benefits of a Dublin-Belfast economic corridor, all-Ireland or cross-border EU funding arrangements and the promotion of tourism and investment on an all-Ireland basis.⁵⁸ Individuals from a unionist background, who were engaged in business, trade or cross-border engagement, were amongst those active in campaigning within Northern Ireland for the UK to remain in the EU.⁵⁹ This emphasises the link that the ‘remain’ campaign identified between maintaining peace, improving the economic condition of Northern Ireland and continued membership of the EU. The consequences for attitudes to Irish unity are long-term rather than immediate, but those in the unionist community who are strongly committed to EU membership face both a practical and ideological challenge. Irish unity was historically portrayed, by some unionists, as a move from a large, cosmopolitan and internationally focused state to a smaller and more inward looking Irish state. This has now reversed, and it is Ireland which is linked to Europe and cosmopolitanism, and the UK seems inward-looking and parochial. If Scotland votes for independence in the near future, that clash of images will be all the stronger.⁶⁰

Brexit will have important implications for the functioning of the Good Friday Agreement as it is underpinned by an assumption of EU membership. The Agreement, sets up a North South Ministerial Council (modelled in some respects on the EU Council of Ministers) and in order to prevent unionists from boycotting such meetings (or to stop nationalists boycotting a Northern Ireland Assembly), the agreement states that

It is understood that the North/South Ministerial Council and the Northern Ireland Assembly are mutually inter-dependent, and that one cannot successfully function without the other.⁶¹

⁵⁷ e.g. Bob McCartney, NI Forum, 29 November 1996, vol. 20. p.2-5.

⁵⁸ e.g. St Clair McAlister (DUP), NI Forum, 20 Feb. 1998, vol. 62, p. 32.

John Hunter (UUP), NI Forum, 24 Oct. 1997, vol. 48, p. 10, claims that ‘The sort of stooges that represent the business community tend to be of the pan-Nationalist front’.

⁵⁹ Gerard McCann & Paul Hainsworth (2017) Brexit and Northern Ireland: the 2016 referendum on the United Kingdom’s membership of the European Union, *Irish Political Studies*, 32:2, 327-342, p. 333.

⁶⁰ Sionaidh Douglas-Scott, ‘Brexit and the Scottish Question’, in this volume.

⁶¹ Strand 2, para 13.

This institution interdependence is strongly written in to those aspects of the agreement that deal with the North/South Ministerial Council. Pursuant to the agreement, in fact, the North/South Council

Will identify and agree at least 6 matters for cooperation and implementation in each of the following categories:

(I) Matters where existing bodies will be the appropriate mechanisms for cooperation in each separate jurisdiction;

(ii) Matters where the co-operation will take place through agreed implementation bodies on a cross-border or all-island level.⁶²

It was assumed that such bodies would operate in an EU context where regulations on issues such as water quality, animal health, trade etc. were framed by EU policy and that these policy areas would be the ‘matters’ around which co-operation would take place. It is not impossible for such bodies to exist between an EU member and a non-member, but their ability to make decisions will be much more limited and therefore one of the neo-functionalism assumptions of the peace agreement is potentially undermined. The Agreement also refers to the Special Peace Programme from the European Union and also explicitly refers to views from the North-South Council being represented ‘at relevant EU meetings.’⁶³

The European Convention on Human Rights (ECHR), although not an EU body, is an integral part of the framework of the Good Friday Agreement. The Agreement explicitly limits the devolved Assembly’s powers with the ECHR – saying any legislation passed by the Assembly would be ‘null and void’ if found to be in breach of the ECHR.⁶⁴ Concerns have been expressed that post Brexit, the European Court of Human Rights and the ECHR will come under further attack, from those in the British Conservative Party opposed to any supra-national authority. The lack of commitment on the part of a UK government to the ECHR would weaken, or even render inoperative, this provision of the Agreement.

The Agreement between the two Governments also clarifies who is entitled to vote in a future Irish unity referendum.

⁶² GFA, Strand 2 para 9 [emphasis added].

⁶³ GFA, Strand 2.

⁶⁴ GFA, para 26, Stand One, GFA, 1998.

The British and Irish Governments declare that it is their joint understanding that the term "the people of Northern Ireland" in paragraph (vi) of Article 1 of this Agreement means, for the purposes of giving effect to this provision, all persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British citizen, an Irish citizen or is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence.⁶⁵

Following Brexit there may be restrictions on EU citizens right to reside in Northern Ireland, in these circumstances the meaning, as understood at the time of signing of this clause will have been retrospectively altered. The UK Government will now be able to restrict those 'entitled to reside in Northern Ireland' in a way that was not envisaged in 1998. This could weaken the rights of Irish citizens, potentially even influencing the result of a future referendum. Irish citizens, as EU citizens, currently living in Northern Ireland, they have full voting and citizenship rights that they have enjoyed under the common travel area, including the right to vote in a referendum. This right may be limited post-Brexit. At the same time, any UK citizen would continue to have the right to vote in a referendum on the future of Ireland, even if they had lived in Britain for many years.

While Brexit will weaken the text of the Good Friday Agreement, it is the re-imposition of a hard land-border that has the potential to set up a negative dynamic that will undermine the progress that has been achieved since 1998. Former British Secretary of State for Northern Ireland, Peter Mandelson, has noted that

'the re-imposition of a formalised border would be a radical departure from the established strategy of the administrations in Dublin, London and Belfast. Anything in my view that strengthened a sense of separatism between Northern and Southern Ireland – physically, economically, psychologically – has the potential to upset the progress that has been made and serve as a potential source of renewed sectarianism that would always bear the risk of triggering further violence in Ireland, particularly in the North.'⁶⁶

⁶⁵ GFA, Agreement between British and Irish Governments – final para.

⁶⁶ Peter Mandelson 'EU exit risks peace process and return to violence', *Belfast Newsletter*, 15 March 2016.

Brexit will be most visibly and immediately seen in the disruption to the movement of people and trade across the border. It will reinstate the idea of an insular Northern Ireland that requires a secure border to ensure its territorial integrity. From a Unionist perspective this will strengthen demands to abandon the reform process embedded in the Good Friday Agreement and in particular its North-South dimension. From a Nationalist perspective a hard border will provide practical and symbolic targets for attack by IRA dissidents opposed to the peace process. These groups are currently marginal to the Irish nationalist community in the North but physically closing the border will greatly increase their capacity to attract support. If customs posts and security installations are built on the border they will become part of a narrative, from opponents of the peace process, that it has ‘failed’ and will be a strong mobilization tool for those seeking to collapse the peace process in its entirety.

Conclusion

Brexit represents a serious threat to the Northern Ireland peace process, in its disruption to the process of all-island cooperation and integration, which underpins the 1998 Good Friday Agreement. A ‘hard’ Irish land-border will be economically disruptive and a powerful symbol that the peace process is in crisis. Installations on the border will be an inevitable target for armed groups opposed to the peace process, leading to a cycle of increased fortification on the border in response to attacks. The Northern Ireland economy is more dependent on the EU than any other region of the UK and it is particularly reliant on access to the market of the Republic of Ireland. The disruption to normal mobility on the island of Ireland, including cross border trade and the routine commuting of individuals, from a hard EU external land border would be seriously damaging. This could be ameliorated if a special status agreement for Northern Ireland, in de facto terms, moved that physical border to the Irish Sea, allowing free movement of goods and people within the island of Ireland and giving Northern Ireland origin goods access to the Single Market. Such special status has the president of Cyprus to build on.

Other implications of Brexit are unclear and depend on a number of factors, including the short-term impacts on the peace process and the outcome of another Scottish independence referendum. If Northern Ireland is taken out of the Single Market and if there is a hard EU frontier on the Irish Border then Irish nationalists will be strengthened in their view that Irish unity is the only practical means to restore the region’s links to Europe, to grow its economy and

to consolidate the peace process.⁶⁷ In those circumstances the demographic growth of the Irish nationalist community is likely to be reflected in a growing demand for a referendum on unity. The majority of Ulster unionists will continue to oppose Irish unity in such circumstances. This is a reassertion of a traditional unionist position as many of those campaigning for Brexit, also opposed the reform agenda of the Good Friday Agreement and the gradual integration with the South of Ireland. From this perspective Brexit can be seen as a means of reinforcing Northern Ireland's separation from the Republic of Ireland and many unionists would pay the price of the collapse of power-sharing institutions to achieve this. However, it is unclear what unaligned voters or pragmatic 'pro-union' voters would do if faced with a choice between remaining in a diminished UK, with a faltering economy, and isolated from Europe. Whatever the longer-term implications, Brexit will create an immediate crisis for the peace process. If the negotiations result in a 'hard' land-border it will undermine the underlying basis of the peace process so completely that it is difficult to see it surviving in its current form.

⁶⁷ Irish reunification is the "biggest and best idea around" and must now be considered in light of 'Brexit', according to SDLP leader Colum Eastwood, *Irish Independent*, 20 July 2016. <http://www.independent.ie/business/brexit/irish-reunification-is-best-idea-around-post-brexit-sdip-leader-says-34899305.html>