

The Impact and Consequences of Brexit for Northern Ireland

KEY FINDINGS

- Northern Ireland is the part of the UK most distinctly affected by Brexit. The introduction of a 'hard border' with the Republic of Ireland is a particular concern, with customs controls probable and immigration checks possible. Free movement across the island of Ireland remains a desired feature of a strong bilateral relationship which strengthened amid common EU membership and the Northern Ireland peace process.
- Northern Ireland has no autonomy over Brexit. As such, Northern Ireland's 2016 referendum vote to remain within the EU is, in constitutional terms, of no significance. The UK Supreme Court has stated categorically that the consent of the Northern Ireland Assembly is not required for the UK government to withdraw from the EU.
- The UK's relationship with the EU (and its termination) is an excepted power, retained by the UK government. No powers have been devolved to the Northern Ireland Assembly in this respect. The 1998 Northern Ireland Act gives the Assembly the right to pass laws but only in devolved policy areas and does not affect the power of the UK Parliament to make laws for Northern Ireland.
- The Northern Ireland Assembly will be able to determine what EU legislation should be retained where it affects Northern Ireland in policy areas over which the Assembly holds devolved powers.
- Brexit will require deletion of references to the EU within the 1998 Good Friday Agreement, Northern Ireland's peace deal. The all-island aspects of the Agreement most embed the EU and provide institutional mechanisms for the continued financing of the peace process by the EU. Given the status of the Good Friday Agreement as an international treaty and its endorsement in referendums in Northern Ireland and the Republic of Ireland, a reworking could be challenged but there seems no legal room for such a challenge.
- The UK and Irish governments appear to desire some form of special status – without using that term – for Northern Ireland, given the potential adverse economic effects in both jurisdictions and the political sensitivities accruing to any hardening of the border dividing the island.
- The political sensitivities of Brexit are considerable. Most nationalists voted to remain within the EU. They see themselves as Irish citizens, i.e. members of the EU, and wish to retain that status. A minimum demand is special status for Northern Ireland. A majority (but a far from overwhelming one) of unionists voted to leave. Whilst the

risks to the current relative peace are minimal, the extent of continuing inter-communal polarity provides a strong case for special treatment for Northern Ireland.

- A bilateral bespoke deal between the UK and Irish governments to maintain the Customs Union between the two states – which would continue to render invisible Northern Ireland’s frontier with the Irish Republic - would require EU approval. The UK government has listed tariff-free trade across borders, via a special agreement with the EU, as a priority. Failure to conclude such a deal will impact significantly upon Northern Ireland as a site of tariff checks.
- The UK government has listed the maintenance of a Common Travel Area (CTA) between the UK and Ireland as one of its negotiating priorities. Its abolition would have significant potential impact upon travel across the border

1. THE LEGAL POSITION

UK government legislative dominance over the Northern Ireland Assembly

On 23 June 2016, the United Kingdom (UK) voted by 17,410,742 votes (51.9%) to 16,141,241 (48.1%) to leave the European Union (EU). However, **Northern Ireland**, as part of the UK, **voted to remain** in the EU **by 440,707 votes (55.7%) to 349,442 (44.3%)**. The Northern Ireland vote amounted to 0.2 per cent of the 17,410,742 total UK Leave tally and 0.3 per cent of the Remain side’s support. Turnout, at 63 %t, was 9% lower than the UK-wide figure. Northern Ireland is a tiny part of the UK – its smallest country with a population of 1.8m, amounting to 2.9% of the total UK population. The legal position on Northern Ireland’s status regarding UK withdrawal from the EU is that it is the United Kingdom government which solely determines the actuality and nature of Brexit.

The Northern Ireland Assembly and Executive **do not possess any formal powers regarding the prevention of the triggering of Article 50**, the commencement of the UK’s EU withdrawal process. In parliamentary decisions on Article 50 (and other subsequent Brexit-related votes) the only votes afforded to Northern Ireland elected representatives will be to the region’s MPs who sit in the UK Parliament (18 in total, although the 4 Sinn Féin MPs do not take their seats). **The UK government may proceed with Brexit regardless of whether consent for the initiation of the withdrawal process is forthcoming from the Northern Ireland Assembly.** This position was confirmed by the High Court in Belfast in its ruling in October 2016¹ and upheld by the UK Supreme Court in January 2017.² (.

Challenges to the UK government’s domination of the EU withdrawal process

A number of challenges were made to the dominant position of the UK government and lack of autonomy for Northern Ireland outlined above regarding Brexit, via judicial review heard in the High Court in Belfast and then at the UK Supreme Court. The challengers to the UK government’s position argued that the UK government could only trigger Article 50 via an Act of Parliament, not via Royal Prerogative (which in effect, provides the government’s own authority). The challengers contended that if an Act of Parliament was required, **a Legislative Consent Motion from the Northern Ireland Assembly was also required** since the Westminster Parliament normally seeks the Assembly’s approval for legislation affecting the devolved powers of the Assembly, under the Sewel Convention.

The challengers also argued that the Northern Ireland Office had failed to comply with Section 75 of the Northern Ireland Act 1998 (following the Good Friday Agreement) which requires that an **equality assessment be undertaken of the impact of any legislation** – and this had not been undertaken regarding Article 50. The equality assessment required of public authorities under the 1998 Act covers differing religious beliefs, political opinion, racial group, gender, age, marital status, sexual orientation, disability and dependants. One of the challengers contended that the Good Friday Agreement had created a substantive legitimate expectation that there would be **no change in the constitutional status of Northern**

Ireland without the consent of the people of Northern Ireland. Withdrawal from the EU, it was argued, clearly changed Northern Ireland's constitutional status against the will of the majority in Northern Ireland.

The applicants' case was built upon the following main assertions:

- the Northern Ireland Act 1998 (the legal outworking of the Good Friday Agreement) was inextricably woven with the UK's membership of the EU;
- triggering Article 50, i.e. beginning Brexit, without parliamentary endorsement would arbitrarily remove the rights of UK citizens;
- EU withdrawal would undermine the Good Friday Agreement and the 1998 Northern Ireland Act which contained domestic, EU and international aspects; and that the operation of EU law was part of Northern Ireland's constitutional arrangements and human rights protection.

The legal upholding of the UK government's position

The Belfast High Court and the Supreme Court rejected all of the challenges to Brexit in relation to Northern Ireland. Between them, the two courts asserted the following:

- **The triggering of Article 50 is not in itself legislation covering matters devolved to the Northern Ireland Assembly.** Instead, any legislation relating to Article 50 should be treated as an excepted power retained by the UK Government.
- **The devolved legislatures 'do not have a parallel legislative competence in relation to withdrawal from the European Union'.**³ In other words, Brexit is not a devolved issue for the Northern Ireland Assembly. The Supreme Court concluded that *'the consent of the Northern Ireland Assembly is not a legal requirement before the relevant Act of the UK Parliament is passed'*.⁴
- Section 5 of the Northern Ireland Agreement empowers the Northern Ireland Assembly to make laws but subsection 6 states that this does not affect the power of the Parliament of the UK to make laws for Northern Ireland. As such, UK withdrawal from the EU and a bill repealing/implementing EU legislation are permissible.
- The Good Friday Agreement's references to **consent for changes** in constitutional status refer to whether Northern Ireland **remains part of the UK** or became **part of a united Ireland**, not to Northern Ireland's position inside or outside the EU.
- **The equality assessment requirement** under Section 75 of the Northern Ireland Act does not apply as the triggering of Article 50 is the responsibility of the Prime Minister and her ministers, not the Northern Ireland Office. Moreover, even if Section 75 was applicable, it was too early to make an equality assessment.
- **The triggering of Article 50**, whilst likely to lead to changes in the law, **did not itself alter legal arrangements at that stage.**

The impact of EU withdrawal upon legislation for Northern Ireland

Unquestionably the UK's EU withdrawal will impact upon Northern Ireland's domestic legislation. The UK government's current legislative proposal has been described as a 'Great Repeal Bill'.⁵ This will overturn the European Communities Act (1972) which allowed the UK to join the (then) EEC and enshrined the supremacy of EEC/EU law. Such a bill intends to place initially into UK law vast amounts of EU law, with these items then considered on a case-by-case basis for possible repeal. Many of these legislative items will impinge upon the domestic arena in which the Northern Ireland Assembly is autonomous.

As noted, **'a range of competences** currently shared between the devolved legislatures and the EU **will revert to the former unless Westminster legislates to take them back to itself... Any effort to bring them back to Westminster would meet strong political objections ...** There are also financial implications, as the monies previously coming from the EU to finance these policies in Scotland, Wales and Northern Ireland will have to be diverted to the devolved administrations'.⁶ Given the range of its competences affected by a 'Great Repeal Bill', a case can be made that **Northern Ireland Assembly consent ought**

to be forthcoming for the passing of any overarching repeal bill. Far more likely is that the Assembly will be left to unpick those items of EU-derived legislation it wishes to overturn.

Legislative consent for repeal of EU law relating to Northern Ireland will apply **only to those aspects of legislation a) over which the Northern Ireland Assembly has competence**, i.e. the Assembly has devolved powers in that area, **and b) wishes to repeal or amend**.

Northern Ireland is reliant upon the UK government acting as a satisfactory custodian for its perceived interests in EU withdrawal negotiations. The Secretary of State for Northern Ireland will only be involved in the Brexit Cabinet Committee 'as required'.⁷ The **Joint Ministerial Committee** is the normal mechanism for liaison between the devolved administrations and the UK government but a new Joint Ministerial Committee on EU negotiations has also been created, to allow those devolved executives more focused input. Ultimately however, the interests of the devolved administrations will be filtered through the UK government.

2. ISSUES RELATING TO THE GOOD FRIDAY AGREEMENT

Political stances on EU withdrawal

The continuing ethno-religious divide in Northern Ireland was apparent in how the region voted in the 2016 referendum on EU membership. Irish Catholic Nationalist areas voted strongly to remain in the EU, the constituency of Foyle providing the third highest percentage vote in the UK to retain EU membership and the highest of any constituency outside London. **89% of those describing themselves as nationalist, 88% of those identifying as Irish and 85% of Catholics** voted to **remain in the EU** (these labels are overwhelmingly overlapping).⁸ Within this community there is sizeable sympathy towards a united Ireland, but also considerable acceptance of devolved government within the UK – but within the context of EU membership.

Majority British Unionist areas were much more evenly divided, but mainly voted in favour of withdrawal. **Only 35% of those describing themselves as unionist, 38% of those identifying as British and 41% of Protestants** voted to **remain** in the EU (again, these labels are overwhelmingly overlapping).^{9 10} Within this community, there is strong support for the assertion of British sovereignty.

Within the 90-member Northern Ireland Assembly elected in March 2017, both of the Irish nationalist parties, **Sinn Féin** (27 seats) and the **Social Democratic and Labour Party (SDLP)** (12 seats) **oppose EU withdrawal**. 86% of Sinn Féin voters and 92% of SDLP voters supported remaining in the EU in the Brexit referendum. The two main unionist parties had opposing stances in the referendum. **The Democratic Unionist Party (DUP)** (28 seats) **supports EU withdrawal** (70% of DUP supporters voted leave). The **Ulster Unionist Party (UUP)** (10 seats) **opposed Brexit but fully accepts the referendum result (54% of UUP supporters voted to leave)**.¹¹ The solitary Traditional Unionist Voice representative supports withdrawal. Of the parties not aligned to unionism or nationalism, **Alliance** (8 seats) **the Green Party** (2 seats) and the one **Independent** are pro-EU, whilst the **People Before Profit** (1 seat) backs withdrawal. Even if the UUP can now be added to the Leave side (a doubtful proposition) there are only 40 Assembly members favouring Brexit against 50 opposed.

As the main party representing the nationalist community, Sinn Féin called, in its 2017 Assembly election manifesto, for an-island poll on Irish unification. Under the terms of the Good Friday Agreement, the Secretary of State can stage a referendum within Northern Ireland if it appears there is the possibility of a vote in favour of a united Ireland. There can only be a poll every seven years under the Agreement. The Sinn Féin President, Gerry Adams, argues that Brexit will 'destroy the Good Friday Agreement', being at odds with consent for change, undermining its human rights elements and reinforcing the border.¹² The SDLP leader, Colum Eastwood, urged that 'every parliamentary and diplomatic tool must now be used to maintain the North's membership of the EU ... whether it is through the Danish model

of selective territorial membership or via another creative exemption, every legal and logistical avenue must now be explored'.¹³

In contrast, the DUP position is that the UK government will negotiate on Northern Ireland's behalf. Party leader Arlene Foster was dismissive of the idea of the Irish government to establish a North-South forum to discuss implications of the UK exit. She described the proposal as 'complete grandstanding exercise' for 'remainers'.¹⁴ The UUP now argues that 'the days of being a "Remainer" or a "Brexit" are over and wants the minimum impact for Northern Ireland,¹⁵ a position seemingly shared by the DUP.

The Good Friday Agreement and Northern Ireland Assembly legislation

The 1998 Good Friday (or Belfast) Agreement and Northern Ireland Act 1998 require key decisions devolved to the Northern Ireland Assembly to be taken via **parallel cross-community consent**, which clearly does not pertain on EU matters, given that all nationalists oppose withdrawal. A requirement for cross-community consent can also be triggered via a Petition of Concern from a minimum of 30 Assembly members. However, as noted above, EU withdrawal is a decision beyond the legislative competence of the Northern Ireland Assembly. Cross-community support is deemed sufficient to pass a measure when one of the following two conditions have been met: a) at least 60% of all Assembly members vote to support the measure, including at least 40% who have self-designated as Unionist and 40% who have designated as nationalist or b) 50% of Assembly members vote to support the measure including at least 50% of Unionists and 50% of Nationalists. All Assembly members are required to self-designate as 'Unionist', 'Nationalist' or 'other' at the start of an Assembly term.

A case can be made that **any 'Great Repeal Bill'**, which initially would enshrine EU law within UK domestic law to then allow unpicking as desired, **ought to be subject to Assembly consent** as many of those laws will impinge upon the Assembly's devolved powers. Cross-community consent is **unlikely** to be forthcoming for such a holistic piece of legislation given Nationalist support for the EU and lack of desire to repeal its laws. If a 'Great Repeal Bill' is passed by the UK Parliament **without consent from the Northern Ireland**, item-by-item repeals or upholding of EU-derived legislation could be attempted by the Assembly in those areas of its domestic authority. **Some attempted repeal items may not elicit cross-community consensus.**

The Good Friday Agreement and EU membership

The Good Friday Agreement comprises two treaties: **a Multi-Party Agreement** involving most of the political parties in Northern Ireland and the **British-Irish Agreement**, the accord between the governments of the UK and Ireland. In Article 2 of the British-Irish Agreement, the two governments 'affirm their **solemn commitment to support, and where appropriate implement, the provisions of the Multi-Party Agreement**'. The Article goes on to pledge the establishment of a North/South Ministerial Council and the 'implementation bodies referred to in paragraph 9 (ii) of the section entitled "Strand Two" of the Multi-Party Agreement'. Strand Two is the all-island dimension of the Multi-Party Agreement. The British-Irish Agreement to uphold the Multi-Party Agreement is a binding bilateral international legal treaty between the UK and Irish governments, registered at the United Nations.

The Good Friday Agreement has successfully managed (but not resolved) Northern Ireland's ethno-national divisions. The Agreement contains **three strands**: the first covering political arrangements within Northern Ireland; the second covering institutional relationships between Northern Ireland and the Republic of Ireland (the all-island dimension) and the third covering British-Irish relationships, also embracing other devolved administrations within the islands of Britain and Ireland. The Agreement **assumes** continuing EU membership for both the UK and Ireland **but binds neither** explicitly to maintaining that membership. The 2016 Belfast High Court case outlined in Section 1 ruled that there was nothing in the Good Friday Agreement to prevent the triggering of Article 50.

That High Court in Belfast declared in October 2016 that it would be an over-statement to suggest that EU membership was a constitutional bulwark central to the Good Friday Agreement, which would be breached by notification of Article 50. This, the Court asserted, would be to 'elevate ... [EU membership] over and beyond its true contextual position'.¹⁶ In its January 2017 verdict, the UK Supreme Court upheld the Belfast High Court position: the principle of consent for constitutional change contained in the Good Friday Agreement referred to whether Northern Ireland remained in the UK or unified with the rest of Ireland. It did not refer to EU membership or withdrawal.

The Agreement confirms (Constitutional Issues, para vi.) the right of Northern Ireland's citizens to hold British and Irish citizenship and that this 'would not be affected by any future change in the status of Northern Ireland'.

EU membership references in the Good Friday Agreement

Strand One of the Good Friday Agreement pledges close cooperation between the UK and Ireland as '**partners in the European Union**', whilst Strand Three suggests EU issues as a possible discussion topic for the British-Irish Council created under its auspices. The Council includes the British dependencies of Jersey, Guernsey and the Isle of Man which do not belong to the EU.

An exponent of constitutional flexibility¹⁷ argues that given the status of these dependencies, separate arrangements can also be made for other parts of the UK when England and Wales leave the EU. Northern Ireland and Scotland could remain within the EU, at least pending the resolution of their UK status via a border poll (Northern Ireland) or an independence referendum (Scotland). Their current status as parts of the UK union have been altered by the decision to leave the EU - a decision rejected by both countries - and as such it would be unfair to forcibly remove them from another union, i.e. the European one. This view may hold merit but has no traction with the Westminster government.

It is **Strand Two** of the Agreement where references to the EU are by far the most significant. This Strand assumes continuing joint UK-Irish membership of the EU and this shared belonging forms part of the background to institutional arrangements. Strand Two pledges that the North-South Ministerial Council, designed to promote and oversee all-island cooperation, will 'consider the European Union dimension of relevant matters, including the implementation of EU policies and programmes and proposals under consideration in the EU framework' (para. 17). The same paragraph also requires '*arrangements to be made to ensure that the views of the [North-South Ministerial] Council are taken into account and represented appropriately at relevant EU meetings*'.

The **Annex to Strand Two** suggests areas for North-South cooperation and implementation which 'may include' (item 8) 'Relevant EU programmes such as SPPR, INTERREG, Leader II and their successors'. By far the most significant of the North-South bodies is the **Special European Union Programmes Body (SEUPB)**, given how it has implemented the EU Programme for Peace and Reconciliation in Northern Ireland. Those four peace programmes have provided 2.3 billion euros of funding.

How can the Good Friday Agreement be revised?

Brexit must surely require **deletion and/or revision of the references to the EU** within the Good Friday Agreement. As one of the signatories to the deal will no longer be part of the EU, it is unclear how the required 'implementation of EU policies and programmes and proposals under consideration in the EU framework', as outlined in para. 17 of Strand Two, can continue.

References to '**relevant EU programmes**' in the Annex may also require deletion as they may no longer apply. It is also a moot point whether the 'arrangements to be made to ensure that the views of the [North-South Ministerial] Council are taken into account and represented

appropriately at relevant EU meetings' in para. 17 could be deemed adequate if only one party to the Agreement, the Irish Government, can provide such representation.

The UK's obligations in international law, via its commitment in the British-Irish Agreement to uphold the Good Friday Agreement, are owed to Ireland. A breach is also a breaking of the commitment to the people of Northern Ireland to uphold the arrangements contained in the Good Friday Agreement. Article 27 of the Vienna Convention on the Law of Treaties declares that **states cannot invoke domestic law** – in this case the impact of a Brexit bill - **as a basis for failure to undertake the obligations of a treaty**.

By far the most probable scenario is that the continuing cooperative bilateralism between the UK and Irish governments will allow the necessary rewriting and deletions required of Strand Two of the Good Friday Agreement. The Irish government would surely not challenge the UK. In any case, the International Court of Justice cannot hear any dispute between Ireland and the UK in relation to Northern Ireland. The UK's exclusion in terms of permitting International Court of Justice rulings is in respect of any dispute with a country which is or has been a member of the Commonwealth. Citizens cannot bring cases.

The UK Government's White Paper, 'The United Kingdom's exit from and new partnership with the European Union' pledges '**continued adherence to the constitutional framework, rights and institutions provided for in the Belfast Agreement**'¹⁸ (Annex B, para.5). The White Paper also states that the government 'remain fully committed to the Belfast Agreement and its successors'. The use of the plural '**successors**' is curious. The 2006 St Andrews Agreement modified the Belfast Agreement and might possibly be considered a 'successor' deal but there have been no others. It might be concluded that the post-Brexit revisions to the Good Friday Agreement will form a 'successor' deal.

By far the most significant of the North-South bodies is the **Special European Union Programmes Body** (SEUPB), which manages cross-border EU structural funds. The SEUPB implements the **EU Programme for Peace and Reconciliation in Northern Ireland**, which has amounted to four peace programmes financially underwriting the peace process, providing 1.5 billion euros of funding. The UK Treasury has pledged to underwrite the remaining EU Peace IV and INTERREG programme money, to be paid up to 2020, in the event of prior EU withdrawal. The EU peace projects have helped diminish the border's salience, vastly improved cross-border transport links and brought the two main communities together in seeking joint funding. The current Peace IV programme is due to expire in 2020, but an earlier Brexit could see the curtailment or abandonment of several projects.

However, the bringing of an international treaty test case is very far-fetched, although it is just possible that an individual, or a political party could 'test the water' in terms of the UK's breaching of the Good Friday Agreement. There may also be **demands that a revised Good Friday Agreement be put to the electorates** North and South, as it was in 1998. Dáil Éireann (the Irish Parliament) approved the Good Friday Agreement in April 1998 and will need to approve any rewriting.

One other important aspect of the Agreement is its confirmation of the right of anyone born on the island of Ireland to hold Irish, and thus EU, citizenship. The Agreement confirms (Constitutional Issues, para vi.) **the right of Northern Ireland's citizens to hold British and Irish citizenship** and that this 'would not be affected by any future change in the status of Northern Ireland'. In the five months following the Brexit referendum vote, there were 24,849 applications for an Irish passport from Northern Ireland (a 63 per cent increase on the same period in 2015).¹⁹

The response of Northern Ireland's political parties to the challenges posed to the Good Friday Agreement by Brexit has been predictably variable. Whilst accepting the vast bulk of its content in the 2006 St Andrews Agreement, the anti-EU DUP never supported the Good Friday Agreement and regards its references to the EU as irrelevant. The DUP's government partners in Sinn Féin take a diametrically opposite view in defending the Agreement.

A further aspect of UK withdrawal relates to the **European Convention of Human Rights (ECHR)**. The Convention is not an EU institution, but secession from the EU may embolden those in the UK Conservative Government seeking to replace adherence to the ECHR with a UK Bill of Rights. Again, this would be **at odds with the Good Friday Agreement** in which the British government committed to 'complete incorporation into Northern Ireland law of the ECHR, with direct access to the courts, and remedies for breach of the Convention' (p. 20) and retreat from this pledge may be subject to legal challenge.

3. IMPLICATIONS OF BREXIT FOR NORTHERN IRELAND

Issues of free movement: The Common Travel Area

A **Common Travel Area**, bereft of immigration controls, has existed between the Irish Free State, later the Republic of Ireland, and Northern Ireland since the foundation of the two countries on either side of the border. Legally, **Irish citizens are subject to UK immigration rules. In practice, however, such rules have never been exercised**, other than in the emergency of World War II and its immediate aftermath.²⁰ The UK and Ireland remain outside the Schengen Agreement and retain border controls for other EU arrivals to their countries.

The **bespoke arrangements** between the UK and Ireland are **recognised in protocols** to EU treaties, notably in Article 2 of **Protocol No.20** of the Lisbon Treaty which confirms that both countries 'may continue to make arrangements between themselves relating to the movement of persons between their territories'.²¹ However, the Irish government – as a continuing EU member – may have to **seek permission** from the EU to maintain its distinctive travel relationship with the UK, post-Brexit, given that permission for such an arrangement has been confirmed in an EU Treaty (even though the arrangement pre-dates the EU). It seems unlikely that an EU state would challenge the existing arrangement – but it is possible and could become **part of the Brexit negotiations**.

During the 2016 UK EU referendum campaign, the future UK Prime Minister, Theresa May, asked: 'if the UK pulled out of the EU and came out of free movement, then how could you have a situation where there was an open border with a country that was in the EU and had access to free movement?'²² Since then, the UK government has been more emollient in terms of what is envisaged regarding **visible partition**. In the UK Government's Brexit White Paper, the maintenance of the Common Travel Area between the UK and Ireland was listed as one of the twelve negotiating priorities.²³

However, regular assurances of 'no return to the borders of the past'²⁴ have not been accompanied by clarity over what is proposed. Moreover, the 'borders of the past' have changed largely due to the improved security situation. There is no demand for control of the movement of people across the border from any political parties in the Northern Ireland Assembly.

Up to **30,000 workers** are 'cross-border' in that they live and work on different sides of the Northern Ireland/Republic of Ireland border and would be directly inconvenienced by border checks.²⁵ **Seven per cent** of Northern Ireland's employees are drawn from the **European Economic Area**, a figure exceeded in the UK only in London.²⁶ In the event of a lack of control of movement across the border, EU immigrants in search of UK work **could enter the UK across the border unchallenged**. They could reside in Northern Ireland or across the Irish Sea in Great Britain. The immigration policing operation, Operation Gull, currently monitors non-EU illegal immigration into Britain via Northern Ireland. This could be extended to deal with immigration from EU countries but would require additional resources.

Immigration policy for Northern Ireland is not a matter for the Northern Ireland Assembly. It is a power **reserved for Westminster**. If the UK government devolved this power to the Assembly, it would allow local control over entry into Northern Ireland and maintain a 'soft' border, but there is zero prospect of such devolution.

UK immigration policy may become a **de facto British immigration policy**, in that controls are maintained at mainland ports rather than at UK's only land frontier. In effect, there would be no control of cross-border movement on the island of Ireland and the UK could conceivably confine its border control frontier to England, Scotland and Wales. This would potentially place Northern Ireland within a more overtly 'Irish context', a feature which would be welcomed by nationalists but might concern some unionists. **UK immigration controls could be shifted towards Irish ports and airports** in the same way that immigration clearance for entry into the United States is undertaken at Dublin Airport. The Ulster Unionist Party has suggested that 'imaginative new arrangements could draw on the experience of the Republic surrendering sovereignty at Dublin Airport to the United States for customs and security clearance, and the Calais model where HM Government part funds the arrangement in France'.²⁷ However, the existence of a similar facility for the UK in Ireland would be much more politically sensitive given the historical context. As such, **this policy option of a shift in the location of controls may not be feasible.**

Cross-border trade, tariffs and the Customs Union

Customs controls on goods travelling between Northern Ireland and the Republic of Ireland operated on both sides of the border until the end of 1992, when the Single European Market came into force. **The imposition of tariffs and return of customs controls** – a harder border – for goods travelling to and from Northern Ireland seems **inevitable** in the event of abolition of a customs union, although the UK Government has listed access to the EU Customs Union and tariff-free trade as an (optimistic) negotiating priority. This option would have to be approved by the EU Member States. Physical checks upon goods are in evidence on the France-Switzerland and Norway-Sweden borders as examples of comparable customs controls likely to be introduced.

The chances of approval of a bespoke deal benefiting only the UK and Ireland and at odds with core EU principles may be remote. **One option would be for Northern Ireland to remain part of the EU Customs Union whilst the rest of the UK withdraws.** This would permit tariff-free trade across the border. However, it seems inconceivable that the EU would permit such an arrangement in the event of a UK Brexit, given that Britain would be a beneficiary of the onward transfer of goods from Northern Ireland. It is also unclear whether the UK government would permit sufficient devolution to Northern Ireland allowing the region to conduct its own trade arrangements.

The avoidance of tariffs would be very useful for the Republic of Ireland. 34% of its exports of goods and services go to the EU, of which almost half go to Britain, the highest single reliance upon British purchases of any EU country.²⁸ However, as the EU represents its largest export market, Brexit arguably matters even more to Northern Ireland than to the Irish Republic or the rest of the UK. Growth in exports to EU countries from Northern Ireland has considerably outpaced that to non-EU countries in recent years and amounted to £3.63bn in 2014, compared to £2.53bn of non-EU exports.²⁹ Of course, given its size, Northern Ireland is only a small trader in a UK-wide context, providing only 2.4% of UK exports and 1.5% of imports.³⁰

The importance of Northern Ireland's current tariff-free and quota-free trade relationship with the Irish Republic is apparent, with **34% of Northern Ireland's EU exports heading there (21% of the region's total exports)**.³¹ This makes Ireland the largest market for Northern Irish exports. More broadly, **the majority of Northern Ireland's exports (57%) head to the EU**.³² Sectoral impacts will vary, but it is worth noting that the agricultural, forestry and fisheries sector in Northern Ireland is the largest, in terms of percentage workforce, of any part of the UK, with 3.2 per cent of the workforce directly employed in these categories, more than treble the percentage figure for England³³ and 70,000 people employed in total. **Tariffs** placed by the EU, at a Most Favoured Nation level of 3.2 per cent upon agricultural products exported from Northern Ireland, would have significant adverse effects, whilst average WTO-level tariffs on agricultural imports into Northern Ireland would create inflationary pressures.

The First and Deputy First Minister wrote to the UK Prime Minister in August 2016 arguing that Northern Ireland's agri-food sector was '**uniquely vulnerable** both to the loss of EU funding, and to potential tariff and non-tariff barriers to trade'.³⁴ Common Agricultural Policy (CAP) payments provided **60% of cash income** to Northern Ireland's farms in 2014-15.³⁵ Northern Ireland's farmers receive one of the highest payments-per-hectare annual awards in the EU and nine per cent of the UK's total allocation of EU pillar payments.³⁶

Smuggling of goods to avoid tariffs appears a strong possibility. Different levels of duty on fuel means that the extent of fuel and cigarette smuggling is currently estimated as considerable³⁷ and would in all probability extend to a much wider range of goods.

For political as much as economic reasons – given the sensitivities and unpopularity of customs policing in the area - **it may be more prudent to avoid physical checks upon goods at the border**. Alternatives would include electronic monitoring and spot checks upon depot goods.

Northern Ireland's EU trade dependence has been such that a **3% reduction in the region's GDP** has been calculated as the likely outcome of withdrawal.³⁸ The local economy is weak compared to the rest of the UK in terms of the private sector on a wide range of indicators.³⁹ Whilst some local measures were already in place to boost the local economy regardless of the referendum outcome, notably the plan to cut corporation tax to 12.5 per cent in April 2018, economic effects upon Northern Ireland may be particularly severe.

Security

The border on the island of Ireland has diminished greatly in salience in recent years, albeit not in constitutional terms with unionist versus nationalist differences over its long-term future still dominating Northern Ireland politics. The **pragmatic benefits** of cross-border trade and ease of movement have become accepted as routine. More British unionists now accept the North-South (all-island) bodies established under the Good Friday Agreement than reject such bodies.⁴⁰ The prospect of the return of a 'hard border' partitioning the island of Ireland, not seen since the Troubles, concerns unionists and nationalists.

Fears of a return to a 'hard' physical border between Northern Ireland and the Republic of Ireland should not be exaggerated. The border of the 1970s-1990s era was untypical, marked by security checkpoints and installations introduced as a response by British security forces to the threat from an Irish Republican Army operating on both sides of the border. The deployment of border checks alienated the republican section of the border population. The current threat level posed by 'dissident' IRAs, although still a threat, is much smaller, as they are less active and hold less traction in republican border communities. There is also no desire for the UK government to revive the security focus of the Troubles. Nonetheless, the return of a physical border ought to be avoided as it will not be welcomed by the local population.

4. CONCLUSIONS

In constitutional terms, Northern Ireland is in a very weak position in shaping Brexit. The UK-EU relationship is not a matter devolved to the Northern Ireland legislature. The Northern Ireland Executive, assuming it can be formed following the March 2017 election, will have some input, but no vetoes, via a special joint ministerial committee.

The Northern Ireland Assembly may have input **after** Brexit over which items of EU legislation are retained or repealed. At this point, withdrawal from the EU could conceivably increase the competences of the devolved administration in that policy formulation would not be subject to EU law.

The Good Friday Agreement will require alteration, the physical status of the border may change slightly and the improvements in cross-border trade evident in recent years may be reversed. Tariffs on trade arrangements between Northern Ireland, as part of the UK, and the EU (including the Republic of Ireland) appear inevitable.

Prior to Brexit, relations between the UK and the Irish government had never been better and the cooperative bilateralism which emerged during the peace process was abetted by shared EU membership. The pragmatic logic of continued cooperation will see attempts to maintain British-Irish exceptionalism, in terms of free movement and no checks on goods, across a soft land border between Northern Ireland and the Republic of Ireland.

Any attempts at bespoke deals between the UK and Irish governments may meet opposition within the EU from those wanting sanctions against the UK, feeling that the (cherry-picked) benefits to the UK are not accompanied by any fulfilment of obligations.

The Interlaken Principles⁴¹ make clear that the EU will a) prioritise internal integration over relations with non-member states and b) the EU will always safeguard its own decision-making autonomy. The Principles declare that any relationship with the EU must be based on a balance of benefits and obligations. Non-member states will not be able to choose what aspects of EU integration they particularly favour. As such, prospects for a bespoke, tariff-free Northern Ireland-EU cross-border trade arrangement appear slim, whilst a continuing Common Travel Area is in jeopardy, with all the possible ramifications outlined above

¹ R (Miller) and others v Secretary of State for Exiting the European Union, 29 October 2016.

² <https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf>

³ <https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf>, 41.

⁴ <https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf>, 48.

⁵ <http://www.independent.co.uk/news/uk/politics/great-repeal-bill-brexit-law-eu-law-theresa-may-david-davis-a7343256.html>, 3 October 2016.

⁶ Political Studies Association (2016) *Brexit and Beyond: How the United Kingdom might leave the European Union*, London: UK in a Changing Europe/Political Studies Association, 13.

⁷ See the evidence from Professor David Phinnemore to House of Lords European Union Committee (2016) 'Brexit: UK-Irish relations', HL Paper 76, p.55.

⁸ 'Coakley, J. and Garry, J. (2016) 'Northern Ireland: the challenge of public opinion', <http://qpol.qub.ac.uk/public-opinion-challenge-ni/>, 9 December 2016.

⁹ 'Coakley, J. and Garry, J. (2016) 'Northern Ireland: the challenge of public opinion', <http://qpol.qub.ac.uk/public-opinion-challenge-ni/>, 9 December 2016.

¹⁰ Similar findings in terms of ethno-national divisions over EU membership were also reported prior to the referendum in the 2015 Northern Ireland General Election survey', UK Data Service. SN 7523, available at <https://discover.ukdataservice.ac.uk/doi?sn=7523#1>, last accessed 6 July 2016.

¹¹ 'Coakley, J. and Garry, J. (2016) 'Northern Ireland: the challenge of public opinion', <http://qpol.qub.ac.uk/public-opinion-challenge-ni/>, 9 December 2016.

¹² <http://www.independent.co.uk/news/uk/politics/brexit-northern-ireland-gerry-adams-sinn-fein-good-friday-agreement-peace-eu-a7539011.html>

¹³ Colum Eastwood, 'North's Remain vote must be respected', *Irish Times*, 4 July 2016.

¹⁴ <http://www.irishtimes.com/news/politics/foster-rubbishes-kenny-s-brexit-forum-for-remoaners-1.2846022>, 27 October 2016.

¹⁵ Ulster Unionist Party (2016) *A Vision for Northern Ireland outside the EU*, Belfast: UUP, 1.

¹⁶ R (Miller) and others v Secretary of State for Exiting the European Union, 29 October 2016.

¹⁷ Brendan O'Leary (2016) 'Detoxifying the UK's exit from the EU, a multi-national compromise is possible', available at <http://blogs.lse.ac.uk/brexitvote/2016/06/27/de-toxifying-the-uks-eu-exit-process-a-multi-national-compromise-is-possible/>, 27 June, last accessed 5 July 2016.

¹⁸ HM Government, 'The United Kingdom's exit from and new partnership with the European Union' London: HMSO, CM9417, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf

¹⁹ <https://www.dfa.ie/passporttracking/passportstatistics/>, 3 January 2017.

²⁰ See the evidence from Professor Bernard Ryan to House of Lords European Union Committee (2016) 'Brexit: UK-Irish relations', HL Paper 76, p.32-33.

²¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN>, 293.

²² <http://www.bbc.co.uk/news/uk-northern-ireland-politics-36587809>, 21 June 2016.

²³ HM Government, 'The United Kingdom's exit from and new partnership with the European Union' London: HMSO, CM9417, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf

- ²⁴ See for example, <http://www.independent.ie/irish-news/news/theresa-may-says-no-return-to-borders-of-the-past-in-postbrexit-northern-ireland-34910494.html>, 25 July 2016.
- ²⁵ House of Lords European Union Committee (2016) 'Brexit: UK-Irish relations', HL Paper 76, p.18.
- ²⁶ Social Market Foundation, Working together : European workers in the UK economy, (May 2016) <http://www.smf.co.uk/wp-content/uploads/2016/04/Social-Market-Foundation-Working-Together-European-workers-in-the-UK-Embargoed-0001-030516.pdf>, p.8
- ²⁷ Ulster Unionist Party (2016) *A Vision for Northern Ireland outside the EU*, Belfast: UUP, 19.
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- ⁴⁰ Tonge, J. (2015) Data from the ESRC 2015 Northern Ireland General Election Study, available at <https://discover.ukdataservice.ac.uk/catalogue/?sn=7523>
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