



# “Hard Brexit” -How to address the new conundrum for the Island of Ireland?

Legal policy considerations with a focus on substantive European Union law

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## **Introduction**

Having won a vote on Brexit before the [UK Supreme Court](#)<sup>1</sup>, MPs in Westminster approved a [137 line bill](#) authorising the UK government to start the process of withdrawing the UK from the EU with an overwhelming majority. The UK [Prime Minister's speech of 17 January](#) and the subsequent government's [White Paper](#) confirmed the [writing on the wall](#): there was never scope for any so-called soft Brexit. The UK's top priorities are to avoid free movement rights for EU citizens, to obtain autonomy in negotiating trade agreements around the world and to eschew ECJ jurisdiction of relevance for the UK. This requires that the UK leaves the Internal Market and the Customs Union and only allows for a specific free trade agreement between the EU and the UK in the future. The White Paper provides smaller surprises: the Westminster Parliament (not the UK government) will decide which parts of the EU acquis are maintained, and any future trade relation with the EU will be discussed in Westminster as well. Although, according to the UK Supreme Court ruling, parliamentary scrutiny is not required for the devolved regions, the White Paper mentions that “where appropriate, the devolved legislatures (...) will be able to decide” which parts of the “EU acquis” to maintain – subject to further specifications in another White Paper on the Repeal Bill. Interestingly, Ireland as a country as well as Northern Ireland receives specific attention in the White Paper,<sup>2</sup> indicating the recognition of specific problems even by the UK government.

## **Brexit and the island of Ireland**

The cutting off of the United Kingdom from 40 years of peaceful cooperation through legal frameworks for the Internal Market and the Customs Union as well as in fields not strictly commercial, epitomised by Union citizenship, will have consequences for the Island of Ireland. Although there are a few upsides for the



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<sup>1</sup> R (on the application of Miller and another) v Secretary of State for Exiting the European Union (Appellant), REFERENCE by the Attorney General for Northern Ireland - In the matter of an application by Agnew and others for Judicial Review, REFERENCE by the Court of Appeal (Northern Ireland) – In the matter of an application by Raymond McCord for Judicial Review [2017] UKSC 5

<sup>2</sup> Pages 21-23 are dedicated to “Protecting our strong and historic ties with Ireland and maintaining the Common Travel Area”, Annex B, at pp. 73-75, is entitled “The UK and Ireland”.

Republic of Ireland (mainly its potential to attract business, including the higher education sector, since it will be the remaining EU Member State where English is the every-day language and where the common law is used) these are outweighed by the risks, as has been well documented in an [ESRI report](#) of 11/2016.<sup>3</sup> Geographically, the Island of Ireland as a whole will be separated from the rest of the EU by a non-Member State. Presently, there are only few sea connections directly to France, and most air transport crosses the UK. This difficulty is enhanced by the fact that one of the two states claiming sovereignty on the island of Ireland will no longer be a Member State of the EU. As a consequence there is one question that has exercised many political commentators: Does the position of the island of Ireland in the new European variegated geography demand a specific solution?

Institutional and constitutional issues around the border between Northern Ireland and the Republic of Ireland are [well rehearsed](#): most politicians express a resolve that the borders of the past should not return, and a desire for more technology to be used at the borders of the future, avoiding the return of barbed wire and watch towers through the imposition of border controls on business, educational and healthcare institutions. The focus on the border is understandable given the



traumatic experiences with the borders of the past. Nevertheless, this focus obfuscates the perception of the relative success of EU integration specifically on the island of Ireland; namely, that substantive integration on the island of Ireland has progressed in the last 44 years, and even more substantively after 1998, the year of the Belfast Peace Agreement. The question of what needs to be done to maintain this process after Brexit has not yet been addressed widely.

In an influential branch of European integration theory, the term integration is understood as a process by which transactions within two separate parts (Northern Ireland and the Republic of Ireland) are complemented and gradually superseded by transactions within the larger, integrated unit.<sup>4</sup> This perspective on integration invites a focus on exchange and transaction between persons, i.e. on the interaction of people(s) instead of states. Distinctions between several areas of integration are common, such as the distinction between economic and social integration. In addition, the notion of civic integration also figures in some of the agreements between the UK and Ireland about Northern Ireland and its status. In these agreements it denotes integration of civil society as well as of administrations and partly the political apparatus. While the success of integration depends on the open-mindedness and integrity of the parties involved, the legal framework for interaction is relevant, in that it can enable integration as well as limiting opportunities for interaction.

### ***EU legal frames and economic, social and civic integration***

When it comes to economic, social and civic integration on the island of Ireland, the European Union has provided a decisive legal framework since 1973, i.e. for more than 40 years. The specific quality of European Union law has been particularly relevant for the relationship between these two countries

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<sup>3</sup> Adele Berginab and others, *Modelling the Medium to Long Term Potential Macroeconomic* (Dublin: Economic and Social Research Institute, 2016).

<sup>4</sup> Defining integration by reference to transactions between persons was first introduced by K. Deutsch (The Analysis of International Relations 1971), and also informs neo-functionalism (Haas & Dinan (eds) *The Uniting of Europe 1950-1957*, 2004). Both inform recent enquiries into the impact of EU law and policy on Europe's societies and their interaction (Sabine Israel and others 'Connected Europe(ans): does economic integration foster social interaction?' (2016) *Journal of Contemporary European Studies* 26 (1) 1-19; Steffen Mau & Jan Mewes 'Horizontal Europeanisation in Contextual Perspective: What Drives Cross Border Activities within the European Union?' (2012) *European Societies* 14 (1) 7-34.

because of the way the Irish written Constitution and the UK's unwritten constitutional arrangements classify public international law: both countries do not grant any Treaties or other arrangements under public international law direct effect internally. The importance of the European Union going beyond mere intergovernmental cooperation cannot be underestimated. The direct effect and supremacy of substantive European Union law within national law and over national law ensures that the European Union is much more than a negotiation space between governments. It creates a new legal space, which in the words of the European Court of Justice is autonomous from national law and enables transactions between economic, social and civic actors to take place in a larger space –both physically and metaphorically -than the nation state. This legal space can be used by individual citizens, businesses and local and regional governments as well as civil society organisations for overcoming the division between separate parts on the island of Ireland.

Just a few examples may be sufficient to illustrate this point: Since 1968 (for the whole of the EU) and 1973 (for UK and Ireland) legal guarantees of free movement of persons deprive states from the right to limit citizens' access to labour markets and professional markets abroad. Free movement rights of economically active persons have been gradually expanded to those not so active. Union Citizenship introduced by the Treaty of Maastricht in 1993, to complement the market freedoms, has complemented and stabilised this development.<sup>5</sup> EU citizens now have access to [higher education systems in other Member States](#), and cannot be barred from engaging in transnational cooperation for purposes of leisure, political activity and civic interaction. Legal guarantees of free movement of goods enable unhindered flow of trade across the island of Ireland. Enforceable [legal frameworks for environmental protection](#) create a level playing field for those interested in a clean environment, but also for businesses which prefer producing and delivering in sustainable ways. In addition, EU environmental laws approximate administrative practices of EU Member States, which again can be useful for administrative cooperation in other fields. The complex legal framework for [EU agricultural policy](#), consisting of regulation as well as funding mechanisms, is a life-line for small farms, and contributes much to the all island agro-food sector.

### ***In particular: the Belfast agreement and subsequent agreements aimed at overcoming sectarian warfare in Northern Ireland***

It has been submitted that a series of peace agreements to which the UK and Ireland are parties (starting with the [Belfast agreement](#) and provisionally ending with the [Stormont house agreement](#)), can continue to function after one of the two parts of Ireland leaves the European Union.<sup>6</sup> There is a certain (albeit limited) parallel to European Union law: all these agreements aim at the overcoming of division in society. Under the definition provided above, this equals integration – as promoted by the EU.

The Belfast Agreement is focused on institutional aspects of democratic governance in Northern Ireland (Strand one and two), establishing institutions whose existence seems conditional on EU membership.<sup>7</sup> Strand 3 of the Belfast Agreement also promotes economic, social and civic integration, in that it aims at the "harmonious and mutually beneficial development of the totality of relationships

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<sup>5</sup> There is a vast literature on free movement of persons in the EU, for economic and other reasons. Recent publications include Dimitri Kochenov (ed) *EU Citizenship and Federalism: The Role of Rights*, Cambridge University Press 2017, and Nuno Ferreira & Dora Kostakopoulou (eds.) *The human face of the European Union: are EU law and policy humane enough?* Cambridge University Press 2016.

<sup>6</sup> Secretary of State for Northern Ireland, Inquiry European Union Committee, House of Lords, Brexit: UK-Irish Relations, Qu 29, final report paragraph 167

<sup>7</sup> Gordon Anthony, 'Britain Alone! A View from Northern Ireland', in *Britain Alone! The Implications and Consequences of United Kingdom Exit from the UK*, Wolters Kluwer, Alphen aan den Rijn, ed. by Patrick Irkinshaw and Andrea Biondi (Alphen aan den Rijn: Wolters Kluwer, 2016).

among people of these islands" (i.e. Great Britain and the island of Ireland), acknowledging that this also requires "sustained economic growth and stability in Northern Ireland" as well as "promoting social inclusion". Economic aspects of cohesion are highlighted by reference to improving infrastructure, "tackling the problem of a divided society" by, among others producing new approaches to transport and improving the infrastructure overall. It also refers to economic planning, equality legislation and tolerance of linguistic diversity. The Stormont House Agreement adds elements of overcoming the ongoing aftereffects of the "Troubles" more directly. It demands institutionalising a commission on flags, identity and culture, as well as processes and institutions aiming at conciliation. Next to chapters on criminal justice and security aspects, as well as reform of political institutions, the Stormont House agreement, under "outstanding commitments", delivers a specification of the Belfast Agreement. It states that "civic voices are heard and civic views are considered in relation to key social, cultural and economic issues", and re-commits overcoming discrimination on grounds of ethno-religious allegiance in the provision of goods and services, housing and other areas. By explicitly demanding that segregated education and housing are overcome, the Stormont House agreement aims at a specific form of socio-economic integration.

As mentioned above, under the national laws of the UK and Ireland the implementation of these agreements depends on the political consensus and legal implementation in national law. Whether these are formal agreements under public international law, may even be doubted (with the exception of the agreement between the governments annexed to the Belfast Agreement). In the absence of specific institutions to implement – and, if needs be, to judicially enforce – these agreements, they lack the supranational character of European Union law, with its direct effect, supremacy and independent court. Substantive EU law, in so far as it engenders socioeconomic integration, is more than a mere moral support for the peace agreements. Instead, giving up common EU membership of both parts of Ireland equals the proverbial pulling of the carpet under the feet for these agreements. This corresponds to the fact that the agreement between the governments of the UK and Ireland, concluded alongside the multi-party agreement referred to as Belfast Agreement, states that the parties have agreed "wishing to develop (...) the close cooperation between their countries as (...) partners in the European Union".

### ***Relevance of EU membership of both parts of Ireland for maintaining all island integration***

Accordingly, if those agreements should continue to inform the integration process on the island of Ireland, a new legal framework for integration on this island must accompany the process of the UK's withdrawal from the EU. It is decisive that this legal frame has the same supranational quality as European Union law. Mere international law without direct effect and lacking institutions for judicial enforcement will not be sufficient – especially given the approach to public international law in both states. Institutionally this would suggest for the EU and the UK to agree on a specific status for the island of Ireland as a whole, notwithstanding the UK's withdrawal from the EU. Ideally the withdrawal agreement should already set out that until the final relationship between the UK and the EU is established in a new European agreement, the whole island of Ireland remains part of the European Union in a transitional capacity.<sup>8</sup> The suggestion that such an arrangement can be made by in-

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<sup>8</sup> It may of course be the case that the UK and the EU agree for the UK to remain in the EU for a transitional period of more than the 2 years which are hailed in the political discourse (referring to Article 50 TEU). If such an agreement is achieved, a specific transitional agreement for the island of Ireland is less pressing. However, the paper proceeds on the assumption that the UK does not wish to maintain full EU membership even for a transitional period. Should the UK maintain full EU membership for a transitional period, the circumstances would change. In this case, the period from announcing the intent to withdraw from the EU and the coming into effect of the withdrawal can be extended by consent in the EU ministerial council (Article 50 (3) TEU).

formal bilateral negotiations between Ireland and the UK misunderstands the character of the European Union as a community of law, in which Ireland remains embedded. This does not indicate a weakness at all: by pooling its sovereignty with the other Member States Ireland has enhanced and strengthened its sovereignty, rendering the overcoming of past colonial power more realistic.

It may be argued that, if that cannot be achieved, those parts of the legal integration framework which are most decisive for economic social and civic integration should be specified as the subset of the European Union legal frame which applies to the island of Ireland. However, it is difficult to imagine that this is indeed an alternative. It would certainly be very cumbersome to identify those areas for which EU membership shall be maintained, especially given the fact that this would have to be established by cooperation of administrations with civil society<sup>9</sup>. Creating a transitional partial membership of the EU crafted for Northern Ireland as the part of the island of Ireland most immediately threatened by the wish of voters in England and Wales to withdraw from the Union will most certainly be too complex to be achieved. Whether a solution by which the EEA legal framework is used as a template is feasible would require a more expansive legal opinion. In any case, whether it is EU or EEA, the UK would have to accept the authority of a supranational court (ECJ or EFTA court), and also be prepared to shoulder the financial bill for the continuing (transitional) membership of Northern Ireland as a separate region of Ireland, as long as it does not belong to the Republic of Ireland and thus the EU.

### ***Areas of specific concern***

Thus, the necessity to not endanger the slow and painful integration process on the island of Ireland, which is part of the peace process, would suggest maintaining a specific legal framework under EU law which preserves the effects of EU membership for Northern Ireland. Assuming that for the time being a two state solution for the island of Ireland is maintained, some illustrations on why maintaining EU membership status is needed can be provided in this space

- Shared markets for employment and professional services  
Only maintaining EU membership can avoid that substantive hurdles are established for cross border commuters working (as employees or self-employed) in the other jurisdiction. Rights guaranteed nowadays include the right to claim in-work benefits for frontier workers as well as a ban on requiring additional investment in service provision (e.g. different bank accounts), to name just two examples. While studies of the Centre for Border Studies for up to 2011 expose the extent to which the EU rights of cross border workers are ignored,<sup>10</sup> without EU membership those rights would not even exist. Frontier workers are, however, living proof of how the integration on the island of Ireland has progressed.
- Citizenship rights beyond economic integration
  - Education systems, in particular higher education, are not fully integrated. Nevertheless, universities in both parts of the island allow some privileges for students completing their courses in the other jurisdiction. For example, the Irish study support

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<sup>9</sup> For Northern Ireland, the civic advisory panel provided for in the Stormont House Agreement should play an important role. The membership of this panel has been announced on 6 December 2016 ([http://www.ief.org.uk/wp-content/uploads/2016/12/Fresh\\_Start\\_and\\_Stormont\\_House\\_Agreements\\_Six\\_Monthly\\_Update\\_14.12.16.pdf](http://www.ief.org.uk/wp-content/uploads/2016/12/Fresh_Start_and_Stormont_House_Agreements_Six_Monthly_Update_14.12.16.pdf) - <https://www.executiveoffice-ni.gov.uk/news/improved-engagement-civic-society-will-leave-us-better-placed-shape-future-foster-and-mcquinness> )

<sup>10</sup> *Information services for cross-border*

*workers in European border regions*, October 2012; *Border People Briefing: Family Benefits*, April 2015

payments are also made for courses studied in Northern Ireland, and similarly student finance is awarded to Northern Irish students for studying at an Irish university. Conversely, any special status for Irish students is not provided for in the Northern Irish jurisdiction. These students can and must rely on their privileged status as EU citizens. Presently, residence permits are not an issue due to the Common Travel Area, an informal arrangement between Ireland and the UK with a long tradition. The situation for students from the UK in Ireland will have to change under the principle that privileges granted to non EU citizens from one state must also be granted to all EU citizens. While many students from Northern Ireland may have Irish citizenship, this is not the case for all. Maintaining EU membership for Northern Ireland by way of a Treaty change in the course of the withdrawal agreement for an interim period will avoid this package of difficulties. The renegotiation of the Common Travel Area into a legally binding instrument under international law would take some time, since negotiations could only start once the EU negotiations with the UK were finished. Also given the approach of both states to public international law it is uncertain in how far a more formal CTA could replace EU law.

- Health care

The area of health care constitutes a popular case study in relation to established practical cooperation on an all island basis.<sup>11</sup> Specific cooperation with a clear all-island perspective refers to specific illnesses which are sufficiently rare as to render a concentration of specific services necessary. Frequently quoted examples include cardiac surgery specialism for children in Dublin and a radiology unit in Derry. Everyday health care for those working or studying across borders relies very much on EU Treaty law and legislation without any specific all island provision. In this regard, the EU legal framework, as well as EU funding, is cited as the basis of ongoing cooperation.

However, the situation emerging while the UK withdraws from the EU and afterwards does not merely require maintaining the status quo as regards integration on the island of Ireland. At the same time, a specific legal framework for the island of Ireland must take into account the fact that the island is severed from the EU by the larger state in its immediate neighbourhood that is positioned physically between Ireland and the other EU Member States. This will have negative effects for both parts, even if a solution can be crafted which allows the integration on the island of Ireland to continue via maintaining the common legal framework of EU membership. Accordingly, the process of the UK's withdrawal requires renewed and increased efforts to develop an all island perspective in combatting these detriments.

### ***Maintaining or developing an all island perspective***

- An “outermost region” of the EU?

There are examples of recognition of the specific needs of regions in the EU: Article 349 TFEU provides for some advantages for remote insular regions such as the Azores, Madeira and the Canary islands. Areas of preferential treatment include state aid and access to structural funds and horizontal EU programmes, while Article 350 provides an authorisation for specific continued cooperation in the BENELUX region. The islands covered by the former provision might be in a more dire situation than the island of Ireland even with all its difficulties –

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<sup>11</sup> See references in European Union Committee, *Brexit: UK-Irish Relations* (London: House of Lords, 2016) (pp. paragraphs 153-157).

though the [current update of a study by the Irish Department of Ireland](#) leave no doubt on the severity of the economic consequences for an island with a large agricultural sector: this is the sector where a WTO regime for trade imposes the highest level of tariffs which will be detrimental for exporting to Great Britain. It cannot be said that the predominance of agriculture only applies to the Republic of Ireland. On the contrary, while the Republic of Ireland has overall profited from EU Membership through a diversification of its trading partners, Northern Ireland is even more focused on Britain in this respect. Also, the economic integration in the so called agro-food sector may well be more developed than in other areas, with common usage of equipment and transnational production chains being the norm rather than the exception. Accordingly, there is an all island perspective for this sector. This suggests that preferential treatment in the areas mentioned could be necessary at least for an interim period. This should be reflected in an interim regime to be implemented prior to a final settlement of the EU UK relationship, as well as in this final settlement. Inclusion in the TFEU is of course not the only option; a regulation would be another option at least as long as EU membership status applies to Northern Ireland.

- European Grouping of Territorial Cooperation ( [Regulation 1082/2006/EU](#))  
Hoping that the specific situation of the island of Ireland justifies preferential treatment in areas such as state aid, customs and access to EU structural funds and horizontal programmes, using the EGTC legal framework for the island of Ireland with a two state solution might be worth a renewed attempt. This framework not only enables the establishment of common administrative bodies for specific public services (e.g. Health Care, education and others), but it has also been used to maximise funding acquisition and streamline funding administration. EGTCs have also been used for establishing transnational spaces of civic cooperation, which again would allow furthering the achievement of aims specified in the Stormont House Agreement as far as these have an all island dimension.

### ***An all island perspective on the basis of a small state analogy for Northern Ireland?***

The all island perspective outlined above may not be agreeable for all factions of Northern Irish society, and it might also fail because of opposition of the UK or even certain Member States. Another option which has not been contemplated so far is the analogy of Northern Ireland (not the UK as a whole) with small states such as Andorra or Vatican City. These are similar in size to Northern Ireland (but not to the island of Ireland). [Their relationship with the EU is presently under negotiation](#), and they aspire becoming aligned with the Internal Market, the Customs Union as well as the option to use the Eurocurrency. Aligning Northern Ireland with the position of these states would require a considerably enhanced degree of autonomy from the UK as compared to today. However, it is not unheard of that in the course of accession agreements autonomy and special status for certain smaller regions is agreed, as witnessed by Article 355 (4) TFEU on the Aland Island. Provided the political will on all sides of the negotiation is there, this might be a further option.

### ***Maintaining the option of re-joining Northern Ireland and the Republic of Ireland.***

- For the sake of completeness, it should be mentioned that the Belfast Agreement requires maintaining the option of achieving a united Ireland. With the UK's withdrawal from the EU the legal framework for such a future endeavour changes substantially. However, German reunification provides a precedent for a reunification of two parts of a state, as a result of which the European Union was enlarged. At this time, the enlargement of the European Union was achieved without a Treaty change, as agreed by [a special meeting of the European](#)

[Council in Dublin on 28 April 1990](#). The necessary acts of secondary law were adopted on the basis of delegation of powers to the Commission, in order to avoid that the EU legislative process was overtaken by the speed of historical events.<sup>12</sup> It is unlikely that such an informal approach to a factual enlargement of the EU would prevail again. Accordingly, it is widely assumed that the withdrawal agreement will contain a clause establishing that any re-joining of Ireland in accordance with the Belfast Agreement would result in EU membership of the enlarged Ireland, except in the case of using the withdrawal procedure by this state in accordance with its constitutional requirements and Article 50 TEU.

- Further, for the sake of completeness, it should be added that any bilateral negotiations between the UK and Ireland during the process of withdrawal are pre-empted by the EU negotiations with the withdrawing Member State UK.<sup>13</sup>

### **Conclusion**

Overall, it is suggested that there is merit in working for a sustained future of substantive integration on the island of Ireland. For more than 40 years, the law of the European Union has offered a functional legal framework for this endeavour. Maintaining the inclusion of Northern Ireland as a territory where the law of the EU applies would appear the least disruptive option. This does not mean that there are no disruptions. This does not mean that the UK's departure will not create any disruption – the disruption resulting from a border between Great Britain and Northern Ireland are all too obvious. Further, there will be immense political difficulties in convincing the UK government in Westminster to continue contributing to the EU budget and enduring relevance of ECJ jurisdiction for the sake of maintaining an all island perspective for Ireland. Political difficulties will also abound from the Republic of Ireland, in particular around accepting that any solution will have to be negotiated with the whole of the EU-27 with priority, instead of relying on post-colonial bonds to the UK. It is possible, however, to craft a solution that does not disrupt all-island perspectives in the same way as it is possible to disrupt integration by foregoing this opportunity.

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<sup>12</sup> Mark Birchen, *The European Parliament and German Reunification* (Brussels: Directorate General for the Presidency: Archive and Documentation Centre (CARDOC), 2009) (pp. 13-16).

<sup>13</sup> Dagmar Schiek, *Written Evidence for the Northern Ireland Affairs Committee's inquiry into Northern Ireland and the EU Referendum (EUN0015)* (London: House of Commons, 2016). with further references