

IIEA Policy Brief

A Special Status for Northern Ireland?

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Overview

Theresa May's address to the Conservative Party Conference on 2 October 2016 has led many observers to believe that the UK is veering towards a 'hard' Brexit – a scenario which would leave the UK outside both the Single Market and Customs Union, and could result in a re-emergence of a hard border on the island of Ireland.

Much of this speculation is hasty. Neither the outcome of the talks nor the negotiating stances of the parties can be predicted at this point. Indeed, there are numerous possible formats for the UK's withdrawal and for its future relationship with the EU - be it Norwegian, Swiss, Canadian or some other, bespoke, solution.

Nonetheless, it is true that at present the UK's stated positions on control of immigration, domestic legislation and trade policy appear incompatible with the EU's requirements for allowing access to the Single Market and Customs Union, and it is necessary to be alert to the challenges this scenario presents.

As such, this brief will take the possibility of a hard Brexit as its baseline scenario. It will begin by examining the current status of the border, discuss the format and potential implications of a hard Brexit, and discuss in broad terms, some possible components of a post-Brexit 'special status' for Northern Ireland, to mitigate damage to the region and the island of Ireland as a whole.

The Border Today

The combination of the Common Travel Area, full EU membership, and the onset of the peace process has ultimately meant that both customs posts and immigration checkpoints on the Northern Irish border have become unnecessary. In fact, the dismantling of security posts and reopening of secondary border-crossings has made the presence of the border almost impossible to discern.

While the Good Friday Agreement underpins much of this progress, two aspects of the current relationship between Ireland, the UK and EU are key to understanding the possible ramifications of Brexit:

- (i) **the Common Travel Area**, an agreement between Ireland and the UK on free movement of people. With just a small number of exceptions, the agreement has allowed for citizens of one country to be treated almost identically in the other, including the ability to live, work and claim social welfare.

In the EU context, the CTA is protected by Protocol 20 of the Treaty on the Functioning of the European Union, which firstly exempts the UK from the Schengen agreement, Europe's own passport-free travel zone, and secondly provides Ireland with an opt-out for as long as the CTA exists.

- (ii) **the EU's Single Market** and separate **Customs Union** which, combined, allow virtually all classes of goods and services to be traded unhindered across the Irish Sea and on the island of Ireland. It is important to bear in mind that the Customs Union and Single Market, though closely intertwined, are distinct entities. The first is an agreement in which Member States and participating countries agree to remove restrictions on mutual trade in goods, and apply a common system of tariffs and import quotas to non-members. The Single Market meanwhile is an enhanced free-trade area, in which not only goods, but also services, capital and people can move freely.

More information on these arrangements can be found on the following page.

More information: What is the Common Travel Area?



The Common Travel Area (CTA) is an agreement between Ireland and the United Kingdom allowing for free movement between the two states. It predates the EU's rules on free movement of persons.

Agreed in 1923 between the United Kingdom and the Irish Free State, the CTA was fully implemented by 1925. It was suspended after the outbreak of the Second World War in 1939, but reinstated in 1952. It has continued without interruption to the present day, although the heightened security during the Northern Irish conflict created difficulties, in particular for Irish citizens crossing into the United Kingdom.

The CTA Covers the whole of the United Kingdom and the Republic of Ireland, including the Channel Islands and the Isle of Man.

The CTA is not specifically provided for in legislation in either country, but is referenced in many pieces of domestic legislation and bilateral agreements between the UK and Ireland.

In the EU context, the CTA is protected by Protocol 20 of the Treaty on the Functioning of the European Union, which exempts the UK and Ireland from the Schengen agreement (the EU's own passport-free travel area).

More information: The Customs Union

The EU Customs Union is an agreement that removes customs duties on goods at the borders between EU Member States, applies common customs duties on imports from outside the EU and common rules of origins procedures for products from outside the EU. It also ensures that common tariffs are applied in the same way across all the EU's external borders.

One of the consequences of this Customs Union is that the EU Member States negotiate trade deals as a single bloc (The Common Commercial Policy), with the European Commission having the exclusive right to negotiate on behalf of the European Union.

More information: The Single Market

The EU's 'Single Market' is an enhanced free-trade area. The Customs Union established, in principle, the free movement of goods in the EU, but the Single Market goes much further. It defines the EU as one territory without internal borders or any other obstacles to the free movement of (i) goods, (ii) capital, (iii) services and (iv) people. These 'Four Freedoms' are the foundation-stones of the Single Market and are inextricably linked to its functioning.

All the EU Member States are a part of the Single Market. Preferential access to the market is also provided to certain third party countries, like Norway, Liechtenstein, Iceland and Switzerland, as part of trade agreements such as the European Economic Area and the European Free Trade Area. Third party countries must conform to Single Market rules and regulations in order to secure this access.

What is a hard Brexit?

As noted, a hard Brexit is far from guaranteed, but it is the scenario that presents the greatest challenges for Ireland, and has exercised minds and pens since Theresa May's speech at the 2016 Conservative Party Conference.

This scenario would leave the UK outside both the customs union and the Single Market, on either a permanent basis, or a transitional basis while the details of a new trading relationship are negotiated.¹

The hard Brexit model assumes that neither the UK nor EU will bend on the key issues in the negotiations, namely:

- for the UK, full control over immigration and domestic legislation;
- for the EU, acceptance of the principle of free movement of people and transposition of Single Market regulations in exchange for Single Market access.

Broadly, in this scenario the UK would:

- lose most if not all preferential access to the Single Market
- be outside the EU customs union, in order to allow it to pursue its own trade policy independently of the EU
- conduct its trade with the EU27 on the basis of WTO rules
- see tariffs applied to most, if not all, goods and services traded between it and the EU
- have the EU's rules of Origin Procedures applied to all goods entering the EU from UK territory
- have customs posts and immigration controls on all its borders with the EU

How does it affect the border arrangements?

This scenario throws up significant complications for the island of Ireland.

Customs controls on the Northern Irish border would be unavoidable: all goods, including agriculture and fisheries produce, which are crucially important to the economies on both sides of the border, would be affected by tariffs and would be subject to the EU's Rules of Origin procedures, creating costs for importers and exporters and damaging the integrity of the deeply interwoven supply chains on the island of Ireland.

UK businesses trading with Ireland and the rest of the EU would have to submit customs declarations, pay Value Added Tax on their products as they cross a border, and accept delays while waiting for them to clear inspections.² The OECD has estimated that crossing the border, documentation and other delays can increase the transaction costs of trade by up to 24% of the value of traded goods.³

Additionally, studies of time-sensitive industries in countries acceding to the EU suggests that every 1 hour of customs delay adds 0.8 percentage points to the ad valorem trade-cost rate and leads to 5% less trade.⁴

¹ The withdrawal negotiations have a deadline of two years from the date the UK formally declares its intention to leave the EU (which can be extended only by a unanimous decision of the European Council). Negotiations on the future trading relationship, if such a relationship is desired by either side, would take significantly longer. Estimates of 5-10 years are common.

² [HM Treasury analysis: the long-term economic impact of EU membership and the alternatives](#), HM Treasury, United Kingdom. (April 2016).

³ [Trade Costs: What have we learned? A synthesis report](#), Moise and Le Bris, OECD trade policy paper No. 150. (April 2013).

⁴ [Is faster trade more trade? Evidence from EU enlargement](#), Cecilia Hornok (July 2011).

“ ... every 1 hour of customs delay adds 0.8 percentage points to the ad valorem trade-cost rate and leads to 5% less trade. ”

A UK outside the EU and Single Market also presents difficulties in terms of immigration controls between Ireland and its neighbour.

First, there is a legal incompatibility to consider: Ireland’s opt-out from the Schengen agreement is structured as a joint exemption for the UK and Ireland, emphasising the special status of the Common Travel Area. It seems unlikely that this protocol, as it stands, could survive a process which sees the UK firmly outside all the Treaties and third party agreements of the European Union.

Even if some accommodation could be reached with the EU to maintain the Common Travel Area, perhaps through an amendment or redrafting of Protocol 20, there is a political incompatibility to consider: though Ireland is not in Schengen, it is committed to uphold the principle of free movement within the Single Market. From a UK perspective, it would be exceedingly difficult to square its domestic requirements regarding the control of immigration with free movement of EU citizens into Ireland and an open Irish border into the UK.

Some manner of both immigration and customs controls would therefore seem to be inevitable.

“ Some manner of immigration and customs controls would seem to be inevitable. ”

Mitigating border controls – a special status for Northern Ireland?

The issue of border controls is more intractable than has been generally conveyed in the Brexit debate. How to manage this eventuality and mitigate disruption is central to the current debate. Existing precedents, however, fail to offer any directly analogous solutions.

For example, the Nordic Passport Union⁵ has sometimes been cited as a possible model for Ireland and the UK, but this falls short of a solution.⁶ Some commentators have rightly pointed out that Sweden (EU) and Norway (non-EU) do not have immigration controls on their border, and only limited customs checks, but this is a consequence of the fact that both are members of the EU’s Schengen travel zone, and that Norway is a member of the Single Market through the European Economic Area, and accepts the free movement of EU citizens on its territory.

As such, a *sui generis* solution for Northern Ireland, reflecting its special status and complicated history, is likely to be the only realistic answer. If the EU27 are willing to recognise the special status of the North, it may be possible to seek special arrangements that prevents the immediate re-emergence of a visible border on the island, or at the very least limits its intrusiveness.

What might be the components of a special status for Northern Ireland?

Any post-withdrawal arrangements must address the two key issues of free movement of people and movement of goods across the island.

1. Movement of people

One possible solution to the question of free movement on the island could be found in the relatively recent past: upon the outbreak of the second World War, the Common Travel Area was suspended, and immigration controls were introduced between the entire island of Ireland and the rest of Great Britain. It could be possible to use a similar model here: immigration checks between Ireland and the UK could be moved to ports and airports in mainland Britain, while simultaneously, and likely with the assistance of the UK, strengthening border controls at entry points on the island of Ireland.

This would not presently be allowed for under EU law, but recognition of Northern Ireland’s unique status, requiring a unique solution, could conceivably be leveraged in the negotiations in order to come to an accommodation.

⁵ The Nordic Passport Union is comprised of: Norway, Sweden, Denmark (including overseas dependencies), Iceland and Finland.

⁶ For more information on this, see the June 2016 policy brief Brexit, Northern Ireland and Ireland co-authored by academics from Newcastle and Durham University, including authors: Dr Sylvia de Mars, C.R.G. Murray, Dr Aoife O’Donoghue and Ben T.C. Warwick

2. Movement of Goods

The issue of customs controls is more intractable – in theory, a ‘hard’ Brexit model leaves little room for manoeuvre (in fact even the typical ‘soft’ withdrawal models, usually based on the European Economic Area, still require some manner of customs controls).

It is not possible to state at this stage precisely how these controls would operate. It is conceivable that simplified procedures could be put in place - perhaps prioritising spot checks and audit over extensive examination of goods consignments.⁷ Such a solution might eliminate the need for an intrusive border presence.

The question of tariffs would remain, however, and would exert a heavy toll on cross-border trade for both Northern Ireland and the Republic of Ireland.

For a creative solution to the issue, we might look to an even more recent passage of Irish history: our accession, with the UK, to the European Union in 1973. When the UK joined the EU, the particularities of its history meant that some of its overseas territories were geographically or politically unsuited to full membership of the European Union. A type of variable geometry solution was devised to accommodate these regions.

Certain territories, such as Gibraltar (cryptically referred to in the Treaty as “European territories for whose external relations a Member State is responsible”) joined the EU but did not join the customs union, thanks in large part to Francisco Franco having closed Spain’s border with the disputed territory four years previously. The Channel Islands and Isle of Man, meanwhile, were not obliged to join the EU, but did join the EU customs union.

While these examples are not precisely analogous to the Northern Irish situation – a region of a non-EU country has never previously been permitted to join the customs union - they demonstrate the EU’s willingness to recognise and make accommodations for regions with particular political or geographic conditions and requirements.

Conclusion

A special status for Northern Ireland would be unprecedented in the EU context, but a convincing argument can be mounted that the region’s unique political and geographic situation warrants consideration of a unique solution. Even transitional arrangements along the above lines would allow time for the island to adjust to the post-UK withdrawal environment.

“ Northern Ireland’s unique political and geographic situation warrants consideration of a unique solution ”

As stated at the outset, however, until the negotiations begin and until the terms of the UK’s exit and future trading relationship are known, any discussion of these issues is entirely speculative. What is clear is that Brexit, regardless of the terms and conditions, whether it be ‘hard’ or ‘soft’, bespoke or off-the-shelf, brings with it potentially serious ramifications for the island of Ireland, to which Irish leaders must be alert, and which must be addressed in the upcoming negotiations.

⁷ IIEA Policy Brief [What would happen to the Northern Irish border in the event of Brexit?](#), Blair Horan and Andrew Gilmore. (June 2016)



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