

# DIRITTI COMPARATI

Comparare i diritti fondamentali in Europa

## **BREXIT: AN IRISH PERSPECTIVE ON A BRITISH MANUFACTURED PROBLEM**

*Posted on 4 Marzo 2019 by [Charles O'Sullivan](#)*

With less than 40 days until Brexit, one of the most persistent and deeply troubling issues that has yet to be resolved remains the status of Northern Ireland. Since the adoption of the Belfast or Good Friday Agreement, facilitated by the existence of the Common Travel Area (CTA) and joint membership of the European Union (EU), Ireland and the United Kingdom have been able to maintain a relatively borderless travel area between both legal jurisdictions.

Due, however, to the demands of many 'hard Brexiteers' the UK Prime Minister Theresa May has been [unable to pass](#) the previously negotiated Withdrawal Agreement through the Houses of Parliament. The inclusion of several provision which allow for a degree of regulatory alignment on EU rules between Ireland and the United Kingdom which would maintain the current status quo is unwelcome to those aiming for a hard Brexit. In light of this, it would appear that the return of a hard boarder is predictable and almost inevitable. This brief blog post discusses the need for legal certainty on this issue from an Irish perspective, despite the lack of any political answer to this same question from the perspective of the UK government.

## **The Common Travel Area**

The Common Travel Area, which dates back to a time in which the Republic of Ireland remained a dominion of the United Kingdom, maintains a largely borderless travel area between both States. This is not to say that there has never been a border between both States. Rather, the extent to which this has been enforced has varied over time, and often included border posts at key entry points along it, with others points of entry being entirely unmanned. In fact, the existence of these border checks were seen by many Irish Republicans to be a symbol of occupation, and due to their symbolism they were often the targets of the IRA in the 1950s, leading to the escalation of what became known as The Troubles - which only formally ended with a mutual ceasefire by both Republicans and Unionists following the conclusion of the Belfast Agreement.

Although the CTA covers many separate issues including [immigration rules and others relating to reciprocal rights-based protections](#). These have largely been governed by administrative arrangements, with many remaining unformalised. This CTA supports the current political and social status of Northern Ireland, and has often been a justification for both Ireland and the United Kingdom to opt-out of EU rules where both States agree that they may potentially undermine or conflict with the functionality of the CTA - which potentially raises certain issues now in a Brexit context.

It may be argued that, in reality, both Ireland and the UK have utilised the CTA in order to simply narrow the material scope of EU rules. The UK has always displayed a degree of Euroskepticism with regards to further integration; and at one point in time an Irish Minister for Justice openly argued that further European integration was based on the State's own 'enlightened self-interest.'

For example, both States have, at different times, toyed with the idea of taking part in specific areas of the Schengen Treaty or Acquis, as well as Ireland's decision to [remove the additional conditions](#) it had attached to some of the most recent accession States prior to the United Kingdom. The most significant, however, which not only called into question the CTA but also the political stability of the Northern Ireland Assembly, was the

19th Amendment to the Constitution of Ireland, which amended what had - for a short time - allowed for a right to almost pure *ius soli* citizenship so that citizens of Northern Ireland could self-identify as Irish or UK citizens. Unionists - those who support the continued existence of Northern Ireland as a part of the UK - within Northern Ireland, argued that the 19th Amendment meant that the Belfast Agreement [could itself be amended](#), introducing the potential for further instability in Northern Ireland. Both State consequently deemed it necessary to [issue a joint statement](#) to assure all parties that the Belfast Agreement and the status of citizens in Northern Ireland would not be affected by the amendment in any way. However, despite issues such as this and the potential use of the CTA in order to achieve national political objectives at a Union level through the strategic carving out of exclusionary zones from the application of EU rules, it is arguably true that following the conclusion of the Belfast Agreement that both Ireland and the UK recognised that the CTA must be maintained in order to maintain the status of Northern Ireland, as the reintroduction of a border would potentially serve as the embodiment of the partition of the country and may reignite sectarian tensions in the North.

### **Challenges Resulting from Brexit for the Existence of the Common Travel Area**

Although the amendment of the Irish Constitution raised significant constitutional concerns and *could* have potentially undermined the CTA and political settlement in Northern Ireland, this pales in comparison to decision to hold a referendum on the United Kingdom's membership of the Union, and the implications of a 'hard Brexit' when the UK did ultimately vote to 'leave' by a narrow margin.

Requiring the UK to leave the Union without any agreement would inevitably mean the reintroduction of a hard border between North and South, an outcome that neither the Irish State nor the European Union institutions wishes to occur due to the political fallout that this might cause. Due to other ongoing political issues, the Northern Ireland Assembly has already reached what is considered to be the [longest period](#)

[without a functioning government](#) in a non-'failed state.' That the current UK government is contingent on the support of the Northern Irish Democratic Unionist Party (DUP) from that same Assembly which arguably views a hard Brexit as [the only outcome](#), particularly in a region which voted quite strongly [in favour of remaining](#) in the Union certainly does not help.

The European Union institutions, as well as the EU 27, have been highly cognisant of the potential ramifications of a hard border being reintroduced on the island of Ireland, and with this in mind, ensured that the original Withdrawal Agreement included specific provisions relating to the status of Northern Ireland. [As Peers notes](#), the combination of the Protocols to the Agreement as well as the 'backstop' - which maintains a degree of regulatory alignment on customs and the free movement of goods and services - ensures that the border issue will be mitigated. However, this does not mean that the free movement of persons will continue without restriction - persons will not be refused passing, but their rights will be dependent on their status and which State they have entered. The CTA will have to compensate for many of the resulting issues, and is far more limited in terms of its scope.

With the failure of this agreement, one argument put forward by MPs within Prime Minister May's party is to ensure that the backstop is limited to a specific period of time - something that both the Irish government and [Michel Barnier](#) have outlined as offering little to ensure the status of Northern Ireland as an ongoing concern.

Another suggestion has been to create a [technologically enforced border](#) which would allow for frictionless movement between both States, a suggestion which has been described as '[chasing unicorns](#)' by some of the political parties in Northern Ireland. Even former Prime Minister Margaret Thatcher, a staunch Euroskeptic in the latter years of her term in office, viewed the border between North and South as largely ungovernable and would require an [East German style wall](#) to ensure the security of it. With more than [30,000 people](#) estimated to cross the border every day and the sheer volume of crossing points, it is impossible to envisage how any technology or combination of them could allow this to continue without

some level of interference.

Similarly, the CTA itself cannot replace the Withdrawal Agreement or the protections contained within it to stop the reintroduction of a hard border. Although [Article 2 to Protocol 22 of the Treaty on the Functioning of the European Union](#) allows Ireland and the United Kingdom to 'continue to make arrangements between themselves relating to the movement of persons between their territories' and uphold the CTA as a result, the largely administrative nature of these arrangements, thus far, has arguably meant that the potential of this Protocol remains largely untested. It can, based on the view of the drafting of the Withdrawal Agreement, supplement further measures which ensure regulatory alignment for other fundamental economic freedoms, but could never replace these in a wholesale manner - to do so would constitute a trade agreement between Ireland and what will be a third-country once the UK has officially exited the Union, which remains an exclusive competence of the EU.

### **The End is Nigh?**

With the rapidly approaching deadline for Brexit, and the Commission's unequivocal view that '[EU-27 will not reopen the withdrawal agreement. We cannot accept a time-limit to the backstop or a unilateral exit clause,](#)' it is difficult to see how this process will end. In spite of this, Theresa May has [returned to Brussels](#) in the hope that she can negotiate concessions which are red line issues for the EU. Although the Withdrawal Agreement appears to be unsatisfactory to both sides of this issue - [Weiler](#) notes that there are inherent issues surrounding the Customs Union - it is, at present, the only workable legal solution to this political problem. However, with the United Kingdom continuing to ignore the importance of Northern Ireland, the risk of a No Deal scenario increases day by day. Ultimately, the reintroduction of a hard land border between the Republic and Northern Ireland in the event of a No Deal scenario will endanger over 20 years of lasting - but far from perfect - peace there, which will only be more acute with the lack of a functioning executive to solve these issues if violence were to arise. Even forming a new executive in Northern

Ireland is made more difficult following a hard exit from the EU due to the DUP being part of the current UK government and their position that the backstop is a ['poison'](#) contained within the current Withdrawal Agreement that must be removed. In almost every respect, the current situation is one which cannot be resolved easily, and certainly not without a substantial shift within the UK executive's attitude towards Northern Ireland.