

NOT BRITISH BUT NOT FOREIGN
THE POST-BREXIT RELATIONSHIP WITH IRELAND

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1. This paper examines the implications of a withdrawal from the common travel area (“CTA”) between the Republic of Ireland (“ROI”) and the United Kingdom (“UK”) if it becomes necessary as a result of the UK leaving the European Union (“EU”). This paper is divided into the following sub-sections:
 - i. Executive Summary;
 - ii. Current Arrangements with the EU, History of the CTA and Implications for the Northern Irish Border -
 - a) History of the Common Travel Area;
 - b) Implications for the Northern Irish Border Post-Brexit; and
 - c) Implications for UK Immigration Policy;
 - iii. Current Arrangements and Implications for Citizen Rights and Voting.

i) Executive Summary

2. The overall CTA principle will probably continue to be supported by the two states; however, the EU will be likely to argue that they will need to approve any such arrangement as part of any post-exit arrangement with them.
3. Both States will likely wish to avoid North/South border checkpoints. It would probably be thought necessary to make specific adjustments to CTA arrangements, e.g. to take account of persons with EU free movement rights in the ROI, or to cater for international protection applicants. Immigration control will likely be necessary to air and sea travel from the ROI to the UK or rights of travel. This might lead on to consideration of a more comprehensive agreement between the two states.
4. The position of Irish citizens within UK immigration law and nationality law should also be more formally agreed including the special status of Irish

citizens in the UK, including their political rights.

ii) Current Arrangements with the EU, History of the CTA and Implications for the Northern Irish Border

a) Current Arrangements with the European Union

5. At the EU level, the arrangements between the UK and ROI are reflected in three Protocols annexed to the Treaty on the Functioning of the EU. Protocol 19, which is concerned with the Schengen open borders zone, provides that the ROI and the UK are not automatically covered by Schengen rules, or by proposals to develop them. Protocol 20 allows the UK and ROI to “*continue to make arrangements between themselves relating to the movement of persons between their territories (‘the Common Travel Area’)*”. Protocol 21 provides that each of the UK and the ROI may unilaterally choose to opt in to immigration or asylum legislation other than Schengen rules, or to discussion of proposals relating to such legislation.

b) History of the Common Travel Area

6. The CTA between the UK and ROI pre-dates both countries joining the EU. The Irish Free State seceded from the UK on 6 December 1922. Before the creation of the Irish Free State, British immigration law applied in Ireland as part of the UK. With the prospect of Irish independence in 1922, the British Home Office was disinclined to impose passport and immigration controls between the Irish Free State and Northern Ireland, which would mean patrolling a porous and meandering 499 km (310 mi) long land border.¹ The border does not follow natural boundaries and currently cuts across some 180 roads. There would also have been the political difficulty of imposing such controls given social and economic relationships which straddle both sides of the Irish border.

¹ MFPP Working Paper No. 2, "The Creation and Consolidation of the Irish Border" by KJ Rankin and published in association with Institute for British-Irish Studies, University College Dublin and Institute for Governance, Queen's University, Belfast (also printed as IBIS working paper no. 48)

7. The term CTA refers to administrative arrangements providing a special immigration control regime between the UK and the ROI. Arrangements of this kind have been in place for the most of the period since the Irish Free State was established in 1922. The aims of these arrangements have been to ensure relative freedom of movement between the two states, and to establish forms of co-operation between the two states' immigration authorities.²

8. The CTA was suspended during World War Two. The ROI re-instated their previous provisions allowing free movement³ in 1946 but the British declined to do so pending the agreement of a similar immigration policy. Therefore the British maintained immigration controls between the islands of Ireland and Great Britain until 1952. The agreement reached in 1952 was not publicised at the time, but a year later the Irish Minister for Justice referred to the lifting of immigration controls between the two islands. The British began referring to the CTA in legislation for the first time in the *Aliens Order 1953* (UK). The existence of the 1952 agreement was conceded in an Irish parliamentary question on 3 June 1980.⁴ The secrecy regarding the existence of the arrangement appears to have been at the behest of the Irish government who felt such an agreement might have been politically unpalatable as a newly independent state.⁵ It was also referred to in the UK by section 1(3) of the *Immigration Act 1971* (as amended) and by *Immigration (Control of Entry through the Republic of Ireland) Order 1972* (as amended) and in Ireland by the *Aliens Orders 1946*.⁶

9. The content of the 1952 agreement appears to be that a foreigner would be refused entry to the UK if they wished to travel onward to Ireland (and vice versa) and is reflected in the relevant immigration law.⁷ The CTA has meant that the ROI has been required to follow changes in British immigration

² See generally Bernard Ryan, 'The Common Travel Area between Britain and Ireland' (2001) 64 *Modern Law Review* 855-874.

³ *Aliens Order 1946* (Ireland)

⁴ *Dáil Debates* volume 321 column 1379

⁵ *Ibid* at n.2 at 858

⁶ As amended in particular by the *Aliens (Amendment) Order 1975*

⁷ References further reading at *ibid* at n.2 at 865 onwards.

policy. This was notable in 1962 when Irish law was changed in response to the Commonwealth Immigrants Act 1962, which imposed immigration controls between the UK and Commonwealth countries, while in the ROI the *Aliens Order 1962* replaced the state's previous provision exempting all British subjects from immigration control⁸ with one exempting only those born in the UK resulting in the exclusion of British citizens by descent or by birth in a British colony. The discrepancy between Britain's and Ireland's definition of a British citizen was resolved in 1999,⁹ when Ireland exempted all (and only) British citizens from immigration control.

10. The CTA between the UK and the ROI provided that each state would refuse leave to a person whom it was satisfied for any reason would be refused entry into the other country. The two states were to notify each other in relation to persons on the other's list of undesirable aliens who, having entered the other state were permitted to remain there. It was also provided the Home Office would retain information about all aliens in a single index of entry and exit for the two states and the ROI would have access to it. Finally, the arrangement affirmed each state's right to reach decisions on the grant of asylum.¹⁰

11. Section 1(3) of the 1971 Act states the "*arrival in or departure from the United Kingdom on a local journey from or to any of the Islands (that is to say, the Channel Islands and the Isle of Man) or the Republic of Ireland shall not be subject to control under this Act.... and in this Act the United Kingdom and those places are collectively referred to as 'the common travel area'.*" The effect of section 1(3) is that no-one travelling from Ireland is obliged to obtain leave to enter which is otherwise required under section 3 of the 1971 Act.

12. There are a number of exceptions to the right to enter without leave. The following must obtain leave:

⁸ The *Aliens (Exemption) Order 1935* (Ireland).

⁹ The *Aliens (Exemption) Order 1999* (Ireland).

¹⁰ *Ibid* at n.2 at 858.

- i. Those with a deportation order in force against them;¹¹
- ii. Those to whom leave to enter has previously been refused (and not subsequently granted);¹² and
- iii. those who have been excluded on the grounds that it is “*conducive to the public good.*”¹³

13. Leave to enter is also required for certain categories of person:

- i. Visa nationals;
- ii. Those (other than Irish nationals) who travel by air from Ireland, having commenced their journey outside the CTA, but who were not given leave to land;
- iii. Those who entered ROI unlawfully from outside the CTA; and
- iv. Those who enter ROI from another part of the CTA which they entered unlawfully or where they remained after the expiry of their visa.¹⁴

14. In *UK law*, by virtue of section 1(3) of the Immigration Act 1971, immigration control does not apply to persons arriving from the ROI. Persons arriving from the ROI have leave to enter automatically, subject to the provisions of the Immigration (Control of Entry through Republic of Ireland) Order 1972. Article 4 of the Order deems certain other persons to have leave only for three months, including persons whose nationality means that they do not require visas. In its original version, Article 4 of the 1972 Order exempted Irish citizens alone. That provision was however replaced in 2014 by an exemption for EEA/Swiss nationals and their family members who have a right to enter deriving from EU free movement law.

15. Under Irish immigration law, everyone who is not an Irish or a British citizen is classed as a “*non-national*”.¹⁵

¹¹ Immigration Act 1971, s. 9(4).

¹² *Ibid.*

¹³ These are contained in the Immigration Act 1971, s 9(4) and in the Immigration (Control of Entry through the Republic of Ireland) Order 1972 (SI 1972 No 1610), Art 3(1)(b)(iv).

¹⁴ Art 3 of the 1972 Order. The provision on expiry of leave was added by the Immigration (Control of Entry through the Republic of Ireland) (Amendment) Order 1979 (SI 1979 No 730).

¹⁵ Immigration Act 1999, section 1(1), read together with Aliens (Exemption) Order 1999

16. Under the Immigration Act 2004, immigration controls apply automatically to all “*non-nationals*” who arrive from the UK by air or sea, and *may* be imposed upon “*non-nationals*” who arrive by land from Northern Ireland.
17. Individuals who arrive by land must obtain immigration permission to be in the state within one month. This framework is however to be read with the EU free movement of persons rules, which confer rights of entry and residence upon EEA/Swiss nationals and family members.
18. 2011 marked the first public agreement between the British and Irish governments concerning the maintenance of the CTA.¹⁶ Like its unpublished predecessors the 2011 agreement is a non-binding agreement. The agreement commits the two governments to continue their co-operation through the CTA, to align their lists of visa-free countries, to develop electronic border management systems, to engage in data sharing to combat the “*abuse*” of the CTA, and to work toward a “*fully-common short stay visit visa*”.¹⁷
19. Currently, 103 states are subject to visa requirements in both states, seven in the UK alone, and seven in the ROI alone. A recent development was the launching in October 2014 of a joint British-Irish visa, which allows nationals of China and India to visit both states for up to three months, on the basis of a visa issued by either state. There is also co-operation to ensure that individuals cannot use one state as a back door to the other. That is linked in turn to provision in the immigration law of each state for entry to be denied to a person who intends to travel to the other, but who would not be admitted there.

c) Implications for the Northern Irish Border Post-Brexit

¹⁶ Joint Statement was made by Mr Damian Green, Minister of State for Immigration the UK's Home Department And Mr. Alan Shatter, Minister for Justice and Equality Ireland's Department of Justice and Equality Regarding Co-Operation on Measures to Secure the External Common Travel Area Border signed in duplicate at Dublin, on the 20th December, 2011 and the two ministers also signed an unpublished memorandum of understanding at the same time

¹⁷ Ibid

20. Britain and Ireland informally agreed post-referendum that there will be no return to a “*hard border*” between Northern Ireland and the Republic after talks at Downing Street.¹⁸ On 17 January 2017, Prime Minister Theresa May stated in a speech regarding the UK’s departure from the EU that the UK wishes to agree a “*practical solution*” maintaining the CTA while protecting the integrity of the UK’s immigration system. A white paper entitled “The United Kingdom’s exit from and new partnership with the European Union” published in February 2017 indicates states that the UK wishes to have as “*seamless and frictionless a border as possible*” in relation to trade and movement.
21. There is wide support for finding a practical solution and keeping the border open. Prime Minister Theresa May has stated that “*nobody wants to return to the borders of the past*” and Irish Taoiseach Enda Kenny has warned of the “*psychological effect of a hardening border*”.¹⁹ Northern Ireland Secretary James Brokenshire recently announced that the UK and Irish governments were working together “*to strengthen the external border of the common travel area [CTA], building on the strong collaboration with our Irish partners*”.²⁰ The strategy therefore logically would be to have border checks at the common border but not between north and south of Ireland.
22. The many social and economic connections between the ROI and all parts of the UK makes free movement attractive and favoured by the Irish Government. It also appeals to nationalist opinion in Northern Ireland and the ROI, which supports the lessening of the *de facto* consequences of the partition of the island of Ireland, which has been extremely contentious since independence. Free movement of labour between Britain and the UK is seen as being beneficial since 1922 and with the economic development of Ireland has been less one-way and more varied in recent history.

¹⁸ “Irish border will stay open after Brexit, leaders agree”, Sunday Times, 27 July 2016

¹⁹ ‘Theresa May on NI post-Brexit: “No-one wants return to borders of the past”’, BBC News, 25 July 2016, retrieved 14 October 2016

²⁰ McDonald, H., ‘Britain to push post-Brexit UK immigration controls back to Irish border’, *The Guardian*, 9 October 2016, retrieved 14 October 2016.

23. The underlying reasons for the CTA would continue to apply to the UK after leaving the European Union. It is arguable that continuing with CTA arrangements is compatible with EU law. It will be argued by the UK that there is no obvious legal reason why the ROI should not retain the benefit of Protocols 19 and 20 after UK exit, allowing it to maintain special co-operation arrangements with the UK outside the Schengen zone.²¹ However the European Union may argue the opposite. It is clear that post-exiting the border between Northern Ireland and the Republic would become an external border for the EU and so the EU will likely assert that it is a matter of negotiation between the UK and EU and not just a matter that needs to be agreed between the ROI and the UK.
24. The EU's Brexit Taskforce told the House of Commons Northern Ireland Affairs Committee ("NIAC") that as the CTA is an agreement between two EU members and protected by EU Protocol (it is currently included in an annex to the Lisbon Treaty) and as far as they are concerned it would no longer apply if the UK was outside the EU. Whilst the CTA predates British and Irish membership of the EU, it is not clear that its status in international law is sufficiently robust for it to bind EU members beyond their mutual obligations to each other in the event of a Brexit.²²
25. The NIAC was told by Professor Dagmar Schiek, Jean Monnet Chair of EU Law and Policy at Queens University Belfast, that there is some latitude within the EU's rules to allow some bilateral agreement between the ROI and the UK over the border but it would require the remaining EU members to agree to it.²³ This would require the consent of the EU, which is itself heavily invested in the Peace Process, so may be open to a bespoke arrangement. The Irish government has told the European Commission's "*Brexit negotiators*" that Ireland is not pre-negotiating with the UK nor is it enjoying any special relationship and intends to negotiate as part of the group of 27 EU member

²¹ Bernard Ryan, The implications of UK withdrawal for immigration policy and nationality law: Irish aspects, www.ilpa.org.uk, 18 May 2016 at p 2-3.

²² House of Commons Northern Ireland Affairs Committee, Northern Ireland and the EU Referendum, First Report of Session 2016-17 at p. 27.

²³ *Ibid.*

states with the UK.²⁴

26. In the Government's March 2016 document *Alternatives to Membership* it is stated that: "*It is not clear that the Common Travel Area could continue to operate with the UK outside the EU, and Ireland inside, in the same way that it did before both countries joined the EU in 1973.*"²⁵

27. The scope of any post-Brexit trade deal or lack thereof would have an influence on the nature of the border. In the event that the trade deal did not extend to mutual tariff-free access to each others' markets, the border might need to include customs checks. A major issue for the post-Brexit trade deal will be the free movement of labour with the rest of the EU. In order to maintain the CTA the EU may indicate that they will only allow it to continue if there is free movement with the entire EU.

28. To the extent that customs checks applied to goods moving across the border on the island of Ireland, or to traffic between the ROI and Britain, there would be consequent pressure for controls on the movement of persons as well.

29. From the UK perspective, there are fears that the border with the Republic would become a "*back door*" by which UK border controls could be evaded. There are however already measures in place to restrict the ability of what may be illegal EU migrants to live and work in the UK to reduce its attractiveness.

30. In the event a harder border is required after exit negotiations, three scenarios are possible:²⁶

- i. the border between the Republic and Northern Ireland could be hardened;

²⁴ Irish officials make case to Brussels to secure common travel, Irish Times, 4 January 2017.

²⁵ HM Government, *Alternatives to membership: Possible models for the UK outside the EU* (March 2016), p. 12.

²⁶ *Ibid* at n.22,

- ii. the UK could instead harden the border between the island of Ireland and Great Britain; and
- iii. or the Republic could opt to enforce the same approach to border controls as the UK.

31. Data on the numbers of people who live on one side of the border but work on the other is limited. A 2001 study estimated that there were 18,000 daily cross-border commuters (9,000 travelling in each direction). John McGrane told the NIAC the figure could be as high as 30,000. It was suggested to the NIAC that it would be impractical to try to control every border crossing between Northern Ireland and the Republic. There are nearly 300 formal crossing points and many informal ones. Assistant Chief Constable Will Kerr, PSNI, told the NIAC: “*We have to be pragmatic about how effectively we could police a border if we want to impose all these controls again*”.²⁷

32. The most logical solution would be to strengthen the border between the island of Ireland and the British mainland. There are few crossing points to enforce and it would be less disruptive as there are already checks in place. Some airlines, such as Ryanair, flying between Northern Ireland and the rest of the UK already subject passengers to identity checks and these could be made more robust and extended to relevant ports such as Holyhead and Stranraer without much difficulty. The UUP told the NIAC that they had been told by the Government that it did not envisage policing the border with the Republic and that the Government’s preferred solution would be to put in place a more robust system of checks at relevant ports and airports on the mainland. Mike Nesbitt told the NIAC: “*The Prime Minister [David Cameron] indicated pretty clearly that it would not be on the physical separation of Northern Ireland from the Republic but it is more likely to be at Stranraer, Cairnryan, Heathrow, Gatwick, our ports and our airports.*”²⁸

33. Sharing a border policy with the ROI would negate the need to impose a hard border between Northern Ireland and the ROI or with the mainland. There is

²⁷ Ibid.

²⁸ Ibid at p. 27-28.

already a considerable amount of shared policy in this area.

34. There must be doubts about the extent to which, in the event of a Brexit, the border between Northern Ireland and the Republic could be effectively policed and the disruption to those who cross the border for work or study would be considerable.²⁹
35. Imposing security checks for those travelling between parts of the UK would be highly undesirable. In the event of a Brexit, an arrangement that maintains a soft land border between Northern Ireland and the Republic but which does not see restrictions imposed on travel within the UK would need to be a priority.³⁰

c) Implications for UK Immigration Policy

36. An amendment to Article 4 of the 1972 Order (above) is required. The 1972 Order currently contains an exemption for all those with rights deriving from EU free movement law in the UK, something that would make no sense after withdrawal. The government could consider having an exemption for Irish citizens alone. This issue would probably be linked to a wider set of issues about the status of Irish citizens in UK immigration law.
37. In the event that the UK does agree to the free movement of persons within a post-exit arrangement, the implications of EU free movement rights in the ROI would need to be addressed. The issue would be that EEA and Swiss nationals and their family members could be present or resident lawfully in the ROI, but free in practice to enter the UK without permission to do so. One solution would be for all or most EEA/Swiss nationalities to be exempted from overall UK visa requirements. Alternatively, persons with those nationalities, and potentially their family members, with residence documents issued in the ROI, might be permitted to enter the UK without a visa, even if they would otherwise be visa nationals.

²⁹ *Ibid.*

³⁰ *Ibid.*

38. At present, the UK and Ireland are among the 32 states covered by the Dublin III Regulation. That legislation permits applicants for international protection to be transferred to another participating state *inter alia* where that was the participating state they first entered, or that was where they first applied for protection. Both states might therefore find it attractive to have a post-withdrawal arrangement concerning the transfer of applicants for international protection. This could in theory happen *under* the Dublin Regulation if the UK continued to participate. Alternatively, it could be achieved as part of the modification of the historic CTA arrangements.

39. One possibility is that the UK might adopt the Irish approach of applying immigration control to entry by air and sea only. Another possible incremental change would address rights of travel between the two states for residence permit and visa holders.

40. There is scope for a more comprehensive arrangement or international agreement between the two states to emerge. That would potentially address the following points:

- i. The extent of immigration control on travel by air and sea, and by land;
- ii. Rights of entry and residence for British and Irish citizens;
- iii. Rights of travel for those with a residence permit or visas issued by one of the states;
- iv. Responsibility for international protection applications; and
- v. The procedures by which visa policy and operational co-ordination would be arranged.

iii) Implications for Citizen Rights and Voting

41. Irish citizens are not considered “*foreign*” in the UK, there are various rights and arrangements direct and indirect which uniquely benefit them. Post-exit of the EU, the appropriateness of that “*special status*” should be re-examined,

either generally or in relation to specific rights.

42. The current arrangements stem from the Ireland Act 1949, which was passed when the Irish state withdrew definitively from the Commonwealth and declared itself a Republic rather than a Free State.
43. Section 2(1) of the 1949 Act declares that “*notwithstanding that the Republic of Ireland is not part of [Her] Majesty’s dominions, the Republic of Ireland is not a foreign country for the purposes of any law in force in any part of the UK.*” It goes on to provide that “*references in any Act of Parliament, other enactment or instrument whatsoever ... to foreigners, aliens [etc..] ... shall be construed accordingly.*”
44. As discussed above, the results of the “*non-foreign*” status of Irish citizens are the following. Irish and other EEA/Swiss citizens travelling directly from the ROI are not subject to a requirement to obtain leave to enter the UK. The position of Irish citizens in UK immigration law is anomalous. Irish citizens became subject to immigration control under the Commonwealth Immigrants Act 1962, but the legislation was not used to prevent entry and residence by them other than in the event of an exclusion or deportation order.
45. Since 1 January 1973, Irish citizens have also been subject to the control under the Immigration Act 1971; however, from that date, Irish citizens entering from the ROI benefitted from the exemption in the 1972 Order discussed above. In addition, progressively from that date, entry and residence by *all* Irish citizens – including those who enter the UK from elsewhere, or who were born there – has been protected by EU law.
46. The position of Irish citizens within nationality law is also anomalous. Irish citizens are treated as “*settled*” in the UK from the date they take up ordinary residence.³¹ This permits Irish citizens to naturalise after five years’ continuous residence, and enables their children born in the UK to acquire

³¹ See Home Office, European Economic Area (EEA) and Swiss nationals: Free movement rights, (12 November 2015), p. 24.

British citizenship from the date of residence. This is a more generous regime than that applicable to other EEA and Swiss citizens and their family members, who typically require five years' residence in order to become "*settled*", and a further year's residence to naturalise.

47. The precise rationale for this preferential regime is uncertain, however, with neither the CTA nor the Ireland Act 1949 appearing sufficient as an explanation.

48. Together with Commonwealth citizens, resident Irish citizens have full political rights in the UK, i.e. the rights to vote in all elections, to stand for election to the House of Commons, and to be members of the House of Lords.

49. Residence elsewhere in the CTA, including in Ireland, counts towards the "*habitual residence*" test of eligibility for non-contributory benefits in the UK.³² This is of relevance to Irish citizens moving from Ireland, and also protects other EEA and Swiss nationals.

50. There is an additional Northern Ireland dimension to consider. The 1998 Belfast Agreement recognised "*the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose*", and that such persons had the "*right to hold both British and Irish citizenship is accepted by both Governments.*" These two statements read together permit a person from Northern Ireland to rely upon their Irish citizenship alone, even if they legally hold British citizenship as well.

51. With the ROI remaining within the EU, with the UK outside, questions might be posed as to whether it remains appropriate to classify it, and its citizens, as "*non-foreign*". If changes were made, they would potentially affect all of the entitlements referred to above. Ireland's position in immigration law should be resolved clearly.

52. As publicly there appears to be continued support for the CTA, a general

³² See for example, Universal Credit Regulations 2012 (SI 2013 No. 376), Regulation 9.

exemption from immigration control, in line with the position of British citizens in Irish law so as to permit both entry and residence by Irish citizens should continue with exceptions for exclusion and deportation cases. The alternative would be a form of visa waiver for Irish citizens, regardless of where they enter from. This would permit entry and short-term stay, but not residence. The limited nature of this solution would be difficult to reconcile with continued support for a CTA between the two states.

53. A resolution of the position of Irish citizens within immigration law would permit clarification of their position in nationality law. There could be a change to the point at which an Irish Citizen becomes “*settled*” with regard to permitting them to acquire British citizenship by naturalisation, and their children to acquire it by virtue of birth in the UK.

54. The political rights of Irish citizens in the UK have previously been questioned. In his review of citizenship law for the Government in 2008, Lord Goldsmith disagreed with the right of Irish and Commonwealth citizens to vote in parliamentary elections.³³ He proposed preserving the position of existing residents. If that suggestion is acted upon, it would probably have implications for membership of the House of Commons and Lords. The Belfast Agreement is a significant constraint in this area. In 2008, Lord Goldsmith’s solution was to preserve the right to vote for Irish citizens from Northern Ireland alone.

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³³ Citizenship: Our Common Bond (2008), p 75.