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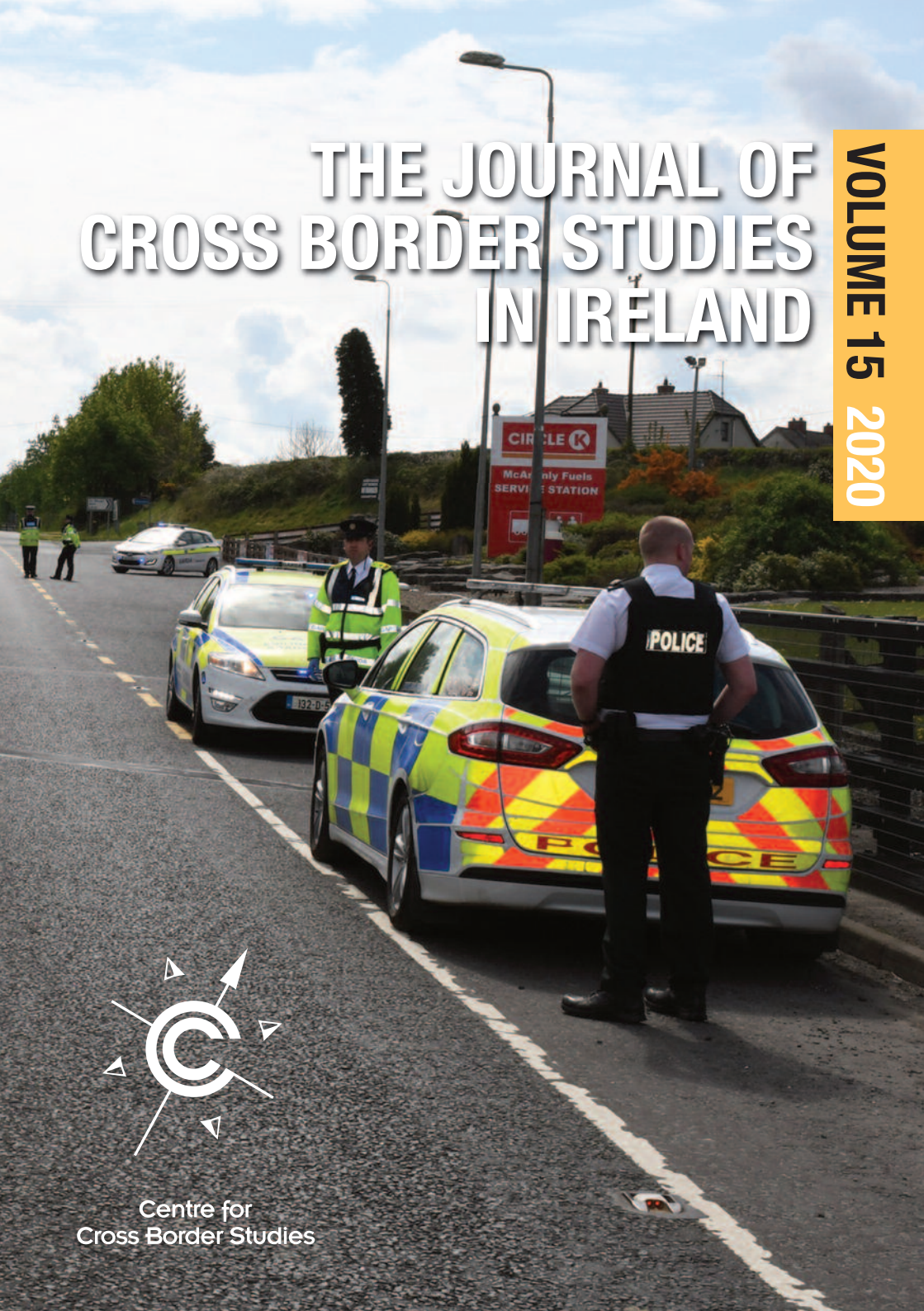

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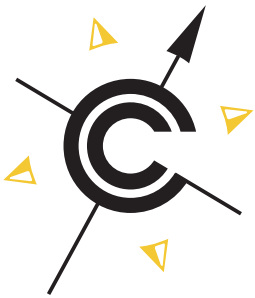

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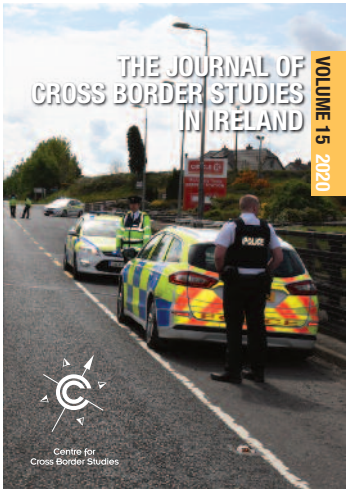

Cover Photo

Officers from the Police Service of Northern Ireland and An Garda Síochána at the Northern Ireland / Ireland Border during the lockdown period of the Covid Crisis.

FOREWORD

Dr Helen Johnston

Chairperson, Centre for Cross Border Studies

This, the 15th edition of *The Journal of Cross Border Studies in Ireland*, appears as a note of regularity in what are the most irregular and challenging of times for the island of Ireland, Great Britain, Europe and the wider world. The coronavirus pandemic we are still in the throes of has taken the lives of so many, made many others seriously ill, and left countless families grieving or grappling with the anxieties of having loved ones hospitalised or in need of care. Uncertainty abounds, as many regions both near and far witness apparent resurgences of the spread of the Covid-19 virus in the wake of the easing of public health restrictions. There is widespread concern as to the economic impacts of the pandemic, with many businesses and jobs at risk of being lost, despite efforts to safeguard them during the height of the public health crisis. Different approaches taken by governments on this island, and these islands, have at times also given rise to confusion and doubts as to whether what the neighbouring jurisdiction is doing is likely to prevent more deaths and the appearance of new cases, as well as a faster return to some sort of normality. And one of those governments having to make enormously difficult decisions and quickly implement wide-sweeping measures was not functioning until January of this year; the return of the Northern Ireland Executive and Assembly is a welcome change to the political context, and it is hoped this will revitalise all of the institutions of the 1998 Belfast/Good Friday Agreement.

In both jurisdictions on the island of Ireland, throughout these islands and further afield, we have also been humbled by the herculean efforts of those working in the health service, as well as those in other frontline services, many of whom sadly sacrificed their lives in the performance of their duties. While all organisations in the community and voluntary sector, like those in other sectors, have had to cope with various public health restrictions, many have found ways to continue to serve their communities throughout the pandemic, bringing vital relief particularly to the most vulnerable in our societies.

The Centre for Cross Border Studies has in some ways been more fortunate than other third sector organisations in that the nature of a lot of its work means it has been able to continue to operate throughout the current crisis. Nevertheless, while the Centre's output has not suffered unduly, this has only been possible due to two principal factors: the team's determination to continue to produce quality work in support of cross-border cooperation and relations, while adopting new ways of working in order to do so; and the continued support and understanding of our main funders.

The Irish Government's Department of Education and Skills' generous and longstanding provision of core funding means that the Centre has been able to continue to fulfil its mission to support, promote and advocate for cross-border cooperation, and to contribute to the ongoing peace and reconciliation process and to improving wider relations within and across these islands. The Centre is also grateful for the continued support from the Department of Foreign Affairs and Trade's Reconciliation Fund, which has again enabled the Centre's flagship Border People project to undertake activities tailored to the changing priorities of citizens who regularly cross the border to work or study.[1]

We also owe our thanks to the Reconciliation Fund for its support for a new research project – "Time to measure cross-border impacts". However, given the current challenging context, the Centre is particularly grateful to both our principal funders for the understanding they have shown in terms of allowing us to change how we deliver some of our activities, and to change the direction of some our research work in order to capture some of the impacts of the pandemic on our border region.

Covid-19 and cross-border responses

Given the Centre for Cross Border Studies' core mission, and the fact that health is one of the six areas of cooperation under the North South Ministerial Council, much of our activity has been focused on both the potential impacts of the Covid-19 pandemic on our border region, and the extent to which the Dublin and Belfast administrations have coordinated their responses. This work has resulted in a number of Briefing Papers looking at how the introduction of public health measures in the two jurisdictions may have affected various aspects of cross-border mobility, how businesses and employees have been supported through the crisis, as well as the different forms of government assistance cross-border workers may be entitled to.[2] As many people who normally cross the border to work have been forced to work from home, had their hours reduced or been placed on furlough, or in some cases lost their jobs, the Border People project has been particularly active in distinguishing between the various supports made available by the Irish Government, the UK Government and by the devolved Northern Ireland administration, and highlighting who is eligible for them.[3]

The Centre's insights on the cross-border effects of and cross-border responses to Covid-19 have been shared with the House of Lords Select Committee on Public Services both in written evidence,[4] and in an (online) appearance before the Committee.[5] They have also been shared through the Transfrontier Euro-Institut Network (TEIN), the European network of which the Centre for Cross Border Studies is a founding member. Moreover, the Centre has been working with other TEIN partners as part of a wider effort to measure the impacts of the pandemic and the extent of cross-border cooperation across a number of European border regions.[6]

Brexit

In my Forewords for the last number of editions of *The Journal of Cross Border Studies in Ireland* I have noted the significant work the Centre has undertaken on the issue of Brexit. Although the current crisis brought about by the Coronavirus pandemic has been the focus of much of the Centre for Cross Border Studies' attention, this has not meant we have been inattentive to the ongoing negotiations between the UK Government and the European Union on the shape of the future UK-EU relations. The outcome of those negotiations, as well as how the UK shapes a number of core policy areas, will have wide-ranging repercussions for the island of Ireland, as well as for relations between the island of Ireland and Great Britain. Moreover, even if those

negotiations are unable to produce an agreement on post-Brexit UK-EU relations, the Protocol on Ireland/Northern Ireland that formed part of the Withdrawal Agreement comes into effect on the 1st of January 2021.

Given the importance of the Protocol to North-South cooperation and what it may mean for relations within and between these islands, the Centre for Cross Border Studies decided to bring together a range of different organisations to share their concerns and hopes for the Protocol. The resulting Ad-Hoc Group for North-South and East-West Cooperation began a series of engagements with officials from the Irish Government, the UK's Cabinet Office, the European Commission's Task Force for Relations with the United Kingdom, and Northern Ireland's Executive Office, looking to ensure that the implementation of the Protocol protects the full range of North-South cooperation activities, and that East-West relations are also safeguarded. As the organisations involved in it are at the forefront of North-South and East-West cooperation and relations, the Centre for Cross Border Studies regards this Ad-Hoc Group as representing an essential vehicle for monitoring how the Protocol's implementation is affecting relations within and across these islands.[7]

There can be no doubt that the Centre for Cross Border Studies will continue to assess the evolving implications of the UK's withdrawal from the EU on how we cooperate and relate with each other on the island of Ireland, and between the island of Ireland and Great Britain. Our work in this area will be to ensure the safeguarding of all aspects of the 1998 Belfast/Good Friday Agreement, and the totality of relations it encompasses – in other words, ensuring that nothing is done to undermine the 1998 Agreement in *any* of its parts.

New Approaches

One of the submissions made by the Centre for Cross Border Studies in 2020 was to the House of Commons Northern Ireland Affairs Committee's inquiry into the New Decade, New Approach agreement that restored a functioning Northern Ireland Assembly and Executive.[8] Contained within that agreement were a series of commitments to North-South cooperation, including those made by the Irish Government in relation to developing an enhanced North-South programme of research and innovation, and to explore the feasibility of an all-island research hub.

The Programme for Government (PfG) for Ireland's new coalition government that emerged following the February 2020 general election offered further commitments to North-South cooperation and relations, as well as to relations between Ireland and Great Britain. As well as committing itself to, among many other things, undertaking a strategic review of British-Irish relations, ensuring the effective operation of the Common Travel Area, working with the Northern Ireland Executive to deliver key cross-border infrastructure initiatives, and ensuring there is an all-island approach to environmental issues, the coalition government also sets out in the PfG how it will support a North-South programme of research and innovation, including an all-island research hub, through Universities Ireland.

Universities Ireland, which brings together the Presidents and Vice Chancellors of all universities on the island of Ireland to cooperate on issues of higher education policy and to influence change in support of peace and reconciliation, is ideally placed to contribute to this goal.[9] It will be led in these efforts by a new President of its Council – Professor Ian Greer of Queen's University Belfast – supported by the Centre for Cross Border Studies, who act as its Secretariat. During 2020 the Universities Ireland Council has already shown its ability to adopt new

approaches to new situations, as it met to specifically address how the Higher Education sector across the island of Ireland would be impacted by the Coronavirus pandemic, and how North-South collaboration in the sector will contribute to the socioeconomic recovery.

The Standing Conference on Teacher Education, North and South (SCoTENS),[10] for which the Centre for Cross Border Studies also provides the Secretariat, has likewise sought to take a different approach in order to continue to deliver support for North-South cooperation in the context of the current health crisis. In light of restrictions resulting from public health measures introduced by the two jurisdictions, SCoTENS ensured it allowed necessary adaptations to ongoing North-South collaborative projects it is funding, and that those applying for funding in 2020 were given additional time to do so. The network's Steering Committee has also pursued means of ensuring its North-South Student Teacher Exchange Programme, which will not be able to operate as normal due to the pandemic, will nevertheless be able to support the North-South exchange of best practice in terms of delivering education in the current challenging context.

Crucially, the Centre for Cross Border Studies has also accelerated its efforts in terms of developing collaborative working and in sharing a diversity of experiences and views on cross-border cooperation and relations. While the pursuit of further collaborative working has given rise to the Ad-Hoc Group for North-South and East-West Cooperation, the Centre's efforts to bring in other relevant expertise and insight have seen the nomination of two Senior Research Associates and the launch of the CCBS Research Platform.

We were delighted and honoured that two longstanding supporters of the Centre for Cross Border Studies accepted the request to become Senior Research Associates.[11] Michael D'Arcy's role as Senior Research Associate was announced when he delivered the 2020 edition of the Annual Sir George Quigley Memorial Lecture,[12] while Maureen O'Reilly began her contribution as a Senior Research Associate with a comprehensive overview of Covid-19 business supports made available in Northern Ireland and the Republic of Ireland.[13]

Building on strong foundations

I am proud to be associated with an organisation that despite various challenges has consistently managed to produce important work in support of North-South cooperation since its creation in 1999. But as chair of the Centre's Board I also recognise the foundations that made this possible.

In this regard I once again express our gratitude to the Irish Government, and in particular the Department of Education and Skills and the Department of Foreign Affairs and Trade. Their steadfastness in supporting us has provided a vital source of confidence allowing the Centre to pursue its efforts in strengthening North-South cooperation, upholding the 1998 Belfast/Good Friday Agreement, and improving relations within and across these islands.

I would also like to recognise the dedication of the Centre's Board in guiding and supporting the organisation – without them our foundations would have been much weaker. This year we have seen the departure from the Board of Trevor Holmes as he left Dublin City University to become Secretary-General of the Irish Red Cross, but not without making the Centre for Cross Border Studies stronger through his wisdom and extraordinary kindness. The Board has also welcomed Peter Osborne, who will bring with him essential insights to ensure the Centre's future.

Finally, recognition is due to the staff of the Centre for Cross Border Studies. Building on the foundations left by his predecessors, Andy Pollak and Ruth Taillon, the Centre's current Director, Anthony Soares, along with his outstanding colleagues, Annmarie O'Kane, Tricia Kelly and Mark McClatchey, has ensured exceptional work has been accomplished in challenging circumstances.

Foundations like these are the guarantee that the Centre for Cross Border Studies will continue to play its part in supporting North-South cooperation and wider relations within and across these islands. It may be a role with increasing importance come 1st of January 2021.

Notes

[1] For more on the Border People project and its objectives, visit https://borderpeople.info/.

[2] See, "The impacts of COVID-19 on cross-border tourism on the island of Ireland: A snapshot" (May 2020), https://crossborder.ie/site2015/wp-content/uploads/2020/04/Covid-Tourism-Impact-Final.pdf; "Border People Briefing Paper: COVID-19: Social Security Entitlement for Frontier Workers" (May 2020), https://crossborder.ie/briefing-paper-covid-19-social-security-entitlement-for-frontier-workers/; "Overview of Covid-19 Business Support Schemes for Northern Ireland (NI) and the Republic of Ireland (RoI)" (May 2020), https://crossborder.ie/site2015/wp-content/uploads/2020/05/The-Two-Economies-Covid-19-Business-Support-Schemes-CCBS-BP.pdf; "The impact of COVID-19 on Cross-Border Movement on the island of Ireland" (August 2020), https://crossborder.ie/site2015/wp-content/uploads/2020/08/Final-CCBS-BP-Cross-Border-Movement-1.pdf.

[3] See, for example, "COVID-19 Pandemic Unemployment Payment – changes to rates of payment" (6 July 2020), https://borderpeople.info/media_news/covid-19-pandemic-unemployment-payment-changes-to-rates-of-payment; "Illness Benefit for COVID-19 absences", https://borderpeople.info/a-z/illness-benefit-for-covid-19-absences.html; "COVID-19 – Supports for Frontier Workers", https://borderpeople.info/a-z/covid-19-supports-for-cross-border-workers.html.

[4] "Submission to the House of Lords Select Committee on Public Services inquiry, 'Public services: Lessons from Coronavirus'" (7 July 2020), https://crossborder.ie/submission-to-the-house-of-lords-select-committee-on-public-services-inquiry-public-services-lessons-from-coronavirus/.

[5] The transcript is available at https://committees.parliament.uk/oralevidence/775/pdf/ [last accessed 06/09/2020].

[6] The other partners are Maastricht University's Institute for Transnational and Euregional cross border cooperation and Mobility (ITEM), the Euro-Institut, and the B/ORDERS IN MOTION Research Centre at the European University Viadrina Frankfurt Oder.

[7] See "Statement from the Ad-Hoc Group for North-South and East-West Cooperation: 'Meeting of North South Ministerial Council must agree to intensify engagement with organisations on the front-line of North-South and East-West cooperation'" (30 July 2020), https://crossborder.ie/site2015/wp-content/uploads/2020/07/Ad-Hoc-Group-Statement-on-NSMC-Plenary-Meeting-310720-FINAL16720.pdf; "The necessary conditions for North-South cooperation: A Position Paper from the Ad-Hoc Group for North-South and East-West Cooperation" (14 August 2020), https://crossborder.ie/ad-hoc-group-for-north-south-and-east-west-cooperation-issues-position-paper-on-the-protocol-and-maintaining-the-conditions-for-cooperation/.

[8] "Submission to the Northern Ireland Affairs Committee's Inquiry into the New Decade, New Approach Agreement" (17 April 2020), https://crossborder.ie/site2015/wp-content/uploads/2020/04/CCBS-Submission-to-the-Northern-Ireland-Affairs-Committee-Inquiry-on-NDNA8399.pdf.

[9] For more on Universities Ireland, visit http://universitiesireland.ie/about-us/.

[10] To learn more about SCoTENS, go to https://scotens.org/.

[11] See https://crossborder.ie/the-centre-has-a-new-senior-research-associate/ and https://crossborder.ie/ccbs-has-a-new-senior-research-associate/.

[12] https://crossborder.ie/the-5th-annual-sir-george-quigley-memorial-lecture/.

[13] https://crossborder.ie/site2015/wp-content/uploads/2020/05/The-Two-Economies-Covid-19-Business-Support-Schemes-CCBS-BP.pdf.

Introduction

Dr Anthony Soares

Director, Centre for Cross Border Studies

The 2020 edition of *The Journal of Cross Border Studies in Ireland* brings together contributions from a range of academics and cross-border cooperation practitioners addressing four broad sets of issues of contemporary relevance to how we relate and cooperate with each other across borders. The first is the implementation of agreements with relevance to the island of Ireland; the second is the response to the Covid-19 pandemic; the third is the environment and agriculture; and the fourth is the scope for North-South cooperation within the economic and skills landscape before us. All of these are areas in which the Centre for Cross Border Studies has been active, and to which we have contributed our own views over the years.

Clearly, with the potential impacts it has for how North-South cooperation and wider relations will operate, Brexit has been an area where we have been particularly active since 2016. That has only intensified as we near the end of the transition period following the UK's formal departure from the European Union at 11pm on the 31st of January 2020. For the Centre for Cross Border Studies a matter of specific concern is how the Protocol on Ireland/Northern Ireland is put into operation on the 1st of January 2021, and how the necessary conditions for North-South cooperation are safeguarded even as the UK Government develops new policies in core areas that could give rise to divergences placing Northern Ireland in hazardous territory.

As Colin Murray and Clare Rice highlight in the opening article to this year's edition of *The Journal of Cross Border Studies in Ireland*, the Protocol on Ireland/Northern Ireland has shone a spotlight on Northern Ireland's reliance upon a delicately interwoven balance of political, economic and social factors, which are often beyond its control. The Protocol's complex trading terms require implementation before the 31st December 2020 to avoid damaging consequences for Northern Ireland's economy. Efforts towards implementation are taking place alongside the UK Government's negotiation of the UK's future relationship with the EU and moves to prevent barriers to trade emerging between the UK's constituent parts. The UK Government's prioritisation of a "clean-break" Brexit for Great Britain has, however, exacerbated the vulnerability of Northern Ireland's position amid these changes. In their article, Murray and Rice explore the workings of these dynamics, addressing how barriers to trade between Northern Ireland and Great Britain have previously existed without being perceived to be a threat to the Union. They examine how the politics of Brexit is impacting upon the Protocol's implementation, and suggest that the UK Government is harnessing the potential for collateral damage being inflicted upon Northern Ireland's economy to generate a narrative of threats to the Union as a means of bolstering its negotiating position.

While many are concerned as to what the outcome of the negotiations on the UK and EU's future relations may bring, as well as to how the various parties will approach the implementation of the Protocol on Ireland/Northern Ireland, and what this will mean for the island of Ireland and Northern Ireland in particular, there are also those who are still waiting for the fulfilment of existing agreements. How to deal with the legacy of the past is a core issue whose resolution is yet to be attained, despite what was set out in the 2014 Stormont House Agreement or the 1998 Belfast/Good Friday Agreement. Brexit has also served to highlight areas of the 1998 Agreement that are not necessarily as solid as might have previously been generally thought.

In "A last chance of ending Northern Ireland's Legacy Wars", Padraig Yeates argues that attempts to find a legalistic resolution to the pain which victims of the Troubles and their families have had to endure are bound to fall short. Suggesting that "The primary obstacle to exploring other options is the unwillingness of both governments and most politicians to consider them", Yeates goes on to offer an analysis of why a single focus on redress through the courts has not been able to reveal the truth about the past, nor has it brought the victims and their families compensation for what was done to them. Crucially, though, and recalling historical precedents, the author sets out a number of detailed proposals as to how we can more properly deal with the legacy of the past, in the knowledge that "the time for doing so in ways that involve all of the participants, whether as victims and survivors, or former combatants is running out".

For Emma DeSouza, who is the author of the third article in this year's edition of *The Journal of Cross Border Studies in Ireland*, successive UK governments' failure to implement the birthright and citizenship provisions set out in the Good Friday/Belfast Agreement led to her involvement in a high-profile court case against the Home Office. Those provisions "recognise 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 accordingly confirm that their right to hold both Irish and British citizenship". However, DeSouza – a "Northern Irish-born Irish citizen" – found that despite holding an Irish passport only and identifying solely as an Irish citizen, UK domestic law did not accept her as such and refused to grant an EEA residence card for her US-born spouse. In her article, DeSouza not only provides a detailed account of the legal case to which she was a party, she also presents the context that gave rise to the birthright provisions in the 1998 Agreement and, crucially, how her case has important implications for citizens on these islands in the wake of the UK's departure from the EU.

Three articles then address our second broad theme, which is the extent to which there has been cross-border cooperation in dealing with the Coronavirus pandemic, and how the absence of coordination between neighbouring jurisdictions can give rise to particular difficulties for those who live and work in border regions. In his contribution, the Centre for Cross Border Studies' founding Director, Andy Pollak, begins by recalling that one of the Centre's earliest studies "concluded that possibly the area which would most benefit from collaboration would be shared threats to health across the island in the forms of both communicable and non-communicable disease". However, drawing on interviews with senior officials, the story so far does not always live up to hopes that the island of Ireland would become a beacon of cross-border cooperation in the face of the pandemic, with political divisions in Northern Ireland at times undermining such cooperation. While suggesting "it is too early to tell what effect the practical collaboration to tackle Covid-19 will have", Andy Pollak also recognises that cross-border cooperation has nevertheless taken place, with the notable outcome of the development of a contact tracing phone app that is operable on a cross-border basis.

In her article, Deirdre Heenan suggests that "The way the response to the coronavirus has unfolded on both sides of the border has been informed by experiences of Brexit with political divisions shaping decision-making and the direction of policy". Like Andy Pollak, she highlights the tensions within the Northern Ireland Executive, as disagreements arose as some pushed for an all-island approach to the virus, while others looked to London. However, informed by her previous work and knowledge in this area, Heenan is also critical of the failure to address longstanding issues within Northern Ireland's health and social care system, exacerbated by what she sees as a culture within the Department of Health that is hostile to appeals for greater transparency and accountability. This is not the ideal context for the trust necessary to engage in meaningful and sustainable cross-border cooperation, although Heenan also points to how the new Shared Island Unit within the Department of the Taoiseach "could provide a significant vehicle to undertake much needed research on opportunities for future co-operation and alignment in the area of health and social care".

The story of cross-border cooperation to address the Covid-19 pandemic is not necessarily always any rosier elsewhere in Europe. In his article, Martin Unfried reflects on how the various authorities in the Meuse-Rhine Euroregion have coped with the effects of the spread of the virus, and how public health measures introduced by national capitals have been received by citizens and businesses in a region that integrates parts of three different EU Member States: Belgium, Germany and The Netherlands. For a region long used to unhindered cross-border mobility, "The previously unimaginable had happened in the Euregion Meuse-Rhine: national borders and national border controls were reintroduced for reasons of pandemic control". However, having suggested that "there are indications today that the closure of national borders was not always motivated by exceptional infection rates on the other side of the border but as a national reflex out of helplessness", Unfried goes on to assess the state of readiness of a range of existing cross-border governance structures to cope with the pandemic. His contribution to the Journal represents a welcome opportunity for us to place the experiences of cross-border cooperation on the island of Ireland into a wider comparative context.

How we have dealt with the Coronavirus pandemic is also one of the central issues tackled in John Barry's article, which is one of four to offer thoughts on the future of the environment and agriculture, and how we might cooperate in these areas. He notes how national and regional governments (including those on these islands) have reacted to the spread of the virus by introducing measures that "have led to dramatic and radical changes to the lifestyles of most people in the countries most affected", as well as initiatives such as "the temporary suspension of evictions and rent increases in the Republic of Ireland, mortgage holidays in Italy, and the UK government committing to pay 80% of the salaries of employees who cannot get to work or work from home". And yet Barry suggests that although "there have been official political declarations of 'climate and ecological emergencies' in the Dáil, Westminster, Stormont, Holyrood and the Welsh Assembly, and in most councils and local authorities across the islands", there has been scant evidence of a concerted and united effort to confront climate change and to introduce the radical/necessary measures to achieve real progress. However, he also sets out his conviction that such progress can only be achieved by bringing about a new "commonsense", and recognising "the rise and importance of non-state actors and action, issues and forms of cooperation (existing and potential) across these islands organised around responding to the planetary crisis at local and global scales".

Shirley Clerkin's article gives us a valuable insight into the difficulties (some of them perhaps unexpected to those not familiar with these matters) of engaging in cross-border cooperation

when it comes to the protection of the natural environment. With urgent action needed to address declining biodiversity, Clerkin explains how:

"Working across jurisdictions to achieve improved conditions for nature brings additional challenges to an already complex situation. These challenges exist in the environmental sphere as well as in the social, economic and political arena. The challenges persist at an intensely local level, scaling right up to the relationships between the member states and the Commission, and within the member states themselves".

Her exploration of the range of obstacles that can hinder cross-border environmental cooperation draws on the experience of the INTERREG VA Collaborative Action for the Natura Network (CANN) project, which is producing 25 Conservation Action Plans for a number of sites across the jurisdictions, including sites that span the border. Among the additional complexities inherent to cross-border environmental conservation work that Clerkin highlights is the different criteria used by the two jurisdictions on the island of Ireland to decide which sites are in need of additional protection. Thus:

"For example, Dummy's Lough, one of the Kilroosky/Magheraveely Lough Cluster lakes is a Special Area of Conservation in Ireland, but not in Northern Ireland. This creates a designation boundary in the middle of a lake habitat."

The UK's departure from the EU could, according to Clerkin, add further complexities to cross-border environmental cooperation, even as the EU is moving to resolve misalignments resulting from the use of different criteria by Member States to designate sites as needing particular protective action.

The potential for post-Brexit divergence between the UK and the EU is also a matter of concern for Tom Arnold in his contribution to *The Journal of Cross Border Studies in Ireland*, which considers the future development of policies relating to agriculture and the environment. "Decisions to be taken during the second half of 2020 will", according to the author, "have a decisive impact on the future of the Irish agri-food industry, North and South". For Arnold, the outcome of the current negotiations on the UK's future relationship with the EU, coupled with the decisions the EU takes on how Member States will adopt more environmentally sustainable agricultural systems, are the determining factors for the future shape of agricultural production on the island of Ireland. After offering a clear overview of the evolution of the European, international and Irish policy framework(s) for agriculture and the environment, Arnold's article goes on to offer an assessment of the state of what has become a highly integrated agri-food sector on the island of Ireland, but one that could face enormous challenges dependent on the direction the UK takes post-Brexit. Significantly, he ends by setting a out series of guiding principles for cooperation within the sector on the island of Ireland, as well as proposing some potential areas for North-South projects, but ones that "require vision, political will, planning, perseverance, human and financial resources".

Like Tom Arnold's, Michelle Murphy's article also considers the future of agriculture and the environment on the island of Ireland, but with a particular focus on farm incomes and how these might be affected by moves to greater environmental sustainability across all areas of production. In terms of the current situation, while the agri-food sector is of considerable economic importance in both jurisdictions, farming can be a precarious activity, with significant income volatility and substantial reliance on the support offered through the EU's Common

Agricultural Policy (CAP). "It is clear", Murphy states, "that farming itself is not enough to provide an adequate income for many families as evidenced by the over reliance on direct payments and the number of farmers engaged in off-farm employment". As well as the "hugely negative potential of Brexit", the prospects for farming communities' incomes on the island of Ireland will be shaped to a significant extent by trade deals: while beef farmers in the Republic of Ireland, for example, fear the consequences of a potential EU-Mercosur trade agreement that would "eliminate tariffs on roughly 90 per cent of Mercosur's exports to the EU over 10 years", farmers in Northern Ireland are equally anxious as to what the UK's post-Brexit trade agreements with other countries will mean for them and their families. Additionally, moves towards greater environmental sustainability present their own sets of challenges to agricultural production on the island of Ireland:

"Farmers on both sides of the border are facing changes in terms of the payments they receive via CAP, or from the UK Government. Farmers in the Republic of Ireland will now be accessing a CAP scheme where four out of every ten euros will be spent on climate measures, and the Basic Payment Scheme is being replaced by a Basic Income Support for Sustainability, implying that climate measures will be at the core of this payment. On the other side of the border the status quo will continue until 2021. After this, the UK Government has committed to fund farmers to the same level as was previously done under CAP until 2024. Things are uncertain from this point on".

Nevertheless, and partly in light of the fact that agriculture and the environment are areas of North-South cooperation within the Protocol on Ireland/Northern Ireland, and notwithstanding the possibility of significant divergence ahead, Murphy concludes that "There is clear common ground across the island for convergence on sustainability, the future of agriculture and the environment".

The final three articles in the 2020 edition of *The Journal of Cross Border Studies in Ireland* are concerned with the scope for North-South cooperation within the economic and skills landscape. In their piece, Kerins, Conneely and Reilly of Chambers Ireland stress the importance of cross-border cooperation in ensuring both jurisdictions on the island of Ireland prosper, and avoiding the situation where "inefficiencies on either side of the border move both jurisdictions onto sub-optimal growth trajectories". The authors highlight the ambitions for North-South cooperation set out in the new Irish coalition government's Programme for Government, but suggest that they should focus on the areas that will most "impact the economic well-being of communities right across the island, namely trade, competitiveness, and infrastructure". Cognisant of the new context brought about by the UK's withdrawal from the EU, the authors go on to identify specific actions that should be taken in support of these areas. They include the "co-ordination of efforts to ensure that traders and businesses not only understand what will change, but also what has not changed and what opportunities remain", and investment in infrastructure to mitigate against common problems impacting on Ireland and Northern Ireland's competitiveness and productivity.

One of the common problems highlighted by Kerins, Conneely and Reilly in their article is "the skills shortages which exist in both jurisdictions and the mobility that highly skilled individuals from both Northern Ireland and the Republic of Ireland have traditionally exhibited". It is the ability of the two jurisdictions to address some of these skills shortages by attracting international workers that forms the focus of Maureen O'Reilly's piece. She begins by defining the critical issue at stake as a result of Brexit, which is that "from the 1st January 2021 people

from the other 26 EU member states (outside Ireland) can freely travel to live and work in the Republic of Ireland while a very defined set of rules will apply for those that wish to live and work in Northern Ireland". This means that international workers will face distinct choices as to which jurisdiction on the island of Ireland they will bring their skills to. O'Reilly notes how there are already differences in terms of the numbers of international workers present in Ireland and Northern Ireland, with "Ireland [being] more reliant on non-Irish workers compared to Northern Ireland" across all "occupation groupings for both lower and higher skilled workers". Crucially, these differences are likely to be exacerbated as the UK – and therefore Northern Ireland – pursues its own immigration policy, while the Republic of Ireland's continued membership of the EU's Single Market means EEA nationals retain the unrestricted right to migrate and take up employment in Ireland. As O'Reilly succinctly puts it:

"while Ireland will have open access to 240,000 people actively working or seeking work from across Ireland's 26 EU partners and the UK, Northern Ireland will have open access to an active population of just over 34,000 people between Ireland and Great Britain. After this, Ireland and Northern Ireland's separate immigration policies will come into play to select and attract top talent from the rest of the world".

The author goes on to offer a detailed analysis of the different immigration policies that will be in effect in 2021, with the potential that these differentials mean "undoubtedly narrowing the playing field to attract people including top talent to come to work in Northern Ireland".

Closing this edition of *The Journal of Cross Border Studies in Ireland* is an article authored by Billy Bennett and Simon Stephens on the provision of higher education through cross-border partnerships, focusing on the experiences in the North West of the island of Ireland. The authors reflect on how years of cross-border collaboration between four further and higher education providers led to the announcement by the North West Strategic Growth Partnership (NWSGP) in 2018 of an agreement in education, training and innovation for the North West City Region. Bennett and Stephens offer three illustrative examples of what cross-border collaboration between further and higher education providers in the region, including their own Letterkenny Institute of Technology (LYIT), has been able to achieve. Significantly, these include the MSc in Leadership and Innovation in Public Service, a "programme […] developed by LYIT and Ulster University in collaboration with the Office of An Taoiseach and the Office of the First Minister and Deputy First Minister" to, among other things, "Promote North/South collaboration with tangible outputs in terms of public service improvements". While the authors note some of the challenges encountered by their cross-border collaborative efforts, they conclude that they "have afforded new opportunities to students at both undergraduate and postgraduate levels and contributed to expanding the higher education capacity, and ultimately the economic potential, of the north-west region".

Undoubtedly, the articles in this year's edition of *The Journal of Cross Border Studies in Ireland* display an acute awareness of the significant challenges that lie ahead for cooperation between the two jurisdictions on the island of Ireland, with the potential impacts of Brexit looming large. However, they are also conscious of both the need and the opportunities for cross-border cooperation to face up to not only the immediate threat posed by the Coronavirus pandemic, but also by the global climate emergency. The recent return of a functioning Northern Ireland Executive and Assembly (whose absence had been noted in previous years' editions of the Journal), allied to the Republic of Ireland's Programme for Government, are also seen by many of the contributors to this year's Journal as presenting opportunities for greater North-South

cooperation, in spite of the UK's withdrawal from the EU. We at the Centre for Cross Border Studies share the concerns for what challenges may arise for those who wish to engage in cross-border cooperation, as well as the recognition that there are opportunities to strengthen cooperation and relations within and across these islands – and we will be there to grasp those opportunities and face those challenges with others in the year and years to come.

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Into the Unknown

Implementing the Protocol on Ireland/Northern Ireland

C.R.G. Murray and Clare A.G. Rice*

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Introduction

After the conclusion of his iteration of the UK-EU Withdrawal Agreement, Boris Johnson informed Parliament that 'this is a good arrangement, reconciling the special circumstances in Northern Ireland with the minimum possible bureaucratic consequences at a few points of arrival in Northern Ireland'.[1] And if they were ultimately unhappy with these arrangements in practice, his Brexit Secretary assured the people of Northern Ireland that their representatives in the Northern Ireland Assembly would be able to bring them to an end.[2] As the burdens for businesses inherent within these arrangements becomes apparent, this article explores these claims against the realities of managing Northern Ireland's economy through Brexit.

The 2019 Brexit deal shows little regard for Northern Ireland's peripheral position,[3] both in terms of the UK and the EU Single Market. The challenges posed by extra administrative burdens for businesses attempting to navigate these new arrangements are not necessarily novel, indeed they mirror some of the burdens which accompanied the creation of Northern Ireland as an autonomous polity within the UK in 1921. The UK Government, however, could mitigate those historic burdens. The Withdrawal Agreement's Protocol on Ireland/Northern Ireland, by contrast, depends upon complex interactions between the UK and the EU, with limited avenues for engagement with Northern Ireland's power-sharing government. We

examine the clashes over the Protocol's implementation, and the potential ramifications for Northern Ireland of the UK Government's decision not to extend the transition/implementation period. We also explore how the Protocol's terms have contributed to, and been compounded by, pathologies of (mis)government which have dominated the implementation/transition phase.

Governing by Amnesia

The economic realities of Northern Ireland intruded little into its creation under the Government of Ireland Act 1920. The reality on the ground was that a sizeable part of the North-East of Ireland was ungovernable, no matter the formal niceties of statehood, without the consent of Unionists. From the 1920 Act onwards, successive UK Governments shaped the governance of Northern Ireland around this reality. This process was demonstrated in the 1923 Speaker's ruling that Northern Ireland-specific issues were for debate in Belfast and would not be entertained on the floor of the House of Commons.[4] What happened in Belfast would stay a matter for Belfast, because no one could claim that the Irish Question had been solved if it remained subject to debate. Although the 1920 Act placed severe strictures on Northern Ireland's budget, the Stormont Government was able to leverage the UK Government's eagerness not to engage with running Northern Ireland to extract concessions. The most eye catching of these, for historians, were the acceptance of a negative contribution to the imperial budget in 1938[5] and extra subventions to cover developments in the welfare state in the late 1940s.[6] Demands from Northern Ireland became so persistent that by the 1950s the UK Treasury had become determined to force Stormont to 'pursue the path of financial rectitude'.[7]

The "fill-your-boots-at-Westminster's-expense" mindset, often ascribed to the era of power sharing after 1998, and which contributed to the Cash-for-Ash scandal over the Renewable Heat Incentive scheme,[8] is thus much deeper-rooted in the challenges of trying to manage Northern Ireland's economy. Although much of the process of adjustment to Northern Ireland's circumstances has long been caricatured as budgetary bargaining between Westminster and Stormont, there is also a history of interaction with business and civil society concerns. The process of attribution of Northern Ireland's revenue established under the Government of Ireland Act 1920 was overly complicated at its inception; because the legislation provided Northern Ireland Government with few powers over taxes, it was to receive specific allocations ("reserved revenue") from the UK Government based upon taxes on goods purchased in Northern Ireland.[9] As a result, in the early 1920s, businesses supplying Northern Ireland from Great Britain were required to complete specific notifications based upon their sales, in order to precisely calculate this budgetary allocation.[10] Taking effect alongside partition, this requirement meant that goods shipped from Great Britain would require different documentation depending on whether they were intended to be sold in Northern Ireland or if they were in transit through Northern Ireland into the Irish Free State.

Traders baulked at these requirements. Representatives of the Clyde Shipping Company pleaded, at the very least, to have the documentation applicable to Northern Ireland (known as specifications) waived if the goods in question were due to be trans-shipped across Northern Ireland into the Free State (and thereby subject to a Green Shipping Bill which had to be presented at the point of export).[11] But the Northern Ireland budget was funded based upon the total value of taxes charged in respect of goods subject to specifications, less the amounts associated with goods not sold in Northern Ireland but exported to the Free State. Customs and Excise worried that any relaxation of the rules could lead to 'confusion in attribution and – still worse – … possible double payments of drawback'.[12] The UK Treasury eventually agreed

that these arrangements were becoming an internal trading barrier, but it took until the start of the new financial year in April 1924 for it to begin to ease these measures, dispensing with declarations of contents of parcels posted from Great Britain to Northern Ireland.[13] Northern Ireland's budget thereafter received a presumptive amount based on trade flow statistics, and the number of shipments requiring specifications was gradually reduced. Arguments would continue for decades over the correct attribution of sales tax revenues and customs duties.[14]

The lessons from these experiences were regularly forgotten and relearned when new taxes were imposed on goods. In the 1930s, the imposition of protectionist measures, under enactments like the Abnormal Importation (Customs Duties) Act 1931, proved to be particularly challenging; every time new duties were imposed on particular goods, new groups of traders were affected. One harassed official reported that:

> *[I]t takes several weeks at least to rope them all in, even where no special complications are involved. … In the meantime we shall have inflicted upon a large body of traders what they will probably regard as vexatious and unnecessary requirement, because in order to check the due lodgement of specifications for dutiable article it is necessary to insist upon specifications for all goods of the same name, including the home-grown article.*[15]

Unsurprisingly, officials once again sought to 'dispense with specifications' and estimate the required attributions to Northern Ireland's budget 'on a presumptive basis'.[16] But even after this relaxation was implemented, the UK Customs & Excise authorities emphasised that specifications continued to be required for other goods being shipped into Northern Ireland from Great Britain.[17] Northern Ireland had come to be regarded as a back door into the market in Great Britain. Some thirty years later a carnet permit system continued to apply to private vehicle travel between Ireland and Northern Ireland, undermining Stormont's efforts to encourage tourists crossing the border. When this was challenged, Customs officials noted that different tax rates on car purchases in Ireland and the UK created an incentive to bring cars from Ireland to sell on in the UK; 'cheap second-hand cars may even be bought in Dublin with the intention of selling them for what they would fetch at the end of a tour through the Republic and the North'.[18]

The Northern Ireland conflict and the imposition of direct rule abridged any institutional memory in Whitehall of managing the interaction between devolved institutions and the UK's internal market. By the time that power sharing arrangements were introduced in 1998, alongside devolution in Scotland and Wales, a ready-made alternative existed to having to manage trade between the different parts of the UK's internal market. For as long as the UK remained in the EU, the easiest solution was to pig-a-back upon the arrangements protecting the Single European Market. Preventing the devolved institutions from introducing regulatory requirements which imposed barriers to EU trade also provided a level of protection for the UK's internal market.[19] This meant, however, that the UK Government had no experience of managing internal boundaries, which would contribute to inept decision making as ministers attempted to forge special arrangements for Northern Ireland in the context of Brexit.

Governing by Brinkmanship

The Withdrawal Agreement reached between the UK and EU in late 2019 was the culmination of over two years of negotiations. For the UK, the aftermath of the 2016 Brexit referendum was a tumultuous political period. The June 2017 General Election saw Theresa May's support

in the House of Commons depleted to the extent that she was obliged to enter a confidence-and-supply arrangement with Northern Ireland's Democratic Unionist Party (DUP). The DUP used this position to assert its own ambitions for Brexit, scuppering May's 2018 Brexit deal, and ultimately her premiership, by combining with elements in the Conservative Party to withhold support for her deal in Parliament over the arrangements for the Northern Ireland 'backstop'.[20] Amid this furious debate, it is sometimes forgotten that the UK Government had accepted that the Good Friday/Belfast Agreement 1998 (GFA), and in particular the aspects of North-South co-operation which had developed under Strand 2, required special arrangements for Northern Ireland.

For all that opposition to May's deal appeared monolithic, the differences in the nature of the objections to it were stark.[21] For the DUP's leadership, the backstop threatened a point at which, if the UK and EU did not agree comprehensive terms on their future trading relationship, Northern Ireland would (unless frictionless trading arrangements could be developed) be locked in a degree of alignment with the EU which would not apply to the remainder of the UK. The underlying problem for the European Research Group (ERG) and others in the Conservative Party, however, was that the logic of the backstop all-but-dictated a close UK-EU future relationship, rather than a clean break. They baulked at the suggestion that ensuring minimal disruption on the island of Ireland required deep regulatory alignment between the UK and the EU post-Brexit. There is little doubt that there were also senior figures in the DUP who ardently approved of a clean-break Brexit for all of the UK. But in the final analysis, Eurosceptics within the Conservative Party were willing to reach this goal for Great Britain alone, even if doing so cast their erstwhile allies adrift.[22]

After Theresa May was forced to resign as Prime Minister, the UK Government's priorities shifted. Whereas May's solution to the problems posed by Northern Ireland had prioritised preventing barriers to trade between Northern Ireland and Great Britain, her successor was more alive to the ERG's concern to limit the connections between Great Britain and the EU after Brexit. In his eagerness to escape the backstop, Boris Johnson was willing to countenance barriers emerging between Northern Ireland and Great Britain. Once he signalled this shift to his Irish counterpart, Leo Varadkar, at a meeting at Thornton Manor in early October 2019, the basis of the deal Johnson wanted was in place.[23] Up until this point, the DUP had been kept onside with proposals for a process of Assembly consent for special trade arrangements applicable to Northern Ireland.[24] Once his deal was presented, however, the DUP discovered that the "Stormont lock" was not what they thought it would be; it would involve a majority Assembly vote over whether to maintain special arrangements four years into their operation, and not a cross-community vote assenting to the initiation of such arrangements.[25] With the now politically toxic notion of the backstop replaced by provisions couched in terms which eschewed emotive references to trade barriers between Northern Ireland and Great Britain, Johnson revelled in achieving a better deal than anything Theresa May could manage.[26] His salesmanship of this deal brushed aside DUP protests that their 'opinion means nothing'.[27] After the House of Commons backed his deal he rode his image as a dealmaker to a historic victory in the December 2019 general election, allowing him to dispense with the DUP's support in Parliament. Not until after the UK left the EU on 31 January 2020 did the practical consequences of his deal start to receive close attention.

Governing by Sleight of Hand

Theresa May's deal envisaged a transition period of almost two years, between March 2019 and December 2020. The saga of attempting to gain Parliament's backing for this deal, and

then the negotiation and approval of Johnson's revised deal, however, consumed much of this window. The more complex task of negotiating the revised Protocol's implementation was to be completed between February and December 2020, alongside concluding an overarching Future Relationship Agreement. The Protocol is so complex because it is based upon a sleight of hand. Northern Ireland formally remains part of the UK's customs territory but in practice is obliged to operate the rules of the Single European Market for goods (the EU Customs Code, legislation covering the regulation of goods and protections against unfair competition).[28] These arrangements would see Northern Ireland placed at the intersection of a Venn Diagram, the point at which the trade arrangements of both the UK and the EU supposedly overlap, giving rise to a narrative of Northern Ireland enjoying "the best of both worlds".[29] Under the terms of the Protocol, however, this zone of overlap is not assured.

Having agreed the broad outline of a deal, the UK Government neglected detailed negotiations over the Protocol's trade arrangements.[30] Under the Protocol's terms, all goods moving into Northern Ireland from Great Britain are assumed to be at risk of crossing into the Single European Market over the open border between Northern Ireland and Ireland unless they are exempted from this categorisation through the agreed implementation of the Protocol.[31] The Single Market's regulatory standards apply to goods produced in Northern Ireland,[32] as do broad level playing field measures.[33] The UK is responsible for carrying out the checks required by the Joint Committee and administering associated charges and rebates, but it cannot simply neglect these tasks, as the Protocol allows EU officials to check enforcement.[34] Disputes over the adequacy of the arrangements for the management of goods entering Northern Ireland from Great Britain will be handled by the Court of Justice of the European Union (CJEU).[35]

The EU's concerns over Northern Ireland being used as a backdoor to the Single Market are not baseless. The UK Government is seeking to conclude trade deals with countries, including the United States, which would potentially allow goods into the UK's internal market which do not meet the EU's product standards.[36] It has published its new UK Global Tariff, to take effect once the Withdrawal Agreement's transition/implementation period ends, which sets lower tariff levels on a wide range of manufactured goods than the EU's Common External Tariff (for example, dishwashers will be zero tariffed, down from 2.7%).[37] Such changes create an incentive for businesses to tranship goods through Great Britain, into Northern Ireland and thence into the Single Market at large. The Protocol's default arrangement is thus not really one of overlapping trading regimes at all, but of the Single Market encompassing Northern Ireland in terms of goods.

In terms of goods moving from Northern Ireland to Great Britain, Johnson insisted through the 2019 election campaign that businesses in Northern Ireland could throw new customs paperwork 'in the bin',[38] because the Protocol does not 'prevent the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to other parts of the United Kingdom's internal market'.[39] This does not, however, mean that no barriers to West-East trade will emerge, only that the Protocol does not impose anything which raises to the level of a fetter. Its terms, for example, appear to require exit summary declarations for goods moving from Northern Ireland to Great Britain (to say nothing of the greater range of obligations where goods are covered by sanitary and phytosanitary measures).[40] Some of these constraints might be negotiated away, but they cannot be wished away.[41] A future UK Government could, moreover, choose to impose novel restrictions or administrative requirements to prevent traders using Northern Ireland as a back door into Great Britain, where doing so would allow them to circumvent product standards laid down by Westminster. As yet,

ministers have not explained how they intend to 'distinguish between qualifying Northern Ireland goods and goods originating in Ireland and the rest of the EU'.[42] Minimising East-West barriers, in short, will require the UK Government to actively facilitate goods movements between Northern Ireland and Great Britain.

The Protocol thus sets up multiple threats to Northern Ireland's economy, not all of which can be mitigated by the UK Government's unilateral action. Contrasting accounts of the Protocol's terms cannot be brushed off as mere differences of interpretation, as Michael Gove has attempted to do with regard to the 'at risk' status of goods.[43] Comforting as that account might be for UK policy makers, it neglects the extent to which the Protocol's terms allow the EU to control the key determinations over trade relating to Northern Ireland. If the resulting barriers to trade are to be minimised, connections between the UK and EU's diverging trade regimes need to be forged through implementation negotiations. If the Joint Committee responsible for implementing the Withdrawal Agreement does not exclude a broad range of goods from being at risk of entering the Single Market, many goods being shipped from Great Britain into Northern Ireland could be subjected to checks and charges, increasing the costs of doing business. If the trading regime between Great Britain and Northern Ireland established by the UK Government fails to meet its obligations under the Protocol, the arrangements will undoubtedly be subject to an EU Commission enforcement action before the CJEU, with all of the attendant uncertainty for traders. And if the UK Government alters product standards on any goods to a level which is higher than those set by the EU, it will become obliged to carry out regulatory checks on products entering Great Britain from Northern Ireland given the opportunity for circumventing these standards that an unmonitored trade route would create.[44] In the context of a timebound transition/implementation period, Northern Ireland's institutions and representatives may have little opportunity to mitigate these threats.[45] The UK Government's reluctance to be steered by the intricacies of trade flows involving Northern Ireland is illustrated by how little coverage these received in its July 2020 White Paper on the UK's internal market, beyond a rhetorical commitment to 'safeguarding Northern Ireland's rightful and essential place in this market'.[46]

Governing by Haste

The Protocol's challenges were exacerbated by the foreshortened implementation period, and that was before the Covid-19 pandemic. In the midst of that pandemic, the possibility of seeking an extension to the transition period beyond the end of 2020, built into the Withdrawal Agreement,[47] seemed to offer a way to address the life-and-death exigencies of the pandemic without the distraction of time-limited negotiations over Brexit's aftermath. The EU negotiating team repeatedly affirmed its willingness to extend talks for up to an additional two years, and in June 2020 the Northern Ireland Assembly voted in favour of an extension being sought, in spite of opposition from Unionist parties to this motion.[48]

Nonetheless, at the end of June 2020, the facility for an extension under the terms of the Withdrawal Agreement lapsed. Competing priorities influenced the UK Government's formal decision not to seek an extension.[49] First, this decision reflects the dogged determination seen at the time of the Withdrawal Agreement's conclusion to pursue a clean-break Brexit for Great Britain rather than one sculpted according to varying interests across the UK. Second, the neglect of pragmatic factors (namely the burdens which Covid-19 was imposing on the negotiation process) speaks to prioritisation of completing the transition phase, rather than the quality of the outcome of negotiations. The EU Trade Commissioner even conjectured that the UK Government could be attempting to use the pandemic to mask the economic impact

of failing to reach a future relationship agreement.[50] Third, there is clear political value to delivering on a promised date in the Brexit process, when missed deadlines have haunted Johnson's predecessors. The driving impetus of achieving a clean-break Brexit encouraged achieving that break as quickly as possible. But even if the UK Government had wanted more time in these circumstances, it found itself constrained by its introduction, through the EU (Withdrawal Agreement) Act 2020, of a statutory bar on a transition extension through executive action.[51] It would have cost too much political capital with Johnson's core supporters to repeal this measure at this point.

Johnson could yet belatedly seek an extension in the form of an implementation period for a future relationship deal, having exerted maximum leverage out of the crunch point of a looming deadline with all its attendant risks for trade flows. This would match the swashbuckling narrative of last-minute deals in which Johnson revels. The legal path to such an extension is, however, more convoluted than would have been the case under the Withdrawal Agreement's terms, and in any case the time pressure cuts both ways (with the UK Government already admitting that it won't be in shape to enforce more than a light touch trade border for months after the end of the current transition/implementation period).[52] Moreover, the UK Government might find that it has exhausted the goodwill of its EU counterparts which would be required in such an eventuality.

This possibility notwithstanding, negotiators have soldiered on under an already heavily truncated timeframe. The Covid-19 pandemic created additional challenges for the negotiations, not least lockdowns and social distancing requiring video conferencing instead of in-person discussions between early March and late June 2020. The pandemic also stretched Whitehall and Westminster resources and redirected policy makers' attention.[53] In Northern Ireland, a senior Executive Office official confirmed that two-thirds of Civil Service staff working on Brexit had been moved to working on Covid-19 matters.[54] When the Assembly and Executive have barely gotten back on their feet after a three-year hiatus, this lack of capacity to manage the range of EU issues which will continue to apply to Northern Ireland at the end of the transition period is particularly concerning.[55] An Executive Sub-Committee was established under the *New Decade, New Approach* deal to facilitate adaptation to Brexit and improve collaboration between Executive partners with divergent Brexit positions, but had to be suspended in May 2020 to prioritise tackling the pandemic.[56] Even at an EU level, finalising the seven-year budget and Covid-19 recovery efforts are taking priority over Brexit in the summer of 2020.[57] Against this backdrop, the lack of progress on implementing the Withdrawal Agreement or negotiating the future relationship is hardly surprising.

Governing by Afterthought

The Withdrawal Agreement is not a substitute for a fully developed post-Brexit relationship between the UK and the EU; indeed, its transition/implementation period is intended to allow that relationship to be negotiated. Talks to date have indicated that the UK Government, emboldened by the 2019 General Election outcome, has been intent on diverging from the Political Declaration on the Future Relationship which accompanied the Withdrawal Agreement in ways which would have consequences for the Protocol's implementation. The EU, by contrast, has continued to treat the Political Declaration as a roadmap for the future relationship negotiations; it can countenance changes in detail but not a complete redrawing of the expectations contained therein.

Some of the issues surrounding the Protocol will be addressed if the UK and the EU conclude

a comprehensive Future Relationship Agreement based upon zero tariffs and zero quotas, as intended in the Political Declaration.[58] Such an Agreement would, for example, negate the need to manage tariffs and quotas with regard to trade from Great Britain into Northern Ireland, at least in terms of goods produced domestically. As the implementation of the Protocol is therefore dependent upon the terms of the EU-UK future relationship, the UK Government would ideally like to approach these issues sequentially, and has been much faster to engage with the future relationship talks than with implementing the Protocol. Those dependent upon trade routes between Great Britain and Northern Ireland found themselves waiting for months for the UK Government to even outline its plans.[59] But for all that Johnson would like to speed along the future relationship talks,[60] the truncated timeframe within his Withdrawal Agreement effectively requires these negotiations and Protocol implementation to take place concurrently. Unless the UK intends to align with the EU in terms of product standards after Brexit (maintaining much of the "Brussels red tape" which has so exercised Brexiteers) and its trade policy (curtailing the ambitions around the mantra of "global Britain") then checks on trade flows from Great Britain into Northern Ireland will remain necessary, notwithstanding a future relationship deal.

The UK Government's explanations of Article 6 of the Protocol, particularly Johnson's assurances of no paperwork during the 2019 election campaign, have contributed to public (mis)understanding, which has caused confusion for businesses and inhibited effective planning to address the coming requirements.[61] These assurances over trade between Northern Ireland and Great Britain were, however, so totemic that ministers became reluctant to explain the operation of the Protocol, as doing so would inevitably call into question these commitments. Following extensive soundings from business groups, the Commons' Northern Ireland Affairs Committee announced that they 'expect "unfettered access" to mean the absence of new regulatory barriers, costs or administrative requirements to businesses moving goods from Northern Ireland to Great Britain'.[62] Before this conclusion was reached, however, it had come to appear unattainable. Michael Gove quietly acknowledged that the Protocol's arrangements will impose some bureaucratic requirements but, despite their attendant costs, continues to explain these away as not amounting to substantial fetters upon trade.[63]

Some of these requirements on trade into and out of territory in which EU customs rules apply, including security declarations, could yet be mitigated by negotiations. A trade deal magicking away the Protocol's problems must seem like a tantalising prospect for the UK Government, and it delayed publishing any account of how it intended to implement the Protocol throughout the Spring of 2020. But it is potentially a chimera. For the UK Government to have been serious about this ambition, then it would have needed to make swift progress in the future relationship talks along the lines set out in the Political Declaration, and not advance the wide divergences from the Declaration which it has been putting on the table alongside talking up the 'very good option' of trading with the EU on "Australia terms", Johnson's preferred euphemism for no overarching deal.[64] If these talks do not result in zero tariffs and quotas and broad regulatory alignment, then further burdens will become unavoidable for each sector affected by divergence. The twin-track negotiations imposed by the Withdrawal Agreement's timeframe prevents the implementation of the Protocol being delayed until the shape of any future relationship is known and, in light of this timeframe, the EU has made some progress on the implementation of the Protocol a prerequisite for a future relationship deal.[65] If the UK Government had been serious about using the future relationship negotiations as a platform by which to minimise trade dislocations in the Irish Sea, then extending the transition period could potentially have allowed these tasks to be staggered. With the elapse of the Withdrawal

Agreement's option for an extension, both strands of negotiations became simultaneously pressing, and the UK Government was obliged to spell out its vision for the Protocol.

Governing by Misdirection

If Northern Ireland has looked like something of an afterthought to a UK Government focused upon both the future relationship negotiations and attempts to conclude new trade deals, this impression was long compounded by the UK Government's desire to disguise its shortcomings during the Protocol's negotiation. The UK's policy position on the Protocol's implementation was slow to emerge, coming only in a Command Paper in May 2020. Following months of concerns over the emergence of barriers to trade across the Irish Sea, the UK Government was eager to assert that it sees 'no need to construct any new bespoke customs infrastructure in Northern Ireland (or in Great Britain ports facing Northern Ireland) in order to meet our obligations under the Protocol'.[66] This pledge was tailored to allay DUP concerns; it promised no physical reminder of Northern Ireland's distinct status under the Protocol and nothing that will look like a border. Although 'this document has gone some way to assuaging the concerns raised by Northern Ireland stakeholders',[67] not for the first time these promises have their limits.

Despite the default position of the Protocol being that all goods are deemed 'at risk' of onward movement until the Joint Committee determines otherwise, the Command Paper challenges the EU to weaken its defence of the Single Market; 'Tariffs should only be charged if goods are destined for Ireland or the EU Single Market more broadly, or if there is a genuine and substantial risk of them ending up there'.[68] Whereas the Protocol is framed in terms of risk, the Command Paper seeks to raise this bar to a 'genuine and substantial' risk. But what could induce the EU to lower the protections for the EU Single Market against goods entering, unchecked, through Northern Ireland? The Command Paper presents such a concession as the price of protecting the GFA, and emphasises the 'constitutional position of Northern Ireland within the United Kingdom' and Northern Ireland being 'fully part of the UK's customs territory'.[69] For the UK Government, the needs of the Single Market must give way to these realities because, on the basis of the Protocol's "Stormont Lock", its 'alignment provisions might only be temporary'.[70] These provisions, however, are not necessarily temporary, they are event-limited.[71] The event in question – a vote in the Assembly which supports their termination (to be held four years after the transition/implementation period ends[72]) – will be a high hurdle to cross given the current position of the Northern Ireland parties. It should be noted that when Michael Gove asserts that if the Protocol was 'imposed in an over-bureaucratic and burdensome manner, that would lead inevitably to a greater degree of disquiet',[73] the UK Government is neither powerless nor neutral in this regard.[74] If the UK Government wants to create pressure towards ending the Protocol's special arrangement for goods, it is not in its interest to facilitate its smooth operation (provided that problems in the Protocol's operation can be blamed upon the EU).

The pledge of no physical customs border appears designed to distract from the acknowledgement that Northern Ireland's businesses will face new administrative requirements.[75] These extra burdens, uncertainty around potential charges upon "at risk" goods and question marks over the Protocol's durability, nonetheless combine to form a pressing concern at a time when Northern Ireland's economy has already been rocked by Covid-19.[76] In terms of the UK's relations with the EU, the Command Paper can be reduced to an unhappy ultimatum; the EU must not attempt to enforce the Protocol's terms as agreed, or the 1998 settlement will be threatened. It is the same message which accompanied the UK

Government's rejection of any EU Office in Belfast.[77] There is no small irony that this message is being delivered by a man who, 22 years ago, was one of the GFA's most ardent detractors. Gove, for his part, seems to be enjoying the opportunity to use the 1998 settlement to push back against the EU, when the UK Government had been forced to make concessions in light of the 'letter and spirit' of the 1998 Agreement during the withdrawal negotiations. But there is a distinction between the EU's ability to map specific aspects of North-South co-operation onto the operation of EU law across the land border[78] and Gove's vaguer claims, including that 'a new mission in Belfast … would be seen by many in Northern Ireland as unnecessary and not in keeping with the spirit of the Belfast agreement'.[79] This posture is creating the impression that the UK Government is more interested in managing narratives of blame surrounding any dislocations resultant from the Protocol than in cooperating with the EU to mitigate such issues.

Governing by Discord

Johnson's 2019 general election victory has allowed his Government to marginalise the voices of devolved institutions in Brexit's transition/implementation phase. Theresa May's precarious position in the Commons had obliged not only her pact with the DUP, but also concessions over the management of UK's internal market post-Brexit to Conservative MPs with seats in Scotland.[80] As a result of these concessions, her Government came to promote a vision of the UK's post-Brexit internal market being governed by frameworks which would preserve scope for autonomous action by the devolved institutions.[81] With a secure majority in Westminster, and little time to stitch together a carefully negotiated arrangement which has buy-in from the devolved institutions, Johnson has instead laid out a scheme which places much more control in the hands of the UK Government.[82] The Scottish Government was quick to raise concerns that these proposals for centralised management of the internal market matters amount to a 'power grab' by Westminster. Its Constitution Secretary, Mike Russell, has admonished the plans, which he argues would see devolved institutions have to accept potentially lower product standards post-Brexit to align with UK-wide policy, and further, that the UK Government's conception of an 'internal market' strays into areas of devolved competence.[83] Northern Ireland's newly restored devolved institutions will also have to find their place within these as-yet-unfinished arrangements for structuring the UK's internal market.[84] Because they must also continue to transpose and operate a range of EU laws, and thus maintain expertise not required in any other part of the UK, these dynamics are even more significant. They will require support from Westminster in a manner which does not undermine devolved competences.

The management of trade, the internal market and constitutional affairs are not only, at best, on the fringes of Scotland and Northern Ireland's devolved competences, their representatives at Westminster will struggle to influence Johnson's Government because these parts of the UK are of limited electoral significance for the Conservative Party. Power dynamics at Westminster, however, are not the only significant factor shaping the developing struggle over how to manage the UK's internal market. The Covid-19 pandemic has highlighted the ability of devolved institutions to pursue divergent policies and encouraged comparison between these and Westminster/Whitehall's response. The UK Government is thus confronted with devolved institutions which are assertive in their own mandates and enjoy a high level of public confidence. Brexit and the Covid-19 pandemic have also emphasised pre-existing challenges to the Union in both polities. With the success of the Scottish National Party in the 2019 general election, and the momentum over debates on Irish reunification generated by Brexit, the UK Government finds itself pursuing a high-stakes agenda. The UK Government must strike a careful balance between competing priorities. Its July 2020 White Paper on the Internal Market,

however, makes no effort to understand how these issues were addressed in an earlier era of devolution to Northern Ireland.[85] Indeed, its text struggles to explain Northern Ireland's place in the UK; '[t]he Union was created in 1707 when Scotland and England and Wales became part of the Kingdom of Great Britain and the Union grew further when the United Kingdom was established in 1801'.[86] When it explains how 'EU laws (rather than UK law) provided the common UK-wide approaches and rules for market access' after the devolution settlement of 1998,[87] it is silent on the framework nature of EU directives, and the autonomy which devolved institutions have thus enjoyed, because this does not promote the ends the UK Government desires.

Against the backdrop of these internal UK tensions, these ongoing processes of managing Brexit will also influence Anglo-Irish relations. Ireland has an interest in managing Brexit's impact upon Northern Ireland, both in its role as co-guarantor to the GFA and in protecting its own economy against dislocations to trade crossing the land border. In many ways, Ireland's influence over the course of Brexit negotiations pointed to an inversion in the historical UK-Ireland power dynamics.[88] For all that it would appear to be in the UK's interest to maintain relations with Ireland through this process, the difficulties in accommodating Northern Ireland within Brexit has complicated what would otherwise be a relatively straightforward diplomatic calculus. It is difficult to see how the GFA's Strand 3 relationships can be maintained and operate free from ulterior political agendas by the UK or Irish Government, when the UK Government appears determined to treat the devolved institutions as little more than branch offices under a unitary account of the UK constitution. For all its prominence within the Brexit debate, Northern Ireland is in many ways being overlooked and the challenges it faces underestimated. How Northern Ireland's institutions and parties react to these dynamics will also have implications in Scotland, just as developments in Scotland will indirectly shape post-Brexit politics in Northern Ireland. Together, these interactions will determine the future of the Union.

Conclusion

Rather than being offered the best of all possible worlds, Northern Ireland has come to find itself viewed with suspicion. For the UK Government, the possibility of smoothing the way for the operation of the Protocol through close alignment in the Future Relationship Agreement has become anathema; an EU trap, baited with Northern Ireland, to prevent the realisation of Brexiteer aspirations. The ERG's calls for the end of the future relationship talks have consequently become increasingly shrill.[89] For some within the EU, by contrast, Northern Ireland is increasingly seen as an unquantifiable threat to the integrity of the Single Market, an impression heightened by the UK's refusal to allow an EU Commission office in Belfast and the risk that there might be inadequate monitoring of the Protocol's terms. Northern Ireland thus finds itself squeezed between these mutual suspicions, hoping that they can be resolved through the Joint Committee's work. Michael Gove's solution is for the EU to not hold the UK to the terms of the Protocol. As he informed the Northern Ireland Affairs Committee, 'the really important thing in Northern Ireland is not adhering to a maximalist approach towards the protocol' but instead 'respecting the fact that Northern Ireland has said again and again that we are part of the United Kingdom'.[90] Much as this amounts to building a narrative that the EU is acting inappropriately in insisting on the Protocol's enforcement, it is a breath-taking admission of just how much Johnson's Government conceded in its rush to abandon the backstop if the enforcement of the Protocol's terms poses an existential threat to the integrity of the UK.

It is important to establish the nature of this supposed threat to the Union. It does not come from a deal which creates distinct arrangements for Northern Ireland. The degree of documentation that the UK imposed on shipments into Northern Ireland upon its creation, for revenue attribution purposes, gives a lie to claims that new administrative obligations on trade across the Irish Sea threaten the Union. States are able to manage trade between their constituent parts, and it makes little difference to this ability that the new requirements stem from an agreement between the UK and the EU. But this is not to say that imposing such strains on a fragile and peripheral economy makes for sensible policy; the UK's statehood is not under threat from making arrangements with the EU, but from the choices UK policy makers have made and are making with regard to those arrangements. The consequences for Northern Ireland cannot continue to be underplayed if a trade agreement is not put in place or the Protocol implementation settled on terms which protect Northern Ireland's economy. Such a settlement, however, is in the EU's gift; it is unlikely to be won by the UK Government picking fights over an EU office in Belfast or needling EU leaders over their commitment to peace in Northern Ireland. In effect, the politics of the Protocol have become a battle between mitigating upheaval for Northern Ireland, and securing the UK Government's eagerness for a clean break with the EU. So deep-seated are these contentions that the implementation process could well impact upon the "constitutional question", if a majority of the people of Northern Ireland become sufficiently unimpressed with the choices the UK Government are making on their behalf.

Notes

* This research is supported by ESRC through Grant ES/S006214/1. Paper updated and hyperlinks last accessed on 16 July 2020.

1 HC Deb., vol.666, col.572 (19 October 2019).

2 HC Deb., vol.666, col.598 (19 October 2019).

3 *Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union* (19 October 2019), <https://www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration>.

4 HC Deb., vol.163, col.1624-1625 (3 May 1923).

5 Government of Ireland Act 1920 (UK), s.23. See HC Deb., vol.335, cols.1708-9 (12 May 1938).

6 Social Services (Agreement) Act (NI) 1949.

7 UK National Archives (UKNA), T 233/1752, E. Compton, Handwritten Note: Northern Ireland Transport (6 November 1956).

8 See Patrick Coghlin, Una O'Brien and Keith MacLean, *The Report of the Independent Public Inquiry into the Non-domestic Renewable Heat Incentive (RHI) Scheme* (2020) pp.48-53 and p.196.

9 Government of Ireland Act 1920 (UK), s.24(3). See also Harry Calvert, *Constitutional Law in Northern Ireland: A Study in Regional Government* (1968), pp.241-242.

10 UK Customs and Excise General Order 23/1922 and 11/1923.

11 UKNA, CUST 49/1298, UK Customs & Excise Memorandum (12 September 1923).

12 UKNA, CUST 49/1298, UK Customs & Excise Memorandum (18 October 1923).

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14 Peter Robson, 'Aspects of public expenditure in Northern Ireland' (1952), p.57.

15 UKNA, CUST 49/1298, HM Customs Internal Memo (Mr Poole to Mr Kenney) (11 December 1931) p.2.

16 Ibid. p.3.

17 UKNA, CUST 49/1298, HM Customs Omnibus Weekly Order 3/1932 (7 January 1932).

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21 See Colin Murray and Ben Warwick, 'The Strange Case of Northern Ireland's Disappearing Rights in the EU-UK Withdrawal Negotiations' (2019).

22 A 2019 YouGov poll of Conservative Party members found that a majority favoured Brexit over maintaining the UK, with 63% content to see Scotland leave and 59% Northern Ireland; <https://yougov.co.uk/topics/politics/articles-reports/2019/06/18/most-conservative-members-would-see-party-destroye>.

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25 Withdrawal Agreement, Protocol on Ireland/Northern Ireland (PINI) Art 18.

26 'Brexit: No better outcome than my deal, says Johnson' (*BBC News,* 18 October 2019) <https://www.bbc.co.uk/news/uk-politics-50099540>.

27 J. Shannon, HC Deb., vol.666, col.606 (19 October 2019).

28 Withdrawal Agreement, PINI, Art 4 and Art 5.

[29] Northern Ireland Affairs Committee, *Oral Evidence: Unfettered Access: Northern Ireland and customs arrangements after Brexit* (2020) HC 161, Q80 (Michael Gove).
[30] See Stephen Weatherill, 'The Protocol on Ireland/Northern Ireland: Protecting the EU's Internal Market at the Expense of the UK's' (2020).
[31] Withdrawal Agreement, PINI, Art 5(2).
[32] Ibid., PINI, Annex 2, para.8.
[33] Ibid., PINI, Art 10.
[34] Ibid., PINI, Art 12(2).
[35] Ibid., PINI, Art 12(4).
[36] T. Bawden, 'Not relaxing food standards is a deal breaker for US-UK trade deal, Washington's chief negotiator warns' (*iNews,* 18 June 2020) <https://inews.co.uk/news/environment/not-relaxing-food-standards-deal-breaker-united-states-uk-trade-deal-washington-chief-negotiator-robert-lighthizer-warns-449323>.
[37] 'UK tariffs from 1 January 2021' (*Department for International Trade*, 11 June 2020) <https://www.gov.uk/guidance/uk-tariffs-from-1-january-2021>.
[38] F. McClements, 'Business leaders puzzled after Johnson contradicts own Brexit deal' (*Irish Times,* 8 November 2019) <https://www.irishtimes.com/news/politics/business-leaders-puzzled-after-johnson-contradicts-own-brexit-deal-1.4077085>.
[39] Withdrawal Agreement, PINI, Art 6.
[40] Ibid., PINI, Art 5(4) and EU Regulation 952/2013 EU Customs Code, Art 271.
[41] Michael Gove engages in such wishful thinking when he answers questions on these issues with a claim that they are inapplicable because 'Northern Ireland and the rest of Great Britain are one customs territory'; Northern Ireland Affairs Committee, HC 161, Q111.
[42] EU Committee, *The Protocol on Ireland/Northern Ireland* (2020) HL 66, para.170.
[43] Northern Ireland Affairs Committee, HC 161, Q90.
[44] At present, the UK Government insists that these risks can be managed by 'market surveillance and intelligence'; Ibid., Q49.
[45] The Northern Ireland Executive contributes to the UK team involved in technical discussions on the Protocol's implementation, but it is difficult to determine how much weight its voice carries; Cabinet Office, 'Factsheet: Withdrawal Agreement Joint Committee' (30 March 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876873/Withdrawal-Agreement-Joint-Committee-Fact-Sheet-FINAL.pdf>.
[46] Department for Business, Energy and Industrial Strategy, *UK Internal Market* (2020) CP 278, para.116.
[47] Withdrawal Agreement, Art 132.
[48] NIA Debs, vol.128(7), p.61 (2 June 2020).
[49] Cabinet Office, 'Government accelerates border planning for the end of the Transition Period' (12 June 2020) <https://www.gov.uk/government/news/government-accelerates-border-planning-for-the-end-of-the-transition-period>.
[50] C. Cooper, 'EU trade chief: UK preparing to blame coronavirus for Brexit fallout' (*Politico,* 5 July 2020) <https://www.politico.eu/article/eu-trade-chief-uk-preparing-to-blame-coronavirus-for-brexit-fall-out/>..
[51] EU (Withdrawal) Act 2018, s.15A.
[52] P. Foster, 'UK in U-turn on full post-Brexit border controls' (Financial Times, 11 June 2020) <https://www.ft.com/content/37fad070-160f-4d3b-b043-940b843a0daf>. Note that, after Ireland broke away from the UK, the introduction of customs border was delayed until 1 April 1923; Gilbert Denton and Tony Fahy, *The Northern Ireland Land Boundary 1923–1992* (1993) p.17.
[53] Joe Marshall, 'Preparing the public for Brexit will be much harder this time around' (8 June 2020).
[54] A. McCormick, 'Official Report, Brexit Issues: The Executive Office' (*Committee for the Executive Office, Northern Ireland Assembly,* 27 May 2020) <http://data.niassembly.gov.uk/HansardXml/committee-22457.pdf>.

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[58] *Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom* (19 October 2019), para.22 <https://www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration>.

[59] Committee on the Future Relationship with the European Union, Oral evidence: Progress of the negotiations on the UK's Future Relationship with the EU (2020) HC 203, Q249.

[60] J. Crisp, 'Boris Johnson calls on EU to put "a tiger in the tank" of Brexit talks, as deal hopes rise' (*The Telegraph,* 15 June 2020) <https://www.telegraph.co.uk/politics/2020/06/15/boris-johnson-calls-eu-put-tiger-tank-brexit-talks-deal-hopes/>.

[61] Northern Ireland Affairs Committee, *Unfettered Access: Customs Arrangements in Northern Ireland after Brexit* (2020) HC 161, para.36.

[62] Ibid., para.55.

[63] Future Relationship Committee, HC 203, Q249.

[64] A. Cowburn, 'Brexit: Boris Johnson says no-deal with EU "very good option"' (*Independent,* 3 July 2020) <https://www.independent.co.uk/news/uk/politics/brexit-no-deal-boris-johnson-eu-trade-a9599816.html>.

[65] See Future Relationship Committee, *The Need for Progress in the Negotiations* (2020) HC 458, para.26.

[66] Cabinet Office, *The UK's Approach to the Northern Ireland Protocol* (2020) CP 226, para.32.

[67] See Future Relationship Committee, HC 458, para.25.

[68] Cabinet Office, CP 226, para.25.

[69] Ibid., Foreword and para.14.

[70] Ibid., para.16.

[71] The UK Government would likely be more reticent about talking about Northern Ireland's place in the UK in the same terms, even though this is also event-limited under the GFA (the people of Northern Ireland having the power to choose to leave the Union); Northern Ireland Act 1998, s.1.

[72] Withdrawal Agreement, PINI, Art 18.

[73] Northern Ireland Affairs Committee, HC 161, Q69.

[74] Johnson, after all, promised the 2018 DUP Conference that he would not 'leave Northern Ireland behind as an economic semi-colony of the EU'; Boris Johnson, *Speech to DUP Conference* (23 November 2018) <https://www.spectator.co.uk/article/boris-johnson-s-speech-to-dup-conference-we-are-on-the-verge-of-making-a-historic-mistake->.

[75] Cabinet Office, CP 226, para.29.

[76] These concerns are reflected in the Northern Ireland Affairs Committee, HC 161, para.65 and 83.

[77] EU Committee, HL 66, para.252-255.

[78] During withdrawal negotiations, the UK Government and EU Commission mapped some 142 areas of Strand 2 co-operation connected to EU law; EU Commission, 'Communication from the Commission to the European Council (Article 50) on the state of progress of the negotiations with the United Kingdom under Article 50 of the Treaty on European Union', COM (2017) 847 (8 December 2017) at 9.

[79] HC Debs, vol.676, col.599 (20 May 2020).

[80] European Union (Withdrawal) Act 2018, s.12.

[81] See D. Lidington, 'United at Home, Stronger Abroad' (26 February 2018) <https://www.gov.uk/government/speeches/united-at-home-stronger-abroad>.

[82] Department for Business, Energy and Industrial Strategy, CP 278, para.167.
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[84] Legislation currently gives overlapping powers to Westminster and Stormont to address the Protocol's responsibilities; European Union (Withdrawal Agreement) Act 2020, ss.21-22.
[85] See Sylvia de Mars et al, *Bordering Two Unions: Northern Ireland and Brexit*, pp.126-128.
[86] Department for Business, Energy and Industrial Strategy, CP 278, para.2.
[87] Ibid., para.64.
[88] See Mary C. Murphy, 'The Brexit crisis, Ireland and British-Irish relations: Europeanisation and/or de-Europeanisation?' (2019).
[89] A combative ERG letter to Michel Barnier to this effect is available to view here <https://twitter.com/andreajenkyns/status/1277613712292155393>, and Barnier's response here <https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/mb_letter_to_m._francois_redacted.pdf>.
[90] Northern Ireland Affairs Committee, HC 161, Q89.

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A last chance of ending Northern Ireland's Legacy Wars

Padraig Yeates

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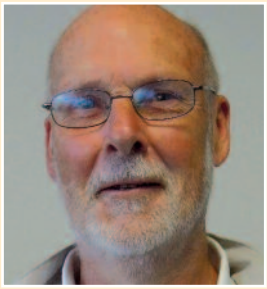

1. Introduction

There is a widespread view that we have entered the end game as regards salvaging some sort of resolution to the Legacy Wars we have inherited from the Troubles for victims and survivors. Perpetrators, or former combatants rarely feature in the debate, although they are the other, unspoken but indispensable half of the equation.

Twenty-two years after the Belfast Good Friday Agreement, 'Lawfare' remains the default setting for addressing the issues that leave so many people locked in the past.

As we know, well over 3,500 people died during the Troubles and over 47,000 were injured. It has been estimated that a third of people in Northern Ireland were affected directly or indirectly by political violence,[1] and many others suffered in Britain, the Republic of Ireland and Europe. Not only the victims, but their children and, in some cases, their grandchildren have been told that the pursuit of 'Truth and Justice' through the courts is the only path along which they can travel to find some form of redress and 'closure'.

Every political initiative undertaken since 1998 has been predicated on finding solutions that are compliant with Article 2 of the European Convention on Human Rights, and it has been taken as a given that these must therefore be routed through the courts. While it is certainly true that the way forward must be Article 2 compliant if both governments are to honour their obligations to each other and to international bodies such as the European Court of Human Rights, it does not have to be through the courts.

The primary obstacle to exploring other options is the unwillingness of both governments and most politicians to consider them.

If little else can be said in favour of the proposals from the Secretary of State for Northern Ireland, Brandon Lewis, last March to resolve the current impasse, they are at least honest in prioritising the needs of British Army veterans over competing Legacy constituencies. They may even be Article 2 compliant, if the measures are introduced along the lines proposed in April by the Committee on the Administration of Justice (CAJ).[2]

Its most radical proposal is that where someone pleads guilty to a serious conflict related offence such as murder, he or she will not have to serve prison time, provided they agree to engage with the Independent Commission on Information Retrieval (ICIR) to a degree that satisfies the court. No indication is given of what would be considered the minimum level of engagement required for reconciliation purposes. And, although the importance of 'reconciliation' is emphasised repeatedly in the CAJ report, nowhere is a definition provided.

Seasoned observers will see that such a proposal might be attractive to ageing British veterans with the spectre of a trial and prison time hanging over them. It is less likely that other former combatants, particularly republicans, would be attracted by this proposal, involving as it does acceptance of the primacy of British justice during the bloodiest years of the conflict when internment was in operation and the rule of law was virtually non-existent.

For a lay person such as myself, this begs the question, why should yet another legal initiative succeed where they have failed in the past?

Perhaps the criminal justice system might not be the best way of coming to terms with the consequences of a major ethnographic conflict that extended over 30 years, addressing each event to the highest standards of criminal investigation, or not at all. Surely the past two decades are proof that reconciliation grounded in due criminal legal process is designed to fail?

2. Reconciliation on the facts is a necessary precondition to reconciliation between people and communities

The law, by its nature, is not suited to reconciliation, be it of individuals, groups or societies. It is a form of trial by combat where champions equipped with battle axes and swords are replaced by lawyers armed with legal instruments. It is designed to decide who is guilty and who is innocent, who is right and who is wrong, who wins and who loses.

It creates an environment which makes reconciliation harder. It can lead to the re-traumatisation of participants, increased hostility and lasting rancour in communities that will be passed on to yet another generation. In Northern Ireland it has led to each side keeping score, where victory goes to those whose status as victims is enhanced and, with it, the need for greater redress of past wrongs.

It is not detracting from the historic achievement of those who negotiated the Belfast Good Friday Agreement to acknowledge that we have failed so far to resolve the differences that led to conflict in the first place. It was a truce that bought precious time to create a lasting peace, but it did not lay the foundations on which that peace could be built.

A system of mediation, overseen by senior members of the British and Irish judiciaries, may achieve a greater degree of Truth and Justice than the legal arena, although its objectives would be modest. Instead of proving who is right or wrong, who is guilty or innocent, or establishing reconciliation between former combatants and victims or survivors, it could provide a process that allowed these two groups to engage with each other to address the facts of what occurred,

because this is the necessary first step towards healing past harms on the basis that without agreement on the facts, there can be no basis for agreement on anything else.

The requirement for the former combatant to engage with victims and survivors, initially through the offices of a mediation officer but then more directly, if circumstances permit, would provide for a far more honest exchange of information than any legal cross examination in a court. It would also allow the participants to learn more about each other, and themselves in the process.

3. The Truth Recovery Process (TRP) is a Logical and Necessary Extension of the Good Friday Belfast Agreement

The opening 'Declaration of Support' to the Good Friday Agreement is unequivocal in its commitment to helping victims and survivors of the conflict.[3] Point 2 of the Declaration states that, 'We must never forget those who have died or been injured, and their families', adding that 'we can best honour them through a fresh start, in which we firmly dedicate ourselves to the achievement of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the human rights of all'.

Point 5 acknowledges 'the substantial differences between our continuing, and equally legitimate, political aspirations', but commits the parties to striving 'in every practical way towards reconciliation and rapprochement within the framework of democratic and agreed arrangements'.

Under the 'Reconciliation and Victims of Violence' section, all the contracting parties recognise 'it is essential to acknowledge and address the suffering of the victims of violence as a necessary element of reconciliation'. They further recognise 'that victims have a right to remember as well as to contribute to a changed society. The achievement of a peaceful and just society would be the true memorial to the victims of violence.

'The participants recognise that young people from areas affected by the troubles face particular difficulties' and they commit to the 'provision of services that are supportive and sensitive to the needs of victims' as 'a critical element' to the success of the Agreement. Such 'support will need to be channelled through both statutory and community-based voluntary organisations facilitating locally-based self-help and support networks.'

These groups already exist and include organisations established by former combatants. The value of their work in developing 'reconciliation and mutual understanding and respect between and within communities and traditions, in Northern Ireland and between North and South' is recognised as playing 'a vital role in consolidating peace and political agreement'.

The Agreement recognises this work as, 'An essential aspect of the reconciliation process' promoting 'a culture of tolerance at every level of society'. But what is not acknowledged explicitly is that as well as involving former combatants who have served terms of imprisonment arising from their involvement in the conflict, these organisations include participants who were sometimes heavily involved in the conflict, but never convicted of an offence. This does not prevent them from participating in very positive educational and reconciliatory activities, but it does inhibit the degree to which they can make a contribution to the Truth Recovery Process and the opportunity of communicating their knowledge and experience to the wider community.

This argument applies with equal relevance to the next section of the Good Friday Agreement on Economic, Social and Cultural Issues, particularly section 2(i), 'tackling the problems of a divided society and social cohesion in urban, rural and border areas.'

Other objectives outlined under its heading on 'Policing and Justice', emphasise the role of 'community involvement where appropriate' in achieving the delivery of justice 'efficiently and effectively'.

Paragraph 5, under the 'Policing and Justice' heading envisages major reforms, including, 'measures to improve the responsiveness and accountability of, and any lay participation in the criminal justice system'; as well as 'mechanisms for addressing law reform' and reviewing 'the scope for structured co-operation between the criminal justice agencies on both parts of the island'.

Lack of progress towards these objectives does not invalidate their desirability.

They are also addressed in the Stormont House Agreement in the paragraphs on 'The Past', and Legacy issues.[4]

Under 'the Past' heading, Paragraph 21 states that, 'As part of the transition to long-term peace and stability the participants agree that an approach to dealing with the past is necessary which respects the following principles:

- promoting reconciliation;
- upholding the rule of law;
- acknowledging and addressing the suffering of victims and survivors;
- facilitating the pursuit of justice and information recovery;
- is human rights compliant; and
- is balanced, proportionate, transparent, fair and equitable.

Although amnesties are not mentioned, the issue is implicit in the Oral History project, which proposes in Paragraph 23 that in collecting shared experiences 'consideration will be given to protecting contributors, and the body itself, from defamation claims.'

The issue is addressed more explicitly in Paragraphs 45 to 49, dealing with the Independent Commission on Information Retrieval (ICIR).

Paragraph 45 states that, 'The ICIR's remit will cover both jurisdictions and will have the same functions in each. It will be entirely separate from the justice system.'

Paragraph 46 states that the ICIR 'will not disclose information provided to it to law enforcement or intelligence agencies and this information will be inadmissible in criminal and civil proceedings. These facts will be made clear to those seeking to access information through the body'.

Paragraph 47 states that, 'The ICIR will be given the immunities and privileges of an international body and would not be subject to judicial review, Freedom of Information, Data

Protection and National Archives legislation, in either jurisdiction'.

Paragraph 48 provides that, 'Legislation will be taken forward by the UK Government, the Irish Government and the Assembly to implement the above decision on inadmissibility.'

Paragraph 49 states that, 'The ICIR will not disclose the identities of people who provide information', although it also states that, 'No individual who provides information to the body will be immune from prosecution for any crime committed should the required evidential test be satisfied by other means.'

The ICIR has been the most successful initiative undertaken under the auspices of the Stormont House Agreement and, if it is compliant with the terms of the Good Friday Agreement it is hard to see why a Conditional Amnesty scheme designed to recover the Truth about 1,700 unsolved murders and thousands of other serious incidents that caused life changing injuries to many people, and years of suffering for them and their families are not.

4. Historical Precedents

All of these measures are Article 2 compliant because the British and Irish governments have agreed they are. Far from being new, amnesties have been used to help end violent political conflict in Ireland for centuries, because they facilitated a return to normal life and mitigated against the most toxic legacies of past violence. The eighteenth century provided an important watershed in this context, dividing wars of contested dynastic and religious allegiances from those defined in more modern ideological terms. Unlike the Jacobite cause, which ended with the death of the Young Pretender in 1788, these new movements were not contingent on the fate of a dynasty or individual but were inspired by the ideals of the American and French revolutions.

The first and bloodiest contest of the modern era in Ireland was the Rising of 1798, which was followed by selective amnesties for members of the United Irishmen. Others followed subsequent periods of unrest. The most important were those applied by the British government after the Treaty was ratified by Dail Eireann in 1922 and by the Free State after the Civil War.

The British measure provided for 'a general amnesty in respect of offences committed in Ireland for political motives prior to the operation of the Truce of 11th, July last'. The Free State amnesty was agreed in November 1924 and applied to prosecutions 'in respect of criminal acts committed or alleged to have been committed between the 6th day of December, 1921, and the 12th day of May, 1923, in any case in which it appears that the act was committed or purported to be committed in connection, directly or indirectly, with the state of rebellion'.

There were a number of factors leading to these decisions but both were predicated on clear outcomes to both conflicts. That was not the case in 1998.

The table below outlines other important differences.

War of Independence	Civil War 1922-24	Troubles 1968-1998
Clear cut political settlement	Clear cut military outcome	Unresolved military and political outcomes
Shared Democratic Values	Shared Political Legacy	Contested Political Legacies and Values
Rival States recognised the political legitimacy of the other	State and Civil Society vs 'Public Band' (IRA)	State vs several political and paramilitary bodies and Paramilitaries vs Paramilitaries
An Ethnographic Conflict in the North was elided by the negotiators and 'parked' for future resolution	Personal and Group Animosities and conflicting political objectives remained between two nationalist alliances	Personal and Group Animosities between nationalist and Unionist communities and within nationalist and Unionist communities remained
The Treaty was an international settlement in which both parties accepted the legitimacy of the other	There was no legal basis for the actions of the Free State government before December 6th, 1922, when the Treaty came into effect. The measure therefore covered the illegal actions of all protagonists, political as well as military	Legal clarity exists on the powers of the British and Irish states

The uncertain politico-military outcome of the struggle in Northern Ireland and the decision of the parties not to include an amnesty, either conditional or unconditional, as part of the peace process left major Legacy issues for both communities unresolved, especially for the victims and survivors of the conflict.

This 'unfinished business' continues to inflict suffering on a scale that is not only unacceptable in humanitarian terms, but has the capacity to undermine the peace process and sow the seeds of future conflict. Reliance on the half-way houses of information retrieval and the courts to deal with outstanding crimes committed by participants on all sides perpetuates rather than resolves the issues that led to conflict in the first place.

5. A Framework for a Justice and Victim-Sensitive Approach to Truth Recovery

The starting point is to create a means by which the pain and loss of victims/survivors can be suitably addressed in the absence of effective legal remedies. They need to know what happened, why it happened and to do so as soon as possible. These issues are paramount for families because it is through Truth Recovery that healing often begins. It is also necessary for some former combatants.

All need to achieve a sense of justice even at this late stage, many years after the event, particularly in situations where there have been no prosecutions and are unlikely to be in the foreseeable future. This is important because deeper issues remain that legal remedies will not repair. The benefits of inter-communal reconciliation initiatives such as those where the stories of victims and survivors are heard, understood, and acknowledged by the other community are well established. Not so, with former combatants. It is through such Truth Recovery processes that a sense of justice, as well as an acknowledgement of each other's identities can be regained. For those who say this is not real justice, we must emphasise that this is not a soft option. Rather, it is a more positive, painful, cathartic and emotionally healing experience than a court hearing; and is capable of producing more information and greater insights for all involved. Northern Ireland has many skilled facilitators who can assist victim/survivor groups through province-wide initiatives.

Time is running out for all those affected by the first decade of the conflict. As one survivor has argued: "We cannot forget the past. While I don't really see Justice as possible, it is a real injustice not being able to access the truth. I want to hear the truth around what happened and get to the bottom of things. That means documents being released or doors opened by the paramilitary gatekeepers so that victims like me can meet the perpetrator face to face to answer my questions and reveal the truth." This must also happen where state agencies are involved.[5]

6. Recommendation for an extra-judicial way forward

Providing conditional amnesties to former combatants willing to engage in mediation processes can allow us to make access the truth more immediately than alternative means:

- With victims and survivors no longer having to consider all the implications of legal proceedings, they can more freely access the truth and answers to questions that have burdened them for decades.
- Requests for reports from police investigations into legacy cases could happen more speedily and in a spirit of full disclosure. The process by which families receive such reports could be through a family support team and done more sensitively than in the past.
- Former soldiers, police officers, paramilitary combatants and public servants would be freer to come forward with information and some of them, at least, want to do so before it is too late. That space will not open up without lifting the fear of prosecution, including prosecution under the Official Secrets Acts in both the Republic of Ireland and the United Kingdom.

What is really needed at this stage of the post-Agreement peace process is relational inter-communal justice that facilitates communities in restoring positive social relationships with neighbours, without fear of perpetuating hatred. This can be achieved by facilitating a Truth Recovery process that acknowledges, through multiple steps, that it is possible to enable the victims and survivors to sit down with the former combatant(s) in a safe place. By recovering the truth of what happened together, expressing their mutual sorrow and regret, they can strengthen the resolve on all sides to ensure political violence is never used again to achieve identity aspirations. This type of justice restores respect for the rule of law and deters similar acts in the future.

7. Sequencing steps for introducing a Justice-sensitive approach

The first step in the Truth Recovery Process would be to appoint a Reconciliation Commission along the lines set out below to create the environment needed to develop a victim-sensitive and justice-sensitive approach. It would be difficult to introduce the legislation for conditional amnesties for former combatants without first initiating a process in the back channels to facilitate a series of acknowledgement statements from former republican and loyalist activists, as well as from both governments. The formula is already there in the October 1994 Combined Loyalist Military Command (CLMC) ceasefire statement that helped facilitate the peace process. A new series of sequenced acknowledgement statements is required from all parties to the conflict, updated and expanded to speak to the current situation. Elements in the wording need to connect past suffering with renewed remorse, together with a recommitment by all to respect differing aspirations and pledge never again to resort to violence to achieve political ends.

The original 2014 Stormont House Agreement proposals, provided (paragraph 53) that the UK and Irish governments would consider making statements of acknowledgement at the end of a five-year process, through the Implementation and Reconciliation Group. We believe this sequence should be reversed. Acknowledgments should be frontloaded and kick off a process of sequenced meaningful steps so as to optimise the environment for legislation.

This requires practical positive steps for victims and survivors, including the speedy implementation of the pension provisions for all those seriously injured, the creation of 'a safe space' for frank discussion of issues of anger, grievance, guilt, shame, injustice, forgiveness and mercy, substantial public investment in Mental Health and Trauma Services at community level, a victim-sensitive focus to the proposed independent PRONI Oral History Archive where families from all backgrounds can share their experiences, and provision for mid-summer day (21st June) to be made a national day of reflection across these islands when all those who have died and suffered in the conflict are remembered.

Meanwhile, the British and Irish governments should establish structures that facilitate an extra-legal Truth Recovery and Justice process based on the establishment in the first instance of a Reconciliation Commission to oversee the creation of dedicated units, headed by a mutually agreed international Chair, or senior members of the British and Irish judiciaries to whom the Chief Executive of such a Commission and its operational wings would be answerable.

8. A Reconciliation Commission

There would be two operational components to the Commission:

1. A Truth Recovery Unit (In a Northern Ireland context this would replace the HIU)
2. A Justice Facilitation Unit (In a Northern Ireland context this would replace the ICIR)

8.1. The Truth Recovery Unit (TRU) needs to be seen as independent by all communities, as originally envisaged in the Stormont House Agreement (paragraph 38) for the HIU. But it should be staffed by professional civilian investigators instead of members of the PSNI, An Garda Síochána or any British police force. This is because the purpose of the unit is to verify information received by the Reconciliation Commission, not assemble evidence for a

prosecution, and it will on occasion have to investigate the activities of police officers and members of state security agencies, North and South, and in Britain.

The TRU will have to operate in all jurisdictions and there will be an obligation on the British and Irish governments to introduce enabling legislation giving investigators the powers they need to perform their duties. It will be the responsibility of the Commission to ensure investigators comply with their obligations, optimise the use of resources and verify the accuracy of the information retrieved. It must ensure consistency in how investigations are handled across jurisdictions.

Getting access to the truth. The controversy surrounding the question of whether state agencies colluded with paramilitaries regarding the death and injury of victims has increased public speculation and added to the suffering it causes them and their families. Victims and survivors need to know the truth and each investigation must seek to achieve this in the speediest way possible. Investigators will need to be as forthcoming as possible with victims and survivors, and with their families, without compromising the Reconciliation Process. In doing so, investigators can help families come to terms with this new information. While there may be many complexities involved, every effort must be made to resolve investigations thoroughly and expeditiously.

The original process offered by the Independent Commission on Information Retrieval (ICIR) was felt to be too clinical by many victims and survivors, and former combatants. They felt it offered little dignity or humanity. There was little respect shown to victims and survivors when they received family reports. For many it was a dehumanising and re-traumatising experience, not sufficiently interactive and unsuited to a Truth Recovery process. It frequently failed to ensure factual and emotional closure as intended, because only the victims and survivors know the questions to which they need answers. Specialised and highly sensitive victim/survivor emotional support will be needed for both the investigative stages of the process and the interactive phase. Truth Recovery is about more than simply retrieving information and details of an individual killed or injured. The healing power of the truth recovery process is for the victims/survivors to make meaning out of the suffering caused by a violent event that often remains fresh in the memory. Close cooperation will be needed between the Unit's family support workers and non-political/non-partisan support groups such as Wave.[6]

- Participants in a safe mediation process might, without being prescriptive, include:
- Protestant/unionist and Catholic/nationalist victims and survivors of the IRA
- Mainly Catholic nationalist victims and survivors of the Loyalist paramilitaries (UVF, RHC, UDA)
- Mainly Catholic nationalist victims and survivors of British Army and Northern Ireland security forces, particularly in the early years of the conflict
- Victims and Survivors of intra-paramilitary feuds within Protestant and Catholic communities
- People in Britain and the Republic who lost family members in Troubles related incidents
- Members and families of the Security Forces killed or seriously injured

Initiatives such as these, convened in cooperation with victim and survivors' organisations, have been found to be very healing for victims and survivors.

Will former combatants have the confidence to come forward? At least some former combatants, whether members of paramilitary organisations or the security forces, may be willing to engage with victims and survivors, once the possibility of prosecution is removed.

The protocols drawn up by the JFU will be critical and broad guidelines will require input by representatives of both victims and survivor, and former combatants' organisations. At the same time, it must be recognised that many former combatants will not avail of a conditional amnesty, especially one that involves engagement with their victims and their families, nor will all who suffered from their actions wish to engage. But at least both groups would be provided with a choice that does not exist at present.

For the former combatants, it not only removes the threat of prosecution and provides them with an opportunity to explain what happened from their perspective to victims and survivors, but it allows them to participate more fully in society. At the same time, it removes the protective shell of their own self-congratulatory tribes and forces them to confront the consequences of their actions.

For victims and survivors, the process also poses challenges. Confronting perpetrators could be traumatic and would have to be a gradual process mediated by trained professionals. But even if the victims and survivors decided not to pursue the process to its completion, they would almost certainly obtain more information and a greater understanding of what happened than through the courts.

8.2. Justice facilitation will be a discrete mediation process co-designed with victims and survivors' families, and with former combatants, with organisational support groups on hand if needed. It will be held in a safe, confidential space under similar rules as Chatham House and convened by the JFU facilitation team after careful preparation and bilateral meetings with each side.

There is a need for victims and survivors to tell their story and to have their pain understood and acknowledged by former combatants. After that, two key questions are important for them: Who did it? Why did they injure me, or kill my parent/husband/wife/sibling/child? They may also want to understand: "What was it all for?"

For the former combatant, there is a need to clarify what happened and why. Arising from this interaction, there may remain unresolved issues or new questions on the part of the victims and survivors. In turn, there exists a need for former combatants to accept responsibility for what they have done and demonstrate credible remorse.

The Justice Facilitation Process would function as follows:

1 The former combatant approaches the JFU with an offer of disclosure.

2 The JFU has a Questionnaire that the former combatant is required to fill out.

3 The former combatant must state what happened, when, where, why, how and to whom (if they know the identities of victims and survivors).

4 They must make it clear if they are making an application on behalf of themselves or a group. If the latter, they must provide proof of this through some accompanying documentation that can be independently verified showing the consent of the other parties. (While group applications may be less likely to occur, they would allow for fuller disclosure.)

5 The contents of the application cannot be disclosed to any law enforcement agency, or other third party.

6 Nothing disclosed by the applicant(s) either intentionally, or inadvertently can be used to investigate or prosecute another individual or group.

7 Nothing disclosed by the applicant(s) either intentionally, or inadvertently can be used as the basis for a civil action for reparations or other damages or loss by victims and survivors. (Any compensation for loss of life, injuries, or other losses would be paid by the state, or states, concerned.)

8 The identity of the applicant(s) will remain confidential in the initial phase of the process and may remain so where its disclosure might have repercussions for their own families. This might be a particular problem where injuries and deaths arose within communities as a result of intra-community paramilitary conflicts.

9 Penalties only arise in the case of false statements. Such penalties should be significant enough to discourage cranks, attention seekers and malicious declarations.

10 It will be a criminal offence to disclose any information submitted by an applicant without their prior knowledge and consent. This applies to all parties to the Process.

11 Having received an application, the JFU will ask the TRU to appoint an investigator.

12 Having satisfied itself as to the applicant's bona fides, and the basic facts with the assistance of the TRU investigator, the JFU will appoint a Mediation Officer to approach victims and survivors to notify them of the nature of the information received and ask if they wish to engage with the former combatant. If so, on what basis? The Mediation Officer would be able to call on the services of the TRU investigator as required. This would include interaction by the investigator with victims and survivors, as well as former combatants.

13 Where the victims and survivors wish to engage, they would meet with the Mediation Officer to discuss the basis of the engagement. The first phase would be through the Mediation Officer who would decide if, and when it would be appropriate for the parties to meet face to face.

14 The Mediation Officer would design protocols based on the discussions with both parties, which they would be required to sign to enable the Process to move to the next stage. In the early phases of the programme this would inevitably be on a trial and error basis but drawing on best practice elsewhere.

15 The Mediation Officer would also have to consider the most appropriate conditions under which both sides could engage. Factors such as their respective state of health and whether they lived in the same jurisdiction would be considered. If the number of victims and survivors was large, they might need to meet separately with former combatant(s), or in small groups. Factors such as mobility, disability, age and mental capacity might arise on both sides.

16 Transportation, accommodation and other expenses should be available from an agreed fund.

17 The Mediation Officer would have discretion to recommend counselling and other supports for participants. As with other expenses these would be paid for by the government(s) from an agreed fund.

18 To give a degree of finality to the process there would be a requirement for both sides to respond within specified time frames to each phase. If victims and survivors wish to withdraw from or suspend the process, they should be granted a three-month period of reflection. However, the overall process should not take more than 15 months, except by the mutual agreement of all parties.

8.3. Joint Statements of Reconciliation and Statements of Acknowledgement: Where the process is concluded, there would be an agreed Joint Statement of Reconciliation, or at least a shared understanding of what happened. Whether the parties engage face to face or not, the aim is to agree a Joint Statement of Reconciliation whenever possible. The primary goal of the Joint Statements of Reconciliation would be to secure reconciliation on the truth and accuracy of the relevant information. Hopefully, the Joint Statements would also entail interpersonal reconciliation between victims and survivors and former combatants, although it would be wise to recognise that this might not be possible in some cases.

The Mediation Officer and TRU investigator would be given full access to official documents, including army and police records, as well as public sources, to ensure the account is as full and accurate as possible. In particularly sensitive instances, this task might be undertaken by the Judges appointed to oversee the Process.

If the process is not completed, it would be open to each party to make a statement providing their own understanding of what transpired, which would be made available to the other side. In such a case, the parties' records would be placed in a secure archive that could not be opened until all the participants had died, or they subsequently consented to publication.

If a joint statement is achieved, it should be made public after a short period of time and the parties encouraged to engage with the wider community through schools, conflict resolution groups, researchers, and other relevant audiences to promote greater understanding of the nature of the conflict; inspire others to participate; and counter the longstanding problem of transgenerational transfer of conflict that bedevils societies such as Northern Ireland.

Perpetrators who do not avail of the conditional amnesty remain at risk of facing the full rigour of the law should their offences subsequently come to light. This is an important condition that differentiates conditional amnesties from a general amnesty. This initiative could be accompanied by additional resources being made available for the investigation of outstanding offences, thus providing an incentive for other former combatants to come forward if they see the pilot scheme is working.

If the Truth Recovery Process is successful it might encourage political leaders to go beyond their usual political narratives by acknowledging more fully the concerns, collective hurts and fears of the other side. The current communal narratives make it difficult for each side to accept the legitimacy of the other's narrative.

Oversight by the British and Irish governments

As far as possible, the process should utilise existing structures in each jurisdiction. In Northern Ireland, the main site of conflict, it could draw on the resources of existing agencies such as the Office of the Victims Commissioner, Community Relations Council and district level Good Relations units across the province.

In Britain and the Republic new structures might be needed, and funding would have to be provided by the British and Irish governments.

Reconciliation Commission (RComm)

The Co-Chairs would have an important role to play in not alone overseeing the efficient and fair functioning of the JFU and TRU, but in providing moral leadership to civil society and eliciting a political response from party leaders. The two governments must also give leadership and set political time aside to support the process over the two years required as the pilot develops.

Conclusion

One thing all those concerned about resolving the problems of the Troubles are agreed on is that the time for doing so in ways that involve all of the participants, whether as victims and survivors, or former combatants is running out. Most of those directly affected by the bloodiest years of the conflict are now in their sixties, seventies or eighties. Many are dead and, in the case of former combatants, have taken what they know to the grave with them.

While some may have left a testimony behind, such accounts can be self-serving and, even when not, are often flawed by a failing memory and by the writer having incomplete knowledge or understanding of the context in which they operated. The Witness Statements given to the Bureau of Military History and the Pension Applications relating to the earlier Troubles, both of which have been released by the Irish Government in recent years, illustrate the pitfalls involved in self-reporting of the past. Despite the relatively limited degree of critical examination to which pension applications were subjected, it is sufficient to illustrate how far personal recollection or, in some cases wishful thinking, can depart from the facts.

Yet, the information contained in both of these archives was collected much nearer to the time when the events recorded took place than is possible for the early and bloodiest years of the more recent Troubles. The dangers of perpetuating myths are therefore at least as great. Many are already well established.

Like everyone else, I have an interest to declare as a member of the Republican Movement who stayed with what became the Official Movement for many years after the split in 1969/70. I have also been a journalist and a trade union activist for most of my working life. I have been a plaintiff, a defendant and a witness in court proceedings but, above all, I have covered cases, both criminal and civil, as a reporter for various publications.

As a lay officer in the National Union of Journalists, I have taken part in negotiations, mediation and, when these failed, industrial action. Fortunately, strikes were very few.

Like many people involved in conflict, I have learnt that mediation is better than litigation, not alone as a means of ending conflict but of helping people understand and come to terms with the past, without allowing that past to steal much of the rest of their lives as well.

The courts cannot give us peace within ourselves, let alone with the neighbours with whom we share this island.

Visit https://www.truthrecoveryprocess.ie/documents *to further explore what is being proposed.*

Notes

[1] The Methodist Church in Ireland, "Submission by the Council on Social Responsibility of the Methodist Church in Ireland to the NIO consultation on the proposed legacy structure" (18 September 2018), p.1.

[2] Kieran McEvoy et al, "Prosecutions, Imprisonment and the Stormont House Agreement: A Critical Analysis of Proposals on Dealing with the Past in Northern Ireland" (April 2020), pp.47-49.

[3] "Agreement reached in the multi-party negotiations" (1998), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf [last accessed 06/08/2020].

[4] "The Stormont House Agreement" (2014), https://www.gov.uk/government/publications/the-stormont-house-agreement [last accessed 06/08/2020].

[5] Submission by the Council on Social Responsibility of the Methodist Church in Ireland to the NIO consultation on the proposed legacy structure.

[6] For more on WAVE Trauma Centre, see https://wavetraumacentre.org.uk/.

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McEvoy, K., Holder, D., Mallinder, L., Bryson, A., Gormally, B., and McKeown, G. (2020), "Prosecutions, Imprisonment and the Stormont House Agreement: A Critical Analysis of Proposals on Dealing with the Past in Northern Ireland", https://caj.org.uk/wp-content/uploads/2020/04/Prosecutions-Imprisonment-the-SHA-LOW-RES.pdf [last accessed 04/08/2020].

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Implementation of the citizenship provisions of the Good Friday Agreement

Emma DeSouza

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Introduction

The question of citizenship and identity in Northern Ireland has been a particular point of contention and much travail since the creation of the border in 1921. If one looks at the historical context it can be of little surprise that the formation of a state that divided the island of Ireland and placed two rivalling communities into a shared space resulted in decades of division, segregation and sectarianism. Northern Ireland was created when Ireland was partitioned between Northern Ireland and Southern Ireland by the 1920 Government of Ireland Act.[1] Since partition the region has been dominated by political arguments over Northern Ireland's constitutional future and stability.

Identity in Northern Ireland cuts across and implicates questions of cultural, religious and national identities. Establishing equality between what had become two largely distinct communities lay at the centre of the Northern Ireland civil rights movement, and would become the centre of the decades of violence and conflict that followed. The 1998 Good Friday Agreement dealt with a number of human rights issues in the region and formed what many see as a constitutional starting point in healing division between the two main communities, and establishing devolution and political stability.[2] Widely seen as a model of peace, cooperation and compromise, the Agreement was the culmination of years of extensive negotiations, which required the intervention of the Irish, British and American governments in order to convince the vast majority of regional political parties to make a profound leap of faith. The Good Friday Agreement dealt with the question of identity and citizenship under article 1 (vi) of both the Multi-party Agreement (in the section on Constitutional Issues) and the British-Irish Agreement, with the latter being an international treaty between the Irish and British Governments registered at the United Nations. Article 1 (vi) is commonly referred to as the birthright provision or birthright protection. It concerned itself with ensuring that neither

of the two main identities or communities would be held above the other in Northern Ireland, and sought to protect identity so as to remove it as a point of contention. The identity provisions extend to the legal right to hold British and Irish citizenship simultaneously.

The Agreement set in place a peace accord founded on the principles of equality and mutual respect, with an onus on the co-guarantors to protect and enshrine these foundations into domestic policy and practice. A complex combination of legislation, reform and good will has been essential to the creation of newly-formed institutions, all of which flourished under the protective blanket of EU law. As a co-guarantor of the Agreement, the British government was required, under its international obligations, to give domestic legal effect to all relevant provisions of the Good Friday Agreement – yet there is no mention of the unique identity and citizenship provisions in domestic UK law.

This legislative gap has been exposed by a recent court challenge over the right to be accepted as Irish under the terms of the Good Friday Agreement and is being compounded by Brexit.

What does the agreement say?

The Good Friday Agreement was put to a referendum on May 22nd 1998. Over 71% of people in Northern Ireland voted for it. A simultaneous referendum held in Ireland produced an even larger majority of 94%.[3]

The Good Friday Agreement includes both the Multi-party agreement (MPA) and the British-Irish Agreement (BIA). The multi-party agreement was signed by the majority of Northern Ireland's political parties. The British-Irish agreement was annexed to the multi-party agreement and is a treaty between the governments of Britain and Ireland.

The MPA deals with many aspects relating to the political and civil rights conflict in Northern Ireland. There are a number of strands and articles containing detailed arrangements on a range of rights issues. Article 1 of the MPA is replicated in the British-Irish agreement and seeks to recognise the legitimacy of divergent political opinions and national identities. In order to give legitimacy to these divergent political ideologies and national identities Article 1 offers guarantees and commitments as to how they will be acknowledged, accommodated and respected.

Article 1 (vi) of the section on Constitutional Issues in the MPA and of the BIA confirms that the participants and the two governments:

> *"recognise 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 accordingly confirm that their right to hold both Irish and British citizenship is accepted for both governments and would not be affected by any future change in the status of Northern Ireland".*

Annex 2 of the BIA is titled 'declaration on the provisions on paragraph (vi) of Article 1 in relation to citizenship'.

The Annex confirms that it is the joint understanding of the British and Irish Governments "that the term 'the people of Northern Ireland' in paragraph (vi) of article 1 of this Agreement means, for the purposes of giving effect to this provision, all persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British citizen, an Irish citizen or

is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence".

It has been recently argued by some that Article 1 (vi) of the Good Friday Agreement is ambiguous, and can be interpreted as relating to identity, which is not the same as a legal right to hold citizenship.[4] However, those making such an argument must in my view actively ignore the express wording of "be accepted as", while also relying on a logical fallacy: that an international treaty concerns itself with bestowing a right to 'feel' a certain way.

The 'identify is not a right to elect' argument is a misinterpretation of Article 1 (vi) recently used by the British Home Office in the case of Jake Parker DeSouza v Secretary of State for the Home Department.[5] The argument is at odds with the view of the Irish government who view Article 1 (vi) to translate to a right to elect citizenship and be accepted as Irish or British or both. The Irish government has been vocal in denouncing attempts to create a distinction between identity and the right to hold citizenship under this provision.[6] As a consequence we have two divergent interpretations of a key tenet of an international agreement held by its two co-guarantors.

Background – citizenship on the island of Ireland

Citizenship across these islands has been complicated due to the historical context and independence of the 26 counties. After partition, under the 1922 constitution citizens in the South became citizens of Saorstát Eireann (the Irish Free State);[7] however, UK law continued to treat them as British subjects. In 1935 the Irish government passed citizenship legislation that sought to reaffirm Dublin's position, with Section 33.3 of the Irish Nationality and Citizenship Act stating that being a 'natural born citizen of Saorstát Eireann' did not confer any other citizenship.[8] Under UK law the British courts disagreed, and found in Murray v Parkes (1942) that a Roscommon-born man who had moved to England, was a British subject under British law and had therefore been legitimately subject to British Army conscription.[9]

Subsequent Irish Nationality and Citizenship Acts implemented Articles 2 and 9 of the Constitution. The 1956 Irish citizenship legislation introduced into law the term 'Irish Citizens',[10] with its provisions on birth and descent automatically conferring Irish citizenship on persons in Northern Ireland – an action considered by the then Stormont Parliament as inflicting 'unwanted Irish republican nationality on the people of Northern Ireland.'[11]

However, Ireland subsequently amended its citizenship legislation to reflect the 'birthright' provisions in the Good Friday Agreement. The changes were taken forward by new citizenship legislation in 2001 that amended Ireland's 1956 Act. The Irish Nationality and Citizenship Act 2001[12] amended the Irish Nationality and Citizenship Act 1956 to give effect to the Good Friday Agreement. Section 7(1) of the 1956 Act had provided:

> *"Pending the re-integration of the national territory, subsection (1) of section 6 shall not apply to a person, not otherwise an Irish citizen, born in Northern Ireland on or after the 6th December 1922, unless, in the prescribed manner, that person, if of full age, declares himself to be an Irish citizen or, if he is not of full age, his parent or guardian declares him to be an Irish citizen. In any such case, the subsection shall be deemed to apply to him from birth".*

Ireland's nationality law is carefully constructed to provide an entitlement to Irish citizenship, a right of election and to avoid statelessness. Under the Nationality and Citizenship Acts, as currently in force, Irish citizenship is an entitlement unless no other entitlement to citizenship exists, at which point it is then automatic to avoid statelessness.

To give effect to this entitlement to become an Irish citizen, a person must do something that only an Irish citizen is entitled to do. This might seem peculiar but the Constitution of Ireland does specify a number of acts as being reserved for citizens.[13] One of the most obvious ways to give effect to this entitlement is through acquiring an Irish passport, but other means include running for certain elected offices, or seeking consular support whilst abroad.

The concept in law of a 'British Citizen' began in 1983 with the commencement of the current British Nationality Act 1981,[14] replacing the concept of a 'Citizen of the United Kingdom and the Colonies' from British nationality legislation in 1948. The 1948 Act ceased to consider the Republic of Ireland as part of the 'UK and the Colonies' and brought an end to the practice of automatic conferral of British Subject status on Irish citizens.[15] The 1981 Act continued automatically to confer British citizenship on most persons born in the UK – including Northern Ireland.

Section 1(1) of the British Nationality Act 1981 provides that:

> "A person born in the United Kingdom after commencement, or in a qualifying territory on or after the appointed day, shall be a British citizen if at the time of the birth his father or mother is—
>
> (a) a British citizen; or
>
> (b) settled in the United Kingdom or that territory".

An Irish citizen is considered settled in the UK, therefore under Section 1 of the British Nationality Act 1981 the people of Northern Ireland, as defined in the Good Friday Agreement, are considered automatically British at birth. This is where a conflict arises between Ireland's implementation of the birthright provisions of the Good Friday Agreement and that of the UK. The UK did not amend domestic UK citizenship law to reflect the unique status of the people of Northern Ireland.

Interaction with domestic UK immigration law

The failure of the UK government to amend domestic statute in line with the birthright provisions of the Good Friday Agreement went largely unnoticed, partly due to Ireland and the UK's joint membership of the European Union.

However, in 2012, the British Home Office latched on to the decision of McCarthy v Secretary of State for the Home Department,[16] as a means to roll out a more restrictive family migration policy that would form part of the newly developed 'hostile environment'. The effect of this policy change was that British citizens/dual British citizens could no longer access more generous EU family reunification provisions and would instead have to apply under the UK's draconian domestic family migration route. This change was implemented UK-wide, without consideration or consultation on how it would affect the people of Northern Ireland.

This resulted in the first major barrier to GFA-rights in Northern Ireland with Irish and British citizens being denied a European Union entitlement that was granted by the Home Office up to 2012. This internal policy change not only ran contrary to the Good Friday Agreement but diverged from previous internal UK immigration policy in regards to Northern Ireland.

The DeSouza case

It was this discrepancy between domestic UK immigration policy and the Good Friday Agreement that prompted the Jake DeSouza case, of which I was a party.

The case began in 2015 when the British Home Office, under the remit of the 2012 McCarthy v Secretary of State for the Home Department case, refused to grant a Northern Irish-born Irish citizen an application for an EEA residence card for their US-born spouse. This was despite the fact that they held an Irish passport only, and identified solely as an Irish citizen under the terms of the Good Friday Agreement. The British government ignored the stark differences between McCarthy (a British citizen born and residing in England, who obtained Irish citizenship solely by descent), and a person of Northern Ireland – who under the terms of the Good Friday Agreement, has an explicit right to be accepted as Irish or British or both. As a workaround, the Home Office recommended that the people of Northern Ireland renounce British citizenship, a process which involves a legal declaration that they are British citizens, costs £372, and removes each person's freedom of movement for up to six months, amongst other limitations and detriments. The case went to appeal.

In 2017, Judge Gillespie, who presided over the First-tier Tribunal (Immigration and Asylum) (FtT), ruled in favour of DeSouza, citing the constitutional nature of the Good Friday agreement:

> *"The constitutional changes effected by the good Friday agreement with its annexed British-Irish agreement, that latter amounting to an international treaty between two sovereign governments, supersede the provisions of the British nationality act 1981 in so far as the people of Northern Ireland are concerned. He or she is permitted to choose their nationality as a birthright. Nationality cannot therefore be imposed upon them by birth".*[17]

The Home Office in turn lodged an appeal against the FtT decision. While initially refused, a second appeal was lodged to the Upper Tribunal, and subsequently granted to the Home Office in May 2018. However, the case wasn't heard by the Upper Tribunal until September of 2019 due to two consecutive adjournments requested by the Home Office. During the court proceedings, Judge Rintoul and Judge Lane presided over the hearing via video link from London. The Upper Tribunal ruled in favour of the Home Office and released their decision via a written judgment on October 14th 2019.[18]

The tribunal stated that they viewed their task to be 'to ascertain what the parties to that agreement intended by way or article 1 (vi)/(iv)', yet concerned itself primarily with parliamentary sovereignty and the dualist nature of the UK's legal system. Some believed the tribunal had overreached and considerable concern was raised as to its interpretation of the Good Friday Agreement and failure to engage with Article 8 (Right to respect for private and family life) of the European Convention on Human Rights in any meaningful way.[19]

The Home Office argument consisted of two main points: firstly, that Article 1 (vi) relates to identity and not citizenship, despite the corollary section on citizenship; and secondly even if

it were to relate to citizenship, that provision does not exist in domestic UK law and therefore under the UK's dualist system cannot be relied upon. The Upper Tribunal agreed with this view.

The submissions by the Home Office were remarkable in that they sought to relieve the British Government of its responsibilities to both the Good Friday Agreement and international law, going so far as to contend that a, "A treaty HMG is a party of does not alter the laws of the United Kingdom", and that "The courts of the United Kingdom do not have the power to force the British Government to uphold its commitments under international law".[20]

In written submissions to the Upper Tribunal the Home Office created an unsupported distinction between the identity and citizenship entitlements in Article 1 (vi),[21] stating that: "The birthright provisions of the British-Irish agreement allow for choice of identity, which is not the same as a right to choose one's citizenship in law".[22]

In addition to this the department claimed that the absence of the birthright provisions from the Northern Ireland Act 1998 indicated that the provision was not intended to have legal scope in terms of citizenship. This is the first time that such an interpretation has been put forward by any Government department or body. Surprisingly, the Upper Tribunal agreed after considering what it deemed to be 'inherent problems' with a system of nationality by consent, namely the risk of statelessness and when consent would be applied:

> *"These examples of the problems inherent in a system of nationality based on consent make it plain that the omission from the 1998 Act of anything touching upon the issues of self-identification and nationality was entirely deliberate on the part of the United Kingdom Parliament".*[23]

There was much to digest in the Upper Tribunal decision with considerable concern raised over the Tribunal's confidence in claiming to know the intent of parliamentarians in 1998, despite there being no submissions to support such a view. The Tribunal considered the UK's failure to give domestic legal affect to Article 1(vi) to mean that the treaty provision related to identity and not citizenship:

> *"The omission [from the 1998 Norther Ireland Act) also underscores the correctness of the Secretary of State's submission that, properly construed, Article 1(iv)/(vi) does not, in fact, involve giving the concept of self-identification the meaning for which the claimant argues. If the parties to the multiparty agreement and the governments of Ireland and the United Kingdom had intended the concept of self-identification necessarily to include a person's ability to reject his or her Irish or British citizenship, it is inconceivable that the provisions would not have dealt with this expressly".*[24]

Of course, the Irish government would contend that it did just that through the express wording of Article 1(vi). It should be noted here that the Home Office claimed Article 1 (iv) of the Good Friday Agreement had an effect on Article 1 (vi), in that Article 1 (iv) reaffirmed Northern Ireland's place in the United Kingdom until such time as the people decide otherwise. However, there is nothing in the Good Friday Agreement to connect these two provisions or to suggest that either have an effect on the other. The argument is equally unsupported.

The Upper Tribunal misdirected itself on a number of occasions and made some notable errors in law. One such error was a failure to determine whether the right to self-determination was engaged under Article 8 of the European Convention on Human Rights, which led to a failure in assessing whether that right was breached.

Additionally, if the legitimate aim was to avoid statelessness, the Upper Tribunal failed to consider whether that aim could be achieved by less intrusive means or by interpreting legislation in a less draconian way.

Most striking, however, was paragraph 39 where the Tribunal erred in law by presupposing the intention of the drafters of the British-Irish Agreement/The Multi-Party Agreement of failing to apply the purposive and generous approach to interpretation required to ensure the British Nationality Act 1981 was interpreted consistently with the Good Friday Agreement.[25]

What all of these errors point to is a failure of the Upper Tribunal to engage with the historical context of Northern Ireland. The Tribunal could only view the granting of British citizenship as a privilege and did not consider that in a contested region with divergent political and national identities, that the granting of British citizenship on those that don't want it, could be seen as an imposition.

An appeal against the Upper Tribunal decision was lodged to the Court of Appeal for Northern Ireland which set a preliminary date of June 3rd 2020.[26]

A political campaign

Over a number of years, the high profile case received significant cross-party political support domestically and further afield, with support from both the European Commission and members of US Congress.[27]

In the background to the ongoing legal proceedings was the *We Are Irish Too* campaign,[28] which had gained considerable momentum. On 9 January, as part of the New Decade New Approach deal to restore devolution in northern Ireland,[29] the British government made a commitment in relation to the DeSouza case, thanks to an intervention from the Irish Government who had sought to find a resolution.[30]

The commitment stated that:

> *"The Government has reviewed the consistency of its family migration arrangements, taking into account the letter and the spirit of the Belfast Agreement and recognising that the policy should not create incentives for renunciation of British citizenship by those citizens who may wish to retain it"* (New Decade, New Approach, Annex A: UK Government Commitments to Northern Ireland, paragraph 39).

Of course, negating the fact that this issue became prevalent not due to those wishing to retain British citizenship but rather by those asserting that they wanted to be accepted as Irish, not British, under the terms of the Good Friday Agreement.

The British Government committed to changing domestic UK immigration law to align with both the letter and the spirit of the Good Friday Agreement, and stated that these changes would be available to the family members of all the people of Northern Ireland, "no matter whether they hold British or Irish citizenship or both" (New Decade, New Approach, Annex A: UK Government Commitments to Northern Ireland, paragraph 15).

This commitment was brought forward in domestic UK legislation shortly before the Court of Appeal hearing in the DeSouza case.[31]

On 14 May 2020, the Government announced these changes in its Statement of Changes to the Immigration Rules.[32] The changes took effect from 24 August 2020. From that date the 'family members' of the 'people of Northern Ireland' are able to apply to the EU Settlement Scheme, whereas previously the family members of NI born citizens were unable to apply as they weren't considered 'EEA nationals' but rather were treated as British citizens.

The changes amended the Home Office's Immigration Rules-Appendix EU,[33] adding the 'people of Northern Ireland' to the definition of an EEA national. Notably, the definition of the people of Northern Ireland under the Good Friday Agreement was replicated, stating that such a person may be 'an Irish citizen, or a British citizen, or a dual British and Irish citizen.'

These changes represented a significant climb-down in the Home Office position in the DeSouza case and set a precedent for recognition of the birthright provisions of the Good Friday Agreement in domestic UK law. They also place the people of Northern Ireland in an advantageous position, particularly those who identify as British, who not only gain more favourable family reunion rights, which aren't available to British citizens elsewhere in the United Kingdom, but who also could apply to the scheme themselves which provides EU protections.

However, the changes are temporary and the window to access this scheme is incredibly narrow, raising some suspicions that this temporary concession worked in favour of the British government who, through these changes, brought an end to the litigation in the DeSouza case and avoided having to address the wider question of imposing British citizenship on the people of Northern Ireland.

Constitutional status of the Good Friday Agreement

The Northern Ireland Office refers to both the Belfast/Good Friday Agreement and the Northern Ireland Act 1998 as forming the basis of the constitutional framework of Northern Ireland. Both the FtT and Upper tribunal considered the constitutional status of the Agreement, with the latter questioning whether the document can be seen as such. This was a divergence from the widely held view that the Good Friday Agreement is a constitutional document with judicial consideration reaffirming that constitutional status.

The case of Robinson vs Secretary of State for Northern Ireland concerned the legality of the election of the First Minister and deputy First Minister by the Northern Ireland Assembly. The House of Lords considered the history and constitutional status of the Good Friday Agreement and the Northern Ireland Act 1998. Lord Bingham clarified that the object of the Good Friday Agreement was:

> *"to achieve 'reconciliation, tolerance and mutual trust' and 'the protection and vindication of the human rights of all' […]. The parties committed themselves to 'partnership, equality and mutual respect' […]. They also pledged themselves in good faith to work to ensure the success of the arrangements to be established under the Agreement".*[34]

The Northern Ireland Act 1998 was explained by Lord Bingham as being enacted to implement the Good Friday Agreement:

> *"The 1998 Act, as already noted, was passed to implement the Belfast Agreement, which was itself reached, after much travail, in an attempt to end decades of bloodshed and centuries of antagonism"* (paragraph 10).
>
> *"The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution. So to categorise the Act is not to relieve the courts of their duty to interpret the constitutional provisions in issue. But the provisions should, consistently with the language used, be interpreted generously, and purposively, bearing in mind the values which the constitutional provisions are intended to embody"* (paragraph 11).

In a country without a written constitution it is considered of jurisprudent relevance that Northern Ireland is regarded as having a written constitution.

International obligations

In addition to the question of the constitutional nature of the Good Friday Agreement is whether the UK can be relied upon to uphold its commitments under international law. The United Nations' Vienna Convention on the Law of Treaties (VCLT),[35] which both the UK and Ireland are parties to, enshrines many of the principles of customary international law, including that of *pacta sunt servanda*, meaning agreements/treaties must be observed. This principle is found in Article 26 of the VCLT which states: "every treaty in force is binding upon the parties to it and must be performed by them in good faith".

Article 27 also states "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". Therefore, not incorporating provisions of a treaty into British domestic law (if they are not provided for already) does not absolve the UK of those obligations under international law.

Counsel on behalf of the Home Department in the case of DeSouza argued that the dualist tradition of the UK's legal system has the consequences that whilst binding in international law, an international treaty provision does not bind in domestic law and is not justiciable before the domestic courts.

However, under the UK's international obligations, a failure to give domestic legal effect to a provision of a treaty does not absolve the Government of its obligations.[36] It remains an important principle of public policy to obey an instrument binding under international law, and as such the British Nationality Act 1981 should be read in such a way as to conform with the international law obligations of the 1998 British-Irish Agreement.

Whether or not the UK considers itself bound to the principles of international law is of particular interest given the UK's departure from the European Union.

Previous interpretations of the birthright provision

Whilst the subject of citizenship in this region has received renewed attention, previous UK interpretations of Article 1(vi) did not lend themselves to the position that a person of Northern Ireland could not choose to be considered an Irish citizen only.

The 2008 Citizenship Review conducted by the former UK Attorney General Lord Goldsmith QC contained the interpretation that, "the Good Friday Agreement confirms the right of the people of Northern Ireland to take either British or Irish citizenship or both".[37]

That same year, the Northern Ireland Human Rights Commission in its GFA-mandated advice on the content of a Northern Ireland Bill of Rights also interpreted the birthright provisions as providing for persons to be British or Irish citizens, or both. The Commission recommended the incorporation of a birthright to citizenship in the Bill of Rights. The proposed right, which would have required an amendment to domestic UK citizenship law referred to "The right of the people of Northern Ireland to hold British or Irish citizenship or both […] with no detriment or differential treatment of any kind".[38]

Until recently the Government website, "nidirect",[39] contained the view, under the heading of Citizenship in Northern Ireland, that "The people of Northern Ireland can choose to be British citizens, or Irish citizens or both. If they choose to be both British and Irish citizens, this means they have a dual citizenship". This definition was replaced after the Upper Tribunal decision in the DeSouza case so as to align with the Government's new interpretation of the birthright provisions.

Ultimately the Home Office used to recognise the sensitivity and complexity of identity in Northern Ireland. A historical example is provided by the ill-fated UK Identity Cards scheme,[40] where the Home Office ultimately conceded that it was incompatible with the GFA to compel NI-born Irish citizens to carry planned UK Identity Cards which identified the holder as a 'British Citizen'. The scheme was abandoned in 2010. The new approach of openly declaring the people of Northern Ireland as British represents a shift in Government policy with little indication as to what prompted this change in attitude.

Why is this so important?

Identity in Northern Ireland remains a complex interaction of political, religious and national identities. According to the academics John Garry and Kevin McNicholl in work presented in the 2014/15 Northern Ireland Assembly Knowledge Exchange Seminar Series, 29% of those surveyed in Northern Ireland described themselves as Northern Irish, around 40% as British, and 25% as Irish.[41] When the responses are broken down by religious affiliation there is a strong relationship between being Protestant and feeling British and between being Catholic and regarding oneself as Irish.

There are any number of subsequent polls relating to identity in Northern Ireland, with a Lucid Talk poll conducted in 2018 for the BBC showing that fewer people in Northern Ireland thought of themselves as British than any other part of the UK.[42] The 2019 National Life and Times Survey results indicated a possible retrenchment of traditional political allegiances, with an increase in those identifying as unionist (33%) and nationalist (23%), and a squeeze on the community who identify as neither unionist or nationalist, a community that has significantly grown since the 1998 Agreement and that remains under the NILT survey as the majority at 39%.[43]

The Brexit referendum is expected to have an ongoing impact on both identity and citizenship in the region with an influx of applications for Irish passports since the UK's decision to leave the European Union. According to figures from Ireland's Department of Foreign affairs there's been an increase of 76% in passport applications between 2016-2019 versus the previous four years of 2012-2015. In total 831,779 Irish passports had been issued to the people of Northern Ireland between 2010-2019.[44] In contrast, in figures obtained by *The Irish Times* through a freedom of information request, the number of British passports issued in Northern Ireland has been steadily declining over the past four years since the Brexit referendum.[45]

Identity in Northern Ireland cuts across religion, political expression and national identity, leaving all citizens of – and around – the region vulnerable. Imposing citizenship upon those who do not want it serves only to harden identities, and for the past two decades – thanks only to the blanket of EU law and the Good Friday Agreement – Irish citizens, British citizens and anyone in-between, have had an open space to slowly soften identity lines.

Bill of Rights

Beyond citizenship under the Good Friday Agreement, there is a wider question of discrimination, and whether the commitments under the Agreement have been successfully implemented to provide for equal treatment for those identifying as Irish or British (or both).

It was envisioned that many of the human rights principles in the Agreement would be brought forward under the scope of a bill of rights, including the right to equal opportunity, freedom and expression of religion, and the right to pursue democratically national and political aspirations.

The Northern Ireland Human Rights Commission completed its GFA mandated work and set forward proposals in 2008, however, this was set aside by the British Government and many of the rights protections under the Agreement have either yet to be implemented or have been mis-implemented. It can be reasonably assumed that if the 2008 Bill of Rights recommendations from NIHRC were implemented in full then the outstanding issues around citizenship under Article 1 (vi) would have been resolved.

As part of the New Decade New Approach deal a newly formed ad hoc committee has been formed at Stormont to revisit the work on a bill of rights for Northern Ireland, but with Brexit already undermining adherence to the European Charter on Human Rights and the Human Rights Act 1998 it may prove all the more difficult at this late stage to ring-fence rights in this region.

Is there a solution?

The next step from the DeSouza case will be establishing a legal solution that is both consistent with the birthright provisions of the Good Friday Agreement and avoids unintended consequences. In a report published earlier this year commissioned by the Joint Committee of the Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission,[46] and completed by leading nationality law barrister Alison Harvey,[47] legislative solutions were put forward. The report contained a raft of careful, considerate and creative recommendations to bring domestic UK citizenship law in line with the Good Friday Agreement. The key recommendations include:

- "To limit the power of the UK State to make an assumption as to the British citizenship of a person born in Northern Ireland without that person having had an opportunity to assert their right not to be identified as a British citizen" (p.48).

- To use the language of the 1954 UN Convention on the Status of Stateless Persons (p.45) – "recognised by any State as a national by operation of its law"[48] – in combination with "An express prohibition on statelessness" (p.44).

- Section 1(1) of the British Nationality Act 1981 should continue to express that all those born to a British citizen or settled parent in the UK are British citizens with a new

subsection in s1 of the British Nationality Act that should provide that no assumption may be made as to the British citizenship of a person born in Northern Ireland without that person having had an opportunity to assert their right not to be identified as a British citizen (p.48).

- The use of the 'right of abode' to distinguish the 'people of Northern Ireland' from other Irish citizens in the UK and highlight their special status (p.61).

The report also contains a number of recommendations on the right of election: that a parent can elect for their child once, and that a person of age can make multiple elections whether they want to be British or Irish or both, with one free election and subsequent elections incurring fees. This system honours the spirit of a birthright, as an inalienable right that continues in perpetuity.

The report on incorporating the birthright commitment into domestic UK law was released in partnership with a report on continuing EU rights and entitlements post-Brexit.[49] The latter report also contained a recommendation in relation to the current citizenship status in Northern Ireland which noted that the current legal position is that the people of Northern Ireland are entitled to apply for Irish citizenship in addition to but not as a substitute for British citizenship. It recommended that "Both Governments should agree a common policy approach regarding the application of the GFA's birthright provision in Northern Ireland", and that "The two Governments' divergent approaches to this issue undermines people's ability to understand their entitlements, and must be resolved" (p.4).

Conclusion

Brexit will create real difficulties in adhering to the parity of esteem principle of the Good Friday Agreement. The UK's exit from the EU complicates questions around citizenship, identity and immigration with British and Irish citizens holding a different set of rights. This is despite the temporary change to the immigration rules that treats both British and Irish citizens born in Northern Ireland as EU citizens.

There remains a significant implementation gap in giving domestic legal effect to the citizenship entitlements of the Good Friday Agreement. Those who identify as British will have to obtain Irish citizenship in order to access EU entitlements and be on a level playing field with their Irish counterparts. No-one should be forced to adopt or renounce a citizenship in order to access rights. At present, there is no tangible solution to this issue. Without adequate legalisation underpinning the unique identity and citizenship provisions, as expressed in the Good Friday Agreement there's likely to be further litigation, possibly on the grounds of discrimination.

There is no default citizenship in the Good Friday Agreement, no mention of citizenship being dependent on Northern Ireland's place in the UK, and yet such an argument is actively pursued by London.

This system creates a special place for those who identify as British in Northern Ireland, with Irish citizenship being perceived by the British Government and some commentators as only possible in addition to being British. Such a policy seeks to place one identity over the other and is notably, not consistent with the letter and the spirit of the Good Friday Agreement.

It relies on the idea that a section of an international treaty concerns itself with bestowing a right to 'feel' a certain way. One must actively perform a series of mental gymnastics to imagine such a concept, and to do so must actively ignore the express wording of the provision itself. There is no evidentiary material to support such a view outside of the recent arguments made by the Home Office. What's needed is a consensus between both the Irish and British governments as to how citizenship in Northern Ireland should operate, especially given the consent principle of the Good Friday Agreement that could see the region reunified in the event of a majoritarian vote.

As an aside to the subject of citizenship implementation under the Good Friday Agreement I want to take this opportunity to highlight wider citizenship concerns in this region. There is a cohort of people in Northern Ireland who fall outside the term 'people of Northern Ireland', who equally face uncertainty with Brexit. Both the Irish and British governments should look to creating a safety net for those who fall outside of this remit but who call Northern Ireland home.

Notes

1 Government of Ireland Act 1920, https://www.legislation.gov.uk/ukpga/Geo5/10-11/67/contents/enacted

2 https://www.gov.uk/government/publications/the-belfast-agreement.

3 See Ulster University's CAIN Web Service, "Results of the Referenda in Northern Ireland and Republic of Ireland, Friday 22 May 1998", https://cain.ulster.ac.uk/issues/politics/election/ref1998.htm.

4 See, for example, Peter Weir, "Automatic UK Citizenship for Northern Ireland people is at risk from De Souza case" (20 September 2019). https://www.newsletter.co.uk/news/politics/peter-weir-automatic-uk-citizenship-northern-ireland-people-risk-de-souza-case-938996.

5 https://tribunalsdecisions.service.gov.uk/utiac/2019-ukut-355 ; see also Diarmaid Ferriter, "Emma deSouza case is about much more than a technicality" (19 October 2019).

6 See Gráinne Ní Aodha and Press Association, "Varadkar says Emma DeSouza 'is an Irish citizen' and that he will raise case with Johnson" (15 October 2019).

7 Constitution of the Irish Free State (Saorstát Eireann) Act, 1922, http://www.irishstatutebook.ie/eli/1922/act/1/enacted/en/print.html.

8 Irish Nationality and Citizenship Act, 1935, http://www.irishstatutebook.ie/eli/1935/act/13/enacted/en/html.

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North-South Cooperation on Healthcare During a Time of Corona Virus

Andy Pollak

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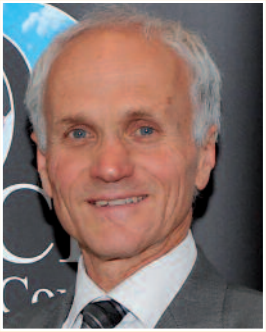

Among the many huge issues the Covid-19 pandemic has raised for the island of Ireland has been the limitations on and barriers to North-South cooperation in healthcare. Senior health officials in Dublin and Belfast have always pointed to cooperation in health as one of the relative success stories since the Good Friday Agreement.

In one of the Centre for Cross Border Studies' earliest studies (2001) on cross-border cooperation in health services, a team of researchers from Queen's University Belfast, the University of Ulster, the Institute of Public Administration and the London School of Hygiene and Tropical Medicine,[1] concluded that possibly the area which would most benefit from collaboration would be shared threats to health across the island in the forms of both communicable and non-communicable disease. They said "this is a field where the barriers to cooperation are few and the potential benefits are substantial" and recommended measures including joint health promotion campaigns.

In the past 20 years there have been a few all-Ireland health promotion campaigns (e.g. on obesity and folic acid for women) and some significant actions on non-communicable disease, notably the setting up of an all-Ireland paediatric cardiac surgery service in Dublin and cross-border radiotherapy and emergency cardiology services for the whole north-west in Derry. The first major all-Ireland communicable disease threat to human beings since 1998 was the Corona virus.

Much of the successful cooperation in the non-communicable disease areas is due to the work of two organisations that were set up before the Good Friday Agreement and thus were outside the auspices of the North/South structures set up by it: Cooperation and Working Together

(CAWT) and the Institute of Public Health in Ireland (the latter provided the two Departments of Health with research expertise in areas like alcohol, tobacco, obesity, rare diseases and health inequalities).

CAWT was set up in 1992 as a partnership of health boards and health trusts in the cross-border region. Between 1995 and 2006 it received nearly €20 million from the EU Peace and Reconciliation Programme for Northern Ireland and the Irish Border Counties (aka the PEACE programme) and the cross-border INTERREG programme for a range of projects in acute care, primary care, family and child care, learning disabilities, health promotion, information technology, human resources, public health and mental health. This led to extensive networks of healthcare professionals across the border region and laid the ground, in terms of research and training, for future, more substantive cooperation initiatives.

In 2016 then CAWT director general Tom Daly identified five models of implementing cross-border cooperation in health that began to evolve out of this early work:

1 Hospital doctors and nurses going to the other jurisdiction to share clinical expertise and help meet the demand for surgical services there.

2 Patients going to the other jurisdiction for surgical services, thereby improving access to those services and cutting waiting times.

3 As confidence built, such cooperation was incorporated into a few mainstream services: for example, Ear, Nose and Throat (ENT) services between Monaghan hospital and Craigavon hospital and Daisy Hill hospital in Newry.

4 Jointly planning new services where the need exists in both jurisdictions and which can be met for the first time on a cross-border basis: e.g. a new €60 million radiotherapy centre at Altnagelvin hospital in Derry, opened in 2016, which served a catchment area of 500,000 people on both sides of the border in the North West. A cross-border emergency cardiology service, using a new cardiac catherisation laboratory at Altnagelvin to provide 24/7 services for Donegal patients, also opened in that year. Another example was a cross-border Ear Nose and Throat (ENT) surgical service in the east border region (Louth, Monaghan, south Armagh and south Down) which involved Northern surgeons travelling south to treat over 2,000 patients there.

5 Moving in a few very specialised areas towards developing services based on a centre of excellence serving the whole island. The only example of this so far is the all-island paediatric cardiac surgery service in Crumlin hospital in Dublin, which combined services previously provided in both Belfast and Dublin and has significantly reduced the need for Northern children to be referred to Britain. This project, led by the Departments of Health, the health authorities and provider hospitals in the two jurisdictions, was signed off during the terms of two DUP health ministers, Edwin Poots and Jim Wells.

Senior CAWT officials estimate that overall the network has received over €50 million in EU funding and around 50,000 people have benefited from its cross-border services. They say the reasons for its success are various: the building of trust and confidence between health

managers on both sides of the border over a period of time, which meant that it was started and driven from the 'ground up' rather than politically directed from Dublin and/or Belfast; feelings of peripherality in the border region (particularly in the North West) so that there is public and local political support for cross-border services which fill a real patient need (it helps that CAWT is serving largely nationalist areas of Northern Ireland); the role of CAWT as a broker between existing statutory bodies, thus avoiding the need to establish any new complex legal entity; and the availability of generous EU funding. For its part, the European Commission has singled out CAWT as one of two outstanding examples of cross-border health cooperation in the EU.[2]

However, with the rare exceptions outlined in points 4. and 5. above (and some smaller programmes like sexual health), CAWT's initiatives in the cross-border region have not been mainstreamed into core Health Service Executive services in the Republic or NHS services in the North. A senior Northern civil servant told this writer in 2016:

> *"Neither health system is in good shape but some rationalisation could have been done together. The cross-border justification could have been used: 'this has to happen on a cross-border basis – otherwise it won't happen'. 60 per cent of people on the island live in the Dublin-Belfast corridor, yet there is no sense of any coordinated services or activities there."*

In the words of one North-South health official:

> *"One thing that bedevils cooperation in health is that it's not systematic or standardised – it's too* ad hoc*. It's not hard-wired into the system. There is no obligation to maintain a level of contact to ensure a degree of continuity. Nobody is responsible for ensuring that cooperation is on the agenda. So when a challenge comes to the system, you concentrate on your own jurisdiction, your own political system. In this way things become more siloed. People are likely to say: "I've got enough on my desk. Don't bother me about North-South cooperation. Any uncertainty or instability in the North will only lead to more inertia – they'll say Stormont is in disarray again, there isn't even a minister in place, so why bother?"*

In the event when the Corona virus arrived on this island at the end of February – in the form of a Northern woman returning from abroad through Dublin airport – Northern Ireland's political institutions had been back and running for less than two months (after a gap of three years), and the two systems were completely unprepared to combat this massive new public health threat on any kind of all-island basis. In a deeply divided Ireland, the lessons of the successful tackling of the virus in island nations like New Zealand and Taiwan were never going to be seriously applied. It did not help that the Northern Minister of Health was an Ulster Unionist, Robin Swann (a contrast can be drawn with the 2001 foot and mouth crisis when an SDLP agriculture minister worked closely with her Irish counterpart to stop the import of infected livestock from Britain and to impose checks and occasional closures on the border).

The main problem was a political one. The power-sharing unionist and nationalist parties were immediately divided on the issue (as they are on most issues). The DUP and Ulster Unionists did not want to break with the overall direction of government in the UK (particularly when that government would be asked to support the North's devastated post-Covid economy). Sinn Fein and the SDLP felt that the island of Ireland was clearly one epidemiological unit and wanted

public health policies aligned on an all-island basis. The magnetic pulls of London and Dublin in situations like this are always in danger of reopening the historic divide.

However, the situation improved during the course of the first four, most serious months of the pandemic *[this article is being written at the end of July 2020]*. In the early weeks the UK (and therefore Northern Irish) and Irish strategies to cope with this existential public health menace clearly differed. On 13th March widespread community testing and contact tracing was largely abandoned in Northern Ireland, being reserved for hospital inpatients and health service staff, in line with the rest of the UK. In contrast the Republic's aim was to ramp up its target to 100,000 tests per week by the end of April (although in the event other public health measures and the 'flattening' of the spread of the virus meant this target never had to be met).

During March and April, as Covid-19 deaths rose rapidly in both jurisdictions, there appears to have been little coordination between the respective health authorities. Each was concerned, first and foremost, with making sure that their own limited intensive care capacity was not overwhelmed. By widespread testing, contact tracing, mass social distancing and self-isolation, and enforcing an immediate lockdown of schools, non-essential shops and other public facilities – while politicians in Britain dithered as scientists discussed so-called 'herd immunity' – the Republic appeared to be coping faster and better. However, the European Centre for Disease Control warned that the South had the lowest level of intensive care facilities in the EU, and thus its hospitals could be the quickest to be overwhelmed if there was a major surge in the virus.

On 31st March the Newry-born president of epidemiology and public health at the Royal College of Medicine in London, Dr Gabriel Scally, called for the Northern Ireland Executive to "decouple themselves" from the British government's approach to tackling the virus and "with every possible urgency, harmonise their strategies and actions" with those of the Irish government. He said in this pandemic Ireland's geographical advantage as an offshore island able to control movement to and from the island "is being squandered by the adopting of very different approaches to the disease."[3]

He said the Republic was attempting to limit the spread and thus terminate the outbreak as soon as possible through its programme of intensive community testing and contact tracing. He warned that without common restrictions on travel to and from the island, there was a real possibility of another mass outbreak in the future. "Two different approaches to testing and contact tracing are just not compatible with achieving the level of control needed to win the battle." He also pointed to the absurdity of the Irish government strongly advising people in Lifford in County Donegal to self-isolate for a minimum of 14 days, while a stone's throw away in Strabane in County Tyrone the government advice was isolation for only seven days. These were themes that would re-occur throughout the pandemic.

On the same day, the Republic's top expert on international health, Professor Sam McConkey of the Royal College of Surgeons in Ireland, was on radio and TV in both jurisdictions calling for similar all-Ireland measures. He repeated that the pandemic would not stop at the border (which he knows well as a Monaghan man) and called for a "joined-up, unified approach" in areas like the provision of vital personal protection equipment (PPE) and diagnostic reagents (both in short supply internationally), staff exchange and the cross-border care of patients. He suggested that the small group of civil servants from both jurisdictions working together for over 20 years in the North South Ministerial Council in Armagh could be used to help coordinate North-South cooperative actions.

McConkey was later to spell out in even more detail how the New Zealand approach could be adapted to the island of Ireland: by eliminating the virus through 60 days of intensive contact tracing; deployment of phone apps to improve that contact tracing; rapid self-isolation; using GPS location data; 14 day quarantine for travellers coming into the country; using cloth reusable masks for all; and the phased reopening of shops and other publicly used facilities.[4]

A week after Dr Scally's intervention the Chief Medical Officers in the Republic and the North, Dr Tony Holohan and Dr Michael McBride (on behalf of the two Departments of Health), signed a Memorandum of Understanding on future public health cooperation to tackle the pandemic on the island. This stated that there was "a compelling case for strong cooperation, including information-sharing and, where appropriate, a common approach to action in both jurisdictions." They would "work to develop evidence-based public health measures central to the response to Covid-19 in both jurisdictions such as, but not limited to, case detection, testing regimens and contact tracing, recognising that the introduction of such measures may differ as a consequence of variation in Covid-19 transmission, local outbreaks and health consequences at different stages of the public health response." They would work together in areas like procurement where that was of mutual benefit. The MoU was non-binding, was not an international agreement, and did "not create rights and obligations governed by international law."

This was a cautious and sensible document. Health officials in Dublin and Belfast were keen to stress that Ireland is not New Zealand, but a divided island of two political jurisdictions, recently emerged from conflict, with a longstanding Common Travel Area which mandated the free movement of people across the island and between Ireland and Britain. However, they also pointed out that relatively early in the outbreak it was clear the virus was behaving in a similar way in both Irish jurisdictions (and differently to the more heavily populated parts of Britain), so it made complete sense to collaborate in trying to control it, particularly through regular exchanges of information. Dr McBride, in particular, stressed that contact tracing would be "very actively" shared across the border as the North trialled a new programme of testing and tracing, thus signalling a divergence from London's approach.

Weekly briefings ensured that the two Chief Medical Officers remained in close touch with up-to-date information. Between April and July there were also five so-called 'quad' meetings between the then Tánaiste, Simon Coveney, the Northern Ireland Secretary of State, Brandon Lewis, and the NI First and Deputy First Ministers, Arlene Foster and Michelle O'Neill, most of which were attended by the two Health Ministers, Simon Harris and Robin Swann, at which anti-Covid cooperation was discussed.

It was therefore surprising that communication between the two governments on the different phases of the pandemic was not more efficient. As early as 12th March, when then Taoiseach, Leo Varadkar, announced from Washington the beginning of the lockdown in the Republic, Arlene Foster complained she had been given only 10 minutes notice of his statement and no content. When the next important announcement came from Dublin on 1st May on the five stages to ease that lockdown, she said the Executive had been given no advance sight of the plan. When the Irish government announced an accelerated, four-stage roadmap out of the lockdown on 5th June, the Executive was informed in advance, but this appears to have been no more than a courtesy call. Robin Swann complained about the inadequacy of the advance information and the *Irish Times* supported him. Some in Stormont believed Varadkar feared that information shared in advance with the Executive would be exploited by Sinn Fein leader

May Lou McDonald. Irish government sources said it was simply to do with the hectic speed at which decisions were taken and implemented at key moments during the crisis.

However, by this time the Northern First and Deputy First Ministers were largely singing off the same hymn sheet. As the leading Belfast social researcher Paul Nolan put it in mid-May: "This week all five political parties united behind a plan for ending the lockdown. This meant the DUP breaking with Boris Johnson, and the nationalist parties accepting less of an alignment with the South than they would have liked. For this perhaps brief moment, the politicians and people of Northern Ireland want to face this existential threat together."[5] Foster emphasised a "totality of relationships" approach and the need "not just to have a north-south approach to what is going on but also an east-west approach." In reply to a journalist's question about whether she would now advocate an all-Ireland approach regardless of her unionist views, Foster said she had always been "very clear that this is not a political issue, this is an issue about saving lives. That's always been the *modus operandi* of the Executive and certainly for me in terms of the way forward."[6] O'Neill said the "common ground" of tackling Covid-19 had brought the First and Deputy First Ministers closer together.

In the event, the number of both deaths and cases went down steadily in the two jurisdictions through May and June, with the number of daily deaths down to zero in both by mid-July, then among the lowest in Europe. In truth, the incidence of the disease continued to be similar – and to decline in similar fashion - in the two parts of the island, despite the occasional claim to the contrary by the odd academic and journalist.

In mid-June Gabriel Scally, while welcoming the fact that the worst was over, warned that given the highly infectious nature of the virus, what was now urgently needed was a concerted effort to achieve a "Zero Covid-19 Ireland". "This will involve getting to zero new cases in both parts of the island and then maintaining and if necessary restoring that position. The best option for Ireland is a joint North-South initiative empowered and resourced to hunt down the remaining cases and hot spots for the virus and deal with them as quickly as possible."[7]

He also insisted that measures would have to be agreed to prevent the virus being reintroduced via ports and airports. The Ulster Unionist Health Minister agreed with him. In late July Robin Swann said that control over international passengers was "perhaps the area in need of greatest cooperation, North and South" and urged the new Irish Health Minister, Stephen Donnelly, to consider an inter-governmental agreement to track such people arriving on the island, which he said would be the key to managing Covid-19 over the following months.[8]

Significant divisions remained on this issue. On 9th July the Northern Ireland Executive had decided to follow England and Wales and exempt travellers to and from 59 countries (including outgoing holiday-makers) from having to quarantine on their arrival in the North. 12 days later the Irish government announced that Irish people could travel to only 15 countries without having to quarantine on their return. Arlene Foster and Michelle O'Neill asked for a meeting of the British-Irish Council (which brings together the governments in London and Dublin and the UK's devolved administrations) to discuss the confusion this difference was causing, with the latter warning that it could lead to Northern Ireland becoming a "back door" for travellers into the Republic.

So what is the overall verdict on North-South cooperation to deal with the Covid-19 pandemic? "It's not the most perfect success story, it's always a highly political thing, but we have come a

long way", say health officials in Dublin. They point to the weekly conference calls between the Chief Medical Officers and their teams; close consultation and information exchange on testing and contact tracing; collaboration on the contact tracing phone apps for the two jurisdictions, both developed by the same County Waterford-based firm, NearForm and launched separately in July; consultation on the easing of the lockdown in both jurisdictions; joint work on testing nursing home staff; and advice and assistance from the Republic's Department of Health to its Northern counterpart on PPE, although in the end the Chinese suppliers of that equipment decided it was too complicated to send joint deliveries to different jurisdictions. By July the Department of Health was satisfied that there was "very good, practical, concrete collaboration" across a range of issues.

The collaboration on the contact tracing phone apps for the two jurisdictions was particularly significant in that these will also work across the border. If a user in Belfast travels to Dublin and is in close contact with a user of the Irish app who later tests positive for the virus, s/he will receive an alert even if they have returned home. This is because the two health services will share a common database of app users with positive test results. This means that the two Irelands have come up with a world first, a contact tracing system that works across borders. The North's officials are sharing what they have learnt with the National Health Service's digital team in London, although it appeared in late July unlikely that an app would be rolled out in England for several months.[9]

As far as the broader field of North-South health cooperation is concerned, it is too early to tell what effect the practical collaboration to tackle Covid-19 will have. As another Centre for Cross Border Studies report on cross-border hospital planning warned in 2011: "There is an absence of any agreed strategic framework covering both health and social care systems which might facilitate cross-border cooperation, a situation exacerbated by the apparent lack of political will to commit to cross-border cooperation on a mutually agreed agenda of work."[10] It remains to be seen whether a new government in Dublin, headed by Micheál Martin, a Taoiseach with a real enthusiasm for North-South cooperation, and the first meeting of the North South Ministerial Council for three and a half years (on 31st July), will change any of that.

The last word should go to Dr Gabriel Scally: "These are not constitutional issues – they are public health issues," he said in June. "They are not about sovereignty – they are about human lives and the preservation of jobs and a functioning economy. We can revert to tribal allegiances in due course if we really want to, but in the meantime let's get the job done."

Notes

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Healthy co-dependencies

Co-ordination across borders in response to COVID-19 and beyond Brexit

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Introduction

Beginning with a cluster of pneumonia cases from a disputed source in Wuhan, China, Covid-19 has spread across the world with alarming speed and has become the defining health crisis of our time. Although we are physically distancing as individuals, the need to work collectively and in a co-ordinated way has never been more apparent. This pandemic recognises no borders and does not discriminate, is a phrase that has been used repeatedly in reference to the politics of an all-island response to Covid-19. Whilst it could be contended that geographic considerations meant that Ireland was ideally placed to co-operate in the area of public health, the political realities were far from conducive to collaboration. This pandemic struck just two months after the restoration of devolution in the North following a three-year hiatus. The Brexit imbroglio added to already strained relationships between the parties and trust and confidence were in fairly low supply. In the Republic of Ireland, a caretaker government headed by Taoiseach Leo Varadkar was leading the country in the wake of the country's inconclusive election in early February. The way the response to the coronavirus has unfolded on both sides

of the border has been informed by experiences of Brexit with political divisions shaping decision-making and the direction of policy. This article assesses the differing approaches to the pandemic, with particular reference to areas of convergence and divergence, data sharing, and scrutiny, and outlines the implications of these developments for future co-operation in the area of cross-border healthcare.

Initial responses

At the outset the Northern Ireland Executive presented a united front and assured the public that the massive challenges presented by Covid-19 would be tackled jointly as the virus had no political consideration; it was neither unionist nor nationalist. This was a significant moment both practically and symbolically, an agreement that party politics would be set aside for the overriding goal of saving lives. There was a recognition that a single strategy for handling the pandemic was paramount as the public were naturally confused and fearful. This united front was however short-lived. The Republic of Ireland announced that the closure of schools, pre-schools and higher education settings would take place on the 12th of March. The Taoiseach Leo Varadkar noted that "Acting together as one nation can save many lives".[1] On the same day in the North the First Minister and Deputy First Minister jointly announced that the Executive would not be moving immediately to close schools and their decision was based on the "scientific evidence". Evidently, there would not be an all-island approach to combatting the pandemic. Less than 24 hours after a joint press conference, the Deputy First Minister Michelle O'Neill backtracked and demanded immediate school closures.

Her 'solo run' was branded shameful and utterly reckless by colleagues in the Executive. The First Minister, Arlene Foster, expressed disappointment, but not surprise. The Ulster Unionist Party leader, Steve Aiken, accused the Deputy First Minister of causing "more fear and uncertainty". He alleged that the move fundamentally undermined the integrity of the Executive. The emphasis was firmly on two jurisdictions rather than a unified approach. The Health Minister Robin Swann told Stormont's health committee that deaths should be expected in Northern Ireland, but so far it was "not in the same place" as the Republic. Our approach is 'different', he stressed. The prospect of diverging strategies caused widespread dismay amongst the public who feared party politics was being prioritised over public health. Was it really being suggested that the coronavirus would respect the 310-mile border between the North and South of Ireland? Sinn Féin and the DUP instinctively defaulting to their constitutional positions when devising their responses to the pandemic was predictable and depressing in equal measure. In a tweet later reported in *The Guardian* the unionist political commentator Alex Kane expressed his frustration and disbelief at the inability to set aside political difference in the face of a global health emergency: "Since coronavirus doesn't give a damn about borders or identities it makes sense for Northern Ireland to follow immediately".[2]

It was quickly apparent that the First Minister and leader of Unionism was determined to slavishly follow Boris Johnson's approach, despite the fact that it inexplicably differed from World Health Organisation guidance. The PM's policy miscalculation on herd immunity, a refusal to participate in an EU ventilator purchasing scheme, a lack of PPE and failure to test, trace and isolate attracted sustained criticism. Nonetheless, despite this, the DUP initially appeared determined to stick rigorously to the British approach and refute suggestions that an all island approach was either desirable or justified. In the face of a global pandemic the First Minister repeatedly demonstrated an unwillingness and inability to break out of her Unionist straitjacket. Conversely, her partners in government Sinn Féin, stressed the need to adopt an all island approach with testing at the core of the battle against the virus. In a tweet following a joint

press conference Michelle O'Neill castigated the health department over a lack of testing and PPE and stressed 'as a political leader I have called this out'. Further cracks emerged when the Department of Health decided to follow the lead of Whitehall and abandon community testing – ignoring the World Health Organisation's mantra of "test, test, test". This decision was reversed months later when UK officials admitted they got it wrong and testing was resumed. While no political party would openly use the health emergency to score political points, it is clear that Northern Ireland's First Minister sought to assert the separateness of Northern Ireland from the Republic, while Sinn Féin argued for convergence.[3] Overcoming the deep political divisions, at least temporarily, and collaborating even when their constituents' lives were at risk presented huge difficulties for parties conditioned to prioritise constitutional and ethnonational considerations. Decision-making around the virus highlighted once again the fragile foundations of politics in Northern Ireland.[4]

Just days after the politicisation of the virus appeared to scupper any hopes of a united approach, a more co-ordinated strategy was agreed. On 14 March senior ministers from the Northern Ireland executive – the First minister, Deputy first minister and health minister met in Armagh with the Taoiseach, the Tánaiste and minister for Health from the Irish government, alongside their respective chief medical officers – to discuss North-South cooperation on Covid-19. A statement released by Northern Ireland's Executive Office noted "It was agreed that everything possible will be done in coordination and cooperation between the Irish Government and the Northern Ireland Executive and with the active involvement of the health administrations in both jurisdictions to tackle the outbreak".[5] The administrations in Northern Ireland and the Republic of Ireland accepted the need to work closely together on the Covid-19 crisis.

As the island of Ireland is a Single Epidemiological Unit (SEU) for disease control relating to animal health, it seemed that similar practical considerations would pertain to the spread of human diseases such as Covid-19.[6] As agreed at the meeting, the health departments in Northern Ireland and the Republic of Ireland signed a Memorandum of Understanding.[7] This committed "to promote cooperation and collaboration in response to the Covid-19 pandemic". In particular they committed to working together on a number of key areas including:

- modelling the spread and impact of Covid-19
- the development of public health messages
- sharing information on measures such as testing, contact tracing and social distances
- adopting consistent common messages where appropriate, such as on handwashing, hygiene and social distancing
- behavioural change, research and ethical frameworks
- co-operation in the area of research

Alongside this it was announced that the chief medical officers of Northern Ireland and the Republic of Ireland agreed to hold a weekly teleconference to update each other on the situation in their respective areas and "ensure mutual ongoing understanding". Significantly with reference to the development of public health responses, the MoU also states that: "Consideration will be given to the potential impact of measures adopted in one jurisdiction on the other recognising that the introduction of such measures may differ reflecting

differences in COVID-19 transmission at different stages of the public health response". Tomlinson suggested this statement was in fact evidence that the island of Ireland had been accepted as two epidemiological units, thereby foregoing the opportunity to exploit the potential for cross-border cooperation.[8] Unfried and Soares, meanwhile, suggested that the MoU acknowledged the value of analysing the impact of any policies on the other jurisdiction, as public health measures introduced on one side of the border have clear implications for all citizens on the island.[9] It was important to acknowledge people will naturally want to understand why governments on either side of the border are acting in particular ways, especially if there was significant divergence between the two jurisdictions. It was completely predictable that fears could be magnified on the island of Ireland, where citizens in Northern Ireland, for example, may seek reassurance that the approach taken by the devolved government was on the basis of scientific evidence rather than politically motivated.

The Memorandum of Understanding between the health authorities of the two jurisdictions on the island of Ireland, notes that cooperation on response to COVID-19 will build on "existing and long-established cooperation on the island of Ireland between the Participants and the health services including across cancer, ambulance and congenital heart services, and the strong pre-existing cooperation between the offices of the Chief Medical Officers in both jurisdictions". Whilst co-operation across the border in the area of healthcare does already exist, it is however relatively limited with no proposals for significant expansion. North-South collaboration in healthcare has evolved in response to patient need, both in border areas and on an all-island basis. Many services are not underpinned by European Regulations, for example, the All-Island Congenital Heart Disease Network and the North West Cancer Centre at Altnagelvin are based on inter-governmental agreements between the respective health departments North and South, underpinned by Service Level Agreements. Following the Brexit transition period, it is envisaged that these will continue on the basis of a bilateral agreement between the UK government and the Republic of Ireland.[10]

Health in Northern Ireland is a fully devolved issue and there has been extensive debate and disquiet about the rationale for following the Whitehall position rather than assessing national and international evidence and delivering a bespoke model for Northern Ireland. One of the key advantages of devolution is the ability to formulate policies tailored to local needs and priorities.[11] The British government, like almost every other government worldwide was seriously unprepared for this global emergency. However, the problem particularly in the crucial initial phases stemmed from an underestimation of the threat combined with breath-taking complacency. Fintan O'Toole has suggested that the Coronavirus has exposed the myth of British Exceptionalism which had also underpinned the approach to Brexit. He contends that this idea of exceptionalism helps to explain the belief that there should be a distinctive British policy response to the virus. According to him this highly delusional ideology helps to explain the slowness of the response, the decision to pursue the discredited herd immunity and the idea that the World Health Organisation was only relevant to low or middle-income countries.[12] The devolved government had the power and ability to chart their own course rather than blindly following the British government's shambolic, counter-intuitive policies.

The North South Ministerial Council

Health is already an established area of North-South cooperation. The North South Ministerial Council (NSMC), which was established under strand two of the 1998 Good Friday Agreement, brings together the two governments on the island of Ireland to "develop consultation, co-operation and action within the island of Ireland", and has health as one of the six agreed areas

of co-operation. On his first visit to the North as Taoiseach in mid-July, Micheál Martin agreed to convene a meeting of the North South Ministerial Council at the end of the month. As agreed, the NMSC met in Dublin on the 31st July. It was the first time that the council had met in three years as it went into abeyance during the three-year collapse of the devolved structures in Northern Ireland. The Council acknowledged the development of a Memorandum of Understanding on public heath cooperation on Covid-19 and welcomed what was termed the "close productive cooperation" that had taken place between the key personnel North and South to ensure an effective public health response.[13] Ministers noted the impact of the pandemic on the administrations North and South and agreed to continue to collaborate in the future. It was reported that they discussed ways of improving cooperation to tackle the pandemic but nothing concrete was agreed and no further details of what was discussed were released. Notwithstanding these warm honeyed words, collaboration and co-ordination had been limited and somewhat perfunctory. Despite the fanfare, this meeting appeared to be going through the motions rather than agreeing any substantial strategic changes in policy or practice.

Statistics and data

A key issue to emerge from this pandemic has been the accessibility, reliability, generalizability and robustness of the available data and the extent to which meaningful comparisons can be made across the North and South of this island. Epidemiological data are paramount to targeting and implementing evidence-based responses to protect the public's health and safety.[14] Nowhere are data more important than epidemiologic investigations designed to understand and prevent the spread of a deadly pandemic. A longstanding issue in terms of all-island comparative research has been the limitations of the data. Allowing the data to be published is not about restricting the ability to pursue differing agendas, but is about holding governments to account, learning from divergence, ensuring value for money and improving outcomes. This issue is of course not limited to cross-border research, making comparisons across the four countries of the UK is beset by seemingly intractable problems.[15]

Comparisons are crucial and the British Prime Minister's assertion that he was not interested in cross-country analysis of coronavirus was treated with a mixture of disbelief and dismay. Comparisons between countries such as Germany and Spain allow an assessment of the effectiveness of differing national responses and can then inform the formulation of best practice. Comparative assessments using health statistics and data from both parts of this island are far from straightforward. However, notwithstanding the difficulties associated with statistics they should be a key part of the debate about policies and outcomes. In this context a culture of transparency and accountability is crucial to ensure that policy is evidence-based.

Concerns around transparency and accountability with the Department of Health in Northern Ireland are a longstanding issue. Previous attempts at comparison across the four countries of the UK have been hampered by data that is not directly comparable (Ham et al). In their study of health and social care in Northern Ireland, Dayan and Heenan noted that the prevailing culture in the Department of Health was one of "a siege mentality".[16] The authors describe a culture of opposition to external scrutiny and oversight, describing a rigid top-down culture characterised by command and control. They note how they "experienced repeated and explicit refusals to engage with our work from senior officials. This went far beyond anything we have ever experienced in often challenging and critical research of the NHS".[17] This unwillingness to engage in independent scrutiny was not just implicit but also extended to circular emails to 'discourage" large groups of senior figures from participating.

Throughout the pandemic concerns have been raised in the North about the data and how it has been reported. In an extraordinary intervention at the end of April the UK Statistics Authority sent a letter admonishing the Department of Health over "gaps" in its information. The Statistics Authority said there was "serious public concern" about changes made in the way the data was reported during the pandemic. The Director General for Regulation noted that "Daily surveillance statistics should be released in a transparent, easily accessible and orderly way", and that "A news release on a departmental website and twitter are not sufficient". Furthermore "users should be provided with appropriate context and explanation, particularly now, where different statistics from different data sources are being produced and used in relation to Covid-19".[18] This intervention was welcomed on twitter by Professor Gabriel Scally who noted that the Department was in "very hot water over their provision of statistics". He had been critical of their "dreadful performance" and suggested they had "quite rightly" been reprimanded.[19]

This significant unease about the culture that prevails in significant aspects of government in Northern Ireland and the apparent unfettered power wielded by senior officials and civil servants was further fuelled by a letter from the Chief Medical Officer (CMO) to the Vice Chancellor of Queen's University Belfast. The extraordinary intervention from the CMO, in which he expressed his concerns about advice on personal protective equipment (PPE) and given to the media by a member of staff at Queens, was widely viewed as an attempt to muzzle independent experts. "Jaw dropping", "inappropriate" and "petty" was the verdict of professor Luke O'Neill, of Trinity College Dublin, on the letter which referred to "ill-informed commentary and communication".[20] In his communication, the CMO urgently requested that the Vice Chancellor addressed this issue as an internal matter and implored him to take all measures within his gift to ensure that the named academic did not give advice which was "beyond his specific expertise". The Alliance MP Stephen Farry, suggested that the letter from the CMO marked a move into "dangerous territory", as indeed was the attempt by the Department of Health to "spin it". Very quickly a statement was released from the Department of Health refuting any suggestion that there was an attempt to stifle academic opinion. This raises the question of what was the Vice Chancellor being asked to do? Why should experts not feel unfettered to publicly express their opinions, particularly in a context where the CMO was unavailable for comment.

This debate over the use of data and the challenges associated with meaningful comparisons between the responses to Covid-19 was brought into sharp relief by the reactions to an opinion piece by Prof Mike Tomlinson, published in the *Irish Times* on 22nd of April. In this influential article, he argued that rather than being Ireland being considered as one epidemiological unit, different public-health policies for fighting the disease had emerged on either side of the border. The question was though, did this divergence, with the North following Westminster and the South following the World Health Organisation produce different results? Or more bluntly, would differing approaches result in avoidable deaths. He highlighted the difficulties of meaningful comparison with divergent methodologies for registering deaths on both parts of the island. However, notwithstanding these methodological constraints, the article contended that there was robust evidence of two Covid-19 death rates on the island of Ireland. Acknowledging the practical difficulties with comparative evaluations, and that there were shortcomings with the available statistics, he contended that the statistical evidence should inform the ongoing debate around policies, such as testing and tracing. Following a critique of the information available, he concluded that the Republic's death rate was two-thirds of that in the North. Acknowledging that this statistic may change as the pandemic progressed, he

argued that "it is reasonable to assume that the North's higher death rates result from lower rates of testing, the lack of contact tracing and the slower application of lockdown measures compared with the Republic". Tomlinson concluded that the difference in outcomes highlighted the need for a co-ordinated approach across the island to tackle the virus. This should involve increased levels of testing and contact tracing and more robust public-health surveillance at points of entry.

Prof Tomlinson's contentions ignited a substantial debate over the differing approaches and their implications for public health. Rather than welcoming a debate the Northern Ireland health minister Robin Swann was scathing and condemned his claims as "misleading" and "ghoulish". However, what was particularly notable was that the main attempts to rebut his claims were not focused on public health considerations but framed in wider political considerations such as the constitutional question and the future of the United Kingdom and Brexit. Dr Graham Gudgin, chief economic advisor to the London based, pro-Brexit, right wing think-tank the Policy Exchange, penned a highly critical response which was published in *The Irish Times* just two days later.[21] The economist's condescending response was largely set in the context of the constitutional question rather than public health policies. He alleged that rather than valid public health concerns the debate on the pandemic had "boosted the war of words" around Irish unity and this was "fuelling the contest over whether the North or South provides superior government". After challenging Tomlinson's findings in his missive, he suggested that the comparison between both parts of the island was not particularly significant. The key point was that death rates North and South of Ireland were markedly below those witnessed by Britain. The management of the pandemic was of second order to the fact that population densities on this "offshore island" were one sixth of those in England. Aside from the disparaging reference to Ireland as an "offshore island", in essence he contended that public health responses were largely an irrelevance, what mattered he opined was the nebulous concept of population density. It is worth noting that the impact of population density on highly contagious diseases has rarely been studied. Whilst it might appear likely that higher population density would be associated with higher transmission of the disease, they are also associated with higher levels of access to healthcare and greater adherence to social distancing measures. Initial findings from large scale studies of Covid-19 suggest that country density is not significantly related to the infection rate.[22]

Gudgin further developed his ideas in a 15-page document entitled "Covid-19 across Ireland", published by the Policy Exchange.[23] Bizarrely, the whole premise of the pamphlet appears to be based on the assumption that proving the death rate North and South of Ireland are broadly similar will strengthen the case for the Union. In the forward to the document, Lord Caine former policy advisor in the Northern Ireland Office bemoans the fact that over the last couple of years it has become "increasingly fashionable to assume that a united Ireland is inevitable". He outlines three factors that have led to this "grossly irresponsible" position, one of which is what he refers to as the "weaponising" of Covid19 by those who advocate the need for an all-island approach to health as a means of promoting a united Ireland. In this publication Gudgin claims he has debunked any assertion that the Republic's response has been more sure-footed and effective. He asserts that his research proves that the death rate is broadly similar in the two jurisdictions. A finding which he states is supported by health authorities North and South, an assertion that there is absolutely no evidence to support. This publication demonstrates how Brexit has politicised and toxified the British-Irish political landscape to the extent that any attempt to draw comparisons in public health responses is automatically viewed through the lens of constitutional threats.

EU Funding and Brexit

Since 1995 the region has received PEACE funding designed to support peace and reconciliation, and managed by the Special EU Programmes Body (SEUPB) since its establishment under strand two of the 1998 Good Friday Agreement. In the most recent round, PEACE IV invested €270m, €229m of which is provided through the European Regional Development Fund, and the remaining €41m is match-funded by the Irish Government and the NI Executive. The region has also been in receipt of INTERREG funding since 1991, representing an investment of approximately €1.13 billion in territorial cooperation.

Additionally, the content of the current INTERREG VA programme has four core objectives that includes providing health and social care services on a cross-border basis which ideally will be mainstreamed into core services after the funding period. Various services have been established through INTERREG funding and rolled out by Cooperation and Working Together (CAWT), including the Multiple Adverse Childhood Experiences programme which secured €5.01 million, and the Acute Hospitals Services project 'Connecting Services, Citizens and Communities' which secured €10 million. Since 1992, CAWT and their partners have been collaborating and working together in the border region of Ireland and Northern Ireland in support of national government and both health departments' priorities. The CAWT Partnership geography spans the entire border region, accounts for twenty-five percent of the total area of the island of Ireland and has a population of 1.6 million. The project designs practical and innovative solutions to the health and social care needs of border region. This valuable EU investment, through the INTERREG VA's health theme, and amounting to a total of €36 million across all projects for all areas, has provided the CAWT partners with a unique opportunity to further intensify and embed cross border health and social care activity. The CAWT Partnership have reiterated a belief and optimism that any post-Brexit agreements will not impede these now firmly established existing cross border and all-island health and social care arrangements and future developments.[24]

The SEUPB recently clarified that even in the event of a no-deal Brexit, funding under the current PEACE and INTERREG programmes will continue until their conclusion in 2023. It is anticipated that funding programmes will continue after Brexit through a single PEACE PLUS programme as part of the EU funding budget for 2021- 2027. The UK Government has given their commitment to the PEACE PLUS Programme and it is currently envisaged the necessary funding will be available irrespective of how the UK exits the EU.

Conclusion

The Covid-19 crisis is still unfolding; to date though it has demonstrated examples of positive working and highlighted underlying tensions and volatility. The sharply divergent policies of the British and Irish governments presented a serious threat to the newly formed government in Northern Ireland. Sinn Féin looked to the Irish government for advice and support and emphasised the advantages of viewing the island as a single epidemiological unit. Unionists were uncomfortable with an all-island approach and took their lead from London. Even in the face of an existential crisis, the political leaders in Northern Ireland defaulted to their engrained positions on the constitution and identity to devise their responses to the pandemic.

The responses to Covid-19 have highlighted the deep political divisions that exist on this island. Whilst across the world politicians have set side aside enmity and collaborated in the face of unprecedented challenges, here it seems not even in a global pandemic will healthcare considerations supersede identity and constitutional issues even if it's a matter of life or death.

After a rocky start the parties in the North developed something akin to a joint approach, although the row over breaches of social distancing regulations at a Republican funeral has demonstrated the tenuous nature of this arrangement. Brexit has placed a huge strain on Anglo-Irish relations, there are historically low levels of trust between Dublin and Belfast and polarisation between the main unionist and nationalist parties in Northern Ireland. Exiting the European Union has evoked acute political sensitivities, resurrected old demons and created a very challenging, toxic backdrop for all-island collaboration. The public health response to Covid-19 illustrates vividly how entrenched political ideologies can negate the geographical advantages of sharing a small island. From a healthcare perspective having two regimes on one island is counter-intuitive.

Obviously there will be fears that an all-island approach will undermine current constitutional arrangements, however the reality is that we share one landmass. It is also noteworthy that when previously faced with a major crisis the Dublin government naturally turned first to their near neighbours in London for advice and support. In this instance Westminster was completely bypassed in favour of Brussels and Geneva. Brexit has fundamentally altered the dynamic between Dublin and London. The Republic of Ireland now views itself as first and foremost a member of the European Union and this is where support, solidarity and advice will be sought.

Cross-border health is a woefully underdeveloped area of public policy and there appears to be little appetite to address this by the administrations on either side of the border. Aside from the notable exceptions of the Congenital Heart Disease Network and the North West Cancer Centre at Altnagelvin, there is relatively little activity in this key policy area. The respective focus on internal pressures faced by poorly performing healthcare systems means that enhancing collaboration and co-operation and co-ordination is afforded a low priority. In their 2011 report for the Centre for Cross Border Studies,[25] McQuillan and Sargent concluded that there were a range of potential benefits to be gained from increased North-South cooperation in healthcare. They identified a number of key acute healthcare services including cystic fibrosis, Ear Nose and Throat (ENT) surgery, paediatric cardiac surgery, orthopaedic surgery and acute mental health services that would particularly benefit from collaboration. The report also suggested that the Erne Hospital in Enniskillen presented substantial opportunities for innovation in respect of service provision on a cross-border basis. Working together to address major health issues has the potential to deliver significant additional gains for the population of each jurisdiction which could not be achieved by each system working in isolation and so much more could be done. At the beginning of June 2020, the North's health Minister launched his "Framework for Rebuilding Health and Social Care". Acknowledging that the health and social care system was in very serious difficulties long before the pandemic, he stressed that the virus had multiplied the challenges and pressures. The title of this document is a misnomer, it is neither strategic nor a framework. It does not address the fundamental issues including waiting lists, workforce planning, social care reform, technological advancements, prevention and cross-border collaboration does not merit a mention.

Formal systems to support and facilitate knowledge exchange across this island are underdeveloped and limited. Currently shared learning and collaboration is largely ad hoc with little attempt to share good practice. Consequently, it is unclear which areas of healthcare would benefit most from increased cooperation and what are the main barriers preventing strategic developments. There has been considerable uncertainty about the nature and purpose of the new Shared Island Unit established within the Department of the Taoiseach. This Unit could provide a significant vehicle to undertake much needed research on

opportunities for future co-operation and alignment in the area of health and social care. An evidence base setting out the opportunities and barriers to future collaboration would help to inform the development of policies and strategies. Political differences particularly around Brexit have weakened trust and reinforced a reluctance to share data, evidence and policy tools. However, it is inconceivable that post-Covid19 there would be not be concerted effort to develop more integrated public health policies across this island.

In the context of the island of Ireland advocating a cross-border approach in healthcare is politically divisive and can be construed as a means of promoting a united Ireland by the back door. Anyone making the case for an all-Ireland approach to healthcare is savaged by some sections of political unionism and accused of promoting a "pan-nationalist agenda". Clear, rational arguments which are evidence-based are dismissed because of an assumed political agenda. Notwithstanding the fact that political and cultural considerations on this island limit the desire for a more collaborative approach, pressures in health and social care dictate that co-operation is not just desirable it is inevitable.

Meaningful collaboration and co-operation must be underpinned by a robust evidence base. What works and why? With reference to Covid-19 it was fairly straightforward to make international comparisons between national governments such as France and Germany but much more difficult to make comparisons between the North and South of the island. Rather than welcoming this type of activity as informative and essential, in the North this type of modelling is actively discouraged, dismissed or castigated. In the Republic, it is largely viewed as marginal to the "real" issues confronting healthcare, hardly a context conducive for building a sustainable, efficient, flexible healthcare system that meets the needs of all of its citizens. From the perspective of anyone interested in policy, politicians, civil servants, academics, policy advisers, service-users the experiences around COVID-19 present a unique opportunity to share learning and establish what works in the divergent approaches. The reality is any meaningful comparisons are hindered by a lack of comparable data, lack of structures to facilitate shared learning and political reluctance to engage in meaningful comparison. So much more could and should be done. Politicians in both jurisdictions must grasp the nettle and make a concerted effort to create an environment that prioritises the open leaning, data sharing and identifying opportunities and barriers to knowledge sharing. Alongside this proactively build capacity, embed and mainstream co-operation and develop the infrastructure and environment to underpin effective collaboration.

Notes

[1] See *Irish Times*, "'Acting together, as one nation, we can save many lives', says Varadkar" (12 March 2020).
[2] Rory Carroll, "Ireland school closures reveal stark contrast to UK Covid-19 response" (12 March 2020).
[3] See Barry Colfer, "The Covid-19 pandemic on the island of Ireland" (31 March 2020).
[4] See Dan Haverty, "Not Even the Coronavirus Can Overcome Northern Ireland's Divisions" (24 April 2020).
[5] The Executive Office, "Meeting of Irish Government and Northern Ireland Executive Ministers concerning North South cooperation to deal with Covid-19" (14 March 2020).
[6] See Jess Sargeant, "North-South cooperation on the island of Ireland" (1 July 2020).
[7] Department of Health, Ireland, and Department of Health, Northern Ireland, "Memorandum of Understanding" (7 April 2020).
[8] Michael Tomlinson, "Coronavirus: Ireland is one island with two very different death rates" (22 April 2020).
[9] Martin Unfried and Anthony Soares, "Approaches to the Covid-19 Pandemic: Bordering on (non) cooperation" (April 2020).
[10] See Northern Ireland Audit Office, "The UK Border: how prepared is Northern Ireland for exiting the EU?" (2018), pp.11-12.
[11] See Deirdre Heenan and Derek Birrell, *The Integration of Health and Social Care in the UK* (2018).
[12] Fintan O'Toole, "Coronavirus has exposed the myth of British exceptionalism" (11 April 2020).
[13] North South Ministerial Council Joint Secretariat, North South Ministerial Council Twenty-fourth Plenary Meeting Dublin Castle – Joint Communiqué (31 July 2020).
[14] See Katrina Hedberg and Julie Maher, "Collecting Data" (2018).
[15] See Chris Ham et al, "Integrated Care in Northern Ireland, Scotland and Wales: Lessons for England" (2013).
[16] Mark Dayan and Deirdre Heenan, "Change or collapse: Lessons from the drive to reform health and social care in Northern Ireland" (2019), p.28.
[17] Ibid.
[18] Office for Statistics Regulation, "Letter regarding statistical information relating to COVID-19 in Northern Ireland" (30 April 2020).
[19] See Gabriel Scally, "A virus free island is within our grasp" (15 June 2020).
[20] See Jilly Beattie, "QUB academic concern after virologists reportedly asked not the engage with the media during Covid-19 pandemic" (19 June 2020).
[21] Graham Gudgin, "Covid-19 – one island with very different death rates?" (24 April 2020).
[22] See Shima Hamidi et al, "Does Density Aggravate the COVID-19 Pandemic?" (2020).
[23] Graham Gudgin, "Covid-19 across Ireland" (2020).
[24] See CAWT, "CAWT Annual Progress Report 2018" (2018).
[25] Shane McQuillan and Vanya Sargent, *Unlocking the Potential of Cross-Border Hospital Planning on the Island of Ireland* (2011).

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Cross-border governance in times of crisis

First experiences from the Euroregion Meuse-Rhine

Martin Unfried

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Introduction: closing the national border as a shock for cross-border citizens

On 15 June 2020, Dutch and Germans were allowed to cross the Belgian border without "good" reason for the first time in weeks. The previously unimaginable had happened in the Euregion Meuse-Rhine: national borders and national border controls were reintroduced for reasons of pandemic control. The Belgian border had been closed to all inhabitants of the border region since 20 March. Only persons with a reason explicitly mentioned on a list of exceptions (such as border work, transport) were allowed to cross. For a border region without borders this was a drastic measure. Suddenly, streets were blocked where people had normally lived the "open Europe" in practice every day. Suddenly even family visits across the border were no longer allowed. Also on the German side, for example at the Belgian-German border in Aachen, a ban on entry for persons without good reason was in force in North Rhine-Westphalia since 16 March in accordance with federal legislation, which was likewise only lifted on 15 June 2020. Although the Dutch government had not adopted any official entry restrictions, it tried to prevent Germans and Belgians from entering the country through appeals and recommendations.

This articles describes how the effects of the crisis on the border area of the Euregion Meuse-Rhine can already be cautiously assessed today – in July 2020 – and how the events will probably be influencing future cross-border cooperation. This first analysis is based on the Institute for Transnational and Euregional cross border cooperation and Mobility (ITEM)'s

impact assessment of the effect of the corona crisis on the cross-border territory. It is mainly based on a series of background discussions and interviews with stakeholders and experts during May, June and July 2020. A full report will be published in November 2020. As the crisis can be characterised as possessing significant dynamics, current assessments of its impacts should also allow us to see their influence beyond the immediate time horizon. To date, the crisis has meant great uncertainty and a rapidly changing level of information in many areas.

Existing Cross-border governance: not appropriate in times of crisis

Of course, measures during the Corona pandemic had to be taken within days or even hours. Of course, there was very often not much time to take all the effects into account. And of course, governments had to act according to the precautionary principle to prevent citizens from experiencing possible worst case scenarios during a pandemic crisis. Nevertheless, there are indications today that the closure of national borders was not always motivated by exceptional infection rates on the other side of the border but as a national reflex out of helplessness.[1]

In the Dutch-Belgian case for instance, due to non-coordination of national measures, mayors on the Belgian side at times had difficulties in coping with Dutch visitors who were not aware of the stricter Belgian rules. That was the reported experience of the mayor of the Belgian border town of Lanaken, close to the Dutch city of Maastricht;[2] and on the other hand, when shops were already closed in Belgium, citizens in the border regions could still frequent their favourite Dutch shops and markets. What had been a normal practice in a cross-border region suddenly led to irritations in this case for the Belgian authorities. They tried to restrict travel and activities and saw that the open border did not help. In this respect, the closure of the border from the Belgian side (for non-essential travel) was a sort of b-solution, since other coordinated measures with the neighbours were apparently not at hand.

In retrospect, coordination across the border was very difficult even in a cross-border territory that is in comparison to other EU border regions, relatively well integrated. According to practitioners, the health crisis was in the first place coordinated by the capitals. In the beginning there was no opportunity to coordinate national measures before they were taken. Existing cross-border governance structures (established governmental routines, Euroregions, networks, the Benelux) could not help in coordinating national measures or find a joint answer to the problem of tracking and tracing infections in a regional context, preventing the spread from a regional hot spot. Closing or restricting free movement across the border was in this respect a consequence of non-coordination that could not be prevented by the existing cross-border governance structures. As described later, this does not mean the existing structures did not help. They were helpful *after* national measures were taken, helping to analyse and solve problems that occurred as a result of non-coordinated measures. It is up to future research to analyse to what extent the neighbouring countries (DE, NL, BE) were taking action in the area of hospital cooperation, joint procurement of materials and respiratory equipment, or with respect to the coordination of hospital capacity.[3] It was, for example, not possible to publish infection data on cross-border territories in order to assess the necessity of the closure of national borders from a cross-border pandemic point of view. One of the reasons was certainly, that there was a big difference with respect to the national registration of infections and death rates. This led to a situation where the Belgian numbers could not be properly understood in comparison to the Dutch or German figures without knowing that they also counted assumed Covid related cases in care home settings. This was not the case in the Netherlands, and means that proper monitoring of the cross-border situation was hindered

from the outset by non-harmonisation of national statistics.[4] The question therefore arises as to whether health systems that currently operate within purely national monitoring systems can meet the general challenge of a cross-border crisis, let alone whether they can offer a structured and defined option to share the capacities of hospitals in a pandemic crisis. It was reported that there were examples of Dutch patients being treated in German intensive care units, but this was the result of ad-hoc decisions rather than well-prepared exchange structures. The crucial question to be answered by future research will be how this can be avoided in the future through coordinated action.

Crisis management and the socioeconomic border effects: the dilemma of structural data collection

What has proved to be a problem in many impact assessments in border regions becomes apparent in the light of the Corona crisis: there is no consistent monitoring of economic data for the cross-border territory of the Euroregion Meuse-Rhine. Data is available at national level and partly at regional level. Economic development at regional/local level is still determined by surveys or assessments of the chambers of industry and commerce for various sectors. The fundamental difficulty, however, is evident in the assessment of border-related effects of the national corona measures. These cannot be separated from the general effects of national measures (such as the closure of parts of public life). In some sectors – as mentioned by stakeholders from public transport companies – the size of the overall reduction in turnover shows that the restriction of the few cross-border lines has only a marginal impact. The same is true according to representatives from Chambers of Commerce for the overall restrictions or even forced closures with respect to shops and other businesses. Less cross-border travel was not their first concern at the peak of the crisis.

For the Netherlands, initial studies are available which show that the structure of the respective regional economy seems to be more decisive for the effects of the crisis. For example, particularly negative effects are expected for the Dutch province of Limburg not because of its border location, but because of the higher share of trade, transport and catering in economic output.[5] In the area of employment, national measures (financial compensations for working time reduction, financial aid for companies) have so far prevented a large wave of redundancies. However, even if this will happen in the autumn, it is hardly possible to determine the effects of the restrictions on border traffic in the border area on the basis of the figures. There is a lack of cross-border data on the employment of cross-border companies in the Euroregion, which are regularly collected, as well as surveys of companies on the conditions and obstacles to cross-border activities. Evidence of the economic effects of border restrictions was instead provided by the assessments of the Chambers of Industry and Commerce in BE and DE: despite the border restrictions, the free movement of goods and services was not really hindered from their point of view during the crisis, which was identified by the governments as an official goal of their crisis management. In the Euroregion Meuse-Rhine, it was also possible to avoid obstacles to the movement of goods caused by long traffic jams. In this sense, the Belgian border controls did not have any serious negative effects either. This does not at all mean that the cross-border territory will not be hit by an economic downfall with very negative effects on the labour market. However, it is so far not possible to make a solid assessment in how far the decline will be made worse by border restrictions during the crisis and very different from regions not close to the border.

Crisis management and the principles of European Integration: a diverse picture

The national measures to contain the spread of Covid-19 were accompanied by cuts and restrictions on public life and civil liberties unknown in peacetime. The closure of private shops and public institutions ordered by the state, the prohibition of public and private events and even private visits, have on the whole restricted many fundamental freedoms and civil rights. In this respect, the restrictions on the crossing of borders and the restrictions on the freedom to travel are not of a fundamentally different quality, but it is assumed that their effect in the border region is different, since integrated cross-border areas are suddenly separated as a result. Unlike in domestic regions, border closures affect the daily routines of work, shopping, leisure or family life.

Figure 1: Border restrictions in comparison

Indicator	NL	DE	BE
Days with border controls	0	0	87
Closed border for all travel without essential reasons	0	66[6]	87
Closed borders: traffic jams/waiting time at the border	To NL: no official controls Accidental policy controls (recommendations not to enter)	To DE/NRW: no official controls at the border[7] (incidental controls in the border region)	Strict controls travel to Belgium: short waiting times first days of the controls
Requirement of a special commuter permit	Travel to NL: no	Travel to DE: not required by law, but a form was offered by German Federal Police[8]	As of 22 March: confirmation from employer required for cross-border workers, Special vignette offered for cross-border workers in essential professions (health care, etc.)
Number of cross-border workers with a permit	-	Not registered	Not registered
Number of cross-border workers potentially affected by border restrictions	The Euroregion Meuse-Rhine is one of the most integrated cross-border regions in the EU. There are around 36,000 cross-border-workers, with 5,000 working in the health sector[9]		

The citizens in the Euroregion Meuse-Rhine saw an imbalance in terms of restrictions on the freedom to travel and the rights of citizens and businesses. This was due to different pandemic control strategies with different national measures. The main difference was that while in Germany and Belgium there was a legal restriction on entry (in Belgium also on exit) for weeks, the Dutch government operated with recommendations only. While in Belgium the restrictions were structurally controlled at the border, this was not the case in Germany. While in Belgium, citizens who contravened travel restrictions were also punished with fines, this was not the case in NL and DE. For Belgium and Germany, it can be noted that the list of exceptions for crossing the border was similar. A clear issue of discrimination arises in the area of families. While mutual visits of family members (who were not in hospitals or care institutions) were not restricted in any country internally, this was the case for families living in the border area on either side of the border (between NL-BE and DE-BE). The extent to which political actors in the border area were alive to the nature of this inequality was revealed by a joint lobbying campaign of the Euroregion Meuse-Rhine with politicians from the German-speaking Community of Belgium. After the Whitsun weekend on 1 June, family visits and shopping in the neighbouring country were once again possible. This was particularly supported by politicians of the German-speaking Community, as well as the board of the Euroregion Meuse-Rhine.[10] At the time of writing this article, it was not known whether Belgian citizens had also taken legal action against the restrictions on family visits.

By contrast, the border between the Netherlands and Germany can, on the basis of the data, be considered as an "open border" during the crisis compared to other internal borders of the EU. Although the Dutch side made recommendations not to enter the country without good reasons, for example in the case of holiday trips to the NL coast, it was difficult to enter the country. However, this never had the character of a legal ban. The border from Germany to the Netherlands remained open not only for the transport of goods and services, but also for passenger transport. According to the rules of the German government, there had to be good reasons for entering Germany from the Netherlands, but unlike other German borders, there were no controls at the border. Therefore, when Dutch people entered Germany, there was hardly any legal question of whether there was a valid reason for entering the country, such as the daily commute to work across the border. This is also why there were no legally difficult considerations that affected sensitive areas such as family visits. Only sporadically, newspaper articles described that the Federal Police actually questioned Dutch people about their reasons.[11]

When comparing the exceptions to the entry ban (valid reasons), it is striking when comparing Germany – or one has to say the land North-Rhine Westfalia since the situation was not always the same at the German border – and Belgium that the regulations basically name the same aspects as exceptions. These catalogues were not static, but were adjusted slightly over the weeks. However, the most important reasons for allowing entry are very similar for North-Rhine Westfalia/DE and BE. In this sense, the border to NRW was legally not much less open or closed than the Belgian border. However, in Belgium there were structural controls and sanctions in case of violation. Thus, the Belgian border was perceived as much more closed, but this was also related to the communication strategy of the governments. Between NL and NRW, the governments jointly maintained a communication of the open border, which was actually more open than other borders with Germany due to the lack of entry regulations on the Dutch side.[12] While in the case of the Belgian-German border, entry restrictions and quarantine rules applied to both sides, this was not the case with NL. Above all, the situation was much more relaxed for border commuters and other groups of people with and without

good reason, as there were no structural controls on the German-Dutch border. The fact that there were no official controls on the German side of the Belgian border had the same effect because of the Belgian controls. Even more importantly, where increased controls in Belgium could also lead to high fines, fines at the German-Dutch border played no role. Where in Belgium special instruments such as commuter certificates and commuter vignettes for people in "systemically important" occupations played a major role, the instrument was hardly used by the German side and not at all by the Dutch side. Restrictions on family visits at the Belgian border proved to be particularly problematic, which for a long time were not among the valid reasons. These were not legally restricted in the DE-NL relationship for the reasons mentioned.

Also, the coordination of measures with regard to cross-border commuters and companies operating across borders can be assessed very differently for the Euroregion Meuse-Rhine depending on the measure. Border commuters were at no time affected by entry bans. The national travel restrictions in DE and BE have formulated exceptions for border commuters. It is not surprising that border commuting was especially supported in the case medical personnel. In Belgium, a special vignette was introduced to avoid waiting times for this group because of the border controls that had been introduced. The extent to which this actually led to relief could not be assessed in retrospect.

For the group of border commuters who had to work at home in their home office, the national governments had bilaterally agreed on exceptions in the area of tax liability at different times. With regard to social security contributions, the responsible authorities in the three countries had already agreed to exceptions after a few weeks,[13] for some combinations more clearly than for others. The "ITEM Cross-border Portal" provides a close observation of this dynamic development.[14] At the time of writing (end of July 2020) there are still uncertainties regarding the situation of civil servants or quasi-civil servants working at home (not in the country of their work).

The question of the extent to which certain forms of national financial aid has not led to discrimination against cross-border commuters and entrepreneurs is controversial. The Dutch income support scheme in the form of the Temporary Scheme for the Self-Employed (Tozo) had in its first version offered subsistence support which, according to the Dutch government, could only be paid to self-employed persons resident in the Netherlands, even though a group of self-employed living abroad pay tax and social security contributions in the Netherlands because of their Dutch business activities. A similar issue of discrimination arose with the restrictions on the payment of the German short-time work allowance. According to the German government, an enterprise resident in BE or NL that employs employees in Germany (who are subject to tax and social security contributions in that country) is not included in the notes for the corona rules on short-time working allowance if it does not also have a permanent establishment in Germany. In both cases, the question is whether the German and Dutch practice is in line with EU Regulation 883/2004. According to ITEM's analyses, this is considered questionable from an EU law perspective and should be clarified before the courts.

Conclusions: Crisis management and the impact on future cross-border cooperation and cohesion

What does the crisis mean for the quality of future cross-border cooperation and "Euroregional" cohesion? The results show that existing cross-border governance structures have not been sufficient to cope with a health crisis of this kind. Especially at the beginning of the crisis, cross-border structures and instruments were missing.

Serious irritations between NL and BE

The aforementioned background discussions suggest that the strict restrictions on entry and exit on the part of the Belgian government were a consequence of the lack of coordination of national measures, especially with the Netherlands. This was triggered by assessments on the Belgian side in March that the Netherlands wanted to adopt a much less restrictive approach. Subjectively, the Dutch approach was seen as incompatible with the Belgian approach (avoid as many infections as possible). Obviously, there was no attempt of coordination from the Dutch side with the Belgian national or regional governments in order to alleviate the Belgian concerns or to agree on a common line.

With the Belgian federal government, an actor also appeared who had not previously been represented in many cross-border cooperation bodies. And the Benelux Union (NL and BE are both members) was not used by the two governments as an organisation for coordination. Non-coordination meant that when stricter rules were already in force in Belgium in March, these were also counteracted in the eyes of Belgian actors in the Euroregion by the open border. One result of the study is that these irritations and disgruntlements between BE and NL could potentially have negative effects for the Euroregion Meuse-Rhine. This would be the case if the political support for compromises in cross-border affairs was damaged in the longer term.

No protocol in times of pandemic crisis management

Unlike in areas of civil protection (accidents in industrial plants close to borders), there were no protocols or arrangements for mutual assistance in the border region or between neighbouring countries in the event of a pandemic. And this despite the fact that, compared to other border regions, the Euroregion Meuse-Rhine has a functioning network in the field of cross-border emergency response (EMRIC).

The problem of the different monitoring systems of the neighbouring countries showed how little this area was harmonised or bi-nationally coordinated in the EU. DE, BE and NL have to date used different counting methods and estimates of the number of infections and corona-related deaths. This had the effect that national figures were not really meaningful, especially in the border region. Therefore, the corresponding data for the assessment of the cross-border infection incidence were also missing. Euregional actors were therefore unable to use euregional data to argue against entry restrictions. The containment of the virus was clearly a national task that stopped at the national border. It was mainly oriented towards national capacities in the field of hospitals and intensive care. As there were no overarching bi- or trilateral agreements on the exchange of medical capacities or patients, policy was national in scope. Although there were a few Dutch patients in German hospitals, this was due more to ad hoc cooperation than to previous agreements between governments. ITEM's first ad-hoc research showed that the systemically conditioned national orientation, occasionally even counteracted Euroregional solidarity. Cross-border networks were slowed down rather than encouraged by national governance. Therefore, a major effect of the crisis is to highlight the need in the Euroregion to develop cross-border protocols and agreements in the event of a pandemic, and to structure cross-border cooperation between health actors.

Ad-hoc task force had positive effects for the Euroregion Meuse-Rhine

It was seen as not politically possible to coordinate national measures in advance. However, a tri-national task force was set up during the crisis as an initiative of the government of the German region NRW (from 20 March) to solve emerging problems. From April, representatives

of the Belgian federal government, the Dutch national government, their embassies, the police forces and the national government met here. Lower Saxony (the Northern German Region at the Dutch border) was also represented and, at a later date, the Rhineland-Palatinate (with a border with Belgium). This had positive consequences for the Euroregion Meuse-Rhine. Together with other Euroregions and border info points, the Euroregion Meuse-Rhine was connected as an organisation and provided problem analyses and recommendations for action. The anticipated problems with taxes and social security of border commuters, for example, were thus signalled at an early stage and mitigated by means of exceptions. In contrast, other major problems such as the difficulties in providing financial assistance to cross-border self-employed persons and companies could not be solved. One effect of the crisis was therefore certainly that the Euroregions and the border info points were perceived together as actors by the task force and were also able to speak with one voice. This could also strengthen political lobbying in the future for the benefit of the Euroregion.

Negative public perception of cross-border cooperation

A major problem in the post-crisis period will be the negative public perception of cross-border cooperation in the Euroregion Meuse-Rhine. The obstruction of freedom of travel, barriers at the border, border controls and fines can potentially shake confidence in a future of "open borders" and thus the belief in the "Euroregion" as a common space. It will therefore potentially become more difficult to promote cross-border work and business. The problems shown in the context of financial aid, for example, have achieved widespread publicity and may lead to a decline in cross-border activities. In particular, the systemic national reflexes in pandemic control have thwarted cross-border thinking. For this reason, the health sector also appears to be a key sector: in the Euroregion Meuse-Rhine, solid structures for cooperation in the health sector already exist. A pilot model for cross-border pandemic control could, for example, be forward-looking and trigger positive effects.

Notes

1 See Martin Unfried, "Mehr Reflex als Effekt" (8 April 2020).

2 See Dirk Selis, "Burgemeester Marino Keulen verscherpt grenscontroles met Nederland", (19 March 2020).

3 ITEM will be involved in a new INTERREG project on crisis management starting in September 2020.

4 Ruben Tans, "Three countries, three ways of counting?" (24 April 2020) [last accessed 09/06/2020].

5 See, for instance, Rogier Aalders et al, "Regionale prognoses: krimp door corona verschilt per regio" (15 June 2020).

6 The German Federal government had decided that unnecessary travel should be avoided, i.e. entries into Germany by persons not resident in Germany should only be made for valid reasons. For persons residing in Germany, sufficient protection against infection should be guaranteed after entry. Against this background, all federal states – including the region of North Rhine-Westphalia (on the German side of the Euroregion Meuse-Rhine) – issued regulations on entry and return travel. The NRW entry regulation came into force on 10 April.

7 The Land North-Rhine Westfalia was partly responsible for border regulations together with the German Federal government.

8 The German Federal Police provided a form. See: https://www.bundespolizei.de/Web/DE/04Aktuelles/01Meldungen/2020/03/pendlerbescheinigung_beruf_down.html.

[9] Source: https://euregio-mr.info/euregio-mr-de/.
[10] BRF, "GrenzÖffnung: Ostbelgische Politiker mussten gemeinsam dicke Bretter bohren" (2 June 2020) [last accessed 27/08/2020].
[11] See, for example, Benti Banach, "Verscherpte controles aan de Limburgse grens: 'We kijken of er iemand ziek uitziet'" (16 March 2020).
[12] See, for instance, *Süddeutsche Zeitung*, "Laschet: NRW-Grenze zu Niederlande und Belgien bleibt offen" (6 April 2020).
[13] See Martin Unfried, "Waarom krijgen Nederlandse ondernemers net over de grens geen corona-uitkering?" (14 May 2020).
[14] The ITEM cross-border portal is regularly updated https://itemcrossborderportal.maastrichtuniversity.nl/p/homepage.

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The Planetary Crisis, Brexit and the Pandemic

Professor John Barry

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Introduction

Like buses, crises (including the opportunities that can also accompany them) seem to come in threes. First, since June 2016 we have Brexit and now, July 2020, the real possibility of a no-deal Brexit since the landslide election of Boris Johnston's Conservative party in December 2019. Second, the Covid-19 pandemic and the uneven manner in which governments, populations, businesses, trades unions etc. across the devolved administrations in Great Britain and the Republic of Ireland have responded, have devastated lives, communities and economies. And finally, looming above both of these in terms of urgency and negative impact potential, is the planetary crisis – climate breakdown and the erosion of the life supporting systems of the earth. But not only do we face all three, they are also interrelated in complex and unpredictable ways such that addressing one of them could have impacts on the others. This is the trilemma of the turbulent times we live in. And this list does not include another connected crisis: the rise of right wing populism, xenophobia and 'post-truth' politics and 'fake news'.

Lest you get too depressed too early in reading this, there is some good news. The good news is that we have seen some progress on green issues. The climate crisis in particular has crept up the political agenda. This can be observed in the rise of social mobilisations such as Extinction Rebellion and the Youth Strike for Climate movements which unexpectedly just emerged in the last year. We can also point to the 'green wave' which saw support for Green Parties across Europe increase in the 2019 European elections, and the rise in Green Party support in local and parliamentary elections in the Republic and Northern Ireland in 2019-20. In particular, I want to draw attention to the rise and importance of non-state actors and action,

issues and forms of cooperation (existing and potential) across these islands organised around responding to the planetary crisis at local and global scales. Too often the media, academia, think tanks and public discussion focus on the state, corporations/business, large organisations such as churches, trades unions to the neglect of civil society, localised political actors and agency. This article will provide some commentary on the 'usual suspects and themes' of how Brexit, the pandemic and the planetary crisis may impact governmental and policy coordination and cooperation across the different levels and dimensions of 'big P politics', *inter alia*, political parties, national and devolved governments, significant business sectors such as agriculture, tourism, ICT etc. However, I wish to mostly concentrate on more local, non-electoral, non-policy, often more confrontational, oppositional, decentralised and grassroots forms of 'small p politics' now discernible around our planetary calamity. But this is *not* to discount, undermine or ignore the importance of nation-state level and especially more local state/council level politics and initiatives. As the pandemic has demonstrated in times of crisis such state action is vital, but we need to reconnect state action with civil society and localised mobilisation as suggested below.

In the context of Brexit for example the media, academia, lobby groups, think tanks all have an understandable tendency to focus on the state and 'big P politics', often together with attention to large economic interests, organisations or sectors. I wish here to move way from such a state-centric focus (and a state-capitalist focus in particular). Taking inspiration from James Scott's work on the dangers of 'seeing like a state' in all the dogmatic, bureaucratic and technocratic rigidity of centralised nation-states (such as Ireland and the UK), I wish to focus on the non-state, community (and sub-state, municipal), 'the indispensable role of practical knowledge, informal processes, and improvisation in the face of unpredictability'.[1] I base this on the one hand, and for full disclosure, as a left-libertarian (verging on anarchist) with a normative disposition towards non-state institutions and practices (such as commons regimes for example), which has always formed part of my green political theorising and activism.[2] Thus, I am more interested in the role of community-to-community distributed, decentralised and cross-borders mutuality and assistance than in any centralised and top-down, state initiated and maintenance of social, ecological or economic order and coordination across these islands.[3]

But more than that. I am now convinced after more than 25 years of scholarly research and more of green political activism (including a period as leader of the Green Party in Northern Ireland, and a councillor for 7 years on North Down and then Ards and North Down Council), that the system of liberal representative democracy within a market based capitalist system is simply incapable of adequately and equitably responding to the planetary emergency we face. I have come to the conclusion that the system is not broke… it was made that way. If we add in related problems of continuing class inequalities and privilege, widening wealth and income gaps within and between countries and regions within countries, declining human wellbeing across the 'minority world', growing distrust in political institutions, scientific knowledge and expertise and the media; my considered view is that we have to transcend liberal democratic capitalism if we are to have any chance of mitigating climate breakdown and reversing the accelerating rivet popping of the life-supporting systems of the planet.

At the state and 'big P politics' level I see a form of *wishful thinking* and *simulative green politics*,[4] as governments and their departments and agencies (regardless of which party is in power) blithely press ahead with ecocidal GDP economic growth for example, which has long passed its sell-by date as an adequate, never mind ecologically appropriate, goal.[5] The *wishful thinking* I see is the dominance of techno-optimistic modes of framing solutions to the climate

crisis within mainstream public debate and especially policy thinking within the state, with science fiction-like proposals for carbon capture and sequestration or solar radiation management given serious attention, consideration and funding. The *simulative green politics* I am speaking of here is the 'big P political' rhetorical and public acceptance that there is a planetary emergency, as evidenced for example in the number of elected chambers from national, to regional and local levels across these islands that have declared 'climate and ecological emergencies', but then… nothing. Or relatedly, how the unprecedented existential crisis our species faces is framed by political parties, businesses, the media, academia and policy makers as a 'normal' policy challenge that can and must only be framed and presented within such parameters.

The planetary emergency is a 'state of exception' not something that can be or ought to be shoehorned into the normal policy process and its incremental reformist logic. As if the planet and its non-human living and geo-chemical processes give a damn about 'Overton windows' in policy making. This is what it means to 'listen to the science' as Greta Thunberg and the Extinction Rebellion movement suggest. To continue in this provocative and radical vein (but remember, 'radical' simply means getting to the root cause of a problem, and this has been solely lacking in nation-states addressing the global ecological crisis), our existing liberal democratic nation-state systems and associated capitalist socio-economic orders, the soft and hard 'operating systems' of the state, especially the 'core state imperative' of endless GDP economic growth,[6] have now passed the threshold beyond which they are dysfunctional, sub-optimal and dangerous. I posit that what we have seen in the UK and Ireland (but equally applicable to almost all liberal democratic capitalist societies) are the kinds of states that worries Scott when he stated that

> *My case is that certain kinds of states, driven by utopian plans and an authoritarian disregard for the values, desires, and objections of their subjects, are indeed a mortal threat to human well-being* (p.8).

We have now reached a stage where serious debate is given to Elon Musk's dreams of colonising Mars, but where someone proposing that we need to transition beyond capitalism and liberal democracy is viewed as utopian or misguided, dangerous or 'politically immature'. More worryingly we have reached a stage where our young people, perhaps most clearly evident in those involved in the Youth Strike for Climate movement, and its international leaders such as Greta Thunberg (Sweden), or more locally here in Northern Ireland in Anna Kernahan (Belfast) or Dara McNulty (South Down), can now more readily imagine the end of the world rather than the end of capitalism. The climate anxiety and apocalypticism experienced and felt by these young people, who do not have a vote though they do thankfully have a voice outside electoral politics, should bring shame on our generation.

Just as Steinbeck wisely noted in his novel, *The Grapes of Wrath*, that 'If you're in trouble or hurt or need – go to poor people. They're the only ones that'll help – the only ones', likewise we should look beyond and below the nation-state for discussions, inspirations and prefigurative but lived and live examples of thinking and doing beyond ecocidal economic growth, waiting for the Overton window to open, or state-sanctioned or commercialised notions of enterprise, innovation and action on the climate and biodiversity crisis.

In increasingly earthly and socially turbulent times as ours, where the UK is not simply exiting the EU, but we as a species are leaving the climatic stability of the '1,000 years of grace' of the geological era known as the Holocene, for the dynamically unstable 'Anthropocene',[7] I want to

suggest that we look down not up for inspiration and suggestive practices and initiatives that might, just might, help us navigate, adapt and minimise the pain and suffering and maximise the multiple co-benefits of transitioning to a low carbon, green regenerative economy and society. And while not always the case, as we will see, non-nation-state or corporate forms of sustainable, green and climate action, innovation, practice and thinking is very often oppositional, experimental, risky, confrontational and can be characterised as (sometimes subtle) forms of resistance to centralised, distant homogenising and command and control imperatives. From my own political perspective as a 'green republican' (read what this means before you jump to parochial conclusions!) this oppositional stance fits nicely with an agonistic view of democracy as non-violent disagreement, which I believe we will need to collectively and creatively respond to our planetary predicament.

Dissent, disagreement and discord should not be viewed negatively on this account. The reasons for this are two-fold. Firstly, any 'just transition' to a post-carbon, post-capitalist society will produce 'winners and losers', thus necessitating conflict transformation processes within any sustainability transformative process (McIlroy, Brennan and Barry, forthcoming). As such, dissent and disagreement need to be valorised and included in any process, not marginalised or supressed. Secondly, the oppositional, non-conformist and sometimes outright confrontational character of such non-state actors contain the energy and insight for improvement and societal progress. As George Bernard Shaw astutely commented (and we will forgive him the sexism),

> *'The reasonable man adapts himself to the world: the unreasonable one persists in trying to adapt the world to himself. Therefore all progress depends on the unreasonable man'.* Man and Superman

Perhaps, just perhaps, with 'our house on fire' (Greta Thunberg) it might be time for us to be 'unreasonable' and do what is necessary?

The Planetary Crisis and the Pandemic

Consider the following statements: "At all stages we have been guided by the science" (Boris Johnson), "we need to listen to what the science says" (Arlene Foster), 'Horse Racing Ireland: putting people before profit' (RTE News, 15th March 2020), and this remarkable statement from the former Irish Taoiseach, Leo Varadkar,

> *"I know that I am asking people to make enormous sacrifices. We're doing it for each other. Together, we can slow [it] in its tracks and push it back. Acting together, as one nation, we can save many lives. Our economy will suffer. It will bounce back."*

The 'it' here and the background reason for the other statements is not addressing the climate and ecological emergency, but the coronavirus crisis of course. Yet, unlike the coronavirus, there have been official political declarations of 'climate and ecological emergencies' in the Dáil, Westminster, Stormont, Holyrood and the Welsh Assembly, and in most councils and local authorities across the islands. But, as yet, we do not see anything close to climate action commensurate with these declarations of 'emergencies'.[8] Unlike the determined and swift actions of governments and state agencies across the islands to the public health threat from Covid-19, there is little evidence of the same determination to take radical and tough decisions on the planetary crisis. It is pertinent to ask why not, given the latter crisis presents an even greater threat to the lives of all citizens (especially the most vulnerable) in those 'minority world' jurisdictions and others in the global south or 'majority world'.

Could it be that all these declarations of 'emergencies' are just that? Some 'in tune' public and 'politically correct' rhetoric and associated positive media coverage for politicians forced by mobilisations like Extinction Rebellion and the Youth Strike for Climate to do (or say they will do) more on climate action? Cheap talk about recognising there is an emergency… But in reality not believing it really is an emergency? Why is it that our political leaders listen to and make decisions informed by the science in the case of coronavirus – closing schools, restricting travel, putting in place financial support for those who 'self-isolate' etc. – but not when it comes to the climate and ecological emergency?

Here we need to start by asking a simple but revealing question: Why do we see politicians across these islands (mostly if unevenly) acting on medical science and expert epidemiological advice on how to deal with the coronavirus, including making some very difficult decisions, but not on the climate and ecological crisis? While most politicians say they accept the climate science and the reality that we are facing a planetary crisis, we have very little evidence of the type of action consistent with what the climate science recommends. The climate science indicates we need to urgently and at scale decarbonise not just our energy system (i.e. move away from a dependence on coal, oil and gas) but decarbonise our economies and ways of life: how we travel; the resource inputs and structure of our food system; how we build and maintain our urban spaces and homes; to our views of the 'good life' and expectations of 'normal'. Responses to the pandemic have led to dramatic and radical changes to the lifestyles of most people in the countries most affected. These range from citizens staying at home (whether 'self-isolating' and/or working from home, with some people forced to do so as in Italy and France), a massive drop-off in air travel, car journeys, and community self-help with neighbours and organisations helping the most vulnerable (but this needs to be balanced with some 'panic buying' of food, household items and medicines in some countries). And when we look at some state responses we can also observe radical action. Perhaps the most dramatic of which are the Spanish and Irish governments taking all of their private health providers and their facilities temporarily (and with payment) into public control as they address the public health crisis. Along with Italy, Spain's regulators also implemented a ban on the short selling of stocks in more than 100 companies. Other radical initiatives included the temporary suspension of evictions and rent increases in the Republic of Ireland, mortgage holidays in Italy, and the UK government committing to pay 80% of the salaries of employees who cannot get to work or work from home. Even in that most neoliberal of states, the USA, we see federal transfers of cash to hard pressed Americans.

However, while there is a flurry of discussion and proposals to link the response to the pandemic to addressing the planetary crisis, there are questions to be considered as to whether we can or should link them, and even if it were possible, can the same 'crisis/emergency' response we see in the pandemic be replicated in responding to the planetary crisis? The reality might be that unlike Covid-19, climate breakdown and ecological devastation is not impacting the lives of people in the minority world, it is not something these populations can see rapidly spreading and killing people around them within their own communities and societies. Climate breakdown is more abstract, distant in space and time, than the pandemic which is a 'clear and present danger'. The dominant public and political discourse around the pandemic is that it will be defeated and therefore a 'temporary risk', the drastic changes to our lives are short-term, and then there will be a 'return to normality'. In short, there is confidence (warranted perhaps) of 'solving' the Covid-19 crisis. However, this is not the same with the planetary emergency which, even if we were to achieve the impressive task of getting greenhouse gas emissions down to stay within a 2 degree warmer world, would also mean us

having to adapt to a climate changed world. There is no 'solution' to the climate crisis, only adaptive and on-going coping strategies, over a much longer period of time. The demand for 'emergency solutions' could usher in large scale technological solutions such as geo-engineering; proponents regularly view such planetary scale technologies as 'insurance policies'.[9]

However, such 'techno-optimistic' solutions bring with them a 'moral hazard' of distracting or downplaying necessary climate mitigation efforts because these are too politically challenging in terms of requiring significant changes to our ways of life. And interestingly enough significant changes in how we work, live, move, feed ourselves, heat our homes, power our societies are precisely what the last Intergovernmental Panel on Climate Change report in 2018 indicated. As it starkly put it, 'Limiting global warming to 1.5°C would require rapid, far-reaching and unprecedented changes in all aspects of society'.[10]

The fears and concerns around the virus within populations in the minority world which legitimate (at least for now) the unprecedented changes in our lives, including the restriction of our mobility and the rapid intervention of the state into the economy, cannot be said to be present within the same populations around the climate and ecological emergency.

Activism, Sharing and Learning – Brexit-Proofing Action on the Planetary Crisis

In this section I want to outline a sample of 'small p' (and some 'big P') political initiatives characterised by either an intentional or contingent sharing of ideas, support and practices on climate and ecological issues across these islands.

Just Transitions

The planned retreat from a carbon-based economy is an essential component of addressing the root causes of climate breakdown. But how just, inclusive and equitable this transition might be is not guaranteed. With its origins in the trades' union movement, the idea of a just transition stands as an energy transition pathway which can challenge head on dominant and comforting 'win-win' and 'greening business as usual' narratives. The reality is that moving to a low carbon or post-carbon economy and society means the end of the fossil fuel energy system. This throws up a host of complex issues ranging from the role of the state (national and local) in managing or coordinating the transition, issues of democratic voice and procedure, reframing fossil fuels as 'carbon resources', to divestment and reinvestment energy strategies. 'Just Transition' has become a politically significant way to frame climate and energy politics across these islands. This can be seen in the increasing use of just transition by the trades' union movement to articulate support or opposition to particular state or corporate policies. For example, the Bord na Mona decision to end peat production in the Irish Midlands,[11] or the near closure of Harland and Wolff in Belfast were called out as 'unjust transitions' by the unions.[12]

Other examples include the Green Party's *Just Transition Commission (Worker and Environmental Rights) Bill* currently making its way through the Dáil, which was inspired by the Scottish Just Transition Commission (established in 2018), while the landmark 2008 UK Climate Change Act has been copied and amended by the various jurisdictions across the UK and Ireland… with the exception of Northern Ireland. However, in the January 2020 *New Decade, New Approach* (Northern Ireland Office, 2020) agreement that restored the NI Executive after 3 years, there is a commitment to implement a Northern Ireland climate change act. Not for the first time, Northern Ireland being the last can turn out to be an advantage in terms of learning from the mistakes of others.

Citizens Assemblies on the Planetary Crisis

Ireland was the first country in the world to establish a Citizens' Assembly on Climate Change,[13] and its pioneering work has been adapted by others such as the UK which in 2020 established and ran its own Climate Assembly UK. While advisory, and therefore 'decision-recommending' as opposed to 'decision-making', what is interesting about the UK one is the overwhelming support that any post-pandemic government recovery package should resist reinstating 'returning to normal'. Rather the Assembly suggested that 'Government, employers and others should support changes to the economy and lifestyles which help achieve the UK's net zero emissions target'.[14]

Fortuitously, citizens' assemblies and more deliberative, inclusive and participative decision-making processes on climate issues is also a demand of many green and climate activists. Consider the three demands of Extinction Rebellion. Firstly, they demand that the Government must 'tell the truth' about how bad our situation is by declaring a climate and ecological emergency and 'listen to the science'. Secondly, they demand Government to act now to reverse biodiversity loss and reduce greenhouse gas emissions to net zero by 2025. And finally, they demand that we need to 'go beyond politics', by creating a Citizens' Assembly to develop policies and strategies on how to address the crisis. If, as I think we will see, more citizens (especially the young who do not have a vote, but have a voice) taking to the streets to demand action on our planetary emergency, citizens' assemblies, especially at more local levels will be indispensable in my view to contain in a constructive manner the anger and anxiety of people frustrated by a lack of progress. Such assemblies have the potential for crowdsourcing local solutions to global dilemmas.

City-based Climate Commissions

There is a growing network of cities in the UK, not as yet extended to the Republic, that have established city-level Climate Commissions. The first Climate Commission was established in Leeds in 2017, and has spread, in part due to an ESRC funded project, the Place-based Climate Action Network (PCAN, 2020), to other cities such as Edinburgh, Belfast, Surrey, Doncaster, Croydon and Lincoln. There is also interest in establishing similar commissions in Dublin, and even in the absence of a city-level climate commission in the Republic of Ireland, there are academic, policy and civil society networks across the UK and Ireland connected to these commissions. The latter are embryonic but have included sharing of ideas and experiences around what a 'just transition' would look like in Ireland and Northern Ireland.[15] These networked cities within the UK share ideas and initiatives around city-level climate governance, climate resilience and adaptation and the planned transition towards a low carbon economy and society. An example of this mutual learning is how some of these commissions have shared 'green and inclusive' recovery proposals as we emerge from the pandemic. The retrofitting of the housing stock for example has been proposed for Belfast, Leeds and Edinburgh.[16] This is particularly significant for Belfast given its higher dependence on oil for space heating and the abysmal insulation of its public and private housing stock: the combination of which accounts for the city (and NI as a region) having the highest rates of energy poverty in Europe. Such policy learning to achieve the stated objective of these Climate Commissions (and other local actors) to 'build back better' as we emerge from the pandemic are excellent examples of non-nation-state forms of distributed and decentralised coordination.[17] And there is every reason to be confident that these will be resilient whatever happens post the UK existing from the EU.

Community Wealth Building

The viral spread of the 'Preston model' of 'community wealth building' across the islands is interesting as an alternative localised and sustainable form of economic development which runs counter to the globalised, competitive, FDI focused approach favoured by national and regional governments in the UK and Ireland. In explicitly aiming to use key 'anchor institutions', such as Universities, health trusts and councils to relocalise the economy and thus minimise the leakage of wealth and income outside the local economy, it is viewed as a step in the direction of a sustainable, green economy. Its 'municipal socialist' approach has been discussed by think tanks in the Republic,[18] Northern Ireland,[19] Belfast City Council,[20] and most recently adopted in Scotland by North Ayrshire Council.[21] Community wealth building is viewed as an effective way for the implementation of local 'green new deals' and creating jobs and investment in a low carbon regenerative economy, creating more climate and economically resilient and self-sufficient communities.[22] Crucial and instrumental to the spread of this model has been the energetic and entrepreneurial work of the Centre for Local Economic Strategies (CLES).

Coordination between anti-fracking activists

Across the UK and Ireland there are links between groups and communities resisting extractivist exploitation of local resources. This is particularly the case with the coordinated pan-islands movements against fracked gas and fracking. While locally based, and where each anti-fracking movement needs to be considered within its distinct local political, legal and economic context, these movements are highly interconnected across the islands and beyond to Europe, North America and Australia.[23] An example of this is the links and sharing of resources across the Irish border by groups opposing fracking in Leitrim for example, helping communities in Tyrone against fracking or the opening of a gold mine.[24] The importance of such opposition lies in preventing the exploitation of 'sub-prime' carbon energy sources which not only cause great environmental (especially water) pollution but divert capital from going into renewable and clean energy investment.[25] As the United Nations Environment Programme (UNEP) notes, 'Unconventional Gas opponents fear that large investments will come at the expense of more environmentally-friendly alternative energies, such as solar, wind, tidal, geothermal and secondary biomass energy sources'.[26] The sharing of arguments such as this, as well as different local campaigns learning protest techniques and successful strategies from one another, is common within the global green movement, made easier now with social media and more widespread availability of ICT and the internet.[27] And there is no reason to think such non-state community-to-community, local movement to local movement solidarity, communication and coordination will stop because of Brexit.

What is interesting about these initiatives, practices and innovations, is while not 'Brexit-proof', many of them would not, *ceteris paribus*, be fatally undermined either in themselves or in their capacity to be spread and shared across these islands regardless of the manner in which the UK leaves the EU. And while of course we should not neglect the importance of state and intra- and inter-state action (especially when the pandemic has demonstrated the importance of state action and coordination between governments), we should also look to strengthen non-state actors and agency. In some ways the 'people to people solidarity' we saw in response to the Syrian refugee crisis in 2017-18 with citizens across Europe acting more quickly and with greater practical humanitarianism than the EU as a whole or its individual members, might be a good way of understanding the types of learning, sharing and mutual support that will continue to grow across these islands. We already see engaged citizens and communities bypassing official electoral politics and political parties, the normal policy process, mainstream

media outlets and the institutions of liberal democratic governance. For some, such as those involved with Extinction Rebellion or direct action green politics, this is because they have no trust or faith that the institutions and processes of liberal representative democracy are up to the task of responding to the planetary emergency. For them the system is not broken: it was made that way. Hence their slogan of 'system change, not climate change'. Just as the climate or ecological crisis does not respect the arbitrary borders created by polities, history, jurisdictions or administrations, neither do those citizens, initiatives and organisations animated to rise to meet the reality of climate and ecological breakdown.

Conclusion: Building Back Better

Crises are events where 'all bets are off' and the 'rules of the game' can be up for renegotiation and rewriting, where there are openings for new ideas, practices and possibilities. Crises are also lessons in new ways of thinking and acting… And responding to them requires stories, narratives to help us understand them, explain their causes and assess solutions and coping strategies. At the moment there are a variety of narratives or 'structures of feeling', as the Marxist cultural critic, Raymond Williams put it, competing for our attention. These range from comforting ones of a 'swift return to normality', the 'master narrative' or commonsense encompassing how most people and elites think, to others which don't fit so easily within that 'return to the Anthropocene' rather depoliticised, top-down and often naively techno-optimistic response. During normal times, out of all the possible ways to organise society, there is only a limited range of ideas considered acceptable for mainstream political discussion—known as the 'Overton window'. The pandemic has forced that 'realm of the possible' wide open, and as suggested above, we need to move beyond a fixation on a nation-state and 'big P politics' focus. In just a few short months of the pandemic we've seen political and economic ideas discussed and in places implemented that had previously been rejected as 'utopian', 'unrealistic' or 'too radical'. There is a possibility for a new narrative, a new 'commonsense' and most importantly a constituency and evidence-base for not 'returning to normal' but rather 'building back better'.

Let's hope, for hope's sake, we do not lose either the lessons we are currently being taught by a harsh teacher or the multiple opportunities for change this current moment offers. We have the ideas, many of us have had them for decades. Now (having missed the opportunity of the 2008 global financial crisis) is the time to act on them and have the courage of our convictions. If, and it's a big if, anything remotely close to a green new deal or a 'justice and sustainability' focused recovery strategy, comes to pass in the months and years ahead as a result of the pandemic and lessons and opportunities learnt and wrested from it, the creation of less unsustainable and ecocidal societies might be fitting tribute to those we have and will lose due to the current pandemic and the longer existing 'slow violence' of the planetary emergency.

The pandemic induced economic slowdown should not be viewed as a temporary pause on either economic growth or capitalism, but rather the foundation upon which a better and different economy and society is constructed. I am reminded here of a wonderful phrase from the Scottish author Alasdair Gray about "working as if we are in the early days of a better nation". In 'building back better' and responding to the pandemic-induced economic contraction, we should insist government bailouts be used to create a sustainable, climate resilient, post-carbon, post-growth and post-capitalist economy. A tall order? Yes. Costly? Yes. Difficult to achieve politically and democratically? Absolutely. But we now know the following:

- Austerity was a lie;
- There is a magic money tree;
- States and populations can act with speed, determination and at scale for the common good when faced with an emergency;
- Another world is possible.

And maybe, just maybe the pandemic has created the possibility for thinking that it is now easier to imagine the end of capitalism than the end of the world… regardless of the outcome of Brexit.

Notes

[1] James Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (1998), p.6.

[2] The recent evolution of which has led me to become considerably more Marxist in my political economy analysis and civic republican in my democratic thinking; see John Barry, 'Green Republicanism and a Just Transition from the Tyranny of Economic Growth' (2019).

[3] Relatedly, but something for another time, I think a nation-state, policy, political party/elections focus misrepresents politics in general, and democratic politics in particular. Neither elections nor policymaking exhaust what democratic is or can be. While in this article I wish to focus on what I would pose as positive and progressive potentials of community, activist and local sustainable and green initiatives and practices, I am not unaware of its reactionary and negative dimensions. For example, it has always struck me as something of a middle class, secure and rather privileged position this focus on 'big P politics', especially here in Northern Ireland, which pays insufficient attention to the lived political realities of working class communities divorced from liberal representative politics. At the same time, and as much in the spirit of provocation as brevity, this 'big P political' focus on the state, policy etc. often offers a mistaken and dysfunctional analysis of, and engagement (where this happens), and often inadvertent collusion with, the enduring reality of 'paramilitary peacekeeping' in post-ceasefire Northern Ireland; see Sean Brennan, *Ulster's Uncertain Menders?* (2017), pp.187-234.

[4] See Ingolfur Blühdorn, 'Sustaining the Unsustainable: Symbolic Politics and the Politics of Simulation' (2007).

[5] See John Barry, 'A Genealogy of Economic Growth as Ideology and Cold War Core State Imperative' (2020).

[6] Ibid.

[7] See Anne Fremaux and John Barry, "The 'Good Anthropocene' and Green Political Theory" (2019).

[8] See John Barry, *This is what a real emergency looks like* (2020).

[9] Royal Society, *Geoengineering the Climate: Science, Governance and Uncertainty* (2009).

[10] Intergovernmental Panel on Climate Change, "Summary for Policymakers of IPCC Special Report on Global Warming of 1.5°C" (2018).

[11] See Unite, "Bord na Mona: Peat harvesting suspension must be accompanied by clear roadmap to protect jobs and earnings" (2020); and Irish Congress of Trade Unions, *Building a Just Transition: the Case of Bord Na Mona* (2019).

[12] See Unite, "Professor John Barry of Queens University launches an open letter in support of Harland & Wolff workforce" (2019).

[13] See Laura Devaney et al, "Ireland's Citizens' Assembly on Climate Change: Lessons for Deliberative Public Engagement and Communication" (2020).
[14] Climate Assembly UK, "Interim Briefing" (2020).
[15] See Sinéad Mercier, "Four Case Studies on Just Transition: Lessons for Ireland" (2020); Jeanne Moore, "Approaches to Transition" (2020), and "Progressing Sustainability in the Context of Covid-19" (2020).
[16] Place based Climate Action Network, "Climate Commissions" (2020).
[17] See John Barry, "Building Back Better" (2020).
[18] Paul Goldrick-Kelly, "Community wealth building for the regions?" (2020).
[19] Development Trust Northern Ireland, *Time to Build an Inclusive Local Economy: A Charter for Change* (2018).
[20] Belfast City Council, "Minutes of City Growth and Regeneration Committee Meeting, 15th January, 2020" (2020).
[21] North Ayrshire Council, "Community Wealth Building" (2020).
[22] See Rethinking Poverty, *Road Map to a Green New Deal* (2019).
[23] See Tamara Steger and Milos Milicevic, "One Global Movement, Many Local Voices" (2014).
[24] See Rory Carroll and Severin Carrell, "'How much is a life worth?': Northern Irish community split over gold-mining plans" (2020).
[25] See John Barry, "Fracking in Northern Ireland" (2015).
[26] UNEP, "Gas Fracking: Can we safely squeeze the rocks?" (2012).
[27] See Jeroen Van Laer and Peter Van Aelst, "Internet and Social Movement Action Repertoires" (2010).

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Working cross-border in nature conservation with regard to different designations, structures and management

Shirley Clerkin

Shirley Clerkin *is Heritage Officer with Monaghan County Council since 2004, having worked previously as Campaigns Manager for the Irish Wildlife Trust, and Natural Environment Officer with An Taisce – the National Trust for Ireland. She has academic qualifications in environmental sciences, law and public management. She co-ordinates heritage research, best practice, and capacity building through the delivery of county heritage and biodiversity plans for County Monaghan. She is a member of the steering committee for the Interreg CANN project and has worked cross-border on natural and cultural heritage issues since 2005. Shirley was the first chairperson of the national network of Heritage Officers from 2017-2020. She was the nominated national expert and chair of an EU open method of coordination committee on Sustainable Cultural Tourism, which produced new recommendations for this thematic area in 2019. Shirley is a member of the board of directors of the Tyrone Guthrie Centre at Annaghmakerrig, an all-island residential workplace for artists.*

Introduction

Biodiversity is declining. The recent Biodiversity Strategy to 2030 communication from the EU Commission, entitled *Bringing Nature back into our Lives* lays down the gauntlet - "We humans are part of, and fully dependent on, this web of life: it gives us the food we eat, filters the water we drink, and supplies the air we breathe. Nature is as important for our mental and physical wellbeing as it is for our society's ability to cope with global change, health threats and disasters. We need nature in our lives."[1]

In its call for urgent action, the EU notes that "in the last four decades, global wildlife populations fell by 60% as a result of human activities. And almost three quarters of the Earth's surface has been altered, squeezing nature into an ever-smaller corner of the planet."[2]

The nature advocacy sector is influenced by the scientific indicators that demonstrate biodiversity loss to find ways to halt the decline, studying site conditions and implementing conservation works to create conditions to restore and conserve species and habitats.

Working across jurisdictions to achieve improved conditions for nature brings additional challenges to an already complex situation. These challenges exist in the environmental sphere

as well as in the social, economic and political arena. The challenges persist at an intensely local level, scaling right up to the relationships between the member states and the Commission, and within the member states themselves.

Collaborative Action for the Natura Network

This article draws on recent experiences of the Collaborative Action for the Natura Network project, funded by Interreg VA through the Special European Union Programmes Body (SEUPB). The €283m INTERREG VA Programme is one of 60 similar funding programmes across the European Union that have been designed to help overcome the issues that arise from the existence of a border. These issues range from access to transport, health and social care services, environmental issues and enterprise development.

The Collaborative Action for the Natura Network (CANN) Project was awarded €9,230,313 under the INTERREG VA Programme to help protect endangered species and restore natural habitats on a cross-border basis. The sites are all wetlands and peatlands, as prioritised under the Interreg programme, valuable for biodiversity, for carbon capture and other climate mitigations. The recent EU Commission Biodiversity Strategy for 2030 highlights these areas as deserving more protections and an increase in protected areas. "Significant areas of other carbon-rich ecosystems, such as peatlands, grasslands, wetlands, mangroves and seagrass meadows should also be strictly protected."[3]

The CANN project team is producing 25 Conservation Action Plans for a range of sites across the jurisdictions which are designated as Special Areas of Conservation (SACs) and accumulatively account for over 25,000 hectares of land. Direct conservation actions will be carried out on 3,650 hectares of these SACs, all with an aim to help and guide the habitats and species found at these sites towards 'favourable conservation status'.

Designations

The Natura Network is a combination of sites designated as Special Areas of Conservation (SACs) under the EU Habitats Directive[4] and sites designated as Special Protection Areas for Birds (SPAs) under the EU Birds Directive.[5] Both the UK and Ireland are part of the same bio-geographic region for the directive.

The Commission drew up the criteria for designating sites for habitats and species, while the member states were responsible for proposing sites for the network. The selection of sites for the candidate lists was based on the following criteria for natural habitat types:

1 Degree of representativity of the natural habitat type on the site,

2 Area of the site covered by the natural habitat type in relation to the total area covered by that natural habitat type within national territory,

3 Degree of conservation of the structure and functions of the natural habitat type concerned and restoration possibilities.

The sites proposed at a state level were then agreed at a bio-geographic region seminar where the member states and nature agencies were present with the Commission. However, the directive did not explicitly call for any horizontal co-operation between the member states.

The sites in the Republic of Ireland are part of Ireland's national response regarding representation of habitats geographically within twenty-six counties, whereas the sites in Northern Ireland form part of the overall UK national geographical response. Both regions are within the same biogeographical Atlantic region, within which representation of habitats types is assessed for the purposes of the directives. The sites proposed for 'priority' habitat types were automatically selected as Sites of Community Importance as part of the designation process.[6]

For other habitat types, four additional criteria were available for use, including ensuring network coherence, for example by designating a "continuous ecosystem stretching across one or more internal Community frontiers".[7]

The cross-border sites that are within the CANN project on the border in Ireland are:

- Cuilcagh in counties Cavan (ROI) and Fermanagh (NI),
- Sliabh Beagh in counties Monaghan (ROI), Tyrone (NI) and Fermanagh (NI), and
- Kilroosky/Magheraveely Lough Cluster in Monaghan (ROI) and Fermanagh (NI).

The three sites are part of the Natura 2000 network, and all are designated in part as a Special Area of Conservation or a Special Protection Area. All the sites are currently in unfavourable conservation status and trending downwards.

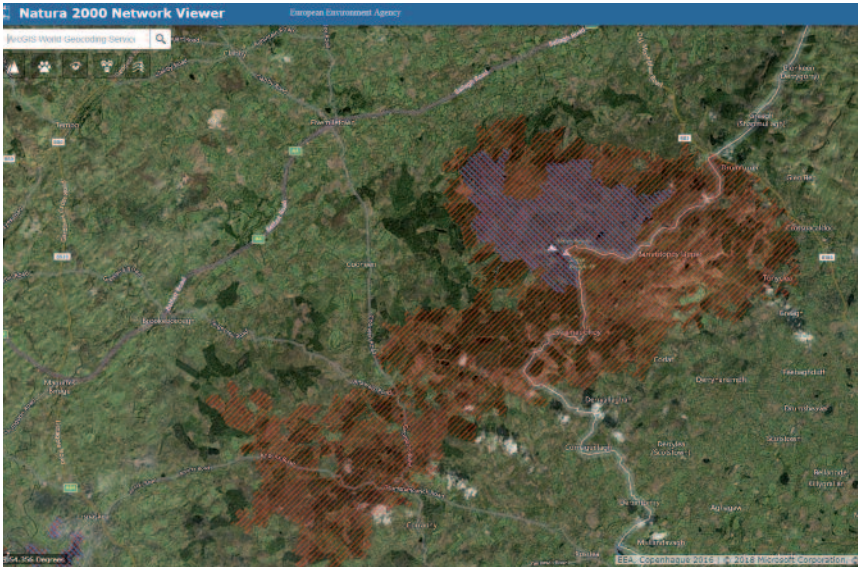
They also benefit from the International Ramsar wetland site designation, and national protections as Natural Heritage Areas in ROI or Areas of Special Scientific Interest in NI.

The designations and areas are presented in the table below.

Site name	Jurisdiction	Total cross-border size (ha)	SAC	SPA (ha)	Ramsar (ha)	ASSI (NI) (ha)	NHA (ROI) (ha)
Sliabh Beagh	ROI	12,391	None	3455	None	N/A	1183
	NI		1888	8936	1885	1900	N/A
Cuilcagh	ROI	12,487	9736	None	None	N/A	None
	NI		2751	None	2744	2750	N/A
Kilroosky/Magheraveely lake cluster	ROI	116	57	None	None	N/A	None
	NI		59	None	59	None	N/A

The coherence of the Natura network is a primary concern, and this cannot be achieved in border regions without a co-ordinated approach to designation and management. A habitat or species may extend across a border, or there may be fragmented parts of the same ecosystem on either side of a border, which should be similarly and simultaneously designated and protected.

The Sliabh Beagh plateau and blanket bog, which extends across a contiguous area of Armagh, Fermanagh and Monaghan is one such area. Here the 1,888 hectares of the SAC for blanket bog in Northern Ireland sits within a much larger SPA in NI, and adjacent to a SPA in ROI, both of which are designated for particular bird species only, not for habitat in itself.



Aerial photograph of cross-border site Sliabh Beagh, the SAC (purple) and SPA (brown) designations.

It has been found that the "European Habitats Forum, other European NGOs as well as scientists did not put much emphasis on cross-border coherence during the bio-geographical seminars."[8] The concentration of institutional effort went into the selection of sites to sufficiently cover the habitats and species, and the quantity of sites and areas within the spatial unit of each jurisdiction. In border areas where ecosystems and habitats extended cross-border, a potential cohesiveness of designation coverage was lost as a result.

For example, Dummy's Lough, one of the Kilroosky/Magheraveely Lough Cluster lakes is a Special Area of Conservation in Ireland, but not in Northern Ireland. This creates a designation boundary in the middle of a lake habitat.

Aerial photograph of Dummy's lake showing the SAC in the Republic of Ireland. Note the designation creeping across the border - this is a problem with anomalies in the mapping system described further on in this article.

A robust scientific case is required to underpin the legality of the Habitats and Birds Directive designations. It is acknowledged that it is almost impossible to understand what constitutes the full biodiversity of any ecosystem so the focus is on the quantification of species and community assessment, to classify habitats into a range of similarly defined types presented in the Directive annexes. An assessment of the conservation status of habitats and species feeds into an EU reporting process which analyses how the directives are delivering for nature every six years.

For Cuilcagh, Sliabh Beagh and Kilroosky/Magheraveely, the Natura 2000 designation process was impacted by legacy issues surrounding the accessibility of the landscapes on the border of Ireland. Although the Good Friday Agreement was signed in April 1998, and the environment is one of the six areas of co-operation, the region adjacent to the border remained one of the most contested spaces. Ecological surveying by state agencies along the border areas was not undertaken to the same extent as elsewhere. Less scientific data was available therefore when designations were being made.

Wetland surveys undertaken by the Monaghan County Council Heritage Office from 2006 onwards demonstrated the wealth of previously un-surveyed wetland habitats in the county, including along border areas.[9] "A number of reviews of environmental governance in NI over the last twenty years have concluded that the region is lagging behind the rest of the UK, experiencing the "relegation of environmental concerns down the list of political imperatives" which is often the case in post-conflict societies".[10]

A recent fitness-check or policy evaluation of the effectiveness, efficiency, relevance, coherence and EU added value of the EU Habitats and Birds Directives has found that "Nature is a shared heritage of the Member States and effective management of natural resources needs to take

place across political boundaries as the ranges of many species, especially migratory ones, are dependent on suitable habitats and conditions being present simultaneously in several Member States."[11]

This finding is echoed in a recent report on the challenges and opportunities in Northern Ireland for post-Brexit environmental governance: "Environmental problems are notoriously difficult to solve within national borders."[12]

The failure to adopt a co-ordinated approach to the designation of sites on the border between the member states at the time of designation, laid the groundwork for the additional challenges to the conservation of habitats and species, solutions for which are being sought through the CANN project.

Structures

There are three main elements to the conservation community, namely the research and academic community, the governmental agencies and the non-governmental or voluntary organisations. The challenge for conservation is to bring these delivery partners together in a way that builds trust, ensures knowledge transfer across science and practice, and that delivers for nature and for stakeholders. The CANN project aims to foster better working relationships within this conservation community by enabling active interactions and engagement between a consortium of eleven partners.[13]

The research and academic community are represented in the CANN project by Ulster University, the Institute of Technology Sligo and the Agri-Foods and Biosciences Institute. These partners are conducting short to medium term studies and producing scientific data to support the delivery of the conservation action plans and choice of conservation actions on the Natura 2000 sites.

National government agencies are represented by Scottish Natural Heritage as a partner, and the National Parks and Wildlife and NIEA as biannual consultees. These organisations are responsible for national implementation of the directives.

Local government is represented by Armagh, Banbridge and Craigavon Borough Council, Monaghan County Council and Newry, Mourne and Down District Council. At this level, conservation and heritage professionals make decisions about biodiversity strategies and policies, and the delivery of local conservation plans within the democratic local structures.

The NGO community, whose expertise in the practice of delivering conservation gains for wildlife is essential to the project, is represented by Ulster Wildlife, the Argyll and the Isles Coast and Countryside Trust, and the Golden Eagle Trust, who conduct and advise on bird monitoring across the project regions. The monitoring of mobile populations, such as the Hen Harrier, across a political border is challenging when undertaken by two agencies. The benefits of one organisation monitoring nests and foraging habitats is making a real difference to the breeding success of the bird. The Department of Agriculture Hen Harrier project, which is active on the lower slopes of Sliabh Beagh is also a key collaborator with the CANN project. Clearly, nothing can be achieved without landowners, on whose lands the project is working to improve the conservation status of habitats and species. Landowners include farmers and private individuals who own a couple, or many hundred, acres, public forestry agencies, and charitable organisations. Considerable effort by the CANN project has been not on

"conservation" in itself, but on building relationships and making agreements to access and work on sites owned by these important stakeholders.

Map shows Cuilcagh Mountain SAC in NI, where on 3,000 hectares there are 100 owners, and Cuilcagh Anerin Uplands SAC ROI where on 7000 hectares there 450 owners.

The definite scientific parameters and deliverables for the project were already set in the call from SEUPB for proposals to the Interreg fund, and clarity on these are communicated to stakeholders on an ongoing basis. Within these there is no wriggle room. However, stakeholders can decide whether their land is part of the project and can influence the type of management prescriptions employed that will deliver a sustainable delivery of an improved conservation status for the habitats and species concerned. This is challenging work, requiring scientific inquiry at all stages to secure agreement on management methods and co-operation by stakeholders to positively buy-in to planned work.

The CANN project employs site co-ordinators to assist with this relationship and consensus building. The Sliabh Beagh site co-ordinator, for example, is employed by Monaghan County Council, but works across the three counties of Armagh, Fermanagh and Monaghan with a range of agencies, landowners and other stakeholders.

Management

Mapping

Differing mapping criteria create ramifications for the conservation and restoration of designated cross-border nature sites. Accurate mapping is an essential part of site designation, management and ongoing monitoring. AFBI conducts the field surveys and mapping for most of the sites within the CANN project, and has found many variances between base maps, mapping methods and between existing datasets.

The habitat features identified as part of the scientific case for the Natura 2000 designation were mapped within different national contexts. The drawing of site boundaries, over which there has been some controversy since the implementation of the directives commenced, has caused differences. Technical issues around the type of base mapping and conversion to digital maps and geographical information systems resulted in a mismatch of alignments.

Controversy over site boundaries in ROI concerned the initial delineation of the Natura 2000 boundary to the nearest convenient topographical boundary. This was challenged by landowner organisations and consequently the NPWS redrew the boundaries to reflect the exact boundary of the scientific feature/habitat. This is difficult to achieve as often the surrounding conditions support the particular piece of habitat ear-marked for designation. The drawing of successive nature designation site boundaries (ASSI, SAC, SPA) has occurred over an extended period of time using differing base mapping.

A range of base maps has been used to draw up the boundaries of sites with a national designation such as Areas of Special Scientific Interest (ASSI) and a European designation, such as Natura 2000. This seems to have led to small discrepancies between boundary outlines. It is possible that these discrepancies have been further magnified by the transposition of these boundaries into digital formats, such as GIS shape files. This has caused mapping issues along the line of the border on some sites. The NPWS website currently states the following:

> *"The SAC and SPA shapefiles now contain a mixture of legacy Irish Grid/1:10,560 and modern ITM/1:5000 data. Most of the data was digitized in the Irish Grid (IG) projection on the OSI 'Six-Inches-to-One-Mile' map series.*
>
> *Our legacy IG/'Six Inch Series' data has been transformed from IG into ITM using the NTv2 polynomial transformation. Legacy issues regarding the Cassini projections and gaps/overlapping of site boundaries across county boundaries remain."*[14]

Currently some designated site boundaries at the border not only overlap each other within their jurisdiction, but also cross into the neighboring jurisdiction such as at Dummy's Lake, Kilroosky Lough Cluster SAC, but also on other sites e.g. NI SPA mapping extending into ROI Natural Heritage Area (NHA) and vice versa.

Conservation Plans

Article 6(1) of the Habitats Directive states that member states "shall establish the necessary conservation measures involving, if need be, appropriate management plans." Part of the CANN project work is to produce twenty-five conservation management plans for sites in Northern Ireland, Ireland and Scotland. The plans contain a series of prioritised actions for the protection and management necessary to meet the requirements of the sites' conservation objectives.

The conservation objectives for a site differ according to the reasons for which it is designated. On a continuous ecosystem, where the reasons for designation do not match at the border, this exacerbates the challenges for the maintenance of the overall site biodiversity.

Currently the conservation management plans for cross-border sites are drawn up separately for either side of the border, and submitted to the relevant nature agency. Sliabh Beagh therefore has two separte conservation plan requirements, one for the north and one for the south.

Northern Ireland authorities provide a comprehensive template to use when developing and writing conservation plans, in accordance with the legal basis of the Habitats Directive and the aim of Article 3.1, which is to maintain or restore natural habitats at a favourable conservation status. The Northern Ireland Environment Agency template is useful, comprehensive and is a different template to that in use in Scotland or England. The overall aim of the Conservation Plan noted in the template, is "to identify and put in place workable and realistic measures at the appropriate scale to deliver the conservation measures of these sites to ensure their long-term sustainability."

In the Republic of Ireland, the National Parks and Wildlife publishes conservation objectives for sites and habitats, together with a list of activities requiring consent. However, there is no conservation plan template available in this jurisdiction. As part of the CANN project liaison with the NPWS and NIEA, it was agreed that sites in ROI should use the NI version, including for Lough Arrow in County Sligo, part of the project but not adjacent to the border.

Knowledge transfer such as the sharing of an already established tool on the island is a positive outcome for policy makers and practitioners.

The future

"Protecting and restoring biodiversity is the only way to preserve the quality and continuity of life on Earth."[15]

The challenges for cross-border biodiversity created by the designation, management and structural issues require additional resources as compared with conservation programmes and activities elsewhere. It is unknown how the exit of the UK from the European Union will further impact on these challenges, despite the assurances of a green Brexit and promise of a commitment to a 25-year Environment Plan. "For Northern Ireland, it means deciding where and how co-operation on environmental matters will continue or even intensify with Ireland."[16] To achieve biodiversity gains for the cross-border nature sites, agencies and communities from both sides involved in conservation of these sites must continue to co-operate and collaborate.

Relationships between the state agencies responsible for nature conservation, and the unique circumstances of nature sites straddling the border has been progressed through involvement with the CANN project. Solving problems together through quality dialogue has enabled technically sound and implementable solutions to be found. This shared understanding of the conservation needs for the sites and the communities can be positively built on in the future.

It is well documented how engagement with heritage, both natural and cultural, can stabilise communities and that "heritage can strengthen community ties and community organisation and […] is essential to the very identity and unique character of communities."[17] More resources for engagement in nature conservation and biodiversity are required along the border areas to enable communities to be on a level playing field with places and people elsewhere on the island. The Heritage Council, the independent organisation which advises and promotes natural and cultural heritage in Ireland, notes the importance of cross-border heritage in their most recent Strategic Plan: "[Heritage] simultaneously crosses borders and transcends difference to connect people through shared values, history and traditions."[18]

The mis-match of designations is a situation that should be remedied and a suitable mechanism has been outlined in the 2020 communication from the Commission on the EU Biodiversity

Strategy. The Commission recommends that additional areas are designated as Natura 2000 sites: "Member States will be responsible for designating the additional protected and strictly protected areas. Designations should either help to complete the Natura 2000 network or be under national protection schemes" (p.4).

The communication also recognises the need for European Territorial co-operation and the need to invest in green and blue infrastructure and to establish ecological corridors to have a truly resilient Trans-European Nature Network.

Both these recommendations open the door to the designation of additional SACs or SPAs, allowing the gaps and non-alignment of designation types along the border to be remedied. Arrangements for the drawing up of a single conservation plan for nature areas which straddle the border should be examined by the state agencies. This would enable conservation measures to be agreed based on the entire ecosystem, with all the communities and agencies involved in a common understanding of the site's requirements.

Conclusion

The project partners hope to build a common ground for nature conservation in the region, albeit recognizing the difficulty this poses in a fixed project timeframe, and within the parameters of a funded project with already agreed outcomes and deliverables.

The UN's Brisbane Declaration on Community Engagement defines deliberation as "where there is sufficient and credible information for dialogue, choice and decisions, and where there is space to weigh options, develop common understandings and to appreciate respective roles and responsibilities."[19] The CANN project, as its collaborative title suggests, finds itself in this space as much as in the traditional nature conservation space which once dealt with the science and ecology only. To achieve lasting and long-term benefits for nature, it is essential that time and resources are dedicated to building capacity and engagement with all those involved, as well as on the scientific aspects of conservation.

Many challenges remain for the project, and for the biodiversity of the cross-border sites. However, information now exists on the designation, structural and management issues for these important biodiversity-rich wetlands and peatlands, and implementable solutions to these can be refined to benefit the conservation of their species and habitats.

Notes

[1] European Commission, Communication from the Commission to the European Parliament, The Council, The European Social and Economic Committee, and the Committee of the Regions. EU Biodiversity Strategy for 2030. Bringing nature back into our lives (20 May 2020), p.2.
[2] Ibid. p.3.
[3] Ibid. p.5.
[4] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31992L0043&from=EN.
[5] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0147&from=EN.
[6] Sites of community interest are the status of sites before they are officially designated as N2000 sites through national legislation. In Ireland, this is the European (Natural Habitats Regulations) 1997. In the UK, including NI, the relevant implementing legislation is The Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995.
[7] Yvonne Scannel et al, *The Habitats Directive in Ireland* (1999), p.79.
[8] Gerd Linz and Markus Leibenath, "Cross-border decision-making processes regarding Natura 2000" (2005), p.101.
[9] See, for example, Peter Foss and Patrick Crushell, "Monaghan Fen Survey 2007" (2007).
[10] Viviane Gravey et al, "Northern Ireland: Challenges and opportunities for post-Brexit environmental governance" (2018), p.8.
[11] European Commission, Fitness Check of the EU Nature Legislation (Birds and Habitats Directives) (2016), p.7.
[12] Viviane Gravey et al, p.6.
[13] Newry, Mourne and Down District Council heads the consortium of local authorities, research institutions, community groups, and charities from across the region - East Border Region Ltd; Armagh City, Banbridge and Craigavon Borough Council; Agri-Food and Biosciences Institute; Ulster University; Ulster Wildlife; Monaghan County Council; Institute of Technology Sligo; Golden Eagle Trust; Argyll and the Isles Coast and Countryside Trust; and Scottish Natural Heritage.
[14] National Parks & Wildlife Service, https://www.npws.ie/maps-and-data/designated-site-data/download-boundary-data [last accessed 24/08/2020].
[15] European Commission, EU Biodiversity Strategy for 2030, p.22.
[16] Viviane Gravey et al, p.25.
[17] Kynan Gentry, "History, heritage and localism", p.510.
[18] The Heritage Council, "Heritage at the Heart: Heritage Council Strategic Plan 2018-2022" (2018), p.7.
[19] UN International Conference on Engaging Communities, August 2005 led to the development of the Brisbane Declaration on Community Engagement.

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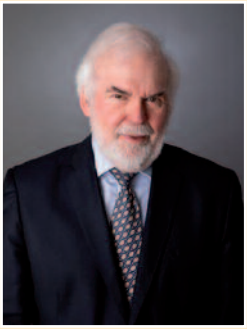
Policies for Agriculture and the Environment on the island of Ireland in the post-Brexit World

Tom Arnold



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Introduction

Decisions to be taken during the second half of 2020 will have a decisive impact on the future of the Irish agri-food industry, North and South. The most important of these decisions will be on the future relationship between the UK and the EU, including the trade relationship, to apply from 1 January 2021. A hard Brexit would have major negative implications for the agri-food sectors in the UK and in Ireland. A second set of decisions concern how the EU and its member states will move towards a more environmentally sustainable agricultural system. The direction of policy has been set out in EU Commission strategy documents, Farm to Fork (F2F) and the Biodiversity Strategy. The detail as to how these proposals should be implemented at national level will be decided over the coming months. This paper seeks to explain what both sets of decisions will mean for the Irish agri-food sector and to identify the challenges facing political leaders in London, Belfast and Dublin. And this will be played out against the background of the COVID-19 pandemic, which in addition to its cost in terms of death and ill-health, risks generating the worst global recession for centuries.

The article has four sections. First, it describes the evolving European, international and Irish policy framework, with particular reference to policy on agriculture and the environment.

Second, it examines the state of the agri-food sector, North and South, on the eve of Brexit. Third, it discusses the possible implications of Brexit and a new UK agriculture and food policy. Fourth, looking to the future decade, it suggests a set of principles to guide co-operation within the agri-food sector on the island of Ireland, as well as proposing some initial ideas for possible future projects.

The evolving policy framework at European, Irish, and international level

The EU's Common Agricultural Policy (CAP) has been the dominant influence on agri-food policy in Ireland, North and South, since Ireland and the UK joined the then European Economic Community (EEC) on 1 January 1973.

The CAP has undergone a number of reforms from the 1970s onwards. During its early decades, it operated a system of price support for the main farm commodities. In 1992, Ray MacSharry, EEC Commissioner for Agriculture and Rural Development, spearheaded a major reform which substantially reduced guaranteed prices for cereals, milk and beef and introduced a 'mixed system' of continuing price support albeit at lower levels, plus 'coupled' direct payments linked to previous levels of on-farm production. In addition, a set of 'accompanying measures' were introduced consisting of three schemes: on afforestation, early retirement for farmers, and the improvement of the rural environment in the form of the Rural Environment Protection Scheme (REPS).

The next major reform came in 2003 and involved a 'decoupling' of direct payments from production, instead introducing direct income payments in the form of the Single Farm Payment (SFP) linked to respecting certain standards in relation to protection of the environment, animal health and welfare, and public health. Member States were given latitude in the timing and methodology of introducing decoupled direct payments. Ireland chose to opt for full decoupling from January 2005.

More generally, the 2003 reform signalled an increasingly integrated European agricultural and rural development policy. Food safety issues loomed larger, influenced by consumer concerns following outbreaks of BSE and Foot and Mouth Disease during the previous decade. There was increased pressure for animal welfare to be adequately reflected in policy.

The essential shape and structure of the CAP has remained in place from 2003 to the present. But we are now on the verge of a further significant reform which began with an EU-wide public consultation process on the CAP's future in 2018. Following that consultation, the Commission proposed that 40% of future CAP funding would be spent on climate mitigation measures.

The momentum towards a 'greener' CAP has been further accentuated with moves towards a more ambitious EU climate policy. In December 2019, the incoming EU Commission proposed the adoption of the European Green Deal (EGD), aiming to make Europe the first climate-neutral continent by 2050. This represented an increase in the level of ambition in European climate policy and would involve a greater reduction in the greenhouse gas (GHG) emissions than has previously been committed to.

The EGD has an important agri-food dimension, through its Farm to Fork (F2F) proposal and the EU Biodiversity Strategy for 2030.[1] F2F aims at enabling 'the transition to a sustainable food system that safeguards food security and ensures access to healthy diets sourced from a healthy planet'.[2] The Biodiversity Strategy stresses its centrality to the well-being of other economic sectors, including agriculture.

Negotiations on the new EU emissions targets and how Member States will contribute to them will commence during the second half of 2020. Discussion will also commence on how F2F and the Biodiversity Strategy will be implemented. The reformed CAP will operate through each Member State preparing its own national Strategic Plan, taking account of its specific circumstances, aimed at contributing to overall European targets under the CAP.

This next CAP reform should be seen within a wider international context. In 2015, the international community adopted two landmark agreements: the Sustainable Development Goals (SDGs) and the Paris Climate Agreement. 2030 is the target date for the achievement of the 17 SDGs. The aim of the Paris Agreement is to avoid dangerous climate change by limiting the increase in global warming to 1.5 degrees above pre-industrial levels. The COVID-19 pandemic will make achievement of both agreements much more difficult.

Within this wider international context, the role which food systems play in contributing to global and planetary health is coming into sharper focus. There is a strong international move towards the better integration of policies on agriculture and food, health, and climate. In 2021, the UN will host a Food Systems Summit (FSS) aimed at accelerating the achievement of the SDGs and meeting climate change challenges. Preparation for this Summit will include Food Systems Dialogues in many countries aimed at stimulating public engagement on how food systems can deliver better health results and reduce their contribution to climate change.

The policy direction at EU and international level on integrating environmental considerations more closely with agricultural policy is in line with significant political developments in ROI and NI during 2020.

In ROI, the new coalition government of Fianna Fáil, Fine Gael and the Green Party has committed to a Programme for Government (PfG) with environmental targets that go beyond what is included in the 2019 Climate Action Plan. In addition, the Irish Supreme Court held in a landmark judgement in July 2020 that the Government's 2017 National Mitigation Plan did not provide sufficient detail to show that it met the terms of the 2015 Climate Action and Low Carbon Development Act.

The Government intends to respond to the PfG and to the Supreme Court judgement through two key actions: first, the introduction of a Climate Action Bill, within its first 100 days in office, to introduce five-yearly carbon budgets to force sectors to reduce their emissions and second, a National Energy and Climate Plan required by the EU, which must set out how emissions will be reduced up to 2030 and beyond.

The production of the Climate Action Bill and the National Energy and Climate Plan will bring additional focus to what the agri-food sector will contribute to the achievement of national targets. The sector will need to reduce its level of emissions and increase its contribution to carbon sequestration.

In January 2020, the UK and Irish governments adopted the 'New Decade New Approach' programme as the basis for a restoration of devolved government in NI following its collapse in January 2017. The programme contains the following important commitments regarding climate change:

'The Executive will tackle climate change head on with a strategy to address the immediate and long term impacts of climate change. The Executive will introduce legislation and targets and for reducing carbon emissions in line with the Paris Climate Change Accord.'[3]

In summary, there is a high degree of policy alignment and direction on climate policy, and on the important role of the agri-food sector to positively contribute to that policy, at international, European, ROI and NI level. The challenge in all cases will be to translate high level policy statements to programmes on the ground to results in terms of lower emissions and effective climate action. How these challenges might be met is at the heart of our discussion later in this article.

The state of the agri-food sector, North and South, on the eve of Brexit

European agricultural policy over the past half century provides the background to the significant structural, economic and social changes which have occurred within the Irish agri-food sector, North and South, over the period.

At a general level the trajectory of change within the agri-food sector, North and South, has been broadly similar since the 1970s. As expected in the case of growing economies over decades, agriculture's share of national GDP, employment and exports has fallen. There has been a reduction in the number of full-time commercial farms, with a smaller number of farms producing a larger share of the output. Part-time farming has increased, with off-farm income representing an increasing share of farm household income. There are broad similarities in terms of farm size and structure, and soil types. Milk and livestock (cattle and sheep) production are the dominant enterprises, with the share of tillage and horticulture declining in relative terms over time.

One area where the North and South diverged in experience was in the management of the EU milk quota. The quota was introduced in 1984 in order to reduce the increasing cost of the CAP. It imposed limits on the quantity of milk a country could produce. Milk produced in excess of the quota attracted a super-levy which rendered the additional production unprofitable.

However, countries had flexibility as to how they operated and policed their quota. The UK chose to disconnect the sale of milk quota from agricultural land. As a consequence, as the English dairy sector declined, farmers got out of milk, sold their quota and switched to other enterprises. Much of the surplus English quota was bought up by NI farms wishing to expand and restructure. This happened to such an extent that when EU milk quotas were withdrawn in 2015, NI was producing 50% more milk than when quotas were introduced in 1984. NI dairy farms became less in number but larger, with more all year round milk production and higher debt levels than their Southern counterparts.

By contrast the Irish government chose to tie milk quota to land which meant there was much less scope for quota purchase and overall flexibility. National production of milk remained in line with the EU milk quota from 1984 onwards. However, as the prospect of the milk quota's abolition in 2015 came into view, ROI farmers began to expand their production and this expansion accelerated post-2015. By the end of 2020 ROI milk production is expected to be over 50% greater than the 1984 quota. So ROI and NI have had broadly similar outcomes in terms of expanding their dairy sector between 1984 and 2020, although they got there by different routes.

The different experiences in the milk quota North and South help to explain the current integration of the dairy industry on an all-island basis. From the 1990s onwards, ROI made substantial investments in processing and value-added dairy businesses, whereas this did not happen to the same degree in NI. As milk production in NI expanded resulting from the purchase of additional quotas from England, Northern processors struggled to pay a good price

for milk. This provided the opportunity for Southern processors to purchase milk from NI, an opportunity which was substantially enhanced with the arrival of the EU Single Market in 1992. Today, NI exports some 800 million litres of milk annually to ROI, mainly for processing.

The operation of the EU Single Market has facilitated increased integration, processing and value-added in other sectors also. About 400,000 lambs are imported from NI to ROI for processing and a similar number of pigs are exported annually from ROI to NI for processing.

Over the past decade, government policies, North and South, have been similar – that their agri-food sectors should expand and do so in an increasingly sustainable way.

In ROI, the development of the agri-food sector since 2000 has been shaped by a series of five-year stakeholder-led strategies, in partnership with the Government. The current strategy is Food Wise (FW) 2025 which set out a vision focused mainly on increasing value-added rather than production growth, with ambitious targets for increasing the value of exports and the number of jobs in the sector. FW 2025 stated that, as a guiding principle, it would seek to embed at all levels of the agri-food industry that environmental protection and economic competitiveness are equal and complementary.[4]

Work is underway to produce the 2030 Agri-Food Strategy, aimed at ensuring the economic, environmental and social sustainability of the sector. A draft Strategy, alongside an Environmental Assessment of the Strategy's recommendations, were published for public consultation, after which the Strategy will be finalised.[5]

In NI, the agri-food sector was identified as a key future driver for economic growth, as referenced in the 2013 'Going for Growth' agri-food strategy which set out a vision of 'Growing a sustainable, profitable and integrated Agri-Food supply chain, focused on delivering the needs of the market.'[6] The strategy set a number of ambitious targets for the sector in 2020 in terms of growing sales, employment and value-added. There has not been a follow-on strategy to 'Going for Growth'.

There are other similarities between the sectors, North and South, which are of relevance when examining the potential impact of Brexit. These relate to existing trade patterns for agri-food products and the high percentage of net farm income accounted for by EU direct payments. Both factors present potential vulnerabilities in the context of Brexit and a policy shift at both EU and UK level towards a greater emphasis on payment for environmental services.

On trade, the simple reality is that trade in agri-food products between the EU and UK, and between ROI and the UK, is very significant. Some selected statistics illustrate the importance of this trade.

The UK is only 61% self-sufficient in food and imports about 70% of its imports from EU 27. ROI accounts for 18% of UK food and drink exports.

For NI, Great Britain (GB) is the biggest market for the entire food and drink processing sector while the ROI is the largest export market. The rest of the EU is a significant export market for the beef and sheep meat subsectors.

For ROI, 41% of agri-food exports go to the UK, 32% to EU countries excluding the UK, and 27% to the rest of the world.

Under current arrangements, all of this trade is currently conducted on a tariff free basis and to a common EU regulatory standard. If Brexit leads to the introduction of tariffs or other impediments to trade, this will directly impact on food prices and farm incomes in both the UK including NI, and ROI. This is discussed in more detail in the next section.

We have seen how the support arrangements under CAP shifted over the years from the earlier system of price support towards income support. Since 2003, the income support scheme has been through the Single Farm Payment (SFP), now termed the Basic Farm Payment (BFP).

EU supports make a considerable contribution to aggregate net farm income in both ROI and NI, but NI has a higher dependence on EU direct payments than other regions in the UK and in ROI. Over the three years, 2016-18, direct payments ranged from 67% to 117% of net farm income. The dependence on direct payments is most pronounced on cattle, sheep and cereals farms – this applies both in ROI and NI.

The high dependence on direct payments as a proportion of net farm income means that budgetary constraints, which could apply within the CAP or in NI's devolved budget allocation for agriculture, would expose key vulnerabilities, especially for those in farming systems (cattle, sheep) most dependent on direct payments.

Brexit – a key turning point

Brexit has the potential to have major consequences for the agri-food sector in the UK and Ireland. The outworking of the following four interlocking issues will determine the consequences:

- The outcome of the negotiations on the future UK/EU relationship
- The introduction of the new UK agriculture and food policy
- The future of NI agri-food policy, influenced by the financial terms of devolved arrangements for the agriculture sector and the terms of the Ireland/Northern Ireland Protocol to the UK/EU Withdrawal Agreement (hereafter called the Protocol).
- For ROI, the choices it will make in drawing up its CAP Strategic Plan

As the UK embarks on framing its new independent agriculture and food policy, it will develop a trade policy to enable the UK to negotiate trade agreements with different third countries. The UK government will also take responsibility for standards and regulations in agriculture and food.

Some of the new agriculture and food policy, related to on-farm supports, will be administered by the devolved administrations of Northern Ireland, Scotland and Wales. But policy in Northern Ireland will be different from that in Scotland and Wales by virtue of the Protocol. The terms of the Protocol mean that NI will remain aligned to a specific set of rules of the EU's Single Market, many of which relate to agriculture, while still remaining part of the UK's customs territory. What this will mean in practical terms for NI's agri-food sector is discussed below.

The outcome of the negotiations on the future UK/EU relationship

Negotiations on the terms of the future relationship between the UK and EU, to apply from 1 January 2021 when the transition period concludes, have been ongoing since early 2020.

Although progress in the negotiations is reported to be slow, the hope remains that they will conclude successfully in September or October. But the timeframe for completing a successful comprehensive agreement is now very short.

In a forthcoming paper,[7] Lucey suggests that the future UK-EU trade deal may take place under one of the following three broad scenarios.

Scenario 1 is that a Comprehensive Free Trade Agreement (CFTA) is reached and would apply from the end of the transition period. Even in the best case scenario of a CFTA involving zero tariffs and zero quota, new procedures and controls will apply at the UK-EU border.

Scenario 2 is that negotiations fail, and that UK-EU trade from the beginning of 2021 takes place under WTO rules. Full border controls between the EU and UK would be in place, to implement import tariffs and regulatory controls – except for farming and food goods produced in NI to which the regulations ensuring their free access to the UK customs union will apply. UK exports would be subject to the EU Common External Tariff which for agri-food products is high. The practical effect would be that GB exports (NI will remain under the Protocol) would be excluded from the EU Market for most agri-food products. EU exports to the UK would be subject to the UK Global Tariff (see below). This would leave the EU at a disadvantage in the GB market relative to supplies from lower cost countries including the US and Brazil.

Scenario 3 assumes that, in the event that a CFTA is not possible, an agreed compromise agreement is reached, termed here as a Preferential Trade Agreement (PTA). The outcome for agri-food products under a PTA is unclear.

In May 2020, the UK government published the tariff schedule that will apply from 1 January 2021, termed the UK Global Tariff. In overall terms, it is likely that GB tariff levels on agri-food products will be lower that their equivalent EU External Tariffs, thus enabling the market to move over time to lower food prices.

Any outcome other than Scenario 1 – the CFTA – would leave ROI and NI food exporters in a worse situation than under current arrangements when there is tariff free access and regulatory alignment to the UK market. How much worse would vary by product, but beef and cheddar cheese exports would be particularly hard hit. There is a deep folk memory among Irish farmers, dating back to the Economic War in the 1930s, of tariffs applying on Irish food exports to the UK, and how this directly translates into falling prices and incomes. The hope is that what lies ahead will not revive memories from that time.

Introduction of a new UK agricultural and food policy

The Agriculture Bill 2019-2020, published in January 2020 and currently in its final parliamentary stages before being enacted, set out the new direction for UK national policy and provides the basis for future agriculture schemes. Farmers in the UK in recent years have been receiving about £3.2 billion annually from the EU's CAP (£3.4 billion when UK government funding is included). For the future, the major change is that direct payments will be based on 'public goods' produced by farmers – 'Public Money for Public Goods'. In December 2019 the Government made a commitment to provide the current annual budget to farmers every year of the term of the current parliament.

When the UK was a member of the EU and abiding by the rules of the CAP, international trade policy was an exclusive EU responsibility. From 1 January 2021, international trade policy will

be a UK central government responsibility, as will standards and regulations for agriculture and food. Other parts of the former CAP will be the responsibility of the devolved administrations of Northern Ireland, Scotland and Wales.

Future trade policy will determine both the terms of access to the UK market and the price level in that market. The UK has already commenced negotiations for new trading agreements with a number of countries including the US, Australia, New Zealand and Japan. This has led to political and public discussion about the possible implications of new trading arrangements for food standards and animal welfare. The issue of chlorinated chicken and hormoned beef has been a particular focus of public discussion in relation to a possible UK/US trade agreement.

Partly in response to this public debate, the government established a Trade and Agriculture Commission in July 2020, reporting to the International Trade Secretary, Liz Truss, which is due to report in six months. It has been asked to advise on trade policies, market access, protection of animal and environmental standards in food production and consumer interests.

Work on developing a National Food Strategy has been going on since 2018, under an Advisory Panel chaired by Henry Dimbleby. The Panel had planned to issue its report in March 2020, but revised its plan given the disruption caused by COVID-19. On 28 July 2020, it issued Part One of its report containing 'urgent recommendations to support the country through the turbulence caused by the COVID-19 pandemic, and to prepare for the end of the EU exit transition period on 31 December 2020'.[8] Part Two of the National Food Strategy will involve 'a root and branch review of the food system, the benefits it brings and the harms it does'. It will be published during 2021 and the Government has committed to publishing a White Paper six months after its publication.

Although the recommendations of Part One of the National Food Strategy are not binding on the UK government, some of its key findings seem worthy of particular note. The report notes that 'Diet-related illness is one of the top three risk factors for dying of COVID-19. This has given a new urgency to the slow-motion disaster of the British diet'.[9] It strongly welcomes the recently published UK government's New Obesity Strategy and commits to return to the issue of dealing with obesity in Part Two of the Strategy.

The report also states 'In negotiating our new trade deals, the Government must protect the high environmental and animal welfare standards of which our country is justly proud' (p.7).

Both processes – the Trade and Agriculture Commission, and the National Food Strategy – will feed into a UK government decision on its future food strategy. This will be a highly political decision, bringing into focus different views about Britain's role in the world which were part of the Brexit referendum debate in 2016. At the heart of this will be the outcome sought in terms of the price level for food on the UK market which will be related to the degree of access granted to imports under an expanded number of trade arrangements between the UK and third countries.

Two broad options may be considered. The first is the option of low food prices, a modern day version of Britain's 'cheap food policy', which applied from the abolition of the Corn Laws in 1846 well into the 20th century. This would be associated with providing widespread market access to imports through a range of trade agreements.

The second option would involve a somewhat higher average food price, a target level of self-sufficiency and more limited import access. This option would require that support

arrangements for UK producers would be adequate to enable them to deliver the targeted level of self-sufficiency. It would also be associated with minimum levels of food standards, animal welfare and environmentally sustainable production.

What the outcome of this political debate will be remains to be seen. But there are reasons to believe that the COVID-19 pandemic and the likely response to it may have changed the terms of the debate. The pandemic has caused many countries and regions to aim for a greater level of food security, more resilient food systems, increased local production and shorter supply chains, and a more circular economy. All of these factors point towards choosing the second option.

The Irish government has a definite interest in the outcome of this debate but will have no role in influencing it. NI political leaders who will have some role in influencing UK government policy will have to decide on their position. Given that NI will continue to be a substantial exporter to the GB market, both NI primary producers and its processing sector would appear to have a strong vested interest in supporting the second rather than the first option.

Future of agri-food policy in Northern Ireland

The agri-food situation in NI is defined by the terms of the Protocol and by the responsibilities devolved to the NI Executive to administer a range of services including on-farm supports. The provisions of 'New Decade New Approach' will also influence policy.

The Protocol provides a legally operative solution that avoids a hard border on the island of Ireland, protects the all-Ireland economy and the Good Friday Agreement, and safeguards the integrity of the EU Single Market. The implementation details are to be resolved by the EU-UK Withdrawal Committee Joint Committee and the Ireland/Northern Ireland Specialised Committee. The Protocol will apply from the end of the transition period on 31 December 2020 and will continue to operate in the future unless it fails to get majority support in the NI Assembly.

The Protocol has a number of important implications for NI agri-food policy. NI will remain aligned to a specific set of rules of the EU Single Market, many of which relate to agriculture. NI will be part of the UK customs territory and goods produced in NI can in future be exported to a third country under the same conditions as goods produced in other parts of the UK. But in order to avoid a hard border on the island of Ireland, EU customs duties will apply on goods entering NI if those goods risk entering the EU's Single Market.

Allocation of agriculture budgets between the devolved administrations is a reserved UK government function and is not part of the block grant under the devolution settlement. Heretofore, the UK received EU CAP funding, which the UK government then allocated to the devolved administrations. The amount of future funding to each part of the UK will depend on the outcome of negotiations between the UK government and the devolved administrations.

In December 2019 the UK government announced a total funding level for agriculture of almost £3 billion. NI was allocated £279 million for 2020/21. Allocations for later years will be the subject of negotiation.

This hybrid existence of the NI agri-food system being part of the EU Single Market, which has the advantage of enabling free trade within the island of Ireland, while the UK Exchequer continues to provide the funding for NI on-farm supports, has the potential to create future challenges for NI political leaders, policy makers and the industry.

The agri-food sector in ROI has the assurance that there is an agreement on the levels of CAP funding under the EU's Multiannual Financing Framework (MFF) agreement for seven years. (There will be active debate between farmer representatives and government about the adequacy of the funding, but that is a separate matter). For NI, funding for on-farm supports provided by the UK Exchequer will be provided on an annual basis – and there will also be active debate in this case about the adequacy of the funding. But these year-to-year funding arrangements must generate concern for NI political leaders about their capacity to do any longer term planning and funding for the sector.

An indicator of the range of uncertainties is captured in a briefing paper on the UK Agriculture Bill 2019-20 produced by the Research and Information Service of the NI Assembly.[10] It notes that the provisions of the Bill are likely to take effect from 2021 onwards and that the government has committed to guaranteeing the current annual budget to farmers in every year of the Parliament. But it then notes the Conservative Party 2019 manifesto pledge to repeal the Fixed Term Parliament Act. This suggests that the life of the current Parliament could be less than five years which could have ramifications for farm payments beyond 2020.

The paper further notes that NI will receive £279 million for the 2020-21 period but that it remains unclear how much NI will be allocated in direct payments for farmers beyond this date. It may be that the 'New Decade New Approach' which commits to 'a multi-year Programme for Government, underpinned by a multi-year budget and legislative programme' may provide a basis to resolve this apparent dilemma.

A medium term challenge is foreseeable as the implementation of the F2F and Biodiversity Strategies commences within EU member states. From 2022 onwards, ROI CAP Strategic Plans will include programmes and associated funding to implement these schemes. This raises the question as to what capacity and funding will there be in NI to follow a similar trajectory of improving environmental standards as is likely to apply in ROI. Here also, there may be a precedent which could assist: in the past the UK government and the EU provided special funding to NI, because of its unique situation, through the Peace Programme and INTERREG. Similar creative thinking may be necessary in the future.

Future of agri-food policy in ROI

The major short-term issue facing the Irish government will be the outcome of the UK-EU negotiations on the future trading relationships between the two blocs. The Irish position on this has been consistent: it would like to see a Comprehensive Free Trade Agreement delivering trading conditions as close as possible to those that have applied when the UK was an EU member. It will seek to avoid a hard Brexit, which would have major short and long term costs to the agri-food sector.

Looking beyond this critical issue, preparing Ireland's Strategic Plan under the new CAP will be a high priority. This should incorporate ideas on how Ireland will interpret and implement the F2F and Biodiversity Strategy, which will be the subject of discussion at EU level with other Member States later in the year. It may be assumed that the Strategic Plan will also reflect the recommendations of the 2030 Agri-Food Strategy report.

Just as the lessons from the COVID-19 pandemic may influence the direction of future UK agriculture and food policy (as discussed earlier), they will also probably influence the policy principles underpinning the 2030 agri-food strategy and indeed the strategies of other countries. Building resilience into food systems will play a more central role than heretofore,

linked to a more diversified sector, a greater emphasis on the circular economy and a reduction in food waste. Sustainability will be a central focus, involving a better use of natural capital. Preventing and managing systemic risks will become a crucial strategic priority, involving an ever greater emphasis on food safety and the prevention of zoonotic diseases that spread between animals and people.

Agriculture and Environment, North and South, in the post-Brexit world

We are finally ready to discuss the theme of this paper. We have seen that agriculture and the environment are at the heart of policy at EU and ROI level, and will also play a central role in the UK agriculture and food policy which will emerge in the coming years. The outcome of the Brexit talks will have a crucial bearing on the short and longer term relationships between the agri-food sectors in ROI and the UK. But whatever the outcome of the Brexit process and the consequences flowing from it, there appear to be good reasons why the agri-food sectors, North and South, should identify opportunities to collaborate in the fields of agriculture and food, nutrition and human health, and the environment.

An agreement to collaborate on these themes on an all-island basis should fit within a wider political vision.

This is a good moment to renew a political commitment to the spirit and structures of the Good Friday Agreement and the New Decade, New Approach Agreement. Such a renewal would, coincidentally, be a fitting tribute to the memory of John Hume who provided much of the vision for the Good Friday Agreement, including the critical three strands of relationships – within NI, between Northern Ireland and the Republic, and between the Irish and British governments – to both underpin it and implement it.

Although the COVID-19 pandemic continues to cause great damage and no one knows when it will be over, there will come a time when a recovery programme will start. At that moment some lessons will be learned and built into how to plan for the future. One of these lessons should be on the importance of linking food, diet and health policies to plan for a healthier population. Another should be on doing this in an environmentally sustainable way. The basic approach towards the future should be 'Build Back Better'.

A set of groundrules on how to proceed would be a good starting point. The following are suggested for discussion:

- Agree to work within the spirit and three stranded structures of the Good Friday Agreement (GFA) and the 'Shared Island' concept articulated in the Programme for Government in the recently formed Government in Dublin.
- Identify areas where there is a clear mutual benefit in working together and which present no threat to anyone's essential interests or identity.
- Think long term and connect with leading European and international thinking, particularly in the context of a post-COVID-19 recovery programme.
- Give preference to projects which involve young people and citizens in their design and implementation

On the basis of these guidelines, a first set of suggestions are offered below to kick off a conversation about future possibilities.

Soil Health Ireland

Great soil is the basis of great food. There is a vital necessity to improve the soils on the island of Ireland. The 2020 Teagasc Soil Fertility Report estimated that 21% of ROI soils are at optimum fertility.[11] The equivalent figure for NI, at 18 %, is slightly lower. There is scope for a commitment to work towards long term and sustained progress, North and South, on improving soil fertility. In NI, an independent working group of DAERA has produced an impressive report 'Delivering Our Future, Valuing Our Soils: A Sustainable Agricultural Land Management for Northern Ireland' which could be a good starting point.[12]

Agriculture and a Better Climate

In both ROI and NI, the agri-food sectors are already under considerable scrutiny on the issue of their contribution to national emissions targets, climate goals and a suite of wider environmental targets, such as water quality and biodiversity. They will both be under pressure to show how they are maximising their contribution to emissions reduction and increased carbon sequestration. There appears to be obvious scope for increased cooperation and joint research programmes, North and South.

A Covenant for the Health and Wellness of the peoples of Ireland and the UK

There is growing international awareness of the link between overweight/ obesity and health. Under current trends, developed and developing countries are heading towards a crisis in public health contributing, in turn, to a public finance crisis. ROI, NI and the UK each have Obesity Strategies. What lessons can be learned from the implementation of these strategies and then expanded into a set of principles aimed at promoting the health and wellness of all the peoples of Ireland and the UK? Uncomfortable issues and compromises may have to be faced: what should be the future of the Ulster Fry which supplies almost three quarters of a woman's daily recommended calories and over half of that suggested for men? But accommodation has been reached on more difficult issues in recent decades so maybe an agreed future can be found for the Ulster Fry.

Sustainable Food Island of Ireland

Bord Bia's Origin Green brand is a global leader in sustainability but it now needs to be taken to a different level. NI has also made progress in marketing its food. Over the coming decade, what scope is there for aspiring to a brand for Irish food, North and South, that meets the highest standards of sustainability, safety, quality and taste – and therefore can return the best possible price to the producer – while becoming a global leader in farming, nutritious food production, environmental and human health improvement?

Adopting any one, or all, of the above initiatives would require vision, political will, planning, perseverance, human and financial resources. But the opportunity is there. Can we start talking about it?

Notes

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[2] European Commission, "Reinforcing Europe's resilience: halting biodiversity loss and building a healthy and sustainable food system" (20 May 2020).
[3] Northern Ireland Office, "New Decade, New Approach" (2020), p.8.
[4] Department of Agriculture, Food and the Marine, *Food Wise 2025* (2015).
[5] See https://www.agriculture.gov.ie/agri-foodindustry/agri-foodandtheeconomy/agri-foodstrategyto2030/publicconsultation/ [last accessed 25/08/2020].
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[10] Northern Ireland Assembly Research and Information Service, "UK Agriculture Bill 2019-20" (19 February 2020).
[11] Mark Plunkett et al, "Teagasc Soil Fertility Report 2020" (April 2020).
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Agriculture and Environment
What paths will policy take?

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Introduction

Membership of the European Union has had a major impact on the island of Ireland in terms of agricultural development and also in terms of the environmental legislation, commitments and obligations.

In terms of agriculture, while the farming communities in both jurisdictions have benefitted from access to markets and capital, membership of the European Union has had perhaps the greater impact for the farming community in the Republic of Ireland. Although farms in Northern Ireland are and were smaller than those south of the border,[1] the agricultural sector in Northern Ireland was more developed than that south of the border prior to the 1970s. The farming community in Northern Ireland were beneficiaries of the cheap food policy pursued by the British Government after World War II,[2] the sector was more diversified, they had access to the British market and received a better price for their product than their neighbours south of the border.

Prior to 1973 the agriculture sector in the Republic of Ireland was not as developed or diversified, with little access to capital or markets beyond Britain. Upon joining the European Economic Community in 1973 the farming community in the Republic of Ireland suddenly had access to capital for investment in infrastructure and in skills development, and importantly access to markets with large populations of consumers. The farming community also benefitted from the fact that rural development, and in particular developing agriculture and associated industry, to create employment in rural settings and generate rural economic growth has always been a key policy priority of the European Union.

In terms of the environment, membership of the European Union has had a major impact on environmental policy in both jurisdictions on this island. From the Single European Act in 1987

and throughout all subsequent treaties, protection of the environment is identified as an objective of the European Union. Policy from the European Union has strongly influenced environmental legislation, policies in relation to sustainable development, biodiversity, waste management, natural resources, marine life, bird life, renewable energy and the setting of emission reductions targets, on both parts of the island.[3] In the coming years the Republic of Ireland will continue to set national environmental targets as determined by European Union ambitions and targets, and will have access to resources and supports from the Green New Deal. It remains to be seen what impact Brexit will have on environmental policy in Northern Ireland, however one thing is clear, the incentives and resources once available to policymakers in both jurisdictions will now only be available to policy makers in the Republic of Ireland.

Agriculture – an all island perspective

Agriculture remains hugely important to economic development on the island of Ireland. According to the latest data the agri-food sector contributed 7.5% of GNI in the Republic of Ireland in 2018, and it employs approximately 173,000 people, representing 7.7% of total employment.[4] In Northern Ireland the agri-food sector is also a major economic contributor, and as with the Republic, agriculture has been identified as a key driver of future economic development. The latest figures show that the sector accounts for around 71,000 local jobs and contributes £1.45bn to the economy of Northern Ireland.[5] Dairy and cattle account for the highest agricultural outputs respectively in both jurisdictions. Farm incomes are also highly volatile in both jurisdictions, with dairy farms in particular vulnerable to fluctuations in market prices. The abolition of milk quotas in the European Union in 2015 has resulted in increased supply of milk and volatility in market prices. Many Irish farmers on both sides of the border borrowed to invest to scale up production with the expectation of demand from Russia, China and other world markets. Whilst dairy farming is the most profitable form of farming across the island of Ireland, it is also the most volatile due to price fluctuations and a high dependency on them is not a sustainable way to maintain farm incomes.

In 2018 average family farm income in the Republic of Ireland was €23,333, a decrease of 21 per cent on the previous year.[6] As ever, there was a wide variation in farm incomes, with 29 per cent of farms earning an income of less than €5,000 in 2018, 15 per cent earning between €5,000 and €10,000 per annum and 31 per cent earning between €10,000 and €30,000 per annum. About half of farm families in the Republic of Ireland require off-farm income to remain sustainable. Average farm income is highest on dairy farms and in the South East region. The Northern and Western region is the most disadvantaged region with the lowest farm income and the highest reliance on subsidies. Some key farm statistics from the Teagasc Farm Survey include:

- Average family farm income was €23,483 in 2018.
- 44 per cent of farms earned a farm income of less than €10,000 in 2018.
- Direct payments accounted for 79 per cent of all payments received to dairy farms, 84 per cent to tillage farms and 57 per cent to cattle-rearing farms.
- Just 32 per cent of farms are considered economically viable with 34 per cent considered vulnerable.
- 52 per cent of farm households have off-farm employment and 40 per cent of cattle farmers work off-farm.

These statistics highlight the challenges the farming community faces in terms of generating sufficient income. Only a minority of farmers are, at present, generating an adequate income from farm activity and even on these farms, income lags behind the national average. Farm incomes are also inconsistent, as the prices of commodities fluctuate and gains are predicated on expanding dairy production which runs contrary to climate commitments.

It is clear that farming itself is not enough to provide an adequate income for many families as evidenced by the over reliance on direct payments and the number of farmers engaged in off-farm employment. Advances in technology and mechanisation have meant that many farmers can seek alternative ways to generate income. From the mid-1990s, off-farm employment by farmers increased significantly. However, during the recession, many of these jobs were lost. A strong potential has been identified for alternative farm enterprises such as niche tourism and food production. However, these need significant support, and are likely to attract younger and better educated farmers.

A 2019 paper from the Central Bank on the uncertain outlook for Irish agriculture found that low profitability and a high reliance of farm incomes on direct payments represent an important weakness in the sector and that any future negative shock – even one less material than Brexit – would further expose the underlying weaknesses in the sector.[7] This serves to highlight the hugely negative potential of Brexit to farming communities on the island of Ireland. Access to the €5bn Brexit fund announced as part of the €750billion EU Recovery Plan will provide some financial support to the sector in the Republic of Ireland.[8] It remains to be seen what additional support will be available to the sector in Northern Ireland.

Farm incomes in Northern Ireland fell by 26 per cent between 2018 and 2019, and are expected to fall by a further 14 per cent in 2020 highlighting the vulnerability of farm businesses.[9] Farm incomes in Northern Ireland have fluctuated considerably over the past eight years, representing challenges for the long-term sustainability of farming, and the economic viability of many farm businesses. In fact, dairy farmers and cattle and sheep farmers in Northern Ireland had the lowest average farming incomes across the entire UK.[10] Farmers in Northern Ireland, like their counterparts in the Republic are also reliant on payments from the European Union's Common Agricultural Policy (CAP) Basic Payment System to support farm incomes. In 2019, financial support from CAP was worth £281million to 23,609 farmers, representing around 60 per cent of farm incomes, however as always there is significant variations between farm types. The long-term sustainability of farming and the economic viability of farms is a significant challenge to the farming communities in both Northern Ireland and the Republic of Ireland. The age profile in farming is a challenge for the community North and South of the border. In Northern Ireland the median age of farmers is 58 years with just 6 per cent of farmers aged under 35,[11] a similar trend is observed South of the border with a quarter of all farmers aged over 65 and just 5 per cent aged under 35.[12] It is clear that farming itself has struggled to provide an adequate income for many families over a number of years as evidenced by the over reliance on direct payments and the age profile in both farming communities. The impact of the Covid-19 crisis on regional and rural employment will have a further negative impact on the incomes for farming households all across the island. The impact of Brexit could make this situation considerably more challenging.

Threats to farm incomes across the island

There are threats to the incomes of farming communities on both sides of the border on the island of Ireland. Beef farmers in particular in the Republic of Ireland are very concerned about

the impact of the EU-Mercusor trade agreement on their livelihoods. If ratified by the European Parliament the EU-Mercosur trade deal will eliminate tariffs on roughly 90 per cent of Mercosur's exports to the EU over 10 years – chiefly agricultural products such as beef, poultry, and fruit and in turn, EU companies would pay less tax to export products – mostly machinery, car parts, and dairy products like cheese – to Mercosur.[13] This trade agreement would not only appear to undermine the income security for European farming communities, it also undermines the commitments and ambitions of the 'European Green Deal and the focus on climate action and sustainability of CAP 2021-2027'.

This deal would lock the European Union into an unsustainable economic model, entirely at odds with the stated aims of the Green Deal for Europe. It is difficult to reconcile importing significant amounts of agricultural products such as beef, poultry and fruit (which the EU itself already produces) and the increased emissions that this will inevitably lead to supporting one of the stated aims of the Green New Deal – Greening of the Common Agricultural Policy (CAP) with a Farm-to-Fork strategy. What incentive is there for famers in the Republic of Ireland and their counterparts across the European Union to invest in sustainable forms of agriculture and the Farm-to-Fork Strategy if they have to compete with agricultural imports from the other side of the world? At a national and EU level policy should support and incentivise sustainable agricultural practice and the incomes for farm families, not undermine them.

Future trade deals between the United Kingdom (UK) and other countries also pose a significant threat to the incomes of the farming community in Northern Ireland. After the transition period, UK agriculture will be operating outside of the EU's Common Agricultural Policy (CAP). However, due to the Ireland/Northern Ireland Protocol farmers and the agri-food industry in Northern Ireland will comply with a range of EU regulations and there is concern that in the long run Britain may move away from these regulations and open up the market to other jurisdictions, creating divergence between both jurisdictions.[14] This will pose a particular challenge to farmers in Northern Ireland, as one of the advantages they currently have is the strength of regulations that they adhere to, and the traceability of their produce. If, over time, the market in Britain (which is the biggest market for the entire agri-food industry in Northern Ireland) is opened up to food imports of a lower standard (and lower price for the consumer) than the current EU based standards via future trade deals then this will have a major impact on the livelihoods of farmers and food producers in Northern Ireland. This remains a possibility, with a recent amendment to the Agriculture Bill to ban the importation of hormone-fed beef and chlorine dipped chicken defeated in the House of Commons.[15]

Of further concern to farming communities in Northern Ireland is what will replace the CAP Basic Payment Scheme in 2021. At present the UK Government has stated that the current annual budget for farmers in the UK will be guaranteed for every year of the Parliament (until 2024). However, what happens beyond that is not guaranteed.[16] The faults with the current CAP system are well documented and there is, in the period 2021-2024, the potential to design a new system in Northern Ireland. A new system that incentivises sustainable farming practices, protects the environment and rewards local farmers and communities would also alleviate some of the challenges the farming community in Northern Ireland will face as their counterparts south of the border will be rewarded for moving to a more sustainable system. However, a commitment to designing such a system is by no means assured. The problems with the current CAP basic payment system notwithstanding, it remains to be seen if the UK Government will commit to making up a shortfall of £281million annually beyond the term of the current parliament. Many in the farming and rural communities must surely be very

concerned as to what will happen in 2024 in terms of future trade deals, tariffs and farm income support.

Sustainable agriculture – guiding future policy?

The European Commission's proposals for the Common Agricultural Policy (CAP) for 2021 to 2027 stipulate that at least 40 per cent of the CAP's overall budget and at least 30 per cent of the Maritime Fisheries Fund would contribute to climate action. This will have implications for Irish agriculture and fisheries as the new system will incentivise more sustainable practices. However, the new CAP will also have a reduced budget meaning there are less funds to be allocated.

CAP payments from 2021-2027 will focus on incentives for farmers to move to more sustainable methods of production. The Basic Payment System is to be replaced by a Basic Income Support for Sustainability payment, indicating the direction in which the European Commission is moving in terms of agriculture policy. Four in every ten Euros spent under the new CAP will involve climate measures, to reduce the impact of agriculture on the environment. An example of this is the priority given to investment in solar panels and other forms of renewable energy on farm houses and barns in CAP 2021-2027. It raises the potential of farmers on one side of the border being incentivised to invest in solar panels for example while farmers on the other side are not.

The refocusing of the CAP budget to climate action presents an opportunity for farmers in the Republic of Ireland to invest in sustainable forms of agriculture and the Farm-to-Fork Strategy has the potential to deliver on short supply chains for farmers, and address some of the issues of product pricing for Irish farmers. One of the key priorities of the Farm-to-Fork Strategy is ensuring a sustainable livelihood for primary producers and making the most sustainable food the most affordable. The goal of this strategy is that European food becomes the global standard for sustainability. It will incentivise more sustainable agricultural practice including reducing excess fertilisation, increasing organic farming, improving animal welfare, and reversing biodiversity loss. Fertilisation, organic farming, animal welfare and biodiversity are all issues raised by Northern Ireland Assembly Research Service as areas of concern or those that require further clarification in relation to the position of the sector in Northern Ireland after Brexit.[17]

Farmers on both sides of the border are facing changes in terms of the payments they receive via CAP, or from the UK Government. Farmers in the Republic of Ireland will now be accessing a CAP scheme where four out of every ten euros will be spent on climate measures, and the Basic Payment Scheme is being replaced by a Basic Income Support for Sustainability, implying that climate measures will be at the core of this payment. On the other side of the border the status quo will continue until 2021. After this, the UK Government has committed to fund farmers to the same level as was previously done under CAP until 2024. Things are uncertain from this point on.

The farming community in Northern Ireland faces considerable uncertainty. It is unclear if they will be incentivised to pursue sustainable agricultural practices and measures that will protect and enhance the environment in a similar manner to their counterparts in the Republic. It is also unclear if they will be able to compete with produce which is seen as the global standard for sustainability.

Environment

In terms of the environment the Republic of Ireland has been a poor performer, persistently missing Europe 2020 emissions reduction targets and the country faces a significant challenge to get on the right trajectory to meet the 2030 emissions reductions targets (the temporary drop in global emissions as a result of the Covid-19 crisis notwithstanding).[18] It is also one of the highest greenhouse gas emitters in the EU,[19] with the highest levels of emissions from agriculture.[20]

The Republic of Ireland's emissions profile is dominated by agriculture and transport with emissions from both sectors increasing in line with economic growth and employment trends in these sectors. The policy of agricultural expansion (particularly the increase in the dairy herd) pursued since 2012 has led to a commensurate increase in emissions from agriculture annually in the same period.[21] Although among the poorest performers in the EU in terms of emissions reductions and environmental targets, 'Our Shared Future', the programme for government for the Republic of Ireland published in June 2020 contains significant environmental commitments, which if fully implemented could be transformative for the sustainability agenda.[22] The headline commitments of an average of per annum reduction in overall greenhouse gas emissions from 2021 to 2030, and the publication of five-year carbon budgets which will set maximum emissions by sector, have the potential to make a real impact on emissions reductions. These commitments are no doubt strongly influenced by the Green Deal for Europe and the fact that the European Commission has made sustainability a key policy priority.

Emissions in Northern Ireland, like those in the Republic of Ireland, are dominated by the agriculture and transport sectors (27 per cent and 23 per cent respectively in 2018).[23] There has been little progress in terms of reducing emissions, and a similar trend is observed of emissions tracking economic trends, with emissions in agriculture and transport being higher in 2018 than in previous years, and in fact analysis shows that no progress has been made towards the baseline set out in the programme for government of the assembly in 2014.[24] Northern Ireland faces similar challenges to the Republic of Ireland in terms of an economy dominated by emissions from agriculture and transport. However, the key difference is that policymakers and legislators in the Republic of Ireland will have access to European funds to incentivise emission reductions and to support and buffer those sectors which will be most affected.

Future direction of environmental policy in the Republic of Ireland

The 'European Green Deal' is a roadmap to transform the European economic model by moving to a circular economy, reversing and averting biodiversity loss, and addressing climate change.[25] It contains a political commitment to become the first climate neutral continent by 2050 with the ambitious aim to ensure that the economy serves people and society and gives back to nature more than it takes away. The deal will influence and guide environmental policy in the EU, and in the Republic of Ireland. Proposals in the European Green Deal that should be of particular interest to policymakers across the island of Ireland include:

- A European 'Climate Law' to enshrine the 2050 climate neutrality objective;
- An increase in the EU's greenhouse gas emission reductions target for 2030 to at least 50 per cent, and towards 55 per cent, compared with 1990 levels;

- The introduction of a carbon border mechanism if required to ensure the price of imports accurately reflects their carbon content;
- The Greening of the Common Agricultural Policy (CAP) with a Farm-to-Fork strategy;
- The adoption by the European Commission in 2021 of a zero pollution action plan for air, water and soil.

In the context of Brexit, a carbon border mechanism has the potential to significantly impact the costs of goods for consumers on the island, and the costs of exports to the UK. A zero pollution action plan for air, water and soil will require common frameworks for an all island management of such issues, similar to the cross-border international River Basin Districts that already exist to coordinate implementation of the EU's Water Framework Directive.[26] Similarly, the commitments and targets in the EU Biodiversity strategy regarding protecting at least 30 per cent of the land, sea area and nature restoration targets, which will guide environmental policy and legislation in the Republic of Ireland will require a common framework to be implemented fully on the island.[27] There is the potential to develop 'ecological corridors' on an all-island basis for example which would provide for the protection of biodiversity, nature and wildlife in both jurisdictions. The biodiversity strategy also contains the target that at least 25% of the EU's agricultural land must be organically farmed by 2030 which has clear implications for the farming communities on both sides of the border, given concerns raised regarding organic standards and the impact on produce from Northern Ireland.[28] Significant resources from the European Union (25% of the total EU budget) have been committed to supporting biodiversity, sustainability and climate action, and the Commission has stated that it will further promote tax systems and pricing that reflect environmental costs, including biodiversity loss. This will certainly impact not only on the direction of environmental policy on an all-island basis, it will also have an impact on the price of goods on either side of the border, those with a lower environmental footprint having a more favourable price.

Future direction of environmental policy in Northern Ireland

Northern Ireland has long faced challenges in terms of environmental governance, compliance and a perceived lack of accountability.[29] Furthermore, managing different rules in two different jurisdictions on the same island also presents a unique set of challenges, particularly in the area of waste management and waste crime.[30]

Although environment is a devolved competence of the Northern Ireland Assembly, concern has been expressed in a recent report as to whether the Ireland/Northern Ireland Protocol was considered when the Environment Bill 2019-2020 was drafted.[31] Environment is one of the areas identified in the protocol for continued North-South cooperation, yet the complexities that this presents are not reflected in the aforementioned Bill. In the Environment Bill 2019-2020 the setting of environmental targets does not extend to Northern Ireland, and will instead be set by the UK government by 2022. Neither will environmental monitoring or environmental improvement plans extend to Northern Ireland. This raises complications as the Republic of Ireland will be setting five-year carbon budgets and targets for national and international environmental obligations, but Northern Ireland will not have the capacity to do the same. A number of specific concerns are identified with regard to the position of Northern Ireland and the Environment Bill 2019-2020 in a report by the Northern Ireland Assembly Research and Information Service including:[32]

- Will the proposed Office for Environmental Protection (OEP) be sufficiently resourced to perform its functions effectively?
- Could Northern Ireland potentially face enforcement from a number of bodies e.g.: the OEP in relation to complying with relevant environmental law and the CJEU in relation to complying with legislation listed in the EU Ireland/Northern Ireland Protocol?
- Would Northern Ireland specific climate change legislation and a Northern Ireland Independent Environmental Protection Agency allow enforcement under the one body?
- In terms of waste and cross-border fly-tipping – how will associated costs be dealt with and by what authority? Will there be consistency with any associated costs across the border so as to ensure one side of the border doesn't become more attractive for unlawful disposal?
- Could the existence of a land border with a country that currently does not operate a Deposit and Retention Scheme increase the potential for leakage of materials and subsequent fraudulent activity?
- In terms of waste crime what happens with the recovery of costs at cross-border locations, or cross border waste deposit?

There is as yet no clear answer or response to these concerns, and significant work lies ahead for the Northern Ireland Assembly in terms of addressing and responding to them.

As outlined in the introduction, the European Union and the European treaties have had a significant influence on environmental policy and legislation across the island of Ireland. The influence that this will have on policy in Northern Ireland when the UK formally exits the European Union is at present unclear. One clear question is whether or not policy in Northern Ireland will be as ambitious on environment and climate as that in the Republic of Ireland, and if it will be appropriately resourced? There is a strong possibility that in twelve months there will be two very different environmental policy landscapes on this island.

Conclusion

Agriculture and the environment are two of the areas identified in the Ireland/Northern Ireland Protocol as areas for continued North-South cooperation. Indeed, these areas are two of the policy areas where there is a history of significant cooperation between administrations. This implies potential for future cooperation and the development of common all-island frameworks in these areas.

The clear direction of policy at a European level is a move towards sustainability, with the protection of the environment and nature as a priority, and this is reflected in the policies of the new Commission including the Green Deal for Europe, the Farm to Fork Strategy and the EU Biodiversity Strategy among others. To this end, resources from the European budget are being directed to these priorities to incentivise areas such as sustainable farming and the circular economy. This in turn will guide investment in rural and regional investment, structural funds and the future economies of rural areas across this island.

The direction of policy from the UK, and in turn, Northern Ireland is less clear. Northern Ireland is in a unique position, and the Northern Ireland Assembly has the opportunity to implement positive policy change both for agriculture and the environment. However, this is highly

dependent on financial and policy support from the UK government, and at present there is significant uncertainty surrounding the future direction of such support.

The current Covid-19 crisis has led to much discussion around the need for an all-island policy to deal with the fallout from the pandemic, particularly in relation to travel.[33] In the future there will be a need for an all-island approach and framework to common areas such as agriculture and environmental legislation in particular. How this discussion evolves will be integral to a Just Transition on the island of Ireland and to what path policymakers will take. One of the fundamental principles of a Just Transition is to leave no people, communities, economic sectors or regions behind as we transition to a low carbon future. As outlined in this paper, there is the possibility of significant divergence ahead, with rural and farming communities across the island being guided by different sets of policies and incentives in terms of agriculture and the environment. There is clear common ground across the island for convergence on sustainability, the future of agriculture and the environment. Our rural and farming communities contribute hugely to the social and economic fabric across the island, it would be a shame to see them move in two very different directions, towards two very different outcomes.

Notes

1 See Mark Allen, "UK Agriculture Bill 2019-20" (19 February 2020).
2 See J.K. Bowers, "British Agricultural Policy since the Second World War" (1985).
3 For more detail on the Republic of Ireland see Noel Cahill, "The Impact of European Environmental Policy in Ireland" (2011), and on Northern Ireland see Charlotte Burns et al, "UK Environmental Policy Post-Brexit: A Risk Analysis" (2018).
4 Department of Agriculture, Food and the Marine, "Annual Review and Outlook for Agriculture, Food and the Marine 2019" (2019).
5 Mark Allen, "UK Agriculture Bill 2019-20", p.2.
6 Emma Dillon et al, *Teagasc National Farm Survey: 2018 Results* (2019), p.8.
7 Thomas Conefrey, "New Risks and Old Problems: The Uncertain Outlook for Irish Agriculture" (2019).
8 RTE, "7 things to know about the EU virus recovery plan" (21 July 2020).
9 Department of Agriculture, Environment and Rural Affairs, "Northern Ireland agricultural incomes in 2019" (30 January 2020).
10 Mark Allen, "UK Agriculture Bill 2019-20", p.5.
11 Department of Agriculture, Environment and Rural Affairs, "EU Farm Structure Survey 2016: Northern Ireland" (2017), p.5.
12 Central Statistics Office, *Ireland's Facts & Figures 2018* (2018), p.24.
13 European Commission, "EU-Mercosur Trade Agreement" (2020).
14 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12020W/TXT#d1e32-102-1
15 See BBC Wales News, "Chlorinated chicken concern grows among Wales' farmers" (8 June 2020), and Judith Evans, "UK leaves door open to imports of US chlorine-washed chicken" (4 June 2020).
16 See Northern Ireland Assembly Committee for Agriculture, Environment and Rural Affairs, "Report on Legislative Consent Memorandum on the UK Government Agriculture Bill 2019-2020" (19 March 2020).
17 Mark Allen, "UK Agriculture Bill 2019-20", pp.13-20.
18 See IEA, *Global Energy Review 2020*: *The impacts of the Covid-19 crisis on global energy demand and C02 emissions* (2020).

[19] Eurostat, https://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&plugin=1&language=en&pcode=sdg_13_10

[20] Eurostat, https://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&plugin=1&language=en&pcode=tai08

[21] Environmental Protection Agency, "Ireland's Provisional Greenhouse Gas Emissions 1990-2018" (October 2019).

[22] https://static.rasset.ie/documents/news/2020/06/draft-programme-for-govt.pdf

[23] Department of Agriculture, Environment and Rural Affairs, "Northern Ireland Greenhouse Gas Emissions 2018" (2020).

[24] ibid.

[25] European Commission, COM(2019) 640, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Green Deal (11 December 2019).

[26] Northern Ireland and the Republic of Ireland have jointly established three cross-border international River Basin Districts, each of which has its own Management Plan that must be implemented by relevant agencies in the respective jurisdictions. For more see Department of the Environment and Department of the Environment, Heritage and Local Government, "Managing Our Shared Waters" (March 2003).

[27] European Commission, COM(2020) 380, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: EU Biodiversity Strategy for 2030 – Bringing nature back into our lives (20 May 2020).

[28] Northern Ireland Assembly Committee for Agriculture, Environment and Rural Affairs, "Report on Legislative Consent Memorandum on the UK Government Agriculture Bill 2019-2020".

[29] Ciara Brennan et al, *Policy Paper: The Future of Environmental Governance in Northern Ireland* (July, 2018).

[30] Differing rules and costs for waste management between Northern Ireland and the Republic of Ireland have already fuelled waste smuggling in the past: a price-hike for the cost of landfill in the Republic of Ireland in the early 2000s led to an estimated 250,000 tonnes of waste being illegally dumped in Northern Ireland. See Viviane Gravey, "Brexit and the environment: Challenges and opportunities for the UK and Northern Ireland" (October 2017).

[31] See Suzie Cave, "Environment Bill 2019 -2020" (27 February 2020).

[32] ibid.

[33] Vincent Kearney, "Stormont leaders seek special Covid-19 travel summit" (23 July 2020).

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The Case for Enhanced Cross Border Co-Operation

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Introduction

The UK's decision to depart the European Union has highlighted the difficulties that the existence of the border continues to present, not just to the economies that exist along the border itself, but also the wider economy on the island. In the past several years, the importance of cross border trade, seamless borders and the all-island economy were rightly in the spotlight, as both the UK and EU negotiated how the UK could leave the Union, without adverse impacts for the peace process and for the communities that benefit from the Good Friday Agreement (GFA). The ratification of the Ireland/Northern Ireland Protocol as part of the Withdrawal Agreement has ensured that the immediate risk of a "hard border" returning to the island of Ireland has been eradicated. However, questions remain as to how the Protocol will be implemented, and how the degree of co-operation that has evolved since 1998 will continue to function.

The conditions of the Good Friday Agreement that drove not only North-South co-operation, but also enhanced co-operation between Ireland and the UK, were made ideal because both jurisdictions shared EU membership. While the Protocol on Ireland and Northern Ireland contained in the Withdrawal Agreement is intended to protect the GFA and the gains of the peace process in all its parts, it may not be possible to fully mitigate many of the risks associated with Brexit. Therefore, it cannot be understated that the UK's exit represents an obvious challenge to the framework for North-South co-operation created by and resulting from the GFA.

The Case for Enhanced Co-Operation

The important focus on the border, cross-border communities and the all-island economy since 2016 has also shone a light on other issues which require greater co-operation. Border impacts are not just limited to trade. They encompass social policy, regulation (particularly environmental regulation), infrastructure and competitiveness.

The two jurisdictions on the island of Ireland have traditionally had a lower than typical border effect, which is likely attributed to the shared history of Northern Ireland and the Republic of Ireland.[1] These historical, cultural, and linguistic commonalities reduce the effect of many of the typical impediments to cross-border trade, leading to greater prosperity for those – on both sides of the border – whose livelihoods depend on trade. This cohesion creates positive spill over effects into both domestic economies. The relative closeness of the economies was reiterated with firm level data and has been demonstrated to have an increasingly strong and positive effect in recent years.[2]

However, this relative 'closeness', which can be an asset to both economies on the island of Ireland (where increased prosperity in one jurisdiction promotes greater cross-border trade effects), can also be a liability, as inefficiencies on either side of the border move both jurisdictions onto sub-optimal growth trajectories with a greater effect than is typical of bordering countries.

What this demonstrates is that that externalities, both positive and negative, in either jurisdiction is transmitted to the partner jurisdiction more freely than is typical. This suggests a heightened need for co-ordination of activities so that the maximum benefit for the most number can be attained, while minimising the overall social and economic costs.

Chambers Ireland, and our members, are conscious that a lot more can be done to ensure that local economies across the island can prosper. As rightly pointed out in a briefing paper published by the Centre for Cross Border Studies, while the issue of the UK's departure from the EU may have provided an immediate focus on the question of cross-border impact assessment – or "border-proofing" – the underlying need for it predates Brexit and will continue to exist post-Brexit.[3]

Ahead of the recent Irish General election, Chambers Ireland called on the new Government to establish a "Super Junior" Ministry with responsibility for North-South Cooperation, which would focus on the infrastructural, economic, and regulatory impacts of government policy on border counties and Northern Ireland. It was, and is our view, that the creation of this post could support greater use of territorial impact assessments by state agencies, Regional Assemblies and Government departments on policies and proposed legislation, which can feed into the pre-legislative scrutiny process.[4]

While the new Government, formed in June of this year, did not create such a position in Cabinet, it has resolved in its Programme for Government to create a "Shared Island Unit" in the Department of An Taoiseach. This Unit will seek to a work towards a consensus on a shared island; it will **examine the political, social, economic, and cultural considerations** underpinning a future in which all traditions are mutually respected.

As part of its work in the context of economic development, cohesion and trade, it will seek to do the following:

- continue to utilise the **All Island Civic Dialogue** as a forum for addressing Brexit-related issues and other challenges arising for the island.
- Enhance, develop, and **deepen all aspects of north-south cooperation** and the all-island economy.
- Seek to adopt an all-island approach to **national planning frameworks**.
- Explore how bodies established under the Good Friday Agreement can ensure that there is a **joined-up approach to environmental issues** on an all-island basis and seek to develop an all-island strategy to tackle climate breakdown and the biodiversity crisis.
- Work with the Northern Ireland Executive to deliver **key cross-border infrastructure** initiatives, including the A5, the Ulster Canal connection from Clones to Upper Lough Erne, the Narrow Water Bridge, and cross-border greenways, in particular the Sligo-Enniskillen Greenway (subject to feasibility).
- Work with the Executive and the UK Government to achieve **greater connectivity** on the island of Ireland.
- Promote an all-island approach to **land-use planning** and river-basin management plans to stop cross border pollution.
- Work with the Executive and the UK Government to commit to investment and **development opportunities** in the North West and Border communities, including third-level opportunities for young people from across the region at the Ulster University Magee Campus in Derry.
- Support a **north-south programme of research and innovation**, including an all-island research hub, through Universities Ireland.

The ambition in the Programme for Government in this context is laudable, but for this Unit to be effective, it will need to be driven by stakeholder engagement as well as inter-departmental collaboration, with increased North-South co-operation through the North-South Ministerial Council.

The issues for inclusion in this approach to policy making should not be exhaustive. But as a start, it should include the portfolios which impact the economic well-being of communities right across the island, namely trade, competitiveness, and infrastructure. In the following sections, we will outline some if the issues that could benefit from "border-proofing" and a more nuanced approach to investment, planning and policy development.

1. The All Island Economy and Cross Border Trade

The issue which has gained the most attention since the UK voted to leave the EU has been the impact on trade, both between Ireland and the UK, but also between Northern Ireland and the 26 counties south of the border. A border of any kind to be administered between the two jurisdictions on the island raises serious concerns as to how supply chains would be managed, how local economies operating the border region would function, and most importantly, how peace and stability in the region would be sustained. Post-partition, the "All-Island Economy", is a term that only came into its own in the years following the peace process.

To illustrate this fact, in a paper for the European Parliament's Committee on Constitutional Affairs authored by David Phinnemore and Katy Hayward, it was noted that "all-island economic activity up to the early 1990s was characterised by 'fragmentation' […] and […] poor integration".[5] This fragmentation manifested in long delays for trucks at the border for customs processing prior to the creation of the single market, inhibiting and obstructing cross-border trade. "In addition", according to Phinnemore and Hayward, "there was the poor quality of road and railway systems connecting the two parts of the island. Based on import and export statistics provided by the Central Statistics Office, total trade between the Ireland and Northern Ireland in 1993 was IR£1,127 million" (ibid). The same statistics note the dominance of Great Britain (GB) as a market for both Northern Ireland and Ireland. This lack of cohesion in the past meant lost opportunity for growth in each jurisdiction.

However, through the European Commission's influence, funding for regional development often came with clauses to the incentives for the Irish government and Northern Ireland Executive to collaborate, and so a habit of greater cross-border co-operation began to emerge. As the peace process progressed there was growing economic cooperation, integration and interdependence that followed the growth of cooperation in policy and political fields. Cross-border trade on the island of Ireland has grown substantially in the post-Agreement era. In 2015, Ireland accounted for 61% of Northern Ireland's exports to the EU and for 34% of Ireland's total exports. It also accounted for 49% of imports from the EU and 27% of total imports.[6] This leap in trade is crystallised in figures published by InterTradeIreland that show that in 1995, trade between Northern Ireland and Ireland was valued at €1,644.7m; by 2015 this had risen to €2,988.3m.[7]

After many months of negotiations to agree the Withdrawal Agreement, a customs and trade orientated border on the island was avoided, through the agreement of a situation where Northern Ireland would remain in both the EU's Single Market, while simultaneously remaining in the UK's Customs territory. The detail involved in the implementation is still to be determined, but it will be fair to assume that complexities will remain. The growth in all-island trade, particularly North-South trade, evolved not only because of co-operation, but also because of alignment in policy, particularly with respect of customs, regulations, and standards. The new arrangements under the Protocol alters the status quo, and without strategic co-operation, could cause diversion and disintegration.

If cross-border trade and the all-island economy are to continue to grow, it will require co-ordination of efforts to ensure that traders and businesses not only understand what will change, but also what has not changed and what opportunities remain. Organisations like InterTradeIreland will have a critical role to play and the North South Ministerial Council must also ensure that the continued access to the Single Market for traders in Northern Ireland is fully capitalised on. In general terms, SME engagement with the Single Market is an area that requires more attention. If legislators are to have success in offsetting any turbulence in trade

post-transition, they must ensure businesses, particularly SMEs, are empowered to play their strongest hand and make the most of all markets available to them. North-South co-operation in this regard must focus on customs training, communication of market opportunities, and provision of funding to support businesses to diversify. Lack of certainty or clarity in policy encourages businesses to be risk-averse, which may result in a decrease of cross-border trade. Through greater co-operation, trade can not only be protected, but economic opportunities can be properly exploited to the advantage of local economies and communities in all parts of the island.

2. Infrastructure and Competitiveness

Competitiveness and productivity are problems for both Northern Ireland and the Republic of Ireland with both economies exhibiting high costs in the SME/non-traded sectors. Firstly, there are the skills shortages which exist in both jurisdictions and the mobility that highly skilled individuals from both Northern Ireland and the Republic of Ireland have traditionally exhibited. Secondly, businesses on the island of Ireland face obvious competitive disadvantages relative to competitors that are operating in the British, or continental Europe, domestic markets. Thirdly, both jurisdictions have higher input-factor costs relative to their competitors in either economy because of the scale of the domestic markets and the competitiveness challenges therein. With these three processes driving up costs, and reducing productivity, it becomes increasingly important to create efficiencies where possible, which is why infrastructure on the island is of such importance.

Given that investment in infrastructure is one of the few areas where there is freedom of action, it is of central importance to businesses of both jurisdictions that the most effective actions are taken. Inefficient infrastructure across the island is a burden that has been increasing costs for businesses while also depriving them of opportunity. Infrastructure is also an area that the "Shared Island Unit" has rightly identified as an issue which requires significantly more co-operation. This applies to everything from transport to energy. To achieve this, how we plan, fund and implement large scale capital projects needs to be jointly considered. In the implementation of these plans, strategic cross-border dialogue between legislators will need to be enhanced.

The National Planning Framework (NPF) affords Ireland the opportunity to support more effective regional, national and indeed all-island coordination and integration across a wide scope of stakeholders. In submissions made ahead of the NPF's publication, Chambers Ireland recommended that successful implementation of the Framework would require regional and national strategies to be aligned and developed in close co-operation, and should include strategies on economic development, environmental protection and sustainability, decarbonisation, transport and energy infrastructure, broadband, flood defence and cross border cooperation. There must be greater levels of inter and intra-regional communication, co-operation, and coordination for each region to successfully differentiate and develop itself. The interdependence of places to one another must not be forgotten and the effective management of growth in a region will require stakeholders to engage with one another and with their neighbours to effectively plan and coordinate.[8]

While the Shared Island Unit has identified all-island infrastructure as a priority, this alone will not serve to improve how and where we invest. The delivery of capital investment is not as simple as identifying the need for a project, it must look at how these projects are determined and delivered. Firstly, when calculating social cost benefit analyses, it is not typical for states to consider the benefits that are experienced by those who are on the opposite side of the

border.[9] This results in sub-optimal border and cross-border infrastructure. Secondly there is scale. Looking narrowly at regions along each side of the border in their respective jurisdictions, or looking at the jurisdictions individually, it may not be possible to justify investing in pieces of infrastructure.

However, by taking a wider view on the impacts of an individual project or plan it may be possible to justify projects that would not be viable if the prospective benefits within only one jurisdiction were being considered. It is therefore even more important for those jurisdictions which are on islands to strive to do all that can be done to promote competitiveness relative to our trading partners, the alternative is wasteful of our providence; creating want where there should be wealth.

Given the uniqueness of the situation, if the potential of the All-Island economy is to be realised, legislators, planners and local government on both sides of the border must be enabled to collaborate, co-ordinate and communicate so greater cohesion can be achieved.

3. Environmental Regulation

Lastly, an area of cross-border collaboration which will be essential following the end of transition relates to regulation, in particular, environmental regulation. EU membership provided the ideal context for regulatory activity, with shared environmental standards, supranational enforcement mechanisms, a funding agenda designed to encourage co-operation, and a trade agenda which removed the need for a hard border.[10] Transition from EU to UK law has the potential to significantly undermine this North-South regulatory alignment as there is a risk that a divergence – or uneven enforcement resulting in de facto regulatory divergence – will threaten the maintenance of environmental co-operation required by the Good Friday Agreement, and will result in increased disintegration in cross-border communities, where through regulatory and policy divergence, it becomes possible to undermine the spirit of various policy objectives.

Should the UK take a different path to the EU with its future environmental laws, this island would find itself in a scenario where there are two different legal frameworks covering the one relatively small biosphere. This could serve to undermine efforts in Ireland to implement EU principles if a more relaxed framework of environmental protections is created in the North; whereas an all-island environmental regulatory framework, with a transboundary consultation where impacts have the potential for effects of a transboundary nature has the potential to considerably advance efforts to achieve climate action goals in both jurisdictions over the coming decades as well as protecting the competitiveness of indigenous businesses.[11]

Common environmental standards play a crucial role in providing a level playing field and preventing unfair regulatory competition across key sectors in relation to cross-border trade, indirectly securing more robust protection of the environment.

Co-operation on issues relating to climate action extend outside of the EU legislative framework and encompass policies that can be initiated and legislated for in both Dublin and Stormont. For example, cohesion in carbon tax policy is one such area where North-South co-operation can positively benefit the environment and economies in both regions as it encourages alternative energy by making it cost-competitive with cheaper fuels. Lack of cohesion in carbon tax policy, for example, could be a major risk to local economies operating in the border regions as the change in consumer behaviour that is induced could be travelling for lower cost, and potentially less “green” options that compromise the climate ambitions of either region.

However, should the Irish Government proceed with gradual increases to carbon tax, as it is committed to in the recent Programme for Government, a significant price gap for fuels post-Brexit may emerge between the regions should the Northern Executive choose not to simultaneously adopt a corresponding measure.

Preserving cross-border cooperation and preventing unfair competition in relation to environmental protections post-Brexit will depend on maintaining the closest possible regulatory alignment, and regulatory co-operation, between Northern Ireland and the Republic of Ireland. Appropriate mechanisms need to be put in place to guarantee this close regulatory alignment on environmental and regulatory matters (i.e. to resolve any regulatory divergences and maintain common minimum standards at least as high as those currently in place). This should include consideration of the potential need to secure the on-going application of key EU Directives across the island of Ireland.[12] It could also include opportunities for stakeholders from both, or either jurisdiction to be consulted and feed into the process of pre-legislative scrutiny. Common frameworks will need to be developed between the UK, Northern Ireland and Ireland in order to safeguard agreement on co-operation.

Concluding thoughts

Tremendous progress has been made over the past two decades to improve the economic cohesion and collaboration between the two jurisdictions on this island. In order to ensure that progress continues, it is imperative that we take the opportunity now to ensure that the frameworks for dialogue and decision making are robust and flexible enough to meet the challenges of the coming decade. The context of the UK's departure means that there is an urgency in having these frameworks. However, while the occasion of the UK's departure from the EU may have inspired the need for greater scrutiny on how we make policy and drive cross-border cooperation, the need for "border- proofing" as noted by the Centre for Cross Border Studies long predates Brexit, and will continue to exist long after the UK departs.

Our geography and status as a small island on the edge of Europe will continue to require us to consider the "shared" nature of our environment. At the dawn of a new decade, let us not waste the opportunity to ensure that economies and communities that exist throughout it can be improved and made more prosperous through better collaboration and increased cooperation.

Notes

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A Tale of Two Immigration Systems

How Immigration Policy Will Work Post Brexit in Northern Ireland and Ireland

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Introduction

One island, two jurisdictions and what has been up until the end of 2020 free movement for EU residents coming to live and work in both parts of the island. The UK's vote to leave the EU on the 23rd June 2016 spelled the beginning of the end for free movement within the EU for UK residents and a fundamental shift in immigration policy for the UK and by default for Northern Ireland also. In very simple terms, what this means is that from the 1st January 2021 people from the other 26 EU member states (outside Ireland) can freely travel to live and work in the Republic of Ireland while a very defined set of rules will apply for those that wish to live and work in Northern Ireland. That departure of common approach between the two economies has as yet unknown but potentially significant consequences for the way in which international workers, with a particular emphasis on skilled workers, choose to live and work on the island.

This paper sets out to explore how immigration policy in the two jurisdictions will work post 31st December 2020 when the transition period ends and negotiations around future relations between the UK and EU should be concluded. It has a particular focus on what these changes, particularly the new UK immigration policy, means for 'skilled' workers and the ability of the two jurisdictions to attract internationally skilled labour.

Why does immigration policy matter?

Immigration policy is obviously a contentious issue and one that divides opinion both economically and politically. It was one of the most important and antagonistic aspects of the UK's decision to leave the EU. Indeed, research suggests that increases in local level immigration impacts across the UK and sentiment generally towards immigration were key predictors over the UK's vote to leave the EU.[1] Concerns around immigration typically centre around the impact of free movement on increased competition for jobs, lower wages, an increased burden on the welfare state and greater pressure on health, education and other state services.

The other side of the argument is that a 'good' immigration policy is viewed by many as a very effective tool to manage the flow of labour and skills in an economy. It can help plug both short and long term skills gaps. It can upskill sectors and occupations within an economy by bringing in skills in short supply to support an upward adjustment of skills levels in the local economy. The OECD suggests that migrants fill important niches both in fast-growing and declining sectors of the economy, contribute significantly to labour market flexibility, arrive with skills and contribute to human capital development of receiving countries and contribute to technological progress in an economy.[2]

What does migrant labour mean to the two jurisdictions?

Around 10% of those working in Northern Ireland were born outside the UK, representing an estimated 86,000 workers in total. Ireland makes up 2% of workers in Northern Ireland with a further 5% from other parts of the EU (EU26) and 3% from other parts of the world. The share of EU26 workers in Northern Ireland peaked at 6.3% in 2016 but has been falling since then. In fact, Northern Ireland lost around a quarter of its EU26 migrants in the 3 years after the Brexit vote took place. This fall has been more pronounced among skilled workers although EU workers tend to be mostly employed in lower skilled occupations.[3]

Ireland is more reliant on non-Irish workers compared to Northern Ireland. Non-Irish workers make up around 17% of people in work in the jurisdiction or almost 400,000 jobs.[4] Around half of those come from EU26 countries (8% of workers), 2% from the UK and 6% from the rest of the world.

Ireland's greater reliance on non-Irish workers for jobs is evident across all occupation groupings for both lower and higher skilled workers (Table 1). Some 28% of workers in 'elementary occupations' (requiring minimal educational requirements) in Ireland are non-Irish. When it comes to higher-level occupations around 1 in 7 workers in Managers, Directors and Senior Officials are non-Irish. What is important to draw out is the fact that both rely to some degree on non-national workers at higher skills levels. For example, in Northern Ireland 1 in 10 Professional Occupation jobs is filled by non-UK workers. This rises to almost 1 in 5 jobs in Ireland. Non-UK workers make up 12% of skilled trades jobs in that occupation and 16% of jobs in Ireland. Both jurisdictions rely on non-nationals to fill highly skilled jobs in their jurisdictions.

Table 1: Employment of Non-UK/Irish Workers by Occupation in Northern Ireland/Ireland

	Northern Ireland	Ireland
UK SOC2010	**Non-UK Workers Share of Employment in NI**	**Non-Irish Workers Share of Employment in Ireland**
1 'Managers, Directors And Senior Officials'	6%	14%
2 'Professional Occupations'	11%	17%
3 'Associate Professional And Technical Occupations'	7%	13%
4 'Administrative And Secretarial Occupations'	7%	14%
5 'Skilled Trades Occupations'	12%	16%
6 'Caring, Leisure And Other Service Occupations'	9%	16%
7 'Sales And Customer Service Occupations'	8%	14%
8 'Process, Plant And Machine Operatives'	16%	20%
9 'Elementary Occupations'	15%	28%
Overall Share of Employment	10%	17%

Source: CSO and NISRA Labour Force Statistics

What will immigration policy look like post transition?

A number of approaches have existed to support movement of people and workers in both jurisdictions over the decades. Policies in common to both the UK and Ireland include 1) The **Common Travel Area (CTA)** meaning that people can move freely to live and work in either jurisdiction and 2) **Freedom of Movement,** a fundamental principle of the EU Treaty (Article 45) meaning that as EU citizens, British and Irish citizens were entitled to freedom of movement between EU member states, including working in another jurisdiction without needing a work permit. Where the two jurisdictions have differed is in their approach to immigration involving non-EU/EEA migrants.[5] The UK and Ireland have always maintained separate immigration policies to that effect.

So what do these policies look like and what are the implications for those policies when the UK leaves the EU? The discussion below sets out to understand what will change mean as the UK leaves the EU, largely focusing on the new immigration system developed by the UK government post-Brexit.

The Common Travel Area

The Common Travel Area (CTA) has existed in various forms for a hundred years. It dates back to the establishment of the Republic of Ireland (or Irish Free State as it was known) in 1922 and came about because there was a recognition of the importance of the interconnectedness

of the two economies (including free movement of labour) and the fact that there was no desire for a 'passport' system between the two.

In simple terms the CTA is a special travel zone between the Republic of Ireland and the UK, the Isle of Man and the Channel Islands. British and Irish citizens can travel freely within the CTA without being subject to passport controls. Citizens from those jurisdictions have permanent immigration permission to remain in the other jurisdictions. This includes access to employment, healthcare, all levels of education and social benefits on the same basis as citizens of the other State, as well as the right to vote in local and national parliamentary elections. The CTA therefore allows British citizens in Ireland and Irish citizens in the UK the right to work, including on a self-employed basis, without any requirement to obtain permission.

Both Irish citizens in the UK and British citizens in Ireland will continue to enjoy these rights now that the UK has left the EU. The British and Irish governments have pledged to continue the CTA after Brexit and signed a new Memorandum of Understanding (MOU)[6] in May 2019 upholding the rights that currently exist under the CTA.[7] It reaffirmed that the status that British and Irish citizens enjoyed in each other's state would be upheld as would the *'reciprocal rights and privileges enjoyed by British and Irish citizens in each other's state'.*

The CTA was also recognised throughout the EU-UK negotiations and there is an agreement in the Ireland/Northern Ireland Protocol that the UK and Ireland *'may continue to make arrangements between themselves relating to the movement of persons between their territories'*.[8]

The Irish Immigration System
Ireland's membership of the European Union means that its immigration policy makes an important distinction between people from within and outside the European Economic Area (EEA). Essentially, because of freedom of movement, EEA nationals are allowed the unrestricted right to migrate and take up employment in Ireland.

Those who are non-EU/EEA and non-Swiss citizens that wish to stay in Ireland must have immigration permission. There are different rules depending on whether an individual is studying, training, working, setting up in business, volunteering or wanting to live in the country. For those that want to work there are specific policies for academics, doctors, nurses and some trainees (accountancy, interns). In order to undertake any other form of work an individual must have a work permit. There are nine types of employment permit in Ireland, including a Critical Skills Employment Permit, Dependant/Partner/Spouse Employment Permit and a General Employment Permit.[9]

The *Critical Skills Employment Permit* is designed to attract highly skilled people into the labour market in Ireland and encourage them to take up permanent residency in the country. The type of occupation and salary offered are the main determinants for eligibility. The prospective employee or employer can apply for the Critical Skills Employment Permit on the basis that a 2-year job offer must be secured. There are two categories of eligible occupations including:

1 Jobs with annual salaries of €64,000 or more. A degree or equivalent experience is required. A non-EEA national who does not have a degree qualification or higher, must have the necessary level of experience; and

2 Jobs with annual salaries of €32,000 or more that are considered of strategic importance and are listed on the Critical Skills Occupation List. The occupations on the list are those that are considered in shortage in respect of qualifications and skills experience needed for the 'proper functioning of the economy'. The list includes ICT professionals, technologists and engineers. A relevant degree or higher is required.

The *Dependant/Partner/Spouse Employment Permit* allows those connected to Critical Skills Employment Permit holders to apply for an employment permit to work in the State. The *General Employment Permit* is a job-offer based work permit which allows immigrants to work in Ireland in a role that pays at least €30,000 per year,[10] although with some exceptions. Unlike the Critical Skills Employment Permit there is no list of eligible occupations, although there is a list of *'ineligible categories of employment for employment permits'*.[11] Ineligible categories include administration roles, personal services, some health services roles and skilled trades.

Other work based Permits include the Intra-Company Transfer Employment Permit, Contract for Services Employment Permit, Reactivation Employment Permit, Internship Employment Permit, Sport and Cultural Employment Permit and Exchange Agreement Employment Permit, all designed to facilitate certain types of non-EEA workers to work in or continue to work in Ireland.

Post 2020 there will be little if any change to immigration policy and the movement of non-nationals into Ireland. The CTA will continue in its current form allowing free movement of workers between the UK and Ireland, as will free movement for citizens from the other 26 EU member states coming to Ireland to work. Ireland's Work Permit criteria will also continue to apply after this time to non-EEA nationals.

The UK (and Northern Ireland) Immigration System

The context to understanding what happens in Northern Ireland is the fact that the Northern Ireland Executive has no direct role to play in terms of the UK government's (UKG) decision-making on immigration policy. This is because migration is considered an '*excepted matter'* in Northern Ireland meaning that UKG remains solely responsible for it because it is of *'national importance'*.[12] Northern Ireland therefore follows UKG rules on immigration policy.

Up until the UK's historic vote to leave the EU, provisions in EU law relating to free movement between residents within the EU governed provision for EU workers in the UK, as with Ireland. UK migration policy in relation to non-EU workers was largely subject to UK immigration law meaning that permission to enter and stay in the UK was reviewed on a case-by-case basis by the Home Office. Non-EU rules only admitted high skilled workers to the UK and imposed controls through minimum skills and salary levels, a cap on numbers and the need to test the availability of local workers before recruiting abroad. This relied on a visa approach using 'Tiers' to identify different types of workers. This ranged from Tier 1 visas preserved for experienced business people to set up an innovative business in the UK, through to Tier 5 visas for short-term voluntary and educational programmes. The two most commonly used have been Tier 2 skilled worker visas and Tier 4 student visas. These visas worked on a points-based system that included salary caps, a knowledge of English, the need for a sponsor and agreeing not to claim benefits for a period of time.

However, when the UK voted to leave the EU it meant that a new immigration policy had to be established. Different rules had to be developed and applied under UK law and a new border and immigration system introduced.

A UK White Paper, *'The UK's future skills-based immigration system',*[13] was published in December 2018 setting out UKG's plans to introduce a new single migration system ending free movement. This included considerations on a range of issues such as borders, family and settlement, and the operational aspects of implementing the new system. The White Paper made it clear that the new system would continue to have a strong skills focus. This would provide a single route of access for highly skilled and skilled workers from all countries. UKG took guidance from the Migration Advisory Committee (MAC)[14] *not* to impose a cap on skilled workers coming into the UK so that any business could hire a suitably qualified migrant. This new skilled route would include graduate and post-graduate workers as well as those at RQF 3-5 level (A level or equivalent/ Leaving Cert in Ireland), a departure from the previous system in that it lowered the skills threshold to include medium-skilled workers. The White Paper also advocated the abolition of the resident labour market test which put the onus on the employer to show that there was no 'settled' worker available to fill the role required. MAC advised a minimum salary threshold of £30,000 which was subsequently lowered to £25,600.

No route of access has been specifically set out for low skilled workers, although a transitional measure has been introduced to allow a time-limited route for temporary short-term workers of all skills levels, including seasonal low-skilled workers. The UKG has emphasised the need to work with key sectors to reduce demand for low skilled migrant labour.

After a period of consultation, the UKG introduced a policy statement in February 2020 setting out a new UK 'points based' immigration system that will come into force from 1st January 2021.[15] In effect, this takes different factors into account to decide if a person is eligible to enter the UK. At its core is the fact that the person must show that they have a job offer from an approved sponsor, that the job offer is at the required skill level, and that they speak English. These characteristics are considered 'essential'. After that some factors are 'tradeable'. These include the salary threshold, whether the job is on the Shortage Occupation List (SOL) and whether the person has a PhD (See Appendix A for more detail). A total of 70 points is required to be eligible to apply.

The Shortage Occupation List (SOL) already existed under the old immigration system that applied to non-EU migrants. This listed a set of occupations in short supply in the UK (and specific occupations in Scotland) that could be filled by migrants. Under the new system the SOL will still apply and a total of 20 points will be allocated for a job being in a shortage occupation (see Appendix A). An occupation listed on the SOL will lower the salary threshold employers must meet by 20%. A minimum salary threshold of £20,480 will apply. The new SOL will accommodate occupations skilled to RQF level 3 and above. The MAC has recently been tasked with reviewing the SOL, including whether there is a need for a separate list for Northern Ireland.[16] Northern Ireland does have the ability to influence the SOL for the region but it does not have any formal role in setting the SOL.

There will be an opportunity for some individuals to enter the UK without a sponsor/employer through 1) the Global Talent route where the most highly skilled can enter the UK without a job if endorsed by a relevant body e.g. Tech Nation, The Royal Society for Science and Medicine or 2) a broader unsponsored route within the points-based system to allow a smaller number of the most highly-skilled workers to come to the UK without a job offer (details to be confirmed).

Other aspects of the policy statement include an expansion of the pilot scheme for seasonal workers in agriculture to 10,000 places, and the maintenance of youth mobility arrangements

with eight countries and territories which results in around 20,000 young people coming to the UK each year. Students will be covered by the points-based system. They will achieve the required points if they can demonstrate that they have an offer from an approved educational institution, speak English and are able to support themselves during their studies in the UK.

How do the Critical Skills Occupation List (Ireland) and Shortage Occupation List (UK) compare?

As discussed, both jurisdictions have a list of occupations set out in their immigration policies that are deemed in short supply and are considered important for the proper functioning of the economy. As outlined above these are known as the Critical Skills Occupation List for Ireland and the Shortage Occupation List for the UK/NI. Both lists form one aspect of the entry requirements for migrant workers. Both jurisdictions use the Standard Occupational Classification (SOC)[17] to classify these jobs according to their occupation by skill level and skill content. This means that there is the basis for comparing the current lists for both. A detailed comparison is set out in Appendix B.

What this tells us is that Ireland's list of skills in short supply takes in more occupations, although both largely focus around similar skills sets. Ireland lists 46 occupations in short supply while the UK lists 33 in total. Scotland has an additional 2 occupations listed (and a third related specifically to gaelic teaching in secondary education). Ireland's list takes into account *all* occupations listed within a 4-digit SOC while in some instances the UK list only includes *some* skills within the 4-digit classification. In terms of overlap, 21 occupations are common to the two jurisdictions, both listing professions including Science, Engineering, ICT, Health, Business, Architects/Surveyors, Quality Control/Planning along with Artistic and Design Occupations. Those parts of the list that stand out as different between the two include a focus in Ireland on manager and director roles, accountants and business professionals, specific skills in the health sector and quality and regulatory roles. For the UK, there is a unique focus on different health sector skills, artistic professions and skilled trades including chefs and welders.

What could all of this mean in attracting skilled workers to both jurisdictions?

On the 31st December 2020 free movement of people between the UK and the EU will end. While the Common Travel Area will still exist, ensuring free movement between Ireland and the UK, what this effectively means is that while Ireland will have open access to 240,000 people actively working or seeking work from across Ireland's 26 EU partners and the UK, Northern Ireland will have open access to an active population of just over 34,000 people between Ireland and Great Britain. After this, Ireland and Northern Ireland's separate immigration policies will come into play to select and attract top talent from the rest of the world.

Both jurisdictions will have an essentially employer-driven approach to attracting migrants based on the existence of a job offer with a firm focus on skilled migrants. For the most part workers will have to be employed in an occupation listed to be in short supply in each jurisdiction, based on a very detailed 4-digit Standard Occupational Classification. However, as it currently stands, Ireland lists significantly more occupations compared to the UK/NI, although the salary thresholds for migrants will be higher in Ireland than Northern Ireland at a minimum of €30,000 for Ireland and £20,400 (around €23,000[18]) for the UK/Northern Ireland. The lower UK minimum salary threshold reflects the fact that the UK system will accept workers with 'medium skills' (A level or equivalent/ Leaving Cert in Ireland). Ireland's system will be largely focused on those with a degree/equivalent or higher. To put those thresholds in context,

the average annual full-time wage in Northern Ireland is €30,000 (£27,000) compared to €49,000 in Ireland.

Highly skilled migrants from other EU member states will continue to travel freely to work in Ireland while those wanting to work in Northern Ireland will have to enter using the new points based system. Northern Ireland will also have to compete with the rest of the UK to attract top talent to the region, against the backdrop of one of the lowest average salaries across the UK regions. The physical barrier of the Irish Sea will continue to add greater complexity to any decision to come to live and work in Northern Ireland.

It is going to take time to see the out-workings of the UK's new immigration policy. However, as with most things Brexit-related, Northern Ireland is different and the implications of the new UK immigration policy in the region should be monitored carefully as a result. It is undoubtedly narrowing the playing field to attract people including top talent to come to work in Northern Ireland and issues including the implications of the minimum salary threshold and occupations listed on the Shortage Occupation List (SOL) need careful consideration. There should be a 'real time' assessment of this as the new rules kick into play so that immigration can be used as the effective tool it can be to support skills development across the island of Ireland.

Appendix A

The UK Points-Based Immigration System

Characteristics	Tradeable	Points
Offer of job by approved sponsor	No	20
Job at appropriate skill level	No	20
Speaks English at required level	No	10
Salary of £20,480 (minimum) – £23,039	Yes	0
Salary of £23,040 – £25,599	Yes	10
Salary of £25,600 or above	Yes	20
Job in a shortage occupation (as designated by the MAC)	Yes	20
Education qualification: PhD in subject relevant to the job	Yes	10
Education qualification: PhD in a STEM subject relevant to the job	Yes	20

A total of 70 points is required to be eligible to apply; some characteristics are tradeable.

Appendix B

Skills in Short Supply: Comparison of Irish and UK Immigration Lists[19]

		Ireland	UK/NI	Scotland
4-Digit SOC	Occupation	Critical Skills Occupation List	Shortage Occupation List (SOL) List (UK)	All UK Occupations PLUS
1122	Site Manager	√√		
1136	Information Technology and Telecoms Directors	√√		
1181	Senior Health Services/Public Health Managers	√√		
2111	Chemical Scientists	√√		√
2112	Medical Laboratory Scientists	√√	√√	
2113	Physical Scientists	√√	√	
2114	Social & Humanities Scientists		√	
2121	Civil Engineers	√√	√√	
2122	Mechanical Engineers	√√	√√	
2123	Electrical Engineers	√√	√√	
2124	Specialist Electronics Engineers	√√		
2126	Design & Development Engineers	√√	√√	
2127	Production & Process Engineers	√√	√√	
2129	Material Scientists	√√	√√	
2133	IT Specialist Managers	√√		
2134	IT project and programme managers	√√		
2135	IT business analysts	√√	√√	
2136	Programme & Software Development	√√	√√	
2137	Web design & development professionals	√√	√√	
2139	All Other ICT professionals	√√	√	

2211	Medical Practitioners	√√	√√	
2212	Psychologists		√√	
2213	Industrial Pharmacists	√√		
2216	Veterinarians		√√	
2217	Radiographers/Radiation Therapists/Vascular technologists/physiologists	√√	√√	
2219	Audiologists/Perfusionists	√√		
2222	Occupational Therapists		√√	
2223	Speech & Language Therapists		√√	
2229	Orthoptists	√√		
2231	Registered Nurses/ Specialist Practitioners	√√	√√	
2232	Registered Midwifes/ Specialist Practitioners	√√		
2311	Academics with Level 10+ NFQ	√√		
2314	Secondary Education Teaching Professionals		√	√
2315	Primary & Nursery Education Teaching Professionals			√
2421	Chartered/Certified Accountants/Tax Consultants	√√		
2423	Management Consultants/Business Analysts	√√		
2424	Business & Financial Project Management Professionals	√√		
2425	Actuaries, Economists, Statisticians	√√	√	
2431	Architects	√√	√√	
2433	Quantity Surveyors	√√	√√	
2435	Architectural Technologists	√√		

2436	Construction Project Managers	√√		
2442	Social Workers		√√	
2461	Quality Control and Planning Engineers	√√	√√	
2462	Quality Assurance and regulatory professionals	√√		
2463	Environmental Health Professionals	√√		
2473	Art Direct in 2D/3D animation	√√		
3213	PHECC Registered Paramedics/Advanced	√√		
3218	Prosthetics/Orthotists	√√		
3411	Animation/Design Artist	√√	√√	
3414	Dancers & Choreographers		√	
3415	Musicians		√	
3416	Arts Officers, producers and directors		√√	
3421	Location/Character/Prop/ Animation Designer/Artist	√√	√√	
3442	High Performance Coaches/Directors for sports	√√		
3542	International Business Sales Executives	√√		
3543	International Marketing Executives	√√		
5215	Welding Trades		√	
5434	Chefs		√	

Note:

√√ Includes *all* occupations within the 4-digit SOC

√ Includes *some* occupations within the 4-digit SOC

Notes

[1] Matthew Goodwin and Caitlin Milazzo, 'Taking back control? Investigating the role of immigration in the 2016 vote for Brexit' (2017).
[2] OECD, 'Is Migration Good for the Economy' (2014).
[3] Department for the Economy, 'Migrant Workers – February 2019' (2019).
[4] Source: Labour Force Survey CSO.
[5] The European Economic Area includes EU member states and three countries of the European Free Trade Association (EFTA) – Iceland, Liechtenstein and Norway.
[6] 'Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland concerning the Common Travel Area and associated reciprocal rights and privileges', https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/800280/CTA-MoU-UK.pdf.
[7] Although this is not legally binding.
[8] https://www.gov.uk/government/publications/new-protocol-on-irelandnorthern-ireland-and-political-declaration.
[9] See Department of Business, Enterprise and Innovation, "Types of Employment Permits", https://dbei.gov.ie/en/What-We-Do/Workplace-and-Skills/Employment-Permits/Permit-Types/.
[10] Although there are some exceptions e.g. newly graduated students, people with specified languages.
[11] See Department of Business, Enterprise and Innovation, "Ineligible List of Occupations for Employment Permits", https://dbei.gov.ie/en/What-We-Do/Workplace-and-Skills/Employment-Permits/Employment-Permit-Eligibility/Ineligible-Categories-of-Employment/.
[12] See Cabinet Office and Northern Ireland Office, "Guidance. Devolution Settlement: Northern Ireland", https://www.gov.uk/guidance/devolution-settlement-northern-ireland.
[13] HM Government, "The UK's future skills-based immigration system" (December 2018).
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[15] Home Office and UK Visas and Immigration, "The UK's points-based immigration system: policy statement" (19 February 2020), https://www.gov.uk/government/publications/the-uks-points-based-immigration-system-policy-statement/the-uks-points-based-immigration-system-policy-statement.
[16] The consultation period ended on the 24th June 2020 and the findings are pending.
[17] The Standard Occupational Classification (SOC) is a common classification of occupational information for the UK.
[18] Based on exchange rate on 28th August 2020.
[19] As at August 2020.

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Reflections on the provision of higher education through cross border partnerships

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Introduction

Numerous authors in this journal have highlighted the concept of cross-border mobility in higher education as an important aspect of both socio-economic development and of the ongoing peace process. Quigley proposed that there are significant possibilities for North-South synergy in such areas as health, higher education and research, energy, tourism and water.[1] Indeed, Soares explains that the societies of the two jurisdictions on the island of Ireland are intimately connected.[2] Education and specifically, higher education are examples of this.

Although the nature and content of each territory's standard qualifications may differ, both support a model of higher education with comparable design and delivery. It is important to note that both are aligned to the European Credit Transfer System (ECTS). Therefore, Komarova reports that the movement of higher education students, staff, and research funding between the two jurisdictions on the island of Ireland has been a focus of increasing political and academic interest throughout the period following the signing of the Good Friday Agreement in 1998.[3] Cross-border student mobility in particular, is widely recognized as offering mutual economic, social and cultural benefits. Indeed, Osborne reflects that there has been substantial EU-funded cross-border activity in relation to education, involving early childhood, primary, secondary and tertiary levels, as well as teacher education.[4]

The Economic and Social Value of Higher Education

The volume edited by Enders et al shows there is a substantial body of international evidence that demonstrates a measurable (beneficial) impact of investment in higher education.[5] Furthermore, ideas and debates about how Higher Education Institutions (HEIs) can and should be involved in social change and economic growth have begun to appear more prominently in the literature.[6] Many HEIs have experienced a paradigm shift towards knowledge transfer, innovation, and commercialization and other academic spin-outs. Such a shift has changed the nature and scope of academic activities within the HEIs, their public spheres; and communities generating significant value across multiple dimensions: financial, social, cultural and environmental.[7] As both an economic and social entity, an HEI plays a vital role in anchoring investment and generating economic activity, jobs and contributing to the growing success of its region. Furthermore, HEIs vary substantially, in terms of scale, scope, and areas of specialization. HEIs are a major source of the skills and knowledge that drive growth and innovation in stimulating business creation and exploiting ideas in society.[8] In the context of this paper there is also a vital role in supporting the peace process and sharing the broad benefits associated with higher education. The ability of educators, policymakers and business to persuade students of the value of higher education has significantly contributed to economic success and social progress. Guerrero *et al* explain that many evaluations do not capture the complexity and dynamic characteristics of the outcomes of higher education and their transformation into economic impacts.[9] Therefore, in this paper we reflect in a broad sense on the value and contribution that collaborative cross border provision of higher education has had.

The Status of Cross Border Mobility

Ongoing work by the Centre for Cross Border Studies highlights a series of ongoing issues with the development of cross-border education:

- A general lack of information within schools regarding third level and further education options within the two jurisdictions.
- Unfamiliarity amongst students and institutions regarding the higher education application system (UCAS, CAO) used in the two jurisdictions.
- Persisting concerns with regard to the fairness of the methodology used to assess the value of school leaving qualifications (A-Levels, Leaving Cert.) from the alternate jurisdiction when dealing with cross-border applications.
- The differing student funding regimes in the two jurisdictions.

- A general lack of adequate recognition of alternative qualifications, such as HND, BTEC and QQI FET, for entry to higher education in the two jurisdictions.

There are many reasons for students to move from one jurisdiction to another and specifically, from the Republic of Ireland to Northern Ireland, or vice versa, to undertake higher education. Two common reasons are to: 1) enhance access to a particular discipline at undergraduate level or 2) to access specialist postgraduate training. Ireland's Higher Education Authority and Northern Ireland's Department for the Economy reported that an average of over 1,000 NI students enrolled at ROI HEIs each year between 2011/12 and 2015/16, with 1,200 NI students enrolled in 2015/16 alone.[10] NI students comprise a substantial component of the overall ROI HEI student population, particularly for HEIs such as Trinity College Dublin, University College Dublin, Dundalk IT and Letterkenny IT.

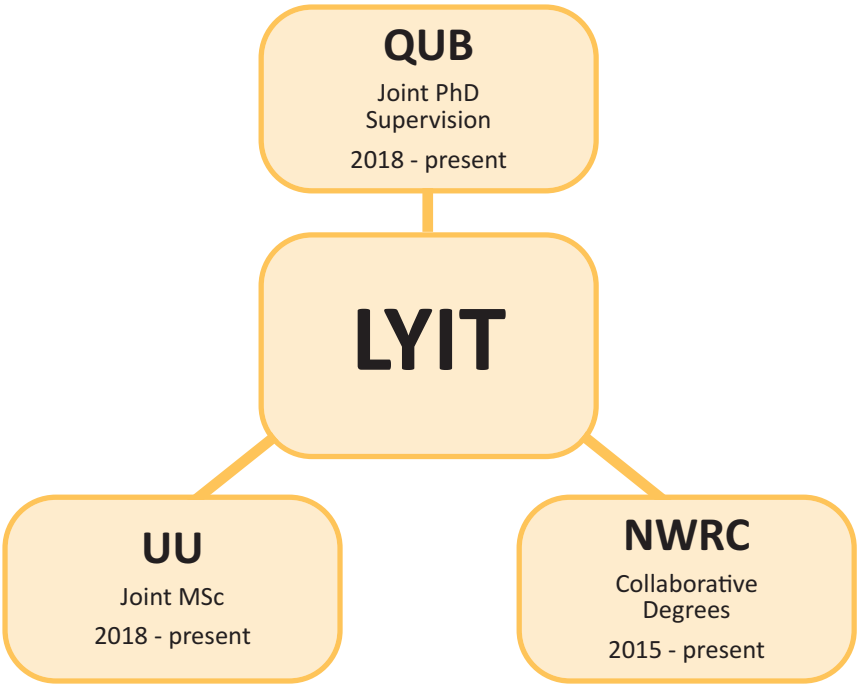
Over 216,000 students were enrolled in ROI HEIs in 2015/16, almost four times the 55,000 enrolled in NI HEIs. The cross-border flow of students in 2015/16 totaled 3,395 – 1,200 NI students at ROI HEIs and 2,195 ROI students at NI HEIs. However, there has been a substantial change in the flow of students over recent years, with ROI students at NI HEIs down 38% between 2011/12 and 2015/16 and NI students at ROI HEIs up 24% over the same period.[11] Both groups currently benefit from being treated as EU students with heavily subsidised undergraduate fees or charges of circa €3,000 in the Republic and £3,805 (€4,235) in the North. It is worth noting that Universities Ireland offers scholarships, each worth €15,000, to students who have been accepted to undertake a recognised programme at a university on the island of Ireland that is not in the same jurisdiction as the university where they have previously studied.

An Overview of Higher Education Provision at LYIT

Emerging Government policy in the Republic of Ireland in the 1960s led to the establishment of Regional Technical Colleges (RTCs) in the 1970s, with RTC Letterkenny opening in 1971, and re-designated as Letterkenny Institute of Technology (LYIT) in 1998. LYIT aims to foster a progressive learning environment. Our reach is both local and international, attracting a diverse student body of almost 4,500 students from Ireland and 31 countries across the globe. We have worked to foster close relationships with the wider local community and partnerships with indigenous and international businesses. We have two modern integrated campuses in Letterkenny and Killybegs. Approximately 59% of our full-time student cohort are SUSI grant recipients, allowing students from all backgrounds, abilities and disabilities to achieve their educational goals and find relevant employment in their own region, with awards available from Level 6 (Higher Certificate) right up to Level 10 (PhD).

A key priority for LYIT is cross border engagement, and collaboration with Queens University Belfast (QUB), Ulster University (UU), and North West Regional College (NWRC) (as illustrated in *figure* 1).

Figure 1: LYIT and our cross-border partners



In some cases, formal memoranda of understanding have been agreed with our partners, in others there is a flexible arrangement but the philosophy is to ensure that all our partners see LYIT as a partner and resource to work with for the benefit of the region. We currently work with the cross-border FE/HE Cluster, to meet the needs of our specific region. The North West City Region growth agenda has been firmly established through the North West Strategic Growth Partnership (NWSGP) and associated structures. The NWSGP has been co-designed and agreed by local and central government in both jurisdictions as the vehicle for co-ordinating and influencing all aspects of future growth of the North West City Region, and is the endorsed mechanism via the North South Ministerial Council for senior central government officials and their Departments to engage with the North West City Region on collaborative approaches to growth. On 23 February 2018 the NWSGP, in partnership with the higher and further education and training institutions of the North West City Region, announced a new agreement in education, training and innovation for the North West City Region. The agreement is the result of years of successful collaborative working amongst the four education sector providers: Letterkenny Institute for Technology (LYIT), Ulster University (UU), North West Regional College (NWRC) and Donegal Education and Training Board (DETB) – with the aim of improving access to higher and further level education and training to students living and studying in the North West City Region. This project, which achieved initial funding support through the HEA for higher education landscape reform, is also aligned with the National Strategy for Higher

Education to 2030 (January 2011) in respect of cross-border collaboration and regional development. Collaboration across the system nationally will also continue to be encouraged, focusing on areas where there is potential to build national scale and strength. There is also significant potential for institutional collaboration on a North-South basis to advance cross-border regional development and strategically advance Irish higher education on an all-island basis.

Case Studies in Partnership and Collaboration

Case Study 1: MSc in Leadership and Innovation in the Public Service
This programme was developed by LYIT and Ulster University in collaboration with the Office of An Taoiseach and the Office of the First Minister and Deputy First Minister who were integral to deciding on the content, structure and philosophy of the programme. The structure is designed to maximise the scope for work-based learning and to develop executive networks for sharing insights from the collective Public Service experience. To date, public service managers including Principal Officers, Assistant Principal Officers, Heads of Function and Heads of Technology from more than sixty departments and agencies have benefited from the programme.

The programme is ongoing and the targeted outcomes for the programme are to:

(a) Promote North/South collaboration with tangible outputs in terms of public service improvements

(b) Develop an All-Island network of innovation expertise

(c) Create opportunities for closer working relationships between senior public servants North and South

(d) Leverage international best practice via action learning to effect sustained public service innovation

The programme philosophy is based entirely on enhancing innovation and efficiency in the delivery of contemporary public services. The unique all-island collaboration between the programme partners and the pooling of resources in itself is a flagship for collaboration in higher education. It uniquely draws on the expertise and resources of the higher education and Government partners and participating senior managers, North and South, to create sustainable innovation networks.

This is LYIT's longest established collaborative programme, and its most significant in terms of student numbers. It was the first joint Masters programme of its kind in Ireland. Since its launch in 2002, 261 public service managers have undertaken this unique joint executive Masters programme. It was the first taught postgraduate programme in LYIT and paved the way for the development of a major growth in postgraduate provision in the ensuing period; by 2019/20 postgraduate students accounted for 15% of all LYIT graduates. The involvement and support from government departments in both jurisdictions, the use of international guest speakers and the opportunity to learn collaboratively from fellow senior public service managers across the island of Ireland has led to important innovations and change initiatives across the civil and public services in both jurisdictions.

The development and validation of this programme presented unique challenges. Formal collaborative agreements, joint awarding agreements and even joint degree parchments had to be agreed between three parties: LYIT; Quality and Qualification Ireland (QQI) – previously the Higher Education and Training Awards Council (HETAC); and Ulster University. At the time, LYIT had delegated authority from HETAC to make postgraduate awards, but did not have delegated authority to make joint awards. This made for very bureaucratic development and approval processes, a situation which no longer pertains since LYIT became a full Designated Awarding Body up to Masters Degree level in January 2020. As a joint award, this represents the pinnacle of collaborative provision, but from a quality assurance perspective it also presents unique challenges. Foremost among these is the necessity to operate under an agreed set of exam regulations, which by definition will differ from the exam regulations of one of the HEIs. Interestingly, and in an unusual procedural quirk, under a dual registration regime, it did result in separate student disciplinary procedures applying, depending on where students were registered. As a joint programme, there is a significant additional overhead for both parties, but this is central to building and maintaining relationships. Joint management meetings, joint course leaders, joint programme boards, joint exam boards and joint conferring ceremonies are just part of what makes this a truly joint programme.

Case Study 2: Bachelor of Science in Early Childhood, Care, Health and Education
The Bachelor of Science in Early Childhood, Care, Health and Education is delivered in a partnership between LYIT and the North West Regional College (NWRC). The programme is designed to upskill those who already hold a UK Level 5 (or ROI Level 6) qualification in Early Childhood Studies or Advanced Practice, to Degree level. Students enter at year three of the four-year programme, which is delivered through blended learning at the Strand Road campus of NWRC and at the Letterkenny campus of LYIT.

This was the first of five add-on bachelor degree programmes to be delivered by LYIT in collaboration with NWRC. It has run for the last five years, and since its inception in 2015/16, 101 students have availed of this collaborative progression opportunity. The delivery model is particularly well suited to mature students and those who are not in a position to relocate outside of the region to pursue an honours degree qualification. It is part of a strategy to expand the higher education capacity in the northwest region, while mutually recognising qualifications on a bi-jurisdictional basis. This progression from Higher National Diplomas and Foundation Degrees to Honours Degrees is entirely consistent with national and international policy on access, transfer and progression. While the qualification is awarded by LYIT, the collaborative nature of the programme means that it is jointly delivered by staff from both institutions. The programme is an exemplar of collaborative programme provision that meets a regional need on a cross-border basis, while at the same time contributing to professionalising of the childcare sector.

From a quality assurance perspective, like all collaborative programmes, this involves significant additional management and administrative overhead for both parties, including quite onerous due diligence processes, the development of formal collaborative and financial agreements and ongoing management of the relationship between both parties. This programme was the first to go through the Institute's new due diligence process within the approved policy on collaborative, joint and

transnational awards. As such, it served as a pilot for the new policy and procedures, and a template for future collaborative arrangements. Once the collaborative model and associated processes were agreed, the addition of subsequent programmes was relatively straightforward. Joint planning meetings, joint programme boards and joint exam boards have been the hallmark of the success of this collaboration, underpinned by the development of close relationships of trust between both parties.

Case Study 3: PhD provision at the Bryden Centre
LYIT/Queens University collaborative PhD provision commenced in 2018.The Bryden Centre is a €9.7 million cross-border research centre for renewable energy projects. Funded by the EU's INTERREG Programme, the Bryden Centre for Advanced Marine and Bio-Energy Research hosts 34 PhD students across the marine and bio-energy disciplines. Match-funding for the project was been provided by the Department for the Economy in Northern Ireland and the Department of Business, Enterprise and Innovation in Ireland. This research includes the use of tidal power at Strangford Lough and the North Antrim Coast, ocean energy sites in Western Scotland, as well as the potential for wave and tidal power generation in Donegal. Additional partners include: the University of the Highlands and Islands, Ulster University, the Agri-Food & Biosciences Institute, Donegal County Council and Dumfries and Galloway Council.

Approaching the final phase of the project, much has been achieved. True multi-disciplinary teams have been established across collaborating institutions and industry partners. Projects tackling real-world challenges to advance design and use of key technologies, prevent harm to the environment and improve social acceptance are delivering outcomes that have led to, for example, major inward investment into novel bioenergy plant and greater understanding of the interactions of marine life with man-made structures. Equally important have been the successful capacity building actions and the strong inter-institutional and cross-disciplinary links that have been formed. Capital investment to establish new research capability has been beneficial. However, the major accomplishment is people centered. Not just the 34 PhD qualified researchers but also the development of supervisory and research direction skills within the partners. Academics at the established university partners have valued exposure to different disciplines, industry and non-academic stakeholders across the region. This change in perspective has led to a substantial upswing in multi-disciplinary work and was instrumental in the establishment of an all-Ireland climate-change and biodiversity research network.

The establishment of the Bryden Centre at LYIT has been a major step forward on the journey towards the expansion of established high-value industries and attraction of new sectors such as marine energy to the region. The experience gained through participating in the Bryden Centre with the strong link to Queen's University Belfast has given LYIT an additional six PhD places over the last three academic years and contributed to the submission for validation by Qualifications and Quality Ireland (QQI) of a new PhD programme in computing in 2019. This in turn will further help build capacity to achieve LYIT's research metrics as part of the ambition of the Connacht-Ulster Alliance (CUA) to attain technological university status in the near future. The collaborative PhD programme has helped develop PhD supervisory skills amongst existing staff and more generally build and extend research capability, facilities and expertise. It has also helped to establish a pathway for LYIT graduates to more readily

pursue a research career, retaining and developing future local industry leaders in the region. Coupled with further investment in capacity building and potentially the ability to establish research career pathways, the doctoral training model will be central to any future proposal for Bryden 2 and will play an important part in supporting LYIT to deliver on its technological university ambition.

Observations and reflections

These collaborative cross-border programmes have afforded new opportunities to students at both undergraduate and postgraduate levels and contributed to expanding the higher education capacity, and ultimately the economic potential, of the north-west region. The joint Masters programme had a significant organisational impact across a large range of departments in the public service and provides a template and roadmap for future programme collaboration. The Bryden Centre PhD programme has played an important role in increasing the research and innovation capacity at LYIT and providing access to local companies for R&D to support their growth and economic potential. O'Dowd reflects that promoting cross-border co-operation goes 'against the grain' in many respects.[12] In contrast the economic, social and cultural importance of mobility and cross border cooperation between higher education institutions in NI and the ROI are highlighted in Graduating to Success.[13] This level of activity has the potential to drive the growth of the all-island economy, broaden the pool of graduates both North and South and support the ongoing peace process. The cross-border nature of our region can result in a fractured approach to development, resulting in opportunities to offer a wide range of opportunities and pathways being lost. Therefore, it is crucial that LYIT work in partnership with HEIs in Northern Ireland to protect the opportunities for our stakeholders by ensuring that they are not inhibited by physical, technological or bureaucratic borders or through implications of fees and admissions requirements. In the context of Brexit, we finish by reflecting that there remains a significant need for a joined up approach to issues of higher education policy that support peace and reconciliation on this shared island. LYIT continues to look for opportunities for collaborative projects utilising the quadruple helix model of academia working in partnership with the public, private and community/voluntary sectors. LYIT and its cross-border partners has ambitious plans to build on this successful collaboration and to further contribute to the emerging cross-border regional higher education and innovation ecosystem in Ireland's north-west.

Notes

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