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FOREWORD

Dr Helen Johnston

Chairperson, Centre for Cross Border Studies

This edition of *The Journal of Cross Border Studies in Ireland* comes as the island of Ireland – as elsewhere – moves uncertainly, but with some degree of hope, out of the darkest moments of the Covid-19 pandemic that nevertheless remains with us. Both jurisdictions are looking to work towards the post-pandemic recovery, preserving some of the adaptations made to our ways of living and working while lifting some of the restrictions that had been necessary to protect ourselves, our families and our communities. There is certainly a greater belief that we are heading in a positive direction than was the case when I wrote the foreword for last year’s edition of *The Journal*, not least because of the vaccination programmes that were rolled out by the authorities in Ireland and Northern Ireland.



In last year’s edition I was also able to note the return of the Northern Ireland Assembly and Executive in January 2020, and the hope that it would “revitalise all of the institutions of the 1998 Belfast/Good Friday Agreement”. That hope may not have been entirely fulfilled given some of the political instability in Northern Ireland and reactions to the coming into effect in January of this year of the Protocol on Ireland/Northern Ireland. As the Centre for Cross Border Studies and the Ad-Hoc Group for North-South and East-West Cooperation have noted, and as the articles in this edition of *The Journal of Cross Border Studies in Ireland* highlight, political instability does not contribute towards a positive context for cooperation and relations within and across these islands.

The unfolding of the post-Brexit context and the path to post-pandemic recovery undoubtedly present both challenges and opportunities for cooperation within and across these islands which, in collaboration with its partners, the Centre for Cross Border Studies will continue to work to address

and exploit. This work would not be possible, however, without the Irish Government's Department of Further and Higher Education, Research, Innovation and Science's 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' 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.

We are also thankful to the Reconciliation Fund for its support for a new project – "Maintaining the necessary conditions for cooperation and cross-border lives" – as well as the funding for the "Time to measure cross-border impacts" project, which is coming to a close this year. Thanks to a grant from the Dormant Accounts Fund NI, the Centre was also able to invest in digital infrastructure and skills to ensure it was properly equipped for the new ways of working required for the pandemic and afterwards.

The Centre would not be able to do what it does without the invaluable support from our various funders, not least to the Department of Further and Higher Education, Research, Innovation and Science whose ongoing assistance enables us to undertake the core research work that informs everything we do. But I would also like to recognise the dedication of the Centre's Board in guiding and supporting the organisation and, of course, the Centre's staff. Our small core team has once again shown itself capable of producing exceptional work, and of maintaining existing collaborations and establishing new ones with organisations across these islands and further afield. The fact that the Centre for Cross Border Studies is one of only seven institutions in Northern Ireland listed as eligible lead institutions in the North-South Research Programme recently launched by the Department of Further and Higher Education, Research, Innovation and Science stands as testament to the esteem in which the Centre is held, and which the staff, Board and the Centre's partners should all be proud of. We will continue to uphold our values and the quality of our work, as we pursue our mission of strengthening North-South cooperation, upholding the 1998 Belfast/Good Friday Agreement, and improving relations within and across these islands.

Introduction

Dr Anthony Soares

Director, Centre for Cross Border Studies

Contributors to the 2021 edition of *The Journal of Cross Border Studies in Ireland* were invited to give their assessment of the extent to which the conditions necessary for cooperation across this island, and across these islands, have been maintained, following the end of the Brexit transition period, and as the Protocol on Ireland/Northern Ireland came into effect. They were asked to assess the relative health of the political, social, material and regulatory contexts for North-South and East-West cooperation and for wider relations. This is in line with the Centre for Cross Border Studies' efforts, and those of the Ad-Hoc Group for North-South and East-West Cooperation which it convenes, to ensure we understand *what* conditions are necessary for cooperation – particularly North-South cooperation – and that they are not seen as consisting exclusively of legal or regulatory underpinnings.



This is in no way to suggest that legislative or regulatory frameworks are expendable luxuries for those engaged in cross-border cooperation. Since 1998 the Good Friday/Belfast Agreement has stood as an essential bulwark for North-South and East-West cooperation and relations, with implementing legislation enabling, for example, the creation of a number of institutions and bodies to take on that cooperation across a range of areas. However, on their own agreements and legislative frameworks are not necessarily guarantees of conducive contexts for cross-border cooperation. Political instability, or even periods of outright political hostility to cross-border cooperation or its core institutions, whilst not signifying a halt to the cooperation that takes place at many levels and across sectors, can nevertheless undermine the confidence of those who are active in that cooperation, especially when political tensions begin to shape perceptions of cross-border cooperation and the reasons behind those who engage in it.

The political context is a key determinant of the extent to which the social context is viewed as supportive of cross-border cooperation, particularly in Northern Ireland. Arguably, political divisions over whether implementation of the Protocol on Ireland/Northern Ireland has privileged North-South or all-island relations at the expense of the East-West dimension and Northern Ireland's position within the United Kingdom have impacted on levels of community support for North-South cooperation, with the stance taken by some political parties (with the Democratic Unionist Party at the forefront) on the withdrawal of participation in meetings of the North South Ministerial Council being significant in this regard. Adding to this are the periods of crisis in relations between the UK Government and the EU, which can fuel political tensions in Northern Ireland with repercussions for social cohesion and social attitudes to North-South cooperation and relations.

Therefore, where Article 11 of the Protocol on Ireland/Northern Ireland states that the "Protocol shall be implemented and applied so as to maintain the necessary conditions for continued North-South cooperation", it is crucial that those conditions are understood to consist not only of the legal or regulatory contexts, but also of the wider contexts in which North-South cooperation takes place. Moreover, the damage to North-South relations and cooperation brought about by the withdrawal of support for North-South institutions by some political leaders in Northern Ireland in light of what they see as the fracture to Northern Ireland's links to the rest of the United Kingdom ignores the fact that for many of those involved in cross-border cooperation it is not a question of either/or between the North-South and East-West dimensions. Many organisations active in cooperation across the Ireland-Northern Ireland border, and from both jurisdictions on the island of Ireland, are also actively engaged with organisations in England, Scotland and Wales, and seek to continue their North-South and East-West cooperation, reflective of the Good Friday/Belfast Agreement as a framework supportive of the totality of relations within and across these islands.

The 2021 edition of *The Journal of Cross Border Studies in Ireland*, then, seeks to test the state of health of the conditions for cooperation and relations within and across these islands and beyond, with the first four articles looking at the political conditions. Beginning with a comparative examination of political science and international relations scholarship's theoretical perspectives on trust, and how these may throw light on post-Brexit British-Irish political cooperation, the opening article by Paul Gillespie goes on to consider how differentials in political power are a factor in shaping the

conditions for the development of relationships of trust. He then considers in more detail how the evolving and fluctuating nature of the balance of political power and of the relations of trust have – and will – provide a fundamental context for the state of North-South and British-Irish relations. Crucially, that evolution took place over four decades with the UK and Ireland as members of the European Union, with British and Irish officials and ministers becoming used to having bilateral contacts at the margins of EU meetings. However, as Gillespie notes, “Brexit has rudely interrupted the pattern, making it necessary to reinvent the trusting relationships built up” in Brussels and Strasbourg.

John O’Brennan’s article also picks up on how common membership of the EU placed Irish-British relations on a different footing, although focusing on how Ireland sought to balance relations with the United Kingdom and the European Union, in the aftermath of the Brexit vote in 2016. O’Brennan reflects on the crucial role played by the EU and its member states in supporting Irish preferences in relation to the negotiations over the UK’s withdrawal, noting that while the UK Prime Minister has proclaimed boldly that “Brexit is done”, the behaviour of the UK government since 2 January 2021 suggests Brexit will constitute a semi-permanent phenomenon (and problem) in British (and Irish) political life. The article stresses how for Ireland, the period since the referendum has necessitated a delicate balancing act between its deepening commitments to the EU and the need to maintain a good relationship with its nearest neighbour. O’Brennan offers a critical insight into how Ireland has been approaching this uniquely complicated balancing act, with the implementation of the Protocol on Ireland/Northern Ireland serving as a severe test.

The third contribution to the 2021 edition of *The Journal of Cross Border Studies in Ireland* also sees Peter McLoughlin examining UK-Irish relations. However, he places them within a longer historical pattern of Ireland and Britain’s different interactions with continental Europe, arguing that there “has always been a significant European influence on the dynamics between the two islands, primarily resulting from British security concerns”. The shifting political landscape within continental Europe since the 17th century, with radical changes to the security situation in Western Europe following World War Two and the creation of what would become the European Union, had repercussions for British-Irish relations, which entered a new phase. This new phase would, McLoughlin contends, come to establish a joint approach by London and Dublin to political crises in Northern Ireland, whereby the

parties in Northern Ireland “have continually been obliged to accept agreements essentially constructed by the two governments”. According to McLoughlin, the New Decade, New Approach deal that restored the Northern Ireland Executive and Assembly after a three-year absence is no different and fits into a pattern that “has characterised the entire process”. However, the author goes on to outline how, although Boris Johnson’s electoral victory in 2019 enabled his government to work with Dublin to break the deadlock in Northern Ireland, this would not set the tone for British-Irish relations, or for London’s concerns for the needs of Northern Ireland. Indeed, remarking on the discussions between Johnson and Varadkar that would lead to a deal on Brexit, McLoughlin suggests that whilst they “had obviously centred on the issue of Northern Ireland, in retrospect it is clear that, for the British government, the agreement made had very little to do with this”, and that “Johnson was happy to sign off on whatever was required to secure a Brexit deal, with no considered resolve to honour the commitments he was entering into”. This approach represents a significant challenge for UK-EU and British-Irish relations going forward and, as McLoughlin contends, for how unionism in Northern Ireland addresses the post-Brexit landscape.

In the last article addressing the political conditions for cooperation, Kirsty Hughes and Tobias Lock focus on Scotland’s relationship to Ireland, and on their different relationships to the European Union in the light of Brexit. These relationships will evolve in what is now “a patchwork of differentiated relations across these two islands”. That patchwork is summarised by the authors as one where:

Ireland remains an EU member state. Northern Ireland is part of the UK but is in the EU’s single market for goods and effectively in the EU customs union. England, Wales and Scotland are no longer in the EU’s single market or customs union; they face an internal border to Northern Ireland in the context of the protocol and a rather hard post-Brexit border to Ireland and the rest of the EU in the context of the Trade and Cooperation Agreement and the Withdrawal Agreement. Ireland and the UK are also participants in their joint Common Travel Area in terms of movement of people, meaning England, Wales, Scotland and Northern Ireland’s relations to Ireland are different from those to the rest of the EU where free movement has ended.

Hughes and Lock note how whereas commonalities exist in terms of how Northern Ireland and Scotland (along with Wales) view with increasing

concern what the administrations see as London's undermining of the devolution settlements, Nicola Sturgeon's government would welcome the greater degree of EU alignment has thanks to the Protocol on Ireland/Northern Ireland, even as unionist parties in Northern Ireland decry that very alignment. In terms of the evolution of Scotland's post-Brexit relations with Ireland, the authors consider Edinburgh and Dublin able to continue to deepen them if the current constitutional status quo remains the same, and if relations between London and Brussels and London and Edinburgh do not deteriorate. Before analysing the potential repercussions of a change in the constitutional status of Northern Ireland, the authors then consider what Irish-Scottish relations might look like in the event that Scotland were to become independent and a member of the EU, suggesting that the greatest challenge for the EU and Ireland in this scenario "would be in the impact on the rest of the UK, England, Wales and Northern Ireland of that independence".

Three articles then offer their assessment of the social conditions for cooperation and relations within and across these islands. In her contribution, Sarah Creighton touches again on the theme of trust that appears with varying degrees of prominence in the articles focusing on the political conditions, stating that "Trust in thin on the ground", and as a result "co-operation between Northern Ireland, the Republic and Britain is at an all-time low". Creighton's article argues that increasing community tensions in Northern Ireland are a result of political decisions and political arguments that are presented as having Northern Ireland's interests at heart, while doing precisely the opposite. Political opponents, she contends, portray themselves as defenders of the Good Friday/Belfast Agreement, but do so with very partial readings of it. The author is forthright in how this dynamic has played out in the Brexit negotiations, with significant repercussions for social cohesion in Northern Ireland and how communities view North-South and East-West cooperation and relations. "From the day after the Brexit", she states, "the British government was seen to represent Leave voters, and by virtue of political theatre, political unionism in Northern Ireland"; but "when it was done, they threw unionists under the bus". The European Union also made mistakes, according to Creighton, and did not take sufficient account of the political complexities of Northern Ireland, meaning that like the British Government, "it has allowed itself to be seen as the vanguard and advocate for one side only". The Irish Government, meanwhile, took up a position that the author sees as giving excessive prominence to the North-South

dimensions of the 1998 Agreement. All of these failings and more have in the view of the author served to exacerbate a disconnect between communities in Northern Ireland, between those communities and their political representatives and the agreements they reach – including the Protocol – and undermined the social conditions for cooperation. However, Creighton suggests a number of ways of addressing this disconnect, including by providing “greater opportunities for civil society” to interact directly with the structures established by the Protocol.

Tara Farrell’s contribution to the 2021 edition of *The Journal of Cross Border Studies in Ireland* focuses on the post-Brexit role of civil society in our communities, informed by how it has been called upon to address the ongoing Covid-19 pandemic. Her article presents a critical assessment of the current structures for civil society engagement in the processes of policy-making, and how women’s voices continue to be largely absent or marginalised, before presenting a number of proposals to strengthen social conditions for the mutual benefit of communities across these islands. The author draws on her rich experience of involvement in a wealth of community initiatives, including a number of cross-border projects such as the New Common Charter for Cooperation Within and Between these Islands, to call for improved structures for civil society engagement. “We have seen with Brexit”, she notes, “what happens when civil society is largely excluded from central discussions and civil society voices, based within our communities not only need to be heard but are essential in building inclusive and resilient communities”. Farrell questions why, when civil society organisations across this island and these islands have been designated by governments as essential in contributing to the response to the pandemic, are they not also seen as essential by policy and decision-makers in actively shaping the post-Brexit context. Noting how the promises of the Good Friday Agreement for greater civic society engagement have largely been left unfulfilled (such as an All-Island Consultative Forum), and how there is a comparative lack of substantive reference to such engagement by the UK and EU in relation to the structures established by the Withdrawal Agreement and its Protocol on Ireland/Northern Ireland, Farrell nevertheless recognises some efforts in this direction, including those involving the Ad-Hoc Group for North-South and East-West Cooperation. However, after suggesting that “current engagements with civil society and communities are peppered with acronyms and well-meaning soundbites that do not necessarily offer practical routes to engagement”, her article goes on to set out a number of specific

recommendations to address this situation, which includes tackling the lack of representation of women's voices.

Considering how the UK's departure from the EU will change the landscape for cross-border cooperation within these islands, and between these islands and the EU, Charles Whitmore's article seeks to provide a clearer understanding of what this will mean in terms of the post-Brexit conditions for civil society engagement in such cooperation. However, the article rightly notes how challenging this is given that the UK is the first country to leave the EU, which means we are faced with the uncertainties of a novel situation. The author sets out the EU's significant experience of establishing structures for cross-border civic society cooperation and dialogue with third countries, but these have been usually been as part of a process where those third countries are seeking to align themselves more closely with the EU, whereas in the context that we have moved into "the UK fits neither into the category of states seeking accession, nor does it fit within those states with whom a trading relationship is articulated around regulatory convergence". As a result, and notwithstanding the particularities of Northern Ireland's situation as a result of the Protocol, UK civic society organisations looking to continue their cooperation with their counterparts in the EU will have to look to adapt and learn from existing structures, and consider how to address the challenges arising from this new context. To this end, Whitmore provides a critical analysis of the extent to which effective civic society cross-border cooperation and engagement has been enabled by the EU's previous use of Civil Society Mechanisms (CSMs) as a result of agreements it has reached with other third countries. This comparative analysis is then used to inform how civic society organisations in the UK may wish to approach the implementation of the CSMs set out in the UK/EU Trade and Cooperation Agreement – including the Civil Society Forum (CSF) – noting however how, for instance, "the UK successfully sought to limit the remit of the CSF". The article concludes with an assessment of how the social and political landscape for informal, less structured cooperation has been impacted by Brexit.

This year's edition of *The Journal of Cross Border Studies in Ireland* concludes with three articles considering the prevailing material and regulatory conditions for cross-border cooperation and relations. In his contribution, David Henig sets out from the premise that in developed economies the production and sale of virtually all products and services are subject to regulations and that these regulations can be set at different levels including

state or province, country, or internationally. Crucially, considering the nature of pre and post-Brexit arguments, he notes that the lower the level regulations are set, the greater the likelihood of meaningful democratic consent, but equally the greater the obstacles to commerce within and between countries. This means that internal and international differences in regulation are normal, but they imply costs to political cohesion as well as to businesses and consumers. Balancing democratic control with the benefits of integration, Henig argues in this article, is a problem that all governments face, but that few have discussed seriously. Brexit, however, has brought these issues to public attention in the UK, particularly in Northern Ireland. The Withdrawal Agreement and its Protocol on Ireland/Northern Ireland, along with the EU/UK Trade and Cooperation Agreement are set to define the Great Britain/Northern Ireland/EU trade and regulatory relationship. If the arrangements seem unstable, Henig suggests, perhaps reflects that speed was more important than understanding in reaching them.

Writing from the perspective of someone with intimate knowledge of many of the issues raised by David Henig given some of his roles, such as convenor of the Northern Ireland Business Brexit Working Group and member of the UK Government's Joint Consultative Committee on Customs for Northern Ireland, in his article Aodhán Connolly outlines the recent trajectory of the business community in Northern Ireland, what the current situation looks like, and what he sees as the needs of business to overcome post-Brexit challenges. Connolly recalls how representatives of business in Northern Ireland, after generally reacting to the UK's decision in 2016 to leave the EU from the perspective of their respective sectors, with only some ad-hoc joint work, began to undertake more structured joint engagement from the spring of 2019 in response to the various proposals being made in relation to the eventual nature of Brexit and Northern Ireland's position within it. This momentum would lead to the formation of the Northern Ireland Business Brexit Working Group at the time of passage of the Withdrawal Agreement Bill through the UK Parliament in late 2019, allowing the Group to formulate a response that would "highlight the concerns of the over 85% of Northern Ireland business that it represents". Connolly is forthright in stating what the position of business in Northern Ireland was before the Withdrawal Agreement was reached:

The Northern Ireland business community did not want the Northern Ireland Protocol; they did not want a border down the Irish Sea. They did not want any borders anywhere. The business community were

aware more than most that the economic success of Northern Ireland was based not only on the peace we have enjoyed since 1998, but on the fact that we have had access to both the EU and GB markets for import and export markets, for ingredients and for selling our final products.

However, the author notes that once the Withdrawal Agreement and its Protocol on Ireland/Northern Ireland was finalised, the business community in Northern Ireland endeavoured to make it work by finding ways of overcoming post-Brexit challenges. After warning that “we must be pragmatic and realistic about the challenges instead of letting these challenges be used for political point scoring and again using Northern Ireland as a pawn in some bigger ideological game”, Connolly goes on to debunk what he sees as some of the myths surrounding the current situation, before setting out three key principles the business community in Northern Ireland is calling for in order for the Protocol to work: certainty, simplicity, and affordability. The article ends by suggesting “It is inaccurate to say that the business community in Northern Ireland are operating in a post-Brexit environment” given that businesses are still grappling with what this will actually mean, but that businesses also “see opportunities for North/South and East/West co-operation in all areas of commerce and business”.

Bringing this edition of *The Journal of Cross Border Studies in Ireland* to a close is Dagmar Schiek’s proposal that “as long as its constituent parts are partially within and without the EU, life on the island of Ireland needs a better legal frame than the protocol offers presently, and it is possible to improve that frame below the threshold of Northern Ireland or the UK re-joining the European Union”. To support her proposal, Schiek begins her article by analysing how transnational and international law relate to socio-economic and civic cooperation, highlighting how “Legal frameworks have the capacity to sustain and ground societal activity, to obviate the need to build trust anew for each interaction, because there is trust in all parties following the rules established”. Crucial in this regard is the European Union’s capacity to provide a transnational legal framework (and its accompanying funding instruments) supportive of cross-border socio-economic and civic cooperation – a framework that will no longer apply to the United Kingdom as a result of Brexit. The potential consequences of this for socio-economic and civic cross-border cooperation on the island of Ireland are then examined by the author in light of legal requirements for such cooperation arising from the Good Friday Agreement, and the extent to which the Protocol on Ireland/Northern

Ireland is capable of resolving the competing tensions resulting from Brexit and the commitments made in the 1998 Agreement. In this regard Schiek reflects on the resonances between the nature of the EU and some of the content of the 1998 Agreement, since “EU membership constitutes not only a political enabler but also a necessary legal frame for those elements of the Good Friday Agreement that constitute Northern Ireland as a hybrid territory and encourage its inhabitants to develop hybrid identities”. The author then offers a more detailed assessment of the extent to which the Protocol on Ireland/Northern Ireland, as well as other agreements and arrangements such as the Trade and Cooperation Agreement or the Common Travel Area, have the capacity to ensure the conditions for continued socio-economic and civic cross-border cooperation. Schiek concludes by setting out how, although the Protocol on its own and in its present form may not be sufficient to guarantee cross-border cooperation, incremental steps can be taken within the mechanisms of the Protocol to more properly safeguard that cooperation, and in doing so “build Northern Ireland into a real bridge between the UK and the EU”.

In different ways and to different extents, the articles in the 2021 edition of *The Journal of Cross Border Studies in Ireland* suggest that we cannot be confident at this time that the conditions for cooperation within and across these islands are guaranteed. Division and confrontation at the political level are not only making the search for solutions increasingly difficult, they are also fuelling division and confrontation among communities in Northern Ireland (and also division, or estrangement, between communities across these islands), undermining confidence in cross-border cooperation. However, to differing extents the articles also point to potential ways out of the current impasse that would provide a more welcoming context for continued North-South and East-West cooperation and relations; but they also suggest that we will not be capable of taking those ways out unless trust is restored, leadership is shown, and honesty replaces the facile sloganeering. As Sarah Creighton suggests in her article: “People need to be prepared to listen to hard truths instead of comfortable lies”. That time is well overdue.

Trusting relationships: *a necessary political condition for cooperation*

Dr Paul Gillespie

Dr Paul Gillespie is Deputy Director of the Institute for British-Irish Studies in University College Dublin, and an adjunct senior research fellow in the School of Politics and International Relations there. He is also a regular columnist and leader writer on international affairs for The Irish Times.



Introduction

Cooperation is a reciprocal relationship, in politics as in other spheres. It depends on a joint commitment of two parties to deal with one another. Cooperation is well and in this Irish context appropriately defined as “actions of separate individuals or organisations—which are not in pre-existent harmony [...] brought into conformity with another through a process of negotiation.”¹ Ireland North and South has pioneered such relationships since the 1970s because the Northern Ireland conflict necessitated intense bargaining between both contending communities there, between Irish and Northern Irish authorities and between the Irish and United Kingdom sovereign governments.²

The pattern of this bargaining laid down in the 1970s was continued and developed in subsequent decades, culminating in the Belfast/Good Friday Agreement of 1998. The agreement formalised it into a three-stranded approach which has continued since then.³ In the Brexit context it must be recognised that the two states joined the European Economic Community at

just the point when they entered into deep negotiations on the Sunningdale Agreement of 1973. The wider European multilateral context made contacts between their political and official elites easier and more regular in a more equal setting. It was a liberating experience for the smaller state that facilitated bilateral contacts in the margins of European meetings. That was to become a fixed if usually unremarked and taken-for-granted reality in the following years. Brexit has rudely interrupted the pattern, making it necessary to reinvent the trusting relationships built up through these two interlinked processes. Political trust is a key requirement for future cooperation within and between these islands.

The first section of this article examines some theoretical and comparative aspects of trust in the political science and international relations literatures, the better to understand their abiding significance for maintaining Irish-British political cooperation after Brexit. Another dimension, political power, is a factor determining the conditions in which trusting relationships can develop. The following two sections examine North-South relations in Ireland and Irish-British relations in that light. The final sections look at the European and United States aspects of political cooperation, arguing that in a period of rapid change these add significant geopolitical context and leverage to the relationships.

Trust, cooperation and power in Irish-British relations

Trust and the lack of it peppers contemporary Irish discourse and commentary on political cooperation between Ireland North and South and Britain.⁴ They reference long historical memories of untrustworthiness and betrayal in Irish dealings with London during imperial and post-imperial times, as well as nostalgia for the remarkable political intimacy between their respective political elites that made the Belfast Agreement possible in 1998. After the 2016 Brexit shock it is better understood that common membership of the European Union supplied an essential institutional ingredient of that high point in trustworthiness between the two states.⁵ Its extent is tracked in the mapping exercise jointly conducted by the EU with Ireland and the UK in 2017-2018. It revealed over 150 cross-border arrangements, many to do with security or entangled with EU joint membership and funding, others predicated on the single market which from 1993 occasioned dismantling of border checks alongside the security relaxations.⁶

Political trust is a slippery subject, traditionally used more in ordinary discourse about politics than in political science analysis.⁷ The concept has been developed in the analysis of domestic politics, particularly to register the falling away of political legitimacy in the crisis of democracy. An overview defines trust as “citizens’ support for political institutions such as government and parliament in the face of uncertainty about or vulnerability to the actions of these institutions”. Van der Meer goes on to emphasise that trust is a relational and contextual concept: “Trust relationships are defined by the subject’s degree of uncertainty and/or vulnerability about the future behaviour of the object”.⁸ Trust is evaluative, connoting assessments of the object’s competence to work in the subject’s interest, and the object is similarly assumed to be accountable, consistent and predictable. From each of these characteristics flows expectations of reciprocity in the relationship. Trust is also multi-layered, occurring at individual, organisational or national levels and there may or may not be spillover between them.

The dynamics of these trusting relationships may change and differ as we move from domestic to international politics. Political trust in the discipline of international relations is a developing issue.⁹ One major conceptual problem is how to give trust a role in a setting of anarchy, where there is no hierarchical order of authority, but rather competing autarchic sovereignties. The realist tradition in international relations portrays a field in which there is little or no room for trustworthiness along the lines of domestic politics. That has been countered by other traditions, notably liberal institutionalism predicated on the growing interdependence of states in the international order, and constructivism, which concentrates on shared identities, rules, norms and values at the international level.

Such approaches point to what is defined as a “trusting relationship” at that level, a behavioural manifestation of trust in which leaders grant others discretion over their interests based on the belief that those interests will not be harmed. This concept presupposes a social structure, where actors interact in more or less dense webs of meaning. As such, trusting relationships must include not only the idea of risk, but also the idea of obligation.¹⁰ That is relevant in considering alliances and long-term relationships between states. In their survey of the disciplinary field Ruzicka and Keating propose future research should seek to combine the methods of rational choice calculation of risk with sociological and psychological approaches. The threefold schema has been taken up in applied research on bilateral relationships like those between the EU and Turkey, the United

States and Egypt or Finland and Sweden.¹¹ It meshes usefully with the idea that trust operates at different levels, including citizens and leaders in domestic politics, organisations in national and international spheres and between states and their leaders internationally.

This brief survey of trust research in domestic and international politics serves to underline how and why it is relevant to relations between Northern Ireland, the Republic of Ireland and Britain during and after the Brexit negotiations on the UK's withdrawal from the European Union. Precisely because the lines of definition between the domestic and international are now so ambiguous and shifting in these jurisdictions the issue of trust is both relevant and problematic. Thus surveys in Northern Ireland show very low levels of citizen trust in Boris Johnson and the Conservative government during contentious periods of 2021, attitudes shared by nationalists and unionists. Compared to relatively high levels of distrust in Northern Ireland business groups, political parties, the EU, the Northern Ireland Executive and the Irish government, distrust in the British government was highest at 86% overall, with only 6% saying they trust it. Comments from pro-unionist respondents were particularly sharply focussed:

“It is clear that UK government were well aware of the problems which would arise and thought that they could sign the agreement and renege on it after, while blaming EU. Behaviour of Johnson, Gove and Frost et al makes me ashamed to be British.”

“The UK government only agreed to the protocol to get Brexit through, in the hope they could wriggle out of the obligations at a later date. The UK government has shown little or no regard for NI, which is shameful”.¹²

That was reflected in the Republic, where only 12% said they trust the British government over Brexit, compared to 65% distrusting it.¹³ These survey data illustrate how exposed public opinion has been to the British government in this period.

Popular attitudes are echoed in the public comments of political leaders in both parts of Ireland, as they respond to successive attempts by the British government to reverse previous commitments on the Northern Ireland Protocol. From Dublin, Belfast and Brussels there were similar comments about the untrustworthiness of Johnson and the Conservatives, in terms of reliability in keeping to commitments, consistency and predictability of their

actions, and reciprocity of their response to political concessions. Simon Coveney, Irish Minister for Foreign Affairs said after the British government said it would unilaterally move the implementation date of the Protocol by six months, that he does not favour legal action and instead favours “engagement on the basis of trust on both sides”.

“But if the UK simply cannot be trusted, because they take unilateral action in an unexpected way without negotiation well then, the British government leaves the EU with no option. This is not where we want to be, but it’s where the British government is driving us towards”.¹⁴

These accusations of bad faith are repeated from London against an EU framed as dogmatically legalistic and inflexible in implementing the agreements reached. The uncharted waters of EU withdrawal rudely interrupted patterns of greater political intimacy between Irish and British state elites laid down since 1973 in successive British-Irish efforts to settle the Northern Ireland conflict, culminating in the 1998 Belfast Agreement and then in applying its three-stranded structures.¹⁵

Article 11 of the Northern Ireland Protocol attached to the Trade and Cooperation Agreement completed by the UK and the EU in December 2020 refers to the need to maintain the necessary conditions of political cooperation laid down in the 1998 agreement in order to preserve the Irish peace process, and how the Protocol “shall be implemented and applied so as to maintain the necessary conditions for continued North-South cooperation”.¹⁶ As Hayward argues:

The Protocol is part of the Withdrawal Agreement which saw the UK as a whole (including Northern Ireland) outside the European Union, but it places Northern Ireland in a very distinct legal position in order to ensure that the Ireland/Northern Ireland border is not a customs or regulatory border, that is, that there is no need to manage that border for those purposes. The Protocol thus ‘frees’ the UK to have a distant relationship with the EU in the future even whilst adhering to the commitments and principles of the Joint Report [of December 2017 on progress made in phase one of the UK–EU withdrawal negotiations]. The ‘specific solution’ for Northern Ireland is unique and even exceptional, not just in the UK but for the European Union itself.¹⁷

In the perspective of political trust extending from domestic to international politics this is an exceptionally demanding scenario. Even though the UK is withdrawing from the EU to become a more distant and “foreign” partner in the classical anarchy of the international system, it is simultaneously agreeing to manage the Northern Ireland peace process involving a part of its own state as before. Further, the very management arrangements entered into involve a new trusting relationship with Brussels and Dublin, expressed in a complicated joint committee system to implement and create policy.

Trust is thereby institutionalised in this international treaty so as to underwrite political cooperation. It is a relatively costly commitment. That is because “by undertaking public commitments, states place their reputations at risk. Parties that abandon their public agreements will be branded unreliable, making others hesitant to cooperate with them in the future”.¹⁸ In addition, by hard-wiring monitoring devices and penalties into written agreements states communicate their willingness to faithfully implement their treaty obligations by making cheating too costly to undertake.¹⁹ This theoretical and comparative point bears out the observation particular to the Irish-British setting that political cooperation should not be mistaken for an absence of, or diminution in, core conflicts of interest, as was the case in the 1990s, or during the relaxation of tensions in the 2000s.²⁰ Cooperation is more accurately defined as the “actions of separate individuals or organisations – which are not in pre-existent harmony [...] brought into conformity with another through a process of negotiation”.²¹ In this perspective political cooperation is hard-wired into the UK-EU WA and TCA as an imperative, the abrogation of which would incur substantial reputational risk and potential sanctions. Tension between the harder Brexit objective of taking back control to facilitate a more Global Britain capable of striking trade deals with the rest of the world and these continuing commitments became a running feature of the post-exit negotiations. They are plainly visible in the UK government’s command paper published in July 2021, which called for a standstill or renegotiation of the commitments made.²² Overcoming these difficulties pushes maintenance of the necessary conditions for political cooperation into the realm of high inter-state politics and geopolitical power relations.

Differences of scale and power and how to mitigate them have determined the course of Ireland’s historical relations with Britain. They continue to do so politically today through the Brexit crisis.²³ Mitigation of its bilateral weakness with the UK can be seen in Ireland’s ability to make the integrity

of the Belfast Agreement and its commitment to an open border on the island a central condition of the first phase and the concluding EU agreement with the UK on Brexit. It is also plainly visible in the solidarity extended to Ireland over the Belfast Agreement by the Biden administration in the US. Nevertheless, Ireland's smaller scale, wealth and power compared to the UK is only partly compensated by these advantageous linkages. They cannot match the objective power of its larger and richer neighbour, with its own extensive international economic, security and military alliances. The harder Brexit diplomacy assumes these advantages can override constraints on its power imposed from Brussels or Washington because its central position in the five eyes intelligence system with the US, Australia, New Zealand and Canada, its willingness to commit new naval strength to the Indo-Pacific theatre, an alliance with the US against China, or the sheer global strength of its huge financial services sector realistically will tell more than they do.²⁴ Critics of such hard Brexit positions point out that the UK (like other NATO allies) was not consulted when Biden decided unilaterally to depart from Afghanistan and that this leaves it very exposed and isolated.²⁵

In terms of British-Irish relations such assertions of unilateral British power and interest should not be underestimated. Realistically that relationship is historically and prospectively overshadowed by Britain's global role, the rhythms of which determine its normal geopolitical preoccupations. Coakley and Todd refer to this when they draw attention to the period before Brexit when

the force of British-Irish agreements tended to vary with wider British interests. The asymmetry of power between the Irish and British states, the impossibility of effective international enforcement even of formal British-Irish agreements, and the lack of any written British constitution meant that the Irish government had to rely on personal relationships and contacts where conflicts existed.²⁶

Notwithstanding the ways in which political cooperation is locked in to these agreements it remains difficult to pin them down amidst such contending interests of the larger state.

Trust is, therefore, a useful benchmark with which to judge and assess the triangular Irish-EU-UK relationship after Brexit. These recent more sophisticated treatments of its scope and dynamics illuminate how it can be applied to that relationship. But trust is also constrained by power, and when

that is asserted frontally or brutally trust becomes an intervening factor or variable rather than having causal validity in its own right, as realist accounts aver.²⁷ There is a tipping point between a trusting relationship and a conflictual one, between agonism and antagonism or friendship and enmity. Threats can then be issued as warnings of conflict or efforts to stop relations deteriorating.²⁸ We are not quite yet at that stage in this triangular relationship, and the structures of political cooperation laid down in these agreements are precisely intended to protect peaceful means of change. Yet British threats to act unilaterally in excluding themselves from commitments made, and to leverage or stoke up anti-Protocol violence in Northern Ireland, as critics charge, open up alternative paths of change and direction. The next sections of this article explore what is needed to protect the political cooperation laid out in 1998 and reinforced as the EU became a guarantor of that agreement in 2017-2020.

North-South political cooperation

The overall purpose of the Northern Ireland Protocol agreed between the UK and the EU is stated as follows in Article 1.3:

to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North-South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions.

The UK government as a signatory to this agreement brought to it repeated affirmations of its commitment to the 1998 agreement in all its parts, in declarations made by itself during the negotiations. The Irish government made similar statements and fully endorsed the position of the EU in signing the agreement, which summed up what is involved as follows:

Consistent with the arrangements set out in Articles 6(2) and Articles 7 to 12 of this Protocol, and in full respect of Union law, this Protocol shall be implemented and applied so as to maintain the necessary conditions for continued North-South cooperation, including in the areas of environment, health, agriculture, transport, education and tourism, as well as energy, telecommunications, broadcasting, inland fisheries, justice and security, higher education and sport. In full respect of Union law, the United Kingdom and Ireland may continue to make new arrangements building on the provisions of the 1998

Agreement in other areas of North-South cooperation on the island of Ireland.

Two novel aspects of the Northern Ireland Protocol as it affects North-South relations after the 2016 Brexit decision should be emphasised: the growing realisation among Irish, British and EU elites of how central common EU membership had been for both the Irish and UK states as they negotiated the Withdrawal Agreement and then the Trade and Cooperation Agreement; and, secondly the new role of the EU as an international treaty guarantor of the Belfast Agreement. As Coakley and Todd put it:

In a way that would have been unthinkable in the 1990s and 2000s, it is the EU rather than the UK or the USA that has become the effective guarantor of the Good Friday Agreement in the new world of Brexit.²⁹

The three strands of the GFA provided for a structure of consociational power-sharing between the two major communities in Northern Ireland (Strand One),³⁰ a structured North-South Ministerial Council (NSMC) meeting in different formats “to develop consultation, cooperation and action within the island of Ireland” (Strand Two), and a British-Irish Council (BIC) bringing together the two sovereign governments, devolved institutions and a British-Irish Intergovernmental Conference (B-IIGC) “to promote bilateral cooperation at all levels on all matters of mutual interest within the competence of both Governments” (Strand Three).

Strand Two was given a specific agenda of areas of North-South cooperation and implementation in an Annex, which could include agriculture, education, transport, environment, waterways, social security, tourism, relevant EU programmes, inland fisheries, aquaculture and marine matters, health, urban and rural development. This had been radically and effectively thinned down in the final stages of the 1998 talks, partly in response to unionist fears, partly as a negotiating concession by the Irish government. After 1998 six North-South implementation bodies under the auspices of the NSMC were created: the Loughs Agency (the Foyle, Carlingford and Irish Lights Commission), Waterways Ireland, the Special European Union Programmes Body, the Food Safety Promotion Board (safefood), InterTradeIreland, and the Language Body. Further developments like the electricity market and EU single market measures took place outside the framework agreed in 1998.

As part of the Brexit negotiations the two sides agreed to do a common mapping exercise in autumn 2017 “aimed at recording the level of North-South cooperation on the island of Ireland and at assessing the role of Ireland’s and the UK’s common EU membership in this regard.” Over 150 areas, varying in significance from the relatively trivial to the centrally important, are listed under the main headings and then in supplementary ones such as higher education and sports, arts and culture.³¹ About two thirds of them have an EU component of some kind, including funding and networking. This finding was surprising to the UK side, which issued a legal note clarifying that because no new EU law would apply to many of them, and because they are subject to the discretion of the NSMC, they will be exempt from the EU enforcement and supervision provisions applying in the main fields of cooperation.³²

This note also served to underline what is involved in protecting North-South cooperation under the agreement. The realisation during the negotiations among the respective UK, EU and Irish elites that common EU membership was central to its development arose from the overlapping security, regulatory, trade and everyday life aspects of its unfolding from the 1990s.³³ Much of the rhetoric concerning no return to the land border refers to the experience of blocked roads, military towers and checkpoints which were dismantled after the ceasefires from the early 1990s. That coincided with gradual dismantling of trade and non-tariff barriers as the EU’s single market was applied in the same years. Border populations were deeply concerned with road safety, health and flood risk measures. Thus it was

[o]nly as the peace process had become embedded in Northern Ireland had the benefits of European integration on the island of Ireland begun to be realised. This meant that, for many (especially Irish citizens), the experience of EU membership was inseparable from the achievement of peace and the 1998 Agreement.³⁴

From the EU perspective this realisation arose from their rapid conclusion in 2016-2017 and later that solidarity with Ireland as the member-state most affected by Brexit coincided with their growing understanding, both in the Commission conducting the negotiations and more gradually among the member-states gathered in the European Council giving the Commission its mandates, that the single market’s integrity is on the line at the Irish border between the departing UK and the EU. This will be all the more the case as they diverge in future. The EU-27’s unity against a contentious or non-reciprocal UK is thereby reinforced.

Trustworthiness comes centrally into play here because part of the “flexible and imaginative” solutions the EU is seeking with the UK involves outsourcing enforcement of its trade rules to a non-member-state – notwithstanding the monitoring and oversight roles for the joint committee system set up by the Protocol. A trusting relationship will be needed to manage the North-South aspects of Northern Ireland’s unique role in which it is granted EU rights to trade in goods even as it remains part of the UK’s customs union. Hence the EU expressed immediate disquiet and concern over the UK’s Internal Market Bill, because it came with a threat by the Northern Ireland Secretary of State to potentially breach the direct effect of the Withdrawal Agreement in domestic law. Since it is a potentially dynamic divergence under the UK’s hard Brexit policies that is all the more problematic.³⁵ There was similar disquiet expressed over the UK’s command paper issued in July 2021 calling for a freezing of the grace periods already granted ahead of a potential renegotiation of the Protocol.

Political polarisation of these issues in Northern Ireland raises the stakes here. Unionist parties oppose the Protocol and say they want it scrapped, nationalist parties defend it, while the UK and Irish governments say or act as if this is unrealistic and the EU categorically refuses to contemplate a renegotiation. Divining the UK’s true negotiating objectives became a commentators’ and analysts’ game in this setting. Since Brexit was ill-defined it became subject to contending forces in the UK’s domestic politics from 2016-2021, between soft and hard Brexiteers, with some of the latter opposed to any deal at all. Informed scenarios of UK negotiating intentions ranged from options to extend grace periods unilaterally, further amending its Internal Market Bill, or signal an end to the negotiations with Brussels by threatening to, or actually, triggering Article 16 of the Protocol. Perhaps the most convincing scenario is that the Johnson government seeks an indefinite standstill in applying the NI Protocol pending the May 2022 Assembly elections in Northern Ireland which will determine whether there is a majority against the Protocol in a vote to be taken by 2024, and the UK general election by 2023 in which Johnson wants to keep the Brexit issue alive.

It is of course true, as the UK note says, that North-South cooperation is grounded in the inter-governmental arrangements spelled out in 1998 and developed (unevenly) since then.³⁶ In particular the NSMC depends on there being a functioning executive in the North; since this was not the case for nearly three years from 2017 to January 2020 a large gap emerged in the

course of the Brexit negotiations. That the council is functioning again makes for a stabilising influence. The council now faces the task of compensating for departing EU funding of some schemes and finding ways to manage its developing role in the new border regime in the Irish Sea. Assuming there is no realistic prospect of it being moved back to land, short of a disastrous collapse of the agreement and the introduction of WTO rules for UK-EU trade, this is a large political task. While overall opinion in Northern Ireland initially preferred to see an end to the Irish Sea border because of the disruptive effects on everyday life as it was introduced, majority opinion there still favours remaining in the EU.³⁷ Business groups are beginning to understand the real investment, manufacturing and trading opportunities arising from privileged access to both the EU and UK markets. These need more advocacy and publicity, which could follow a negotiated solution between London and Brussels. The Irish Government's Shared Island initiative, with associated funding of 500 million euro is a factor here; pitched to the medium term it is dedicated to bed down the Belfast Agreement institutions.³⁸

Offsetting that are politics on the ground, including about the Protocol itself. It provides for a consent mechanism by which it will only continue if it has the support of 60 per cent of the Assembly to be elected in May 2022, or 40 per cent in both designated communities. Politicians opposed to the Protocol must decide how best to mobilise support, but they face an uphill battle given overall EU support. The developing debate on potential Irish reunification plays into the issue, as it raises questions of whether Northern Ireland is being removed from the UK orbit and into the Irish-EU one by the Irish Sea border. Associated with that is the agreement secured from the EU in 2017 under Irish tutelage that if there were to be a vote for Irish unity the new state would be entitled to automatic membership.³⁹ The growing centre ground in Northern Ireland politics will be the battlefield here, in what will pit pragmatic against ideological alternatives of the region's identity and direction of travel.⁴⁰

In all these circumstances, creation of a real trusting relationship grounded in a common institutional approach with due processes of monitoring and adjudication remains an elusive goal. As Hayward concludes:

Flexibility and imagination brought the UK and the EU to the point of agreeing to the Protocol on Ireland/Northern Ireland. Its successful implementation will require those same qualities to continue to be demonstrated on both sides.⁴¹

East-West political cooperation

Protecting the 1998 agreement in all its dimensions must include paying due attention to relations between the Republic and the United Kingdom. These polities are asymmetrical in scale and power and affected by wider geopolitical trends. The ebb and flow of the relationship since the 1970s has been predicated on two major axes: joint political engagement with and management of the Northern Ireland security and political crises; and joint membership of the larger multilateral framework of European integration in which both state elites found a wider setting to work together and get to know one another better. The dynamics of the two axes preceded and go beyond the institutions laid down in the 1998 agreement, the BIC and the B-IIGC, to encompass the totality of bilateral relations between Dublin and London, as is illustrated by the British-Irish Parliamentary Assembly, which predated the agreement and has played a not insignificant role in these relations.⁴²

Where inter-personal and psychological trust between political leaders is diminished, institutions can compensate by providing common sociological webs of meaning. Both the BIC and the B-IIGC have an important part to play in creating the necessary conditions for political cooperation between the two states after Brexit. Significantly, the BIC's objective is defined as being "to promote the harmonious and mutually beneficial development of the totality of relationships among the peoples of these islands." The now famous phrase was coined by Kenneth Stowe, Principle Private Secretary to the British prime minister in the joint studies by civil servants on improving the relationship in 1978-1980.⁴³ The BIC, in bringing together the two governments with the UK's devolved authorities and the crown dependencies can play an important role in coordinating their policies, so long as the governments treat these meetings seriously. This has been only sporadically the case over its history;⁴⁴ but that can change as the Conservative government led by Boris Johnson pursues its centralising role in pursuit of Brexit and a more assertive unitary unionism.⁴⁵

The devolved authorities resent this Conservative shift and seek out better coordination for their interests, including with Dublin. There is mounting pressure on the UK's union as the demand for a referendum on Scottish independence grows and is linked to the demands for referendums on Irish unity. In coming years there will be a convergence of Scottish and Irish constitutional issues and futures. This will affect British and Irish politics in an existential fashion. We can expect UK governments to link Scotland and

Northern Ireland when it comes to issues such as consent to be governed within the UK, referendums on independence or Irish unity, borders with England and Ireland, economics and EU membership – especially if they are Conservative governments led by Boris Johnson. They will be reluctant to move on these issues in one country for fear of influencing the other.⁴⁶

Paradoxically, this can lead to a simultaneous valorisation of the BIC because it brings Irish and devolved authorities together, and a marginalisation of it from London because it provides an unwanted platform for secessionist or radical devolutionists, both opposed to its assertive centralising unionism.⁴⁷ The Northern Ireland Protocol's UK-EU border in the Irish Sea stands as a warning to Scots from London about the potential border regulatory difficulties they face with England if they vote for independence. The economic costs and benefits of independence are a closely-related convergent issue between Scotland and Ireland. Northern Ireland's annual transfers from the UK exchequer are used to argue for the union, as in Scotland; but both could gain more from a self-rule which unleashes their productive potential. The Scottish government admires Ireland's achievement in securing EU agreement that a united Ireland would join the EU without renegotiation. It too would like to find favorable terms for EU membership if it secures independence. It recognises that the UK-EU deals have strengthened Ireland's international position with the EU – and the United States.

Strand Three of the 1998 agreement on East-West relations provides for the British-Irish Intergovernmental Conference (B-IIGC) which brings the two sovereigns together “to promote bilateral co-operation at all levels on all matters of mutual interest within the competence of both governments”. The governments are required to “make determined efforts to resolve disagreements between them”, but immediately adds that there will be “no derogation from the sovereignty of either Government”. The two governments agreed in May 2021 to restore regular meetings of the conference, with two in 2021 and three scheduled for 2022. This brings an institutional stability and regularity which Johnson had resisted up to then; but that may give more diplomatic than political comfort to the Irish side given his volatility and reputed untrustworthiness. Rory Montgomery, the former Irish permanent representative to the EU and second secretary general at the Department of the Taoiseach and the Department of Foreign Affairs, says “[t]rust in this British government's good faith, never high, is now minimal across the EU, and on all sides in Northern Ireland”.⁴⁸

Commenting instructively on an article which argues that the B-IIGC can help fill an institutional vacuum in British-Irish relations, partly due to neglect of the conference by both governments in 2007-2018 when it did not meet,⁴⁹ Montgomery points out that the politics which gave rise to the 1998 agreement was conducted informally at the highest levels.⁵⁰ It followed a tradition laid down in the 1980s between the highest civil servants in both jurisdictions negotiating the Anglo-Irish Agreement. It is well described by Dermot Nally, former Irish Government Secretary General:

as negotiations continued, trust increased between both sides and gradually the Irish delegation ceased to advocate a purely Irish set of preferences on the bargaining table, but instead would take on board British approaches and vice versa.⁵¹

Tannam argues that Brexit “is not the sole or fundamental cause of a weak British-Irish relationship, but that it exposed that relationship’s fragility”.⁵² This arose from different perceptions of the 1998 peace process between the two governments, especially Conservative ones which were not involved in it; from the very success of devolution which limited its possible agenda; and from a loss of institutional memory on both sides.⁵³ Montgomery believes Brexit is more consequential as a disruptive factor in the relationship and that unionism has an abiding dislike of the B-IIGC, arising from its hatred of the 1985 AIA when it was marginalised by both governments. While he agrees that regular institutionalised meetings have their purpose, they are not guaranteed to command the attention of busy politicians. There is now provision to include Northern Ireland Executive members in B-IIGC meetings, but that may undermine their purpose if the governments want to deal directly and unhindered with each other. There are also limits to using the B-IIGC to deal with European issues arising from Brexit, since these are handled from Brussels and Ireland has to be careful about being labelled bilateral from there.⁵⁴

The B-IIGC seems the obvious forum to handle the great number of intergovernmental issues arising if a Northern Ireland referendum is contemplated – although Johnson says that will not be for “a long, long time”. But talk of unity referendums inflames unionists who worked on the assumption that the 1998 agreement would bed down the devolution settlement within the UK. Yet unionists too have to live with Brexit’s consequences, including how it reopened the unity question, not least through the DUP’s support for the UK’s leaving. In light of the potential

existential challenges to the union, how much can this British government be trusted to act with “rigorous impartiality” and to refrain from “external impediment” in the event of referendums North and South on Irish unity? These obligations fall on the machinery of government rather than the political parties in power and appear not to impose campaigning neutrality in referendum campaigns;⁵⁵ but the British state will be profoundly at risk in them, which is why these terms were written in to the 1998 agreement.

Overall it can be seen that trust mechanisms play a central role in East-West relations. They help institutionalise the relationships, but there are limits to how much that can substitute for or overcome personality and policy differences. These have to be tackled and agreements reached before predictable, consistent and regular cooperation can be established.

The EU dimension of political cooperation

The Brexit crisis has deepened Ireland’s role in the European Union because defending the integrity of its single market has become intimately linked to solidarity with Ireland as the member-state most directly affected by the UK’s departure.⁵⁶ This outcome has surprised Britain’s hard Brexiteers. They expected that bilateral trade interests with the UK, such as German car exports there, would override more multilateral interests like the single market. They see Brexit heralding disintegration rather than strengthening of the EU27. Boris Johnson’s former advisor, Dominic Cummings, explained in a tweet how he thought Emmanuel Macron would likewise ditch Ireland’s membership of the single market to reach a deal. That would have made the Protocol on Northern Ireland contained in the EU-UK withdrawal treaty, with its border in the Irish Sea, unnecessary, “cos we’d have refused ANY checks anywhere and Ireland wd not have dared build anything either”. He agreed this would have been “messy” but worth the trouble to get their way.⁵⁷ He did not factor in the resulting international isolation and economic disruption for Britain as reputational damage and trade sanctions kick in.

In fact, EU member-states, together with the European Commission they mandated through the European Council in the Brexit negotiations found their own unity was strongly reinforced as they encountered such British attitudes. They drew on the resilience established when they came through the 2008-2014 financial and eurozone crises and were determined not to be divided by British diplomacy pitting national capitals against Brussels.⁵⁸ The

linkage forged by Irish diplomacy between the single market issue and an open border (especially with Angela Merkel in the months following the 2016 Brexit referendum) endured and deepened. That showed up in the EU's insistence on dealing with the Irish issue along with citizenship and financial ones, in the first stage of the negotiations. Most important, it is contained in the overall purpose of the Northern Ireland Protocol "to protect the 1998 Agreement in all its dimensions," making the EU an international guarantor of the Belfast agreement.

Guarantors demand reciprocal trust in partnerships in the international order, one of the necessary conditions for maintaining political cooperation. That requires a trusting relationship if the joint committee system established to manage the Protocol is to work – a point Maroš Šefčovič, the Commission negotiator, spelled out in a Brussels press statement on June 30 2021:

All Northern Irish stakeholders deserve clarity, stability and predictability. By the same token, I encourage the UK to continue to pursue joint action through joint bodies – as opposed to unilateral steps, undermining trust.⁵⁹

Clarity, stability and predictability were not on view from UK negotiators in the exchanges over the Protocol in the summer of 2021. Boris Johnson and David Frost said they did not fully understand the effects an Irish Sea border to protect the single market would have on British trade with Northern Ireland – even though these were fully spelled out in two briefing documents at the time.⁶⁰ Their threats to breach the agreement are seen as bad faith. Their call for a freezing of Protocol implementation while an effective renegotiation of it is sought is seen in the same way. It was firmly rejected by the Commission president van der Leyen. Their strategy was interpreted along a continuum from indefinitely postponed implementation to a more ambitiously mendacious effort to define it as a frozen conflict in the expectation that continental EU states would eventually tire of confrontation and concede the changes sought. For that, though, it would be necessary to restore a trusting relationship with Brussels – an elusive goal indeed for this Conservative government and its leader.

One thread of discussion between the more technocratic European Commission, which is willing to explore possible further flexible and imaginative solutions to the Protocol problems, and the more political European Council, was whether the latest UK position is an effort to upend

the agreement for domestic political reasons. In that case, blunter tactics could be called for, including trade sanctions or even reversion to World Trade Organisation conditions. That would be a disaster for Ireland, necessitating hard border controls.⁶¹

This delicate line between procedural trust willing to seek out compromise for further cooperation and riskier high politics for a more contentious outcome is being tested out in the continuing EU-UK talks. It raises an important set of questions around sovereignty, as Laffan explains in her analysis of a David Frost lecture defining sovereignty as “about the ability to get your own rules right in a way that suits our own conditions”:

A narrow definition of sovereignty as unfettered control over domestic law making is out of touch with the reality of the 21st century world and the sovereignty practices it requires. The Johnson Government opted for an absolutist form of sovereignty but in practice lost effective control other than on migration, in its relationship with its near neighbour. Its geographic proximity to the EU implies a continuous tension between its desire for sovereignty and the demands of interdependence. The UK opted for exit over voice whereas EU member states continue to opt for voice, a seat at the collective table and the ability to influence EU developments. The UK may find that it has traded formal sovereignty for effective control.⁶²

Geopolitics and the US dimension

A related and important factor here concerns the geopolitical power at play in the Brexit negotiations. Objectively the UK put itself in a weaker position than the EU in a changing power relationship once the decision was made to leave.⁶³ From both their points of view, it rapidly became clear that membership of the EU matters.⁶⁴ It is much easier to obtain opt-outs from due legal process while still a member-state than it is after exit, because membership confers a bargaining advantage on the member-state seeking exceptional treatment arising from special problems it faces, compared to a non-member. Exit transfers that bargaining advantage to the member-state(s) most directly affected by the departing state’s demands for special treatment – notably, in this case, Ireland – as the relationship between the supply and

demand for differentiation and the balance of institutional leverage shifts decisively.⁶⁵

The solidarity shown to Ireland by the other 26 EU member-states through the Brexit crisis helped mitigate its disadvantages of scale, wealth and power weaknesses compared to the UK. A key bargaining trade-off was that the Irish state agreed to conduct its Brexit bargaining through Brussels rather than bilaterally with the UK. This does not prevent certain initiatives being taken on the EU's behalf by Ireland, most notably the Varadkar-Johnson one in October 2019 that produced the Irish Sea border, and the subsequent efforts to ensure a fair and minimally obstructive implementation of the Protocol agreement for Northern Ireland. It is a delicate balance for Irish diplomacy.⁶⁶ John Bruton points out there are two types of problem for a substantial, mainly unionist, section of Northern Ireland's population. Solving the first, practical inconvenience in terms of trade, requires "an atmosphere of maximum trust between the UK and the EU, and between the people of Northern Ireland and the EU".⁶⁷ That elusive quality comes up at every juncture of this story. The second is an additional measure of democratic accountability to the consent principle set out in Article 18 of the Protocol, which might see Northern Ireland representatives associating the region with the European Economic Area (EEA), similar to the rule-shaping role of Norway, Iceland and Lichtenstein.

The other major mitigating factor in Irish-British power relations through the Brexit crisis concerns relations between both states – and the EU – with the United States. The US role in the Northern Ireland peace process developed in the 1970s as John Hume's SDLP influenced Senator Edward Kennedy's thinking, and they in turn encouraged President Carter to say Northern Ireland was a legitimate concern of US foreign policy.⁶⁸ The involvement continued under Ronald Reagan's presidency on cross-party lines as Irish American leaders revived diasporic politics from prominent positions of power within their political system, including Tip O'Neill as Speaker of the House of Representatives, Senator Daniel Patrick Moynihan and Governor Hugh Carey of New York and Senate Majority leader George Mitchell. Their combined influence on the Thatcher government in the 1980s, including pressure to sign and implement the Anglo-Irish Agreement of 1985, is acknowledged by some of Thatcher's then advisors such as David Goodall,⁶⁹ though disputed by others like Robin Butler and Quentin Thomas.⁷⁰ That US pressure and involvement was enhanced in the 1990s under President

Clinton, culminating in Mitchell's important chairing role in the 1998 agreement. That this had become an enduring US commitment was seen in the Richard Haass effort to revive power-sharing under the Obama administration.

While interest waned under Donald Trump, it was sharply revived with Joe Biden's victory in 2020, given his avowed Irish background and commitment to the 1998 agreement. In a replay of the powerful involvement of 40 years earlier Nancy Pelosi, House Speaker, Richard Neal, Chairman of the House Ways and Means Committee, and congressman Brendan Boyle backed up Biden's explicit warning that there would be no US-UK trade deal if it undermined Northern Ireland's peace process.⁷¹ Precisely this prospect, including the likelihood that such a deal would include less environmentally sustainable agricultural goods hitherto denied entry to the EU, was at the basis of hard Brexiteer plans for Global Britain. That in turn stiffened the EU's resolve to enforce the NI Protocol more tightly.

Such a perfect storm in transatlantic relations as they affected Northern Ireland was unanticipated by the Brexiteers. They cut across Boris Johnson's ambitions to leverage the US relationship against Brussels; instead of Trump's Europhobia he now has to deal with a Biden administration favouring better relations with the EU, anxious to shore up multilateral alliances against China, and in general wanting to restore trust in the US as a reliable hegemonic power. This geopolitical calculus played to the Irish government's hand in dealing with Brexit; it was a useful additional source of pressure too for EU leaders dealing with the UK at 2021 summit level, whether in the Group of Seven context or the Glasgow COP26 climate summit, at both of which Johnson as chair was anxious not to antagonise the US by reputational untrustworthiness on the Northern Ireland Protocol.

Conclusion

Political trust is a necessary ingredient of international diplomacy and inter-governmental cooperation. It is not predicated on harmony, but on a need to manage interdependence or manage conflicts of interest – both of which remain plentiful conditions in this period of international politics. Expectations of predictability, accountability, consistency and reciprocity are major elements of trust as a relational concept and practice. Translated into treaty-making these qualities gain the force of law. As they do states open

themselves to sanctions and reputational damage if they fail to match these expectations.

Such norms of international life are stitched in to the two treaties considered here, the 1998 Belfast Agreement and the 2020 Trade and Cooperation Agreement between the EU and the UK. Whether trust is considered at psychological level between political leaders, sociologically as a shared web of meaning or rationally as a calculus of risk these norms apply. That is the case also if trust is considered from the perspective of domestic politics, private organisations or international politics.

This article has examined how trust has become a recurrent feature in all these dimensions between the UK, the EU and Ireland in the Brexit negotiations and the agreements reached between them to preserve political cooperation after they concluded. It has taken account of the distinctive characteristics of Brexit, a very under-defined objective which played out in British domestic politics over four years. It ended in the political and then electoral victory of Boris Johnson as prime minister on a hard Brexiteer platform supporting maximal distance from the EU and a narrowly domestic definition of sovereignty. Johnson's widespread personal reputation as an untrustworthy opportunist played into that outcome, particularly its inherent uncertainty. His political base in English electoral politics, which gave him both victories, took precedence over international obligations during these years. So did his admiration for Britain's imperial past, in which power and interests classically overcame normative commitments.

All this has made the norms of political cooperation built in to the Belfast Agreement more difficult to deliver on and implement in the Brexit outcome. As we have seen, they both depend on institutional means of exercising political trust. That is difficult indeed if outcomes and expectations are not matched in one party's political understanding, as is the case with the UK's expressed unhappiness with the TCA. Avoiding a hard border on the island of Ireland and protecting the Belfast agreement in all its dimensions has brought the EU into play as a guarantor of that agreement. A key task facing all parties in the coming period is to restore the political and institutional conditions that can allow trust assume its necessary role across each link of this now triangular relationship.

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Stuck in the Middle with EU (and the UK)?

How Ireland navigates its relationships with the EU and UK post-Brexit

John O' Brennan

John O' Brennan holds the Jean Monnet Chair in European Integration at Maynooth University and is Director of the Maynooth Centre for European and Eurasian Studies. He is widely published in academic journals, including recent articles on Ireland, Brexit and the European Union in Capital and Class, the Journal of European Integration, Irish Political Studies and Parliamentary Affairs. He is the co-editor (with Mary C. Murphy, UCC) of a special issue of Irish Political Studies in 2019 on 'Ireland and EU Crisis Governance' and a member of the Irish government's Brexit Stakeholder Group since 2017. He appears regularly on Irish and international radio and television programmes to discuss European Union issues.



Introduction

The vote by the United Kingdom on 23 June 2016 to leave the European Union presented Ireland with some very difficult choices, in particular between its commitment to protecting the Good Friday Agreement and its membership of the EU's Customs Union and Single Market. Immediately on 24 June 2016, the sense in Dublin was one that the exit of the UK from the EU constituted an existential threat to Ireland, and in particular to peace on the island. While entirely accepting of the legitimacy of the decision, the Irish government led by Taoiseach Enda Kenny, set about limiting the potential damage caused to Ireland.

Ireland had hardly featured in the referendum debate, despite warnings from John Major, Tony Blair, Bertie Ahern and others, that Brexit represented a potential threat to a hard won peace. Both prior to and after the Brexit referendum, it seemed little understood in London how the attainment of Irish membership of the (then) European Communities in 1973 represented the most crucial development in the life of the independent Irish state, and thereafter how much EU membership helped to re-fashion Ireland in decisive ways. “Europeanisation”, in different forms, has played a critical role in shaping Irish economic, political and social life over almost five decades of membership.¹ Ireland, in effect, used EU membership as a vehicle for development and modernisation. So there was no question of Ireland following the UK out of the EU, as some excitable Brexiteers suggested as the most obvious route to solving the potential problems cause by the rupture.

This article examines the challenge posed for Ireland by Brexit and assesses how Ireland responded to developments in the UK since 2016. It evaluates, in particular, the balancing act performed by successive Irish governments, in seeking to protect the peace process on the island, maintain a good relationship with the United Kingdom and simultaneously deepen its commitment to membership of the European Union. Irish governments operated from four main principles after 2016, as the multiple challenges posed by Brexit became an everyday part of government activity:

- Protection of the peace process and the Good Friday Agreement;
- Maintaining an open border on the island of Ireland;
- Maintaining as good a relationship as possible with the UK;
- Cementing Ireland’s position within the EU and the Single Market.

These principles derived both from the Good Friday Agreement and the European integration process, and the Irish experience of participating in both models of shared governance. At the heart of these complex, multi-nation, multi-faith, highly institutionalised models of collective governance lies the notion of interdependence – the idea that different entities can come together in a spirit of solidarity and shared sovereignty to the mutual benefit of participating entities. Interdependence is a self-reinforcing mechanism and can deepen inter-communal relationships significantly over time. The problem which Irish governments encountered after 2016 was that the Brexit referendum was won on the basis of a monolithic notion of both identity and governance. Shared governance was jettisoned in favour of a rhetorically

insistent but ideologically vague British notion of ‘sovereignty’. Taoiseach Micheál Martin summed up the difference in a January 2021 speech: “One of the striking things about the debate within the UK about Europe in the decades before the Brexit referendum was the constant repetition of the idea that sovereignty is a zero-sum issue. We reject that idea and, just as importantly, we know that we must never let up in confronting those who spread it”.²

The Northern Ireland Protocol has increasingly been identified within Brexiteer circles and by key figures in the Johnson administration as an obstruction to their goal of achieving full ‘sovereignty’, despite the vagueness of the concept. Thus Dublin has found it increasingly difficult to square the circle of supporting the Protocol, which it sees as a proxy for the Good Friday Agreement, with maintaining good relations with the United Kingdom and getting on with normal business in the European Union. This article goes on to examine the challenges Ireland has faced in its engagement with the United Kingdom since the Brexit vote and then evaluates how it has pursued the most significant deepening of its engagement with the European Union since joining the then European Economic Community (EEC) in 1973. Arguably, in fact, Ireland’s commitment to European integration deepened significantly because of Brexit: with every unanticipated crisis experienced by the UK after 2016, the Irish choice to commit to European integration became clearer.³ Indeed, the annual poll conducted by Red C for the European Movement Ireland showed public support for EU membership at a very high level of 84 per cent in the spring of 2021.⁴ This constitutes one of the highest levels of support across the 27 member states.

Irish-UK relations post-Brexit

One of the most striking features of the shared Irish-UK membership of the EEC/EU is how Ireland used its membership to increasingly diverge away from the UK in respect of trade, but despite this, the political relationship between Dublin and London grew significantly closer after 1973. There were two reasons for this. First, the difficulties experienced by both governments in managing The Troubles in Northern Ireland meant Dublin and London needed to cooperate with each other, and gradually converged towards a common landing zone, in seeking to de-escalate tensions in Northern Ireland. Notwithstanding periodic crises, the general trend was one of increasing and cumulative cooperation and trust.

Second, the fact that ministers and key officials from both the UK and Ireland met at increasingly regular intervals after 1973 at meetings of the European Council and other forums, provided a vehicle for close communication and exchange. Indeed, one former ambassador to the UK, Dan Mullhall, in giving evidence before the House of Lords in 2016, attested that there were, on average, 25 meetings a day in Brussels where Irish and UK representatives met.⁵ Just as European integration facilitated deep reconciliation between France and Germany (and, later, Germany and Poland), the relationship between Ireland and the United Kingdom developed in the shadow of EU encounters, in both formal and informal spaces. Brussels offered ‘breathing space’, a neutral landscape in which politicians and civil servants could ‘get to know each other’. In the framework of mutual exchange which characterised the Council in particular, patterns of increased trust and better bilateral relationships became the norm.⁶ The introduction of the ‘Council Presidency’ also encouraged at times intense interaction and engagement across the full range of EU legislative activity.⁷

It is also worth noting that, notwithstanding patterns of trade divergence, from the mid-1980s onwards, Ireland’s approach to economic issues increasingly dovetailed with that of the UK, with the two countries coinciding especially on competition policy, trade and taxation. In the process, Ireland decisively changed the dial on its relationship with the UK, from one of dependence and supplication to interdependence and mutual respect. Adversarial politics gradually gave way to cooperation based on mutual interest, as both countries advocated for pro-globalization policies within the European Council. The trust engendered via these two routes contributed in some part to the critical breakthrough in the peace process in the 1990s. Thus, we confront one of the key paradoxes of the Irish-UK relationship within the EU: that while Ireland used its membership to diverge significantly from the UK on trade and thus reduce its economic dependence on its nearest neighbour, political relations improved markedly over the 47 years of shared membership. Undoubtedly, the highpoint of UK-Irish relations was reached in 2011 with the hugely successful visit of Queen Elizabeth to Ireland. This was followed by an equally successful – if indeed, more low key – return visit by President Michael D. Higgins. Subsequently Prime Minister David Cameron proclaimed in 2014 that relations were at “an all-time high”.⁸

This positive dynamic was thrown into disarray by the Brexit vote. Brexit turned the common interests of Ireland and the UK into (potentially) competing interests,⁹ to the point where, at times, the relationship now looks

like a zero sum game. Ireland's principal difficulty lay in the fact that, as Fintan O' Toole suggests: "Neither before nor after the referendum of June 2016 did its leading proponents come up with any serious plan for what Brexit would really mean for Britain's economy, for its place in the world, for its very existence as a unitary state".¹⁰ Prime Minister Theresa May is alleged to have said (referring to Ireland) that "one country cannot hold up progress" and the UK was a "much bigger and much more important country".¹¹ Once Boris Johnson came to office in July 2019, trust was further undermined by a series of unilateral British moves.

There are different ways in which we might map this serious deterioration in Irish-UK relations. One indicator is the number of meetings between heads of government. Prior to 1973, no British Prime Minister had visited Dublin since independence in 1921.¹² We have seen how shared EU membership helped transform this dynamic. Tannam (2021) demonstrates that from September 2018 to July 2019, Theresa May and Leo Varadkar met about once a month, usually at EU summit meetings. However, there was a marked decline in the number of meetings between Boris Johnson and his Irish counterparts after July 2019. Notwithstanding the inevitable reduction in contact as the UK gradually disengaged from the EU, this later pattern was more consistent with the pre-1973 model of relations.

We can also evince this pattern of deterioration in relations in the discourse of politicians and senior officials. The former UK minister responsible for exiting the EU, David Davis, had remarked to a meeting in London in 2017 that there had been a change of government in Dublin and that the new Taoiseach (Mr. Varadkar) was being strongly influenced by Sinn Féin. This became a common trope in UK media outlets. Varadkar described the comments as 'strange' and 'inaccurate', while his Minister for Foreign Affairs and Trade said they were 'nonsense'.¹³ In fact, such a belief was reported to be commonly held in the Conservative party.¹⁴ Priti Patel (currently UK Home Secretary) at one point threatened an economic blockade of Ireland, with the aim of cutting off the Irish food supply and starving the Irish into submission. This threat, she suggested, should be used as leverage in the negotiations with the EU.¹⁵

Some Brexiteers went a lot further by openly wondering whether the Good Friday Agreement was passed its sell-by date. Former Northern Ireland secretary Owen Patterson tweeted that 'the collapse of power-sharing in Northern Ireland shows that the Good Friday Agreement has outlived its

use'.¹⁶ Michael Gove also stated on a number of occasions that the Good Friday Agreement (which he had opposed in 1998) had outlived its usefulness.¹⁷ Labour's staunch Brexiteer, Kate Hoey (herself born in Northern Ireland) called the Agreement 'unsustainable'. Leading Tory MEP Daniel Hannan claimed the Agreement was nothing other than 'a bribe to two sets of hardliners' in Northern Ireland. In addition, he argued that the Agreement was 'a consequence, not the cause, of the end of terrorism'. While serving as Foreign Secretary in 2018, Boris Johnson demonstrated his ignorance of the border problem by comparing the Northern Ireland border with that between the London boroughs of Camden and Westminster.¹⁸ Jacob Rees-Mogg, leader of the so-called 'European Research Group' (ERG, the hard-line Brexit grouping within the Conservative party) conspiratorially declared the Irish border problem did not really exist – it was an 'imaginary problem' created by Dublin and Brussels to prevent Brexit happening. Later Rees-Mogg went so far as to suggest that it might be a good idea to 'inspect' people crossing the Irish border after Brexit.¹⁹ This led Simon Coveney to warn that 'reckless shouting and sloganeering has consequences for the people of Northern Ireland'. He went on to say, 'psychologically, it (peace) has transformed the landscape and allowed identity to breathe more freely. Protecting this precious achievement, a backbone to our hard-won peace, is the only motivation in prioritising Northern Ireland in the Brexit negotiations'.²⁰ When Arlene Foster, leader of the DUP, claimed that the Agreement 'wasn't sacrosanct', Varadkar told the Dáil that the Agreement:

is not a piece of British legislation. It is an international agreement between the British and Irish governments as well as a multi-party agreement among the various parties. And certainly, as far as the government is concerned, the Good Friday Agreement is not up for negotiation in these talks over Brexit.²¹

The (later) repeated threats by the UK government to resile from the Northern Ireland Protocol also caused great friction between Dublin and London. An early indication of the direction of travel of the Johnson administration came in the autumn of 2020 when the government published the Internal Market Bill which contained controversial measures relating to the way trade would function between Northern Ireland and Great Britain. These measures would have overridden the Withdrawal Agreement the UK signed with the EU in 2019. Article 4 of the Agreement made it clear that the provisions of the treaty took precedence over UK domestic legislation. Commenting on the move, Northern Ireland Secretary of State Brandon Lewis

asserted that the Internal Market Bill would break international law in a “very specific and limited way”. Reacting to the comments, Simon Coveney stated in the Dáil: “if those comments represent the considered view of the British government, then I find them gravely concerning”.²² Boris Johnson didn’t help matters when he went to Northern Ireland and assured Unionists there would be no border in the Irish Sea (when it was perfectly clear that this was exactly the outcome which the Agreement necessitated).

In June 2021, Lord Frost threatened to invoke Article 16 of the Protocol (which he himself had negotiated), in publishing a so-called ‘Command Paper’ (UK Government, 2021). The paper referenced animal, plant and health checks, customs and VAT arrangements, the treatment of manufactured goods, Northern Ireland trade with Great Britain and state aid rules. DUP leader Sir Jeffrey Donaldson claimed that it was clear that the Protocol “has failed” and “is creating very substantial trade problems”. He said that it was now time for the EU and UK “to renegotiate”, a move firmly ruled out by the EU.²³ Frost argued that the EU should operate a light touch, “risk-based” approach for the UK because of the fact that “we both operate the high food standards which are, in most areas extremely similar”.²⁴ This reflects a central Brexiteer belief – that the UK could (and would) have all the benefits of membership of the EU without any of the costs of membership.²⁵ As Chris Grey puts it, “Frost wants the benefit of being aligned without making any commitment to being aligned [...] the UK has left but shouldn’t be treated as if it had left”.²⁶ The “common sense” approach which Frost demands from the EU is really cover, in other words, for a renewed model of UK ‘cakeism’. These threats came after Boris Johnson had earlier unilaterally delayed the implementation of some measures required by the Protocol. From Dublin’s perspective, Lord Frost’s intervention was most unwelcome and presented further confirmation that ‘cakeism’ was still the driving force of HMG policy and that, for Boris Johnson and Lord Frost, Brexit does not in fact mean Brexit. Chris Grey, in alluding to these examples, suggested that the UK had not moved on from the debates of 2016 and was stuck in a cul-de-sac of performative gesture politics.²⁷ For Ireland, every new iteration of such gesture politics, meant that trust in the UK government was further reduced.

How do we replicate the common spaces of the EU?

Perhaps the most important question engendered by Brexit for Irish-UK relations is what kind of institutional structures or policy networks might replace the common/shared EU spaces? The obvious answer lies in Strand Three of the Good Friday Agreement and, in particular, the British-Irish Intergovernmental Council (B-IIGC) and the British-Irish Council. Tannam points out that the well-established practice of issuing joint statements after heads of government meetings all but disappeared in recent years.²⁸ And, although in June 2021 the B-IIGC met in Dublin, giving hope that it might take on a beefed-up function, at the time of writing its future role is far from clear. Dublin and London also have to contend with Unionist hostility to the B-IIGC, despite, as Brendan O' Leary points out, the fact that "the all-island and cross-border aspects of rights, justice, prisons and policing are part of the remit of the B-IIGC",²⁹ even where devolution of functions in these domains has taken place. In the wake of the tensions provoked by the Northern Ireland Protocol, however, it is difficult currently to see Unionists reconciling themselves any time soon to the Strand Three institutions, or indeed any structures that meaningfully include the Irish government as a partner.

Etain Tannam, however, points out that the relative neglect of the institutions set up by the Good Friday Agreement by both the UK and Irish governments, was as much a factor in the deterioration of UK-Irish relations as Brexit. She suggests that both governments tended to neglect the B-IIGC. Amongst the reasons she cites are: DUP opposition to the body; a certain complacency built on peace process 'successes' such as the visit of Queen Elizabeth to Ireland and that "both governments mistook an absence of core conflicts for cooperation" with Northern Ireland no longer needing "any hands-on involvement".³⁰ Tannam further cites the reduction in the number of non-devolved policy areas, following the St. Andrews Agreement (2006) and the reduction in staff numbers on both sides. The loss of institutional memory is directly linked to this, in particular on the UK side. Finally, she cites the preoccupation of the Irish government with the financial crisis after 2008. All these factors led to Strand Three being less prioritised than should have been the case.

In a 2021 speech, Leo Varadkar pointed out that there were other structures to facilitate dialogue. For one thing, the Joint Committee and the specialised committees of the Brexit Agreement provided outlets for engagement. In addition:

“Under Strand Three, the British-Irish Council covers matters of mutual interest, bringing together representatives from 8 jurisdictions, including Guernsey, the Isle of Man and Jersey. The BIIGC provides a formal structure for enhanced relations between the two sovereign governments. And we are exploring other ideas to enhance UK-Irish dialogue, such as the Nordic Council model which the Taoiseach has spoken about. Whatever form it takes, we are agreed that there needs to be more engagement between the UK and Irish Governments.”

Tellingly, he added the rider: “We just hope the British Government feels the same way”.³¹

As part of the response to Brexit, the Irish government announced plans to open new diplomatic representations in the UK regions. The Irish relationship with Scotland became significantly closer after Brexit as Nicola Sturgeon and her SNP government sought to increase economic and cultural ties between Edinburgh and Dublin. In January 2021, Ireland and Scotland published the results of a bilateral review into the future relationship. The report set out a series of actions to be undertaken by the two governments in business and the economy, community and diaspora relations, academic exchange and research, and rural, coastal and island communities as well as government to government ties. The report includes over 40 different recommendations across the thematic areas and expresses a desire to develop the closest possible relationship in the years to come. Among the recommendations were: regular high-level contact between Scottish and Irish Ministers and continued cooperation through the British-Irish Council; a new Ireland-Scotland Trade Taskforce, supported by the Consulate General of Ireland in Edinburgh and the Scottish Government Office in Dublin, which will work with the public and private sectors to develop and support trade relations; a conference scheduled for late 2021, to address the opportunities and challenges of living in rural, coastal and island communities, to be convened by both Governments, working with the University of Highlands and Islands and Údarás na Gaeltachta.³²

Similarly, Ireland is currently conducting a review of relations with Wales, with the expectation of increased intensity of ties across a broad spectrum of fields. The Irish consular office in Cardiff was re-opened in 2019 and this will be followed by the opening of a new consulate in Manchester to serve the northern and north western region of England. This pluralisation of

relations with the regions of Great Britain is meant to balance the focus on London and help develop economic, cultural, and educational links with regions of Britain hitherto somewhat neglected.

Changes to trade patterns

When Ireland joined the EEC (along with the UK and Denmark) in 1973, it was still highly dependent on the UK in respect of its international trade. From accounting for 75% of Irish exports in 1960, and 61% in 1971, the UK market share fell steadily to under 20% in 2009, and 13% in 2018.³³ By 2020 it had reduced significantly again to less than 10 per cent. So, one of the main features of the Republic's economic development has been a marked reduction in trade dependency on UK markets. In parallel with this, we have seen exports to EU states (excluding the United Kingdom) rise concomitantly, from just 13% in 1970 to almost 47% in 2016³⁴ and close on 50% in 2020. Thus, market diversification away from the United Kingdom and towards continental partners has been one of the most striking features of Ireland's membership of the EU.³⁵

One of the key indicators of Ireland's increased commitment to European integration is the extent to which trade with the UK has been replaced by trade with the EU because of Brexit. Although it is difficult to precisely disentangle 'Brexit effects' from 'Covid effects', the underlying patterns to emerge in 2021 suggest a significant divergence of Irish goods trade from the UK to EU states. In August 2021, the Irish Maritime Development Office (IMDO) published data on port freight volumes in Quarter 2/2021. It provides a clear picture of this divergence. The IMDO points out that the Quarter 1 data may have been distorted by Brexit stockpiling combined with Covid restrictions (which saw hard lockdowns in both the UK and Ireland). Overall, trade volumes were back to 2019 levels in Quarter 2. The key point, however, relates to the very significant change in the composition of trade. The share of Roll on/Roll Off produce going to ports in the EU doubled in Q2/2021, relative to Q2/2019. The share of similar volumes going to the UK decreased by 20 per cent, relative to the same period in 2019. The reduction for the first half of 2021 amounted to 29 per cent. The trend can also be observed and, in fact, is even more apparent in container traffic. These set a record in Q2/2021, with the vast majority of these now being directed to continental EU ports. Irish importers and exporters now benefit from a significant

increase in direct Roll on/Roll Off EU services to the EU: from just 5 in 2019 to 12 (with more planned) in 2021.³⁶

The IMDO data also includes figures for Northern Ireland's three ports: Belfast, Larne and Warrenpoint. Like ports in the Republic, these ports individually and collectively experienced a record quarter in Q2/2021, with traffic up more than 10 per cent compared to Q2/2019. Belfast and Warrenpoint recorded their busiest ever quarterly activity. Additional impacts will surely be felt when Great Britain starts enforcing its trade border at ports, after October 2021.

In August 2021, new data from Ireland's Central Statistics Office also shone a light on changes in Ireland's trade patterns. The data showed the value of goods imported from Northern Ireland to the Republic increased by 77 per cent in the first half of 2021, compared to the same period in 2020 (€1.77 billion, compared to just under €1 billion). At the same time the value of exports from the Republic to Northern Ireland increased by 43 per cent (€1.57 billion, compared to €1.1 billion). Some British based traders have established bases in Northern Ireland to gain easier access to the Republic, while some companies in the Republic have replaced imports from Great Britain with imports from Northern Ireland. Although there is no equivalent data on trade between Great Britain and Northern Ireland, anecdotal evidence suggests it may be significantly down as a result of difficulties in implementing the Northern Ireland Protocol. The CSO data also demonstrates that the value of the Republic's exports to Great Britain in the first half of 2021 increased by 20 per cent (€6.7 billion, compared to €5.6 billion in 2020). Conversely, imports from Great Britain to the Republic decreased by €213 million (16 per cent) to about €1 billion in the same period. The largest such decreases were in food and live animals and manufactured goods. In a separate report Grant Thornton suggests that four out of ten Irish businesses are reporting delays to their supply chains as a consequence of Brexit, while a substantial proportion have changed their strategies ahead of an expected increase of Brexit red tape over the next year.³⁷

Tying the different strands of this section together, we can say that Brexit catalysed a very serious deterioration in Irish-UK relations as well as a further divergence of Irish trade from Great Britain to the EU. This deterioration reflected the determination of Ireland to protect its interests in the Brexit

negotiations and the equal determination of Brexiteers to pursue a 'sovereignty first' Brexit which threatened the Good Friday Agreement and peace on the island of Ireland. Even after the eventual agreement of the EU and UK on a deal in late 2020 (following the Withdrawal Agreement in 2019), Northern Ireland remained the key zone of contention of both sides, with London presenting an interpretation of what was agreed which was entirely unacceptable to Dublin and Brussels. Analysis suggests that the Strand Three institutions, in particular the British Irish Intergovernmental Council, could help fill the gap presented by the loss of shared spaces in EU forums for Irish and UK officials. But the lack of investment of political capital (both Irish and British) in the B-IIGC and other institutions to date does not augur particularly well for the future.

Ireland and the EU post-Brexit

If Ireland's relationship with the United Kingdom is significantly challenged by the difficulties in operationalising the Northern Ireland Protocol, the deepening of its commitment to European integration also brings challenges. Before reviewing those challenges, it is worth examining how Ireland sought to employ the EU as a buttress against Brexit harm.

The nature of threats to the Peace Process triggered an expansive diplomatic effort on the part of the Irish government to educate EU leaders about the explicit nature of those threats. Ensuring that Ireland's EU partners and the key institutional actors in Brussels understood the potentially existential impact of Brexit on Ireland called for an unparalleled engagement by the government and administrative system at all political and diplomatic levels across the European Union. More than 400 meetings were held between Irish officials and EU counterparts between June 2017 and March 2018 alone.³⁸ The early focus was on Germany and Chancellor Merkel, because as Charlie Flanagan, then Ireland's foreign minister, put it: "she is the towering political figure of her age".³⁹ Brexit thus forced the Irish system to engage more systematically and intensively with EU institutions and member states than at any other time in its membership, apart from EU presidencies.

From an early point it was clear that Ireland's bargaining power within the negotiations exceeded that of the UK. This was evident in any number of statements by key EU actors. But it was conveyed quite emphatically by Donald Tusk, President of the European Council, when he stated that

“Ireland’s position (on the so-called ‘backstop’) will be the European Union’s position”.⁴⁰ The Irish strategy included bringing every important visiting European delegation to the border, to underline the physical and social realities of peace and what was at stake in the Brexit negotiations. Both Michel Barnier and Jean Claude Juncker delivered historic addresses to joint sittings of the Oireachtas. British efforts to exploit alleged divisions on the EU27 side so as to optimise their negotiating hand, met with a consistently negative response in EU capitals. Those efforts were more than countered by an at time intense and much more sustained Irish campaign across the European Union.⁴¹

The Brexit vote prompted considered thinking within the Department of Foreign Affairs and Trade about Ireland’s future in the EU without the UK, and the future power balance within the Union. This led to the most comprehensive reconfiguration of Ireland’s diplomatic relationships since accession to the EEC in 1973.⁴² Analysis of voting patterns in the EU Council of Ministers provides evidence of extensive long-term Irish-UK cooperation and successful coalition-building as a result of shared membership of the EU.⁴³ The question of alliances within the Council is not straightforward, however; far from demonstrating a ‘Eurovision’-style pattern of geo-cultural voting groups, member states tend to converge around specified issue areas rather than defined blocs.⁴⁴ Evidence from 22,000 Council votes between 2009 and 2016 demonstrated that Ireland corresponded most closely with a cluster of mainly smaller member states – including Belgium, Slovenia, Slovakia, Luxembourg and Romania. This shouldn’t surprise us, as the EU is a collective of mainly small and medium-sized states. Of the largest five member states, Ireland voted most closely with Italy, Spain and France. But while this snapshot provides a largely quantitative analysis of Council voting alignments, if one engages in a deeper *qualitative* evaluation of concrete Irish policy priorities, we find a significant convergence of preferences with the UK on key issues.⁴⁵

The UK and Ireland were allies in the EU Council of Ministers because both countries, from the mid-1980s onwards, favoured economic policies which embraced free trade, deregulation and globalisation. Allied to this was a suspicion of the protectionist instincts of some member states.⁴⁶ There was little to divide Ireland and the UK on trade and competition policy nor on approaches to EU corporate taxation policy. Irish officials were keenly aware that the disappearance of this UK-Irish cooperation from the Council risked

leaving Ireland isolated at the Council table and necessitated new thinking about locating allies within the EU.⁴⁷ Ireland's vulnerability was very evident when, in June 2021, it was one of only nine countries (out of 139) still opposing the OECD plans for the introduction of a global minimum tax rate for corporations of 15 per cent.⁴⁸ And although other member states such as the Netherlands also oppose a collective EU Tax approach, the absence of the UK from the European Council leaves Ireland more exposed in the decision-making sphere and may be keenly felt in the years to come.

The Irish move to join the so-called 'Hansa Group' in 2017 was indicative of new strategic thinking among Irish officials and political leaders about Ireland's future positioning within the Union. This informal alliance includes like-minded states, advocates of free trade and globalisation, and to some extent acting as a counter to the Franco-German tandem within the Council. Its members include Estonia, Finland, Latvia, Lithuania, Netherlands, and Sweden.⁴⁹ And despite representing a total population share well short of that necessary to produce a 'blocking minority' within the Council, a united Hansa group that can win over one large member state – particularly Germany – will be difficult to defeat in Council settings where QMV applies post-Brexit.⁵⁰ Hansa is far from the only game in town for Ireland, however. In a 2021 speech Leo Varadkar, now Tánaiste, said: "Ireland is now actively seeking to build new alliances to fill that gap and to advance our interests. As Taoiseach, on occasion, I was invited to the Nordic-Baltic Group meetings and we have much in common with the Benelux countries and places further afield – like Cyprus and Malta". He also said "I now meet with a group of like-minded Trade Ministers to discuss how to position ourselves on major trade issues. This includes Germany".⁵¹

Ireland has also spent an increasing amount of time and resources in beefing up bilateral relationships with partner states in the EU. The most important development here potentially is the new partnership with Germany, announced in early 2018 after a strategic review by the Department of Foreign Affairs and Trade. This wasn't entirely straightforward. Germany, after all, had been the principal advocate of the austerity which Ireland had to accept after the financial crash, as the price for the bailout by the 'Troika'. Brendan Howlin, former Minister for Public Expenditure in the Fine Gael-Labour coalition which took office in 2011, states that: "there was a Calvinist view [in Germany] that the peripheral countries had been wastrels, spendthrift, and that there had to be some element of punishment attached to the recovery". Over time Angela Merkel and other German leaders came

to see Ireland as the success story of the recovery of the Eurozone, as it implemented tough austerity and then saw growth and investment rebound strongly. Diplomats believe that the “goodwill” banked in the process of “taking our medicine” helped crucially with getting Germany on side in the Brexit negotiations.⁵²

The reset of the Irish relationship with Germany saw a new Irish consulate opened in Frankfurt in June 2019 (to raise the profile of Ireland in Germany’s south), significantly enhanced cultural links, and, most importantly, an Irish-German economic council to deliberate on issues of importance to both member states. Senior Irish and German civil servants would meet regularly to review key bilateral issues.⁵³ This was a reminder that the UK’s departure from the EU also impacts on Germany, especially regarding its preferences for generally liberal trade policy and dismantling further barriers to trade. Berlin identified Ireland, along with the three Nordic member states as priority states with which to pursue stronger engagement under the German Foreign Office’s so-called ‘Like-Minded Initiative’. Ireland was also seen as a key interlocutor with the US and UK post-Brexit.⁵⁴

Ireland’s deepening commitment to European integration can also be evidenced through analysis of speeches by leading political figures. One good example is then Taoiseach Leo Varadkar’s speech to the European Parliament in January 2018. The Taoiseach consciously linked the EU as a peace project with the peace process on the island of Ireland, emphasising interdependence and institutionalization and the indivisibility of the two:

I was born European, and am part of a new generation of political leaders born after our countries joined the Union. [...] The vision that delivered peace in Europe, opened the door to peace in my country [...]. For us, Europe enabled our transformation from being a country on the periphery, to an island at the centre of the world, at the heart of the common European home that we helped to build. The promise of Europe unlocked the potential of Ireland. It allowed us to take our place among the nations of the earth.⁵⁵

Varadkar’s speech was just one of a number by senior figures in the Irish government to acknowledge Ireland’s significantly changed position within the EU.⁵⁶ The Tánaiste, Simon Coveney, in a speech in November 2017, strove to outline that Ireland, despite being a small state, was a *rule-maker* rather than *rule-taker* in Brussels. His speech was also noteworthy in arguing that

the EU should go further and deepen cooperation. Amongst his suggestions was that the EU set itself a new goal: 'to have a common foreign policy that is as effective and ambitious as its international trade policy. The EU needs to find its voice and become the diplomatic super-power it should be'.⁵⁷ Notwithstanding the contradictions inherent in the Minister for Foreign Affairs of a militarily neutral state arguing that the EU should become a 'diplomatic super-state', Coveney's remarks point to a step-change in Irish elite attitudes to the EU and a decisive move away from the old utilitarian conception of Irish membership.⁵⁸

The ideas contained within these speeches and diplomatic outreach efforts are not entirely new. But they are indicative of a new generation of leaders emerging in Ireland who view the EU and Ireland's membership of it in normative as well as functional-utilitarian terms. On taking office in 2017 Leo Varadkar was aged 38, Simon Coveney 45, and Helen McEntee, Minister of State for European Affairs, only 31. Their rhetoric and approach to European integration reflects a substantial generational change in attitudes about Ireland's position in the world. Instead of thinking of and describing Ireland as a peripheral member state, on the geographic margins of Europe and in need of permanent subvention from the Union, the new approach situates Ireland within a more expansive 'imagined community' of open, pluralist, globalised EU member states. In this perspective, the EU is both an expression of growing material interdependence and a normative force that underpins both domestic politics and the forms of international engagement that Ireland undertakes.⁵⁹ This perspective could not be more different to the monolithic, sovereignty-obsessed Brexiteer worldview which currently prevails in London.

Conclusion

Chris Grey suggests Brexit is comparable to "an embarrassing episode at the Christmas office party that it would be bad taste to remind anyone of in the new year".⁶⁰ While Ireland viewed the problems thrown up by Brexit through the lenses of realist pragmatism, the UK increasingly exhibited an 'Alice in Wonderland' conception of its position. To that end, Ireland has had to deal with a UK government that has no actual strategy on Brexit, that has spent its time in office – literally – 'winging it', exhibiting an ideological obsession with a completely discordant notion of 'sovereignty' and playing a game of almost permanent performative gesture politics for the benefit of shoring

up its position in domestic politics by ‘bashing Brussels’ (and Ireland). Unless there is a significant change in tone and behavior from the UK government and a more conciliatory approach to the implementation of the Northern Ireland Protocol, Irish-UK relations will continue to be difficult and could get a lot worse.

The difficulties experienced by the United Kingdom in seeking to detach itself from the EU after 2016 provide a striking reminder of the depth of inter-penetration of economies and legal systems set in train by decades of shared EU membership.⁶¹ Brexit, however, turned the increasingly common interests of Ireland and the UK into (potentially) competing interests, to the point where at times the relationship now looks like a zero-sum game. The return of identity politics which accompanied Brexit has been particularly discomfiting for Ireland as it brought back some of the most difficult constitutional, institutional and inter-communal issues which many thought had been settled comprehensively by the Good Friday Agreement. The ambiguity and fluidity which characterised the Agreement (and European integration) have given way to a familiar kind of tribal rigidity, as identity politics flourishes once more.

The central argument put forward in this article is that Ireland has had to operate a difficult balancing act between its commitments to the EU and the need to protect the Good Friday Agreement while maintaining a positive working relationship with the UK. Brexit caused a hugely significant deterioration in the Irish-UK relationship, a relationship which had blossomed in the latter part of the years of shared membership of the EEC/EU, with Queen Elizabeth’s state visit to Ireland in 2011 (and President Higgins’ reciprocal visit) the highpoint of that cycle of rapprochement.

Brexit also acted to make Ireland’s ‘choice for Europe’ emphatically clear and the five years since the Brexit referendum has seen a progressive Irish deepening of its engagement with EU structures and processes. In contrast to the UK’s chosen path of ‘sovereignty first’, the Irish engagement with European integration has been one of pragmatic adaptation and cumulative embrace of EU norms. Because of participation in the integration process, Ireland learned to live with ambiguity and institutional fluidity. The basic rationale of the EU as an international collective which allows its member states to cooperate on different issues, via different levels of institutional power, is one that Ireland embraced enthusiastically as a small state, seeking to maximise its influence internationally. For Ireland now the challenge is to

maintain that commitment to the EU as its external anchor, while protecting the Good Friday Agreement and ensuring that the relationship with the United Kingdom can be repaired.

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British-Irish Relations, Northern Ireland and Europe:

An Historical Perspective on a Contemporary Political Problem

P. J. McLoughlin

Dr Peter John McLoughlin is a Senior Lecturer in Politics at Queen's University Belfast and an Associate Fellow at the Senator George J. Mitchell Institute for Global Peace, Security and Justice. He was a visiting Fulbright Scholar at Boston College in 2019, examining the role of the US government and Irish-America in both the Northern Ireland conflict and peace process. His work also addresses other international dimensions of the Northern Ireland problem, such as the EU influence. He has published widely, with articles appearing in journals such as Diplomatic History, Nationalism and Ethnic Politics, and Twentieth Century British History. He is also author of a book on John Hume – John Hume and the Revision of Irish Nationalism (MUP: 2010).



2021 brings many anniversaries with significance to British-Irish and cross-border relations. Most obviously, it is Northern Ireland's centenary, and the same for the Anglo-Irish Treaty which gave birth to the Irish state. Thus, it is 100 years since the border between the two parts of Ireland was confirmed. This article will reflect on the legacy of such events, and the broader historical patterns of British-Irish relations, including their wider European context, to show how they continue to interact and to shape contemporary politics in these islands.

British-Irish Relations and Europe

An anniversary less noted, of an event which projected a powerful image of reconciliation between Britain and Ireland, is that of Queen Elizabeth's visit to the Irish Republic in May 2011. Pictures of the Queen laying a wreath in Dublin's Garden of Remembrance, then bowing her head in respect to those who died fighting against the rule of her own grandfather over Ireland, had an enormous impact on nationalist opinion. But this gesture was balanced by the visit that the Queen and President McAleese then made to the city's War Memorial Gardens, where they jointly honoured those Irishmen who died fighting in British uniforms in two world wars. Their sacrifice did not fit the traditional narrative of Irish nationalism, and so was not acknowledged for many decades after independence. These shared acts of commemoration, following the stabilisation of Northern Ireland's political institutions in the preceding years, seemed to mark the end of a history of conflict between Britain and Ireland.

The choreography of these events also suggests a European influence.¹ They echo the images of Chancellor Kohl and President Mitterrand holding hands at the war graves of Verdun in 1984, or their predecessors, President de Gaulle and Chancellor Adenauer, praying together at Reims Cathedral in 1962. Such acts sought to simultaneously acknowledge the pain of the past in Franco-German relations, and show resolve that this should not be repeated. The gestures of Queen Elizabeth and President McAleese in 2011 said much the same for British-Irish relations.

The Franco-German analogy is also apposite given the EU dimension to British-Irish reconciliation. When Britain and Ireland joined what was then the EEC² in 1973, the Northern Ireland Troubles were at their height, and relations between the two countries had reached their nadir. In response to the Bloody Sunday killings 12 months earlier, the Irish government recalled its ambassador to London, and the British Embassy in Dublin was set ablaze by protesters. The withdrawal of Irish representation in Britain, and the physical destruction of British representation in Ireland, powerfully demonstrated the breakdown in diplomacy at this point. Despite this, the entry of Britain and Ireland into the EU both obliged and created a context for their rapprochement. Numerous scholars have noted the multiple influences of European integration on peace-building in Northern Ireland,³ from the generous funding provided to support cross-border and cross-community reconciliation projects, to the adoption of the D'Hondt method

to elect Stormont's power-sharing executive.⁴ But the most important impact of the EU on the region was arguably indirect. By transforming British-Irish relations, European integration helped establish the basis for the joint-stewardship of the peace process by London and Dublin.

This transformation came by various means. Firstly, joining the EU created greater equality between the UK and Ireland. For many decades after formal independence, Ireland remained economically dependent on the UK. EU membership changed this situation, greatly advancing the Irish economy, and diversifying its markets. In 1971, 61% of Irish exports went to the UK; by the time of the Good Friday Agreement (GFA) in 1998, this figure was reduced to 25%.⁵ At the EU table, Ireland was, formally, an equal partner to the UK, its voice holding equal weight in decision-making. And Dublin used this voice to great effect, shrewdly lobbying and successfully operating the EU institutions to serve its interests. This enhanced Irish self-confidence, and earned British respect. It helped end Ireland's post-colonial inferiority complex, and Britain's post-colonial superiority complex.⁶ The greater balance that now existed between the UK and Ireland allowed them to co-manage the peace process.

In more practical terms, the EU also brought the British and Irish elites closer together, providing a neutral forum for their frequent interaction. Away from the glare of the British and Irish media, they could more freely discuss Northern Ireland. As a result, European meetings often led to important breakthroughs on this matter. Beyond Northern Ireland, British and Irish elites found they had common interests in an EU context, with similar objectives regarding taxation and trade regulation, for example. Their collaboration in pursuit of these interests also increased trust and understanding, with positive feedback effects for Northern Ireland. Finally, the practices and ideas of EU membership, and particularly the move away from absolutist notions of national sovereignty, made the cross-border and intergovernmental innovations of the 1985 Anglo-Irish Agreement (AIA) and later GFA more "thinkable".⁷

From a broader historical perspective, the EU's effect on British-Irish relations makes much sense. There has always been a significant European influence on the dynamics between the two islands, primarily resulting from British security concerns. The plantations of the 16th and 17th centuries were influenced, and certainly enhanced, by concerns that Spanish forces would use Ireland as a base from which to attack England. Irish chieftains' efforts

to enlist the aid of their fellow Catholics to overthrow the yoke of Protestant England showed that such concerns were not unfounded. The defeat of Ulster's Gaelic Lords led to their exile in Europe from 1607, the confiscation of their lands, and then the plantation of the province that still shapes modern Northern Ireland.

The same pattern was evident in the late 18th century, though now revolutionary France was Britain's chief concern. Again, the alliance of Irish rebels with its European rival, culminating in the rising of 1798, had profound political effects, leading to the abolition of the Irish parliament and the 1801 Act of Union between Britain and Ireland, this to bring the latter more firmly under the Crown's control. Into the twentieth century, again war in Europe provided the context for an Irish rebellion. And again, the support of Britain's enemy, now Germany, for the Easter Rising of 1916 triggered a cycle of repression and radicalisation that made the partition of Ireland, already mooted, both more likely and more permanent than originally envisaged.

Some of the most important markers in the political evolution of the British-Irish relationship – the Ulster plantation, the Act of Union, and partition – were thus shaped by broader European dynamics. It is understandable, then, that it took radical changes in political relations on the Continent, and with this the transformation of security concerns across Western Europe, to aid similar shifts in the British-Irish relationship, and thus the peace process. It makes the echoing of European gestures of reconciliation in Queen Elizabeth's visit to Ireland in 2011 more fitting, and the destabilisation of British-Ireland relations since 2016 more comprehensible.

The Challenge of Brexit

2021 is also the fifth anniversary of the Brexit referendum. And though it took much of the intervening time to enact, Brexit has already had an enormous impact on Northern Ireland. The vote itself saw polarisation along communal lines, with most unionists opting to Leave, and most nationalists to Remain. The DUP ignored warnings that supporting the Leave campaign would destabilise the peace process, and Sinn Féin immediately responded to the result by calling for a border poll. Thereafter, the issue of the Irish border – little considered in the debate in Great Britain – gradually came to dominate the Brexit process. It became clear – as it had been to most Irish commentators from the outset – that this was the primary obstacle to any

meaningful Brexit, though Brexiteers remained in denial of this reality for some time.

Power-sharing at Stormont collapsed in January 2017 for a variety of reasons, but tensions over Brexit certainly contributed. Brexit also explains why the assembly remained inoperative for so long,⁸ and was promptly restored after Boris Johnson's victory in the 2019 British election, which created a Westminster majority willing to support the withdrawal deal that he had negotiated with the EU. By keeping Northern Ireland largely under EU regulation, this deal averted the threat of a hard border in the Irish countryside, but merely by moving this to the Irish Sea, with controls now placed on goods entering from Great Britain. Again, this was a solution foreseen by many from the outset, but the arrangement has angered unionists, who feel it separates them from Britain, and pushes them towards a united Ireland.

Before considering the political implications of this, it is worth returning to explore further the reasons for the swift return of power-sharing at Stormont after Johnson's electoral victory. At this time, though it would be another year before the Brexit deal came into force, its implications for unionists were well-known. Nonetheless, the DUP, like Sinn Féin, felt obliged to accept the terms of the 'New Decade, New Approach' (NDNA) agreement – essentially a package negotiated between the British and Irish governments to address the key concerns of both parties, and offering a balanced compromise sufficient to compel them to return to sharing power.⁹ The fact that this deal was made just weeks after Johnson's electoral victory, but following three years of failed efforts to achieve the same end, shows the importance of co-operation between the British and Irish governments. Up until that point, the former had been focused on efforts to achieve a breakthrough on Brexit. In addition, Theresa May's government had been in the awkward position of requiring DUP support after she lost the Tories' majority in June 2017. This meant that London could not press the DUP towards compromise with Sinn Féin. Johnson's landslide thus changed the game for both Brexit and the return of power-sharing. The two governments could now jointly press the local parties to accept the terms of a compromise which London and Dublin had fashioned.

In this regard, the NDNA agreement is no different to any accord made during the Northern Ireland peace process. Since the AIA of 1985, all progress in the region has been based on a version of McGarry and O'Leary's famous

formulation: “coercive consociationalism”.¹⁰ Local parties have continually been obliged to accept agreements essentially constructed by the two governments. London and Dublin would listen to their respective demands, agree on a package or political framework that balanced these, and then jointly pressure the parties accept this. In the absence of local approval, the two governments would either press on to implement what they could of agreements they had reached, threaten to proceed further with the measures opposed by the most recalcitrant local actor, or wait, sometimes months or even years, until all parties were ready to move forward with the same basic deal. With slight variations, this pattern has characterised the entire peace process. In order to have any power, the local parties have always been obliged to share power – hence coercive consociationalism. This approach may sound terribly paternal, but it has been remarkably effective, leading from the AIA in 1985, to the Downing Street Declaration in 1993, the GFA in 1998, and the St. Andrew’s Agreement in 2006. The NDNA accord was yet another example of the same successful strategy being used to edge the peace process forward.

This interpretation does not diminish the efforts of local politicians. Their leadership abilities have been essential in bringing their communities to accept the terms decreed by successive governments in London and Dublin. Nor is it to deny that the local parties have had some agency in modifying the details – though not the essential terms – of these accords. Nor is it to deny the importance of civil society efforts to improve inter-communal relationships and thus create a more favourable context for local political leaders to move their supporters towards successive compromises. However, all such efforts have been based upon, and certainly fundamentally shaped by, the prior determination of the two governments to pursue a certain course of action, and to implement an approach which they had firstly agreed constituted the best way towards a fair and workable agreement. Put simply, British-Irish co-operation is the bedrock on which all progress in the peace process has been built.

Carry On Brexiting

Though the challenges that Brexit created for the Irish border were bound to affect British-Irish relations, the NDNA appeared to suggest that normal working order had been restored. However, the argument made here is that we are much less likely to see a return to any sustained pattern of co-

operation between London and Dublin on Northern Ireland for the foreseeable future. Whilst the Irish border was and remains a highly significant and highly challenging issue, the changes entailed by Brexit are more far-reaching than this. The British state has now set course on a very different political trajectory to Ireland and all its close European neighbours. Whatever challenges this might bring, and whatever the changes in government in London, it is unlikely that we will see any significant deviation from this course in the near future. Project Brexit remains the overriding focus.

Signs of this were evident in the shifts, or seeming shifts, that first led to agreement on the terms of the UK's withdrawal from the EU. When Johnson met with Leo Varadkar in the North-West of England in October 2019, commentators were shocked that they took three hours to negotiate a way around the problem which had gridlocked the Brexit talks for three years. Even more surprising was that Johnson appeared to accept pretty much everything that the Irish government, the EU, and all reasonable commentators had argued from the outset – Northern Ireland would need to remain essentially under EU regulations in order to avoid a hard border in Ireland and still allow the rest of the UK to pursue its own political path with Brexit. Varadkar seemed to have effected a diplomatic *tour de force* in this short meeting.

However, whilst discussions between Johnson and Varadkar had obviously centred on the issue of Northern Ireland, in retrospect it is clear that, for the British government, the agreement made had very little to do with this. The accord that was achieved was not like those previously made between London and Dublin on Northern Ireland – the AIA, GFA, or St. Andrew's Agreement – which both governments overwhelmingly adhered to in order to force eventual acceptance by the local parties. Indeed, it seems that the only agreement Johnson had made was to say and do whatever was necessary in order to “Get Brexit Done”, the lead slogan for the election he subsequently won. This explains the short nature of the meeting between Johnson and Varadkar, and the rapid breakthrough. Johnson was happy to sign off on whatever was required to secure a Brexit deal, with no considered resolve to honour the commitments he was entering into.

As much was suggested when, just a month later, and now in electoral campaign mode to sell his Brexit deal, Johnson told a meeting of Northern Ireland business leaders that they could bin any proposed paperwork

concerning the movement of goods across the Irish Sea: “There will be no forms, no checks, no barriers of any kind”.¹¹ Had Johnson actually read the agreement he had signed up to? Did he understand it? Did he care either way? The same questions were raised when Johnson’s government threatened to effectively override those aspects of his Brexit withdrawal agreement that applied to Northern Ireland, the so-called “Protocol”, through its Internal Market Bill of autumn 2020. The Northern Ireland Secretary was obliged to admit that this would break international law by contravening the Protocol,¹² but the move was purely a gambit to force the EU to concede ground in the ongoing talks over a new UK-EU trade deal. London eventually removed the offending articles from the bill, but not before damaging trust with the EU over its commitment to the Protocol. Again, Northern Ireland was not the concern here. The aim was still to “Get Brexit Done” by securing a trade deal with the EU on terms that suited the UK and before the end of the transition period when it would actually leave the bloc on 31st December 2020.

It should have come as little surprise, then, that once a trade deal was secured just a week before that deadline, and when this and the related Protocol came into effect in January 2021, Johnson’s commitment to the latter again wavered. As loyalist tensions over the new arrangements quickly and predictably escalated, instead of working to address these, Johnson made the unilateral decision to delay the implementation of aspects of the Protocol. Arguably, this served only to stoke loyalist opposition by suggesting that further defiance could wholly overturn the Protocol, with extensive rioting following across Northern Ireland in the spring. If the aim was to cool tensions, it would also have been sensible for Johnson to seek the EU’s approval for a delay in implementation of the Protocol – something that the EU later agreed to with other aspects of the accord. Again, this would have avoided damaging trust with the EU. However, to suggest that Johnson should pursue a more consensual relationship with the EU after leaving the bloc is to misunderstand his political rise.

“Battling with Brussels”, we must remember, is what brought Johnson to Number 10. And as noted, whatever criticism might be made of his approach, his achievement of a Brexit withdrawal deal with the potential to win majority approval at Westminster is what won Johnson his landslide victory in December 2019. It makes perfect sense, therefore, that he will continue to use the issue of Europe, even after Brexit, to maintain the level of support that he won in that election and so keep himself in power. It should also be

noted that, for a leader renowned for inconsistency, antagonism with the EU has been the one constant in Johnson's career, even before he entered into politics. Indeed, criticising the EU is what first brought him into the public consciousness as *The Daily Telegraph's* Brussels correspondent, and made him a darling of the Tory right, then battling John Major over the Maastricht Treaty, when the seeds of Brexit were arguably sown.¹³

As well as establishing his reputation, Johnson's time in Brussels provided him with a repertoire to regurgitate when he did finally decide he was opposed to EU membership – or, more accurately, that this posture was the best one to aid his path to Number 10.¹⁴ Thus, from the outset of the Brexit campaign, Johnson recycled the old myth that Brussels dictated the shape of bananas that could be imported to the EU.¹⁵ The complete absence of truth from this claim is immaterial. As Johnson knew from his own days creating such stories, the more farcical the notion, the more it captures the headlines,¹⁶ and this is what would lead the Vote Leave campaign to victory.

The other common feature in the claims of Brussels' obsession with bent bananas and crooked cucumbers is the not-so-subtle sexual innuendo. The current "sausage war" with the EU – again relating to the Protocol, which would introduce controls on chilled meat goods entering Northern Ireland from Great Britain – fits perfectly with this theme. Johnson could only have dreamed of such a gift when he was a journalist, but as Prime Minister he can thank the entire British media establishment for promoting this "Oo, er, missus!" / *Carry On Brexiting* style of commentary.¹⁷ It supports the archetypal image of Johnson as the cheeky Eton schoolboy who never grew up, but is somehow actually running the country, and combines with the other favourite trope of the Brexiteers – war with Europe and particularly the Germans. Put simply, the EU, and Brexit specifically, is the gift that keeps on giving for Johnson.

In more serious terms, Johnson understands that the energies which propelled the UK from Europe, and which he successfully steered towards his own ends, have far from dissipated. Rather, they have now fused with the UK's "culture wars" to reinforce a broader cleavage in British politics. This does not wholly mirror the Leave-Remain divide, but it is remarkably similar, and the cleavage helps explain the continued woes of the Labour Party, particularly its astonishing loss of the Hartlepool by-election in May 2021. Voting for the Tories, despite the region suffering some of the worst effects of the party's austerity policies, and its 11 years in office, proves the powerful

combination of Johnson having “delivered” on Brexit and refusing to submit to the “woke brigade” on issues like Black Lives Matter. It also suggests that, whatever the ineptitude of his handling of the pandemic, Johnson may be Prime Minister for longer than many commentators predict. Those on the right of his party criticise the extended lockdowns, those on the left his slowness to enact and seeming haste to end them. Both, however, see that he reaches parts of the country no other Tory could, gets away with more than any other leader would, and remains a vote-winner. It may be his own boredom, or pursuit of higher earnings, that finally sees Johnson leave Number 10. Meantime, Labour also sees that any route back to power will involve somehow reconciling itself with the many “Red Wall” voters who supported Brexit and were so alienated by the party’s ambivalence on the subject that they turned to the Tories. As suggested, Project Brexit is unlikely to be derailed any time soon.

This brings us back to Johnson’s handling of the Protocol crisis, where the popular narrative of a looming “sausage war” is particularly helpful to his government, providing a comedic commentary on what is a very serious issue, and distracting from the very dangerous game that it is playing here. Not all British commentators are taken in, of course. Rafael Behr of *The Guardian* provided a cynical but persuasive account of the Prime Minister’s approach:

“Johnson’s calculation doesn’t prioritise peace in Northern Ireland. If it did, he would spend time telling the Unionist community that customs checks at Irish Sea ports were an administrative fact of life after Brexit but not a precursor to severance from the UK. [...] Instead he has gamed and inflamed the grievance in the belief that the threat of conflagration puts pressure on the EU to make concessions. If Northern Ireland is on fire, any insistence from Brussels on maximum implementation of rules on sausage imports will look callous and disproportionate”.¹⁸

Suggesting that Johnson has “gamed” the situation is maybe an overstatement. Behr perhaps gives the Prime Minister more Machiavellian cunning than he is due. It may be that Johnson has just done his usual, taking the easiest option open to him at any one point, and worrying about the consequences later. His approach to the Protocol crisis shows the same laziness and slapdash that characterises all his policies. As long as the British – and for this read mainly English – electorate continue to accept this

attitude, or indeed endorse his stance on the Protocol as another example of “standing firm against the Brussels bureaucrats”, so it will continue, with obvious implications for Northern Ireland and London-Dublin relations.

Forging New Relationships: The Irish Government and Ulster Unionism

For the main, this article has stressed the vital importance of close co-operation between London and Dublin as a way to successfully manage the peace process, and emphasised the European context for their alignment, itself reflecting the influence of Continental politics and rivalries on British-Irish relations over many centuries. For this reason, it has suggested that Brexit was bound to fundamentally destabilise the pattern of increasing alignment between London and Dublin after they joined the EU. However, this is a result not only of the issue of the Irish border, challenging though that is. More broadly, Britain and Ireland are now pursuing fundamentally different political pathways. For the first time since the early 1960s, when the two countries initially applied to join the EU, they are moving in very different directions. When the UK originally moved to join, Ireland was obliged to do likewise. Such was its dependency on the British market at that time that it could not conceive of being outside a trading bloc that the UK was part of. In its stance since Brexit, Ireland has shown that its economy and political interests have so evolved that now it cannot conceive of a future outside the EU. Meanwhile, for the reasons argued above, it is clear that the UK's departure from the EU will not result in any fundamental rethink as soon as Remainers, now Rejoiners, hope. The early signs from the post-Brexit UK-EU relationship suggest that there is still plenty of political capital to be gained from stirring traditional British animosities towards the Continent. For all these reasons, it is hard to see how London and Dublin will be able to maintain the kind of closeness they once enjoyed, and which so successfully served the peace process in Northern Ireland. Even if a fudge can be found to reconcile all parties to the Protocol, new difficulties will no doubt emerge, particularly if Brexit increases support for an Irish border poll, or leads to Scottish independence – a result which would also destabilise Northern Ireland given unionist kinship with the Scots, and the further unbalancing of the Union towards outright English domination.

Despite and indeed because of this, the most important political relationship for Dublin right now is not with London, but rather with Ulster unionism. For a long time, southern sympathies have been with northern nationalists. This sympathy was merited, and helped press the Irish government in its efforts to reform Northern Ireland and secure equality for the minority. However, that community is now in its strongest position since partition, and indeed no longer faces an overall unionist majority. For the same reason, unionists feel they are at their weakest. Their anxiety seems exacerbated by the fact that this was meant to be a year of celebration for unionism, but the turn of events has certainly spoiled the party. The implementation of the Protocol; the related infighting and embarrassingly frequent turnover in unionists' political leadership; the loss of their majority status, with the First Minister role possibly soon to follow; the unceasing momentum of republicanism, and particularly the prospect of Sinn Féin holding power in both parts of Ireland; the constant debate about border polls and Irish unity; and the fact that there is an Irish-American in the White House, who unionists feel would happily facilitate that end – all have provided a uniquely unsettling combination of circumstances for this community. Though the human and economic costs of Covid are obviously not unique in their impact on unionists, their effects, and those of extended lockdowns, have also contributed to their loss of confidence, build-up of anxiety, and overspilling of frustration.

In spite of all this, many commentators have limited sympathy for unionists, seeing their current predicament as being largely of their own creation. First came the DUP's support for Vote Leave, and the party aligning with the May government to facilitate Brexit, but then repeatedly voting against May's deal, which would have avoided any of the controls now seen between Great Britain and Northern Ireland. Then there was the willingness to believe that Johnson was the solution to their problems. It seems that only the DUP could not see that he would betray the party at the first available opportunity, which he did just three months into his premiership. However, the current anxiety and instability within unionism should be a serious concern for all on this island.

This is hard, of course, when unionists seem willing to repeat the same errors, time and time again. For example, there is incredulity that the DUP still supports Johnson's approach to the Protocol, with Jeffrey Donaldson welcoming the UK government's most recent proposals as a "significant step in the right direction".¹⁹ It is hard to believe that unionists still trust the British government, and particularly this British government. However, one

commentator with insider understanding of unionist politics, the former *director of communications for the UUP*, Alex Kane, is adamant: “Party-political unionism doesn’t trust Johnson”. Rather, Kane explains, “the prime minister is the only key player who could be described as even a little sympathetic to the dilemma it faces. But I doubt if you could find one leader or influential voice in unionism who would tell you, on the record, they trust him.” Indeed, Kane concludes that Johnson “is the worst possible ally unionism could have right now”.²⁰

If so, surely this creates an opening for Dublin. This sounds paradoxical, and to be clear the aim is not to suggest that the Irish government renounces its aspiration to reunification, nor that it can persuade unionists to join a unitary state and thus, in effect, renounce their unionism. Rather, it is to argue that the Irish government needs to show unionists that, whatever their different objectives, it has kept its word in its commitments on Northern Ireland, unlike its British counterpart. Also, if, as Kane suggests, Johnson is “the only key player who could be described as even a little sympathetic” to unionists’ plight, Dublin needs to step up its game.

One crucial advantage that the current Irish government has in unionist eyes is that it does not include Sinn Féin. On the basis of all recent evidence, it is hard to see a situation where Sinn Féin will not be in government in Dublin at some time in the next decade. Unionists also know this, and it has already been noted as one of the many factors driving their fears. However, this prospect should also encourage pragmatism. It will be far harder for unionist leaders, psychologically and politically, to strike a deal and create workable relations with an Irish government involving Sinn Féin. The current coalition must work to encourage such pragmatism.

This brings us back to Kane’s assertion that unionists only feel sympathy for their position coming only from Johnson. Greater recognition by Dublin of how bewildering recent months have been for unionists will help. As noted, it is not just the implementation of the Protocol and resulting destabilisation of unionist politics, but what McEvoy et al call the “mainstreaming” of the debate on Irish reunification.²¹ Barely a week went by in the first half of 2021 when there hadn’t been a newspaper column, televised discussion, or high-profile public lecture that in some way addressed the issue of constitutional change on the island. However, within this debate, survey evidence suggests that, whilst there is increasingly openness to the idea of a border poll, there has not been an overly significant shift in voting preferences in Northern

Ireland at this point. That important fact is not heard by many unionists, and does not matter to many. It is the very fact that this discussion is happening, and that there could even be a border poll, that scares unionists. A perfect example of this comes from Peter Cardwell, a former special adviser to two Secretaries of State for Northern Ireland. Reflecting on the debate he was hearing in the early months of 2021, he found it hard to fault the tenor and reasonableness of this discussion, but explained that psychological dissonance nonetheless prevails for unionists:

“I was struck by the intellect and maturity of Fianna Fáil’s Jim O’Callaghan and intrigued by his thoughtful proposals on how a united Ireland might work. But I was also deeply uneasy ... quite simply, unionism is not emotionally ready for the conversation about a united Ireland”.²²

Of course, this does not mean the conversation should stop. It is nationalists’ right, enshrined by the GFA, to pursue Irish unity, and indeed it is quite sensible to begin discussing such a hugely challenging issue, long before any move is made to hold a border poll, and not least because of the lessons learned from Brexit, and a referendum wherein so many people did not fully understand the issues at stake. However, continued appreciation of the difficulties of this debate for most unionists will be required, as will respect for the fact many will still refuse to engage.

Discussion of the Protocol also needs to be mindful of this context. It is not so much that unionists fear their ability to purchase a certain type of sausage will affect their rights as British citizens, but rather what this foreshadows. Again, it is about psychology – the sense of separation from Great Britain, that Northern Ireland is now more aligned with the Republic, that this is a mere precursor to reunification, and they have no say in this – that is creating such panic within unionism, and a resulting inability to engage constructively in the important debates that are ongoing. This is why all discussion of the Protocol, and indeed of a united Ireland, has to lead, end, and have repeated throughout, one key commitment: the principle of consent. This principle, central to the GFA, is unchanged by the Protocol, and as suggested, survey evidence shows limited movement in the numbers required to produce constitutional change – something else that unionists need to be continually reminded of.

As well as repeating its continued commitment to the principle of consent, *ad nauseum*, the Irish government needs to do everything it can to engage with unionism at every possible level. The establishment of its Shared Island Unit last October, following on from its All-Island Civic Dialogue on Brexit, confirmed this intent, though the continuation of the pandemic since then will obviously have hindered face-to-face discussions – the most important medium for any diplomatic effort. However, with improving conditions for interaction across this island in the coming months, Irish emissaries should be eager to get out and talking with Protestant church leaders, educationalists, trade unionists, journalists, and many more besides. In doing so, they need to continue the patient efforts – for this is something that most senior Irish politicians have already been trying – of explaining why the Protocol is the only reasonable solution that anyone has so far devised to allow the UK government to pursue a meaningful Brexit, avoid a hard border in Ireland, and protect the integrity of the Single European Market (SEM). If unionists have more practical solutions to achieve these ends, or improve the Protocol's operation, they should be encouraged to present them. Equally, Dublin should continue urging the EU to allow maximum leeway in its arrangements for Northern Ireland – again acknowledging that this is something that the Irish government has dedicated enormous energies to since 2016 – and every possible flexibility in its application of the Protocol.

Meantime, through their engagements with unionists, Irish officials must continue to emphasise what has already been said by Dublin on the Protocol: that although there will undoubtedly be persistent challenges in the transition towards its full implementation, Brexit was always going to create some such difficulties, and yet the special arrangements secured for Northern Ireland will likely deliver many economic benefits. For example, the major supermarkets serving Northern Ireland recently sent a formal letter to both the British government and EU stating that they will not be able to maintain current supplies to the region after the full implementation of the Protocol comes into force in October.²³ Switching to EU suppliers, including in the Republic, would be required, which would increase prices. However, surely some of the new suppliers could come from Northern Ireland, too, cutting costs and creating business and employment opportunities. And this only hints at the huge potential that Northern Ireland will enjoy under the Protocol. More of its goods will certainly come from the EU, but it can also freely trade with this bloc, one of the world's largest. This is something that the rest of the UK cannot do, and many businesses have endured significant

losses, with some losing half their trade to the Continent.²⁴ This raises the possibility of companies based in Great Britain relocating to Northern Ireland to restore unfettered access to EU markets, and investors from outside the EU choosing to establish new businesses here for similar reasons, again creating more jobs. Any short-term challenges for Northern Ireland are thus likely to be dwarfed by the economic gains over the long term – as long as the stability essential to investors is assured.²⁵ Business leaders in Northern Ireland are already well aware of this, but the Irish government needs to make sure that ordinary unionists are also constantly told of the huge advantages that will come after the costs of transition.

This is particularly important, as it is something the UK government cannot and will not do. If the Johnson administration was to stress the significant economic advantages that the terms of the Brexit agreement bring to Northern Ireland, voters in Great Britain would wonder why they did not have the same. In short, they would ask why Brexit was pursued, or May's deal – which would have secured the same terms for all of the UK – was not endorsed. Again, this shows the fundamental problem that, post-Brexit, the requirements of the peace process conflict with the British government's need to show that Brexit was worthwhile. In the absence of Johnson selling the Brexit Protocol to unionists, Dublin will need to redouble its efforts to this end.

The Irish government also needs to continually explain to unionists how, as an EU member, it can help shape European economic policies in ways that suit their business interests – again, something which the UK government can no longer do. Some unionists see this dynamic creating an “economic united Ireland”, with Northern Ireland businesses pursuing their interests via Dublin rather than London, and there is no denying the fact that Brexit increases the logic for increased economic co-operation on the island. But this is not the same as constitutional change, where again the principle of consent prevails, and should regularly be repeated.

Of course, unionists have agency too, and they also need to show more political leadership, and confidence. It would be in their interests for their leaders to engage constructively in the debate about Irish unity, not to agree with that end, but rather to reassure their community that the principle of consent remains central to this, is guaranteed by all sides, and again to point out that survey evidence does not show any significant shift towards constitutional change at this point. More than that, unionists should engage

to make the case for the other side of the argument: continuation of the Union. As part of this, they could also make a positive and specifically unionist case for the Protocol, which in combination with the Union offers truly unique opportunities to Northern Ireland. Nowhere else in these islands do people have access to both the SEM and NHS. Surely the pandemic has made clear that the latter is the greatest of all British institutions, which should therefore lead any pro-Union argument. And given the economic as well as human costs of the pandemic, surely this is the worst time to risk access to the one of the largest trading blocs in the world. In this, unionists can make a hugely positive case for Northern Ireland remaining both under the Union and under the Protocol, yet what unionist leader or commentator dares to make it?

Finally, unionist leaders also need to show more confidence in making the case for the Union through their attitudes to equality. The peace process has raised the nationalist community up to a position of effective parity within Northern Ireland, but many unionists have chosen to interpret this as weakening their own position. Unionists need to change the narrative on the peace process, too long portrayed as involving concessions only on their part. This ignores the fact that on the most fundamental issue, the constitutional position, nationalists conceded, accepting the Union on the condition that they would enjoy full equality under it. However, many unionists continue to oppose the measures to achieve that end, with the Irish language debate being the most recent example. Unionists argue that promotion of the Irish language undermines the Britishness of Northern Ireland. But why is the English language seen as the only linguistic marker of Britishness, when Scottish Gaelic and the Welsh language have long enjoyed the kind of protections that Irish now will, and when many more languages are freely spoken throughout the UK on a daily basis? Why, then, is the Irish language such a fundamental threat to the Britishness of the Union – unless your idea of Britishness is one that excludes all difference, and your sense of the Union is something uniquely fragile?

Unionist leaders need to openly argue that the peace process, and with it equality for nationalists in Northern Ireland, including such measures as protecting the language which many hold dear, can make them more accepting of the Union. Again, this is a fact often ignored, but with stabilisation of the peace process from 2007, nationalists saw that the promise of the GFA could be delivered, and Catholic support for a united Ireland fell as low as 32%, with their approval of the Union correspondingly

rising to as high as 51%.²⁶ This might seem paradoxical for unionism, but allowing nationalists to be nationalists – recognising their right to speak the Irish language, carry Irish passports, fly the tricolour, and all the other changes that have come through the peace process – their need to be part of a united Ireland actually diminished. By contrast, denying nationalists their rights encourages the sense that they will only enjoy full equality by ending partition. This was evident from the start of the Troubles, when violent suppression of the civil rights movement pushed ever more nationalists to support reunification. A less urgent version of the same trend is seen with Brexit. It suggested that unionists want to turn back the clock on the peace process, follow the Brexiteers in reasserting British sovereignty, and end the porousness of the border which had allowed nationalists to interact more freely with the Republic, and to feel that they enjoyed all the same rights as their southern co-nationals. The risk to these rights, and the possible loss of the EU rights still enjoyed by people in the Republic, has naturally led northern nationalists to question again their political future. Unionist supporters of Brexit need to recognise their part in provoking this debate.

A confident and positive unionism will embrace equality in all its forms, and argue that this is central to Britishness and the ideal of the Union. It will also have to accept that views on Irish reunification may change further as Brexit plays out, for nationalists particularly, but maybe young, liberal or pro-European unionists, too. However, this will all depend on the course that Northern Ireland now takes, and whether the Protocol can be made to work, or unionist leaders insist on both Brexit and arrangements that risk a return to a hard border in Ireland, wholly separating nationalists from the state that embodies their national identity. Unionists must accept that nationalists are Irish, and have a right to express that identity in every way. Of course, the same logic applies in reverse for Irish nationalists, and for all the talk of a new constitution in any future unitary state, they should question whether unionists can truly be accommodated under such an arrangement. Can a unionist still be a unionist if the Union ends, any more than a nationalist can be a nationalist in a purely British Northern Ireland? At the heart of the GFA – which, whatever critics say, has brought us closer than we have ever been to a normal and shared society – is an acknowledgement that Northern Ireland is not British, not Irish, but both. Continued progress towards a fuller realisation of that fact, evolving towards a truly bi-national polity, is the only way forward. That will also entail recognition that, as well as being both British and Irish, Northern Ireland is also fundamentally European. From

plantation to partition, the region's history has always been shaped by broader European influences. Acceptance of this reality will also help us realise that there are many more identities in the region, national and otherwise, beyond a simple British-Irish binary. Whatever the constitutional debate and arrangements that evolve from this, they will also need to accommodate these multiple and changing identities.

Endnotes

- ¹ President McAleese’s ardent pro-Europeanism may explain this; see James Mulhall, “‘We owe peace in North of Ireland to EU’, says former Irish President Mary McAleese’ (15 March 2016), *The Irish Post*, <https://www.irishpost.com/news/we-owe-peace-in-north-of-ireland-to-eu-says-former-irish-president-mary-mcaleese-83148>; [accessed 29/7/21].
- ² The European Economic Community. For ease, the term EU alone will be used hereafter to refer to the project of European integration in its various guides.
- ³ For an introduction to this literature, see K. Hayward and M. Murphy, ‘The EU’s Influence on the Peace Process and Agreement in Northern Ireland in Light of Brexit’ (2018); and B. Laffan, ‘The European context: a new political dimension in Ireland, North and South’ (2005).
- ⁴ The European Parliament uses the same mechanism to allocate its political offices.
- ⁵ Laffan, ‘The European context’, p.168.
- ⁶ D. Kennedy, ‘The European Union and the Northern Ireland question’, p.177.
- ⁷ Laffan, ‘The European context’, p.171, p.173.
- ⁸ See Peter John McLoughlin, ‘There’s a reason why Northern Ireland has been without a government for more than 500 days – Brexit’ (29 August 2018), *The Conversation*, <https://theconversation.com/theres-a-reason-why-northern-ireland-has-been-without-a-government-for-more-than-500-days-brexit-102297>; [accessed 29/7/21].
- ⁹ See Peter John McLoughlin, ‘Northern Ireland’s government is back up and running – here’s how it happened and why’ (13 January 2020), *The Conversation*, <https://theconversation.com/northern-irelands-government-is-back-up-and-running-heres-how-it-happened-and-why-129831>; [accessed 29/7/21].
- ¹⁰ Brendan O’Leary and John McGarry, *The Politics of Antagonism*, p.220.
- ¹¹ Heather Stewart, Jennifer Rankin and Lisa O’Carroll, ‘Johnson accused of misleading public over Brexit deal after NI remarks’ (8 November 2019), *The Guardian*, <https://www.theguardian.com/politics/2019/nov/08/boris-johnson-goods-from-northern-ireland-to-gb-wont-be-checked-brexit>; [accessed 29/7/21].
- ¹² See Lisa O’Carroll, ‘Government admits new Brexit bill “will break international law”’ (8 September 2020), *The Guardian*, <https://www.theguardian.com/politics/2020/sep/08/government-admits-new-brexit-bill-will-break-international-law>; [accessed 26/7/21].
- ¹³ See Jennifer Rankin and Jim Waterson, ‘The real Boris Johnson: How Boris Johnson’s Brussels-bashing stories shaped British politics’ (14 July 2019), *The Guardian*, <https://www.theguardian.com/politics/2019/jul/14/boris-johnson-brussels-bashing-stories-shaped-politics>; [accessed 26/7/21].
- ¹⁴ On this, we should recall the famous two articles that Johnson wrote for *The Daily Telegraph*, one arguing for Remain, the other for Leave. It seems he chose the latter purely on the basis that it was more likely to advance his political career; Jessica Elgot, ‘Secret Boris Johnson column favoured UK remaining in EU’ (16 October 2016), *The Guardian*, <https://www.theguardian.com/politics/2016/oct/16/secret-boris-johnson-column-favoured-uk-remaining-in-eu>; [accessed 1/8/21].

- ¹⁵ See Jon Henley, 'Is the EU really dictating the shape of your bananas?' (11 May 2016), *The Guardian*, <https://www.theguardian.com/politics/2016/may/11/boris-johnson-launches-the-vote-leave-battlebus-in-cornwall> ; [accessed 27/7/21].
- ¹⁶ *Ibid.*
- ¹⁷ Even *The Guardian* has run with the phrase, as in Daniel Boffey's article, 'Sausage war truce leaves EU and UK with much to chew on' (30 June 2021), *The Guardian*, <https://www.theguardian.com/politics/2021/jun/30/sausage-war-truce-leaves-eu-and-uk-with-much-to-chew-on>; accessed 29/7/21.
- ¹⁸ Rafael Behr, 'British politics is still drunk on Brexit spirit, and Boris Johnson won't call time' (16 June 2021), *The Guardian*, <https://www.theguardian.com/commentisfree/2021/jun/16/british-politics-drunk-brexit-spirit-boris-johnson>; [accessed 29/7/21].
- ¹⁹ Gerry Moriarty, 'London protocol move "a significant step in right direction" – Jeffrey Donaldson' (21 July 2021), *The Irish Times*, <https://www.irishtimes.com/news/ireland/irish-news/london-protocol-move-a-significant-step-in-right-direction-jeffrey-donaldson-1.4626964>; [accessed 29/7/21].
- ²⁰ Alex Kane, 'Johnson is worst possible ally unionism could have' (26 July 2021), *The Irish Times*, <https://www.irishtimes.com/opinion/johnson-is-worst-possible-ally-unionism-could-have-1.4630067>; [accessed 29/7/21].
- ²¹ K. McEvoy et al., 'The Empire Strikes Back: Brexit, the Irish Peace Process, and the Limitations of Law' (2020), p.643ff; <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2777&context=ilj>; [accessed 29/7/21].
- ²² Peter Cardwell, 'Unionism not emotionally ready for conversation about united Ireland' (14 April 2021), *The Irish Times*, <https://www.irishtimes.com/opinion/unionism-not-emotionally-ready-for-conversation-about-united-ireland-1.4536486?mode=sample&auth-ailed=1&pw-orig=https%3A%2F%2Fwww.irishtimes.com%2Fopinion%2Funionism-not-emotionally-ready-for-conversation-about-united-ireland-1.4536486>; [accessed 29/7/21].
- ²³ See *BBC News NI*, 'Brexit: Supermarkets warn of rising costs due to NI Protocol' (18 July 2021), <https://www.bbc.co.uk/news/uk-northern-ireland-57879007>; [accessed 29/7/21].
- ²⁴ As reported, for example, by Celine Wadhera, 'British food and drink exports to EU fall by 47% in first quarter' (18 June 2021), *Independent*, <https://www.independent.co.uk/news/uk/home-news/british-food-drink-trade-fall-b1868346.html>; [accessed 29/7/21].
- ²⁵ Scenes such as the rioting of March and April 2021 were an obvious deterrent.
- ²⁶ SOL Surveys Online, 'Community Relations Issues: Constitutional issues', https://www.ark.ac.uk/sol/surveys/community_relations/time_series/crconstit.htm; [accessed 29/7/21].

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Scotland-Ireland Relations in a European Context

Kirsty Hughes and Tobias Lock

Dr Kirsty Hughes is a researcher, writer and commentator on European politics and policy. From 2017-2021, she was Director and founder of the Scottish Centre on European Relations. She has worked at a number of leading European think tanks, including as Senior Fellow at Friends of Europe, Brussels; Senior Fellow, Centre for European Policy Studies; Director, European Programme, Chatham House; Senior Fellow, Policy Studies Institute, and Research Fellow, WZB Berlin Social Science Centre. She is a fellow of the Royal Society of Edinburgh. She has published extensively, including books, reports, and policy papers, as well as contributing to a wide range of national and international media outlets. Her research focus has included: the UK, Scotland and Brexit, EU democracy, the politics of the Eurozone crisis, the EU enlargement to central and eastern Europe, and Turkey's EU accession process.



Professor Tobias Lock has a Jean Monnet Chair in EU Law and Fundamental Rights at the Department of Law, Maynooth University. His research focuses on the multi-level relations between legal orders with a specific focus on human rights and constitutional change. He served as an advisor to the Scottish Parliament's Culture, Tourism, Europe and External Relations Committee and was a member of the Scottish First Minister's Advisory Group on Human Rights Leadership. He is also a member of Royal Irish Academy's ARINS (Analysing and Researching Ireland) project.



Introduction

Until the Brexit vote in 2016, Scotland's relations with the island of Ireland (i.e. both Ireland and Northern Ireland) took place in the context of the UK and Ireland being member states of the European Union. Ireland looked to its relations, North-South and East-West, in that EU context; in the East-West case both to the UK as a whole but also to its constituent parts, notably Scotland and Wales.

Scotland's constitutional debate has inevitably played into Scottish-Irish relations, not least with the 2014 independence referendum, but the Irish government has tended to be adept and well-versed in dealing with constitutional sensitivities in its relations with the UK, including with respect to Scotland. Scotland's constitutional debate continues: since the May 2021 elections to the Scottish parliament the Scottish government has underlined its intention to hold an independence referendum during the new/current term of the Scottish parliament, something the UK government is currently opposed to.

But that constitutional debate now takes place in the context of Brexit having happened, even though 62% of Scottish voters chose 'remain' in 2016. Scottish debates over the desirability and feasibility of independence in the EU frequently look both to Ireland and to its Nordic neighbours to the East, seeing similarly sized countries prospering and having influence within the EU. Equally, despite the pronounced difficulties in EU-UK relations over the Northern Ireland protocol, there has also been some tendency in Scotland to look at that protocol as giving Northern Ireland the access to the EU's single market that the Scottish government would very much liked to have kept (and which it proposed as a compromise to the UK government during the Brexit negotiations).

The UK left the EU on 31st January 2020 and left its single market and customs union on 31st December 2020. Scotland, inevitably, left with the rest of the UK. We now see a patchwork of differentiated relations across these two islands. Ireland remains an EU member state. Northern Ireland is part of the UK but is in the EU's single market for goods and effectively in the EU customs union. England, Wales and Scotland are no longer in the EU's single market or customs union; they face an internal border to Northern Ireland in the context of the protocol and a rather hard post-Brexit border to Ireland and the rest of the EU in the context of the Trade and Cooperation Agreement

and the Withdrawal Agreement. Ireland and the UK are also participants in their joint Common Travel Area in terms of movement of people, meaning England, Wales, Scotland and Northern Ireland's relations to Ireland are different from those to the rest of the EU where free movement has ended.

In this article, we explore the implications of this patchwork and differentiated set of relationships that Brexit has super-imposed on pre-existing relations, focusing on Scotland's relationship to Ireland, and their different relationships to the EU. We also consider how different constitutional scenarios could impact in future on these relations.

Section One: Scotland-Ireland-EU Relations: How Clear is the Status Quo Post-Brexit?

In this section, we look at Scotland's relations with Ireland and Northern Ireland. We focus first on Scotland and Northern Ireland both in the context of the Protocol and of post-Brexit devolved relations across the UK. Then we consider Ireland-Scotland relations in the post-Brexit era. It is notable that, while foreign policy is not a devolved power in the UK, the Scottish government is making clear efforts to implement a strategic and positive approach to Scotland-EU relations post-Brexit, despite the current difficult state of EU-UK relations.¹

1.1 Northern Ireland and Scotland

Scotland's relations with both Northern Ireland and Ireland are now conditioned through a complex set of post-Brexit relationships: the Trade and Cooperation Agreement, the Withdrawal Agreement, bilateral UK-Ireland relations and internal UK relations, and not least the evolving structures of devolution.

Despite the many differences in the politics of Scotland and Northern Ireland, they were the two out of the UK's four constituent parts that voted to remain in the EU in 2016 – 62% remain in Scotland and 56% remain in Northern Ireland. In the unstable UK politics that evolved, following the 2016 referendum, Northern Ireland ended up playing a more significant role than Scotland, not least after Theresa May's gambit of calling an early general election in 2017 left her with a minority government dependent on support from the Democratic Unionist Party (DUP).

The irony here was, of course, that the DUP – unlike the majority vote in Northern Ireland – was pro-Brexit. So while DUP MPs played a key role from 2017 on, the remain majorities in Northern Ireland and Scotland were essentially ignored in London (as were the divisions across England and Wales thrown up by the Brexit vote). Both under Theresa May, and subsequently under Boris Johnson, consultation with the devolved administrations and/or their civil services (given the absence of the Northern Ireland executive from 2017 to 2020) was minimal. There was no attempt at compromise or even discussion of compromise with the two remain parts of the UK.

Moreover, under May and Johnson, the tendency was towards re-centralisation of powers that had previously sat with the devolved administrations in the face of EU powers returning to the UK, such as on environment and agriculture.² This tendency became even stronger once Johnson's government passed the Internal Market Act – and in the face of Johnson's apparent policy of so-called muscular unionism, not least due to demands from the Scottish government for another Scottish independence referendum. The Internal Market Act results in far-reaching intrusions into the (devolved) regulatory autonomy of Scotland and Wales as it opens the door for a race to the bottom in terms of regulatory standards, which the devolved legislatures will struggle to prevent. In contrast to the EU single market, mutual recognition in the Internal Market Act is not softened by wide-ranging 'justifications' for higher Scottish or Welsh standards or by flanking UK-wide minimum standards brought about by harmonising legislation, so that the lower standard usually prevails.³

These challenges to the devolution settlement caused concern in Wales too. The Welsh majority vote for Brexit did not mean its Labour government wanted a hard Brexit nor a diminution or undermining of devolved powers. Indeed, there was a fair amount of coordination between the Scottish and Welsh governments (in the absence of the Northern Ireland executive) in challenging and pushing back towards both the May and Johnson governments on devolved powers and on wider consultation (or its absence) during the EU-UK Brexit talks. But this has been substantially unsuccessful so far.

It was the Scottish government that pushed most strongly and clearly for what it called a compromise Brexit of the whole UK staying in the EU's customs union and single market. Scotland's First Minister, Nicola Sturgeon, called for this at the end of 2016 in a key policy paper called 'Scotland's Place

in Europe'.⁴ Sturgeon also argued that, if the UK did not adopt this compromise, Scotland should stay in the EU's single market even while the rest of the UK did not, and set out an analysis of how it proposed this could happen. This proposal was dismissed out of hand – and without discussion – by the UK government just as it triggered Article 50 of the EU Treaty in March 2017.

Various Brexit ironies figure here. In the end, despite her 'red lines', in the 2018 Withdrawal Agreement, Theresa May effectively agreed to keep the UK indefinitely in the EU's customs union to avoid a hard border on the island of Ireland. This might have been presented through the previous two years as a compromise across the UK with those who had voted remain. But it was not.

Instead, May was driven towards this Agreement by the challenge of the Irish border and with scant regard given to the views of the Scottish government on Brexit. Even in the case of Northern Ireland, keeping the Irish border open was driven by the needs of the peace process and strong political and diplomatic pressure from the Irish government and the EU. It was not driven by the fact that there was a remain majority too in Northern Ireland. May's Brexit politics, like Johnson's after her – was driven most of all by the internal conflicts within the Conservative party and to some extent by the perceived or imagined wants of leave voters.

Ultimately, Boris Johnson's 2019 Withdrawal Agreement by putting a customs and regulatory border between Great Britain and Northern Ireland effectively kept Northern Ireland in the EU's single market for goods and its customs union. While the EU would have agreed to keep the whole UK in the EU's single market and customs union, its clear rejection of May's convoluted Chequers proposals showed it was not going to allow the whole UK to cherry-pick parts of the EU single market. Johnson himself, of course, resigned over May's Chequers proposals – as not representing a real Brexit.

Nor was the EU likely to have agreed the proposal for Scotland to stay in the EU's single market. There was no imperative of the peace process to drive such a deal. And while there was plenty of sympathy for Scotland in Brussels and Dublin, the core political focus was on the Irish border and the Good Friday/Belfast Agreement, not on remain-voting Scotland. In the event, the UK government did not even contemplate such a deal for Scotland and so it was never presented to the EU. This led to the perception by some in

Scotland that while Northern Ireland had got a partial compromise on a softer Brexit (however complex it subsequently became politically), Scotland had got nothing. Meanwhile, Scotland, Northern Ireland and Wales had also got a weakening of their devolved powers: Brexit was the opposite of the gift that keeps giving.

As a consequence of the Withdrawal Agreement and the Protocol, the asymmetry of the UK's devolution settlement has become more pronounced. Because of the Protocol, the Internal Market Act 2020 applies only to a limited extent in Northern Ireland where trade in goods is concerned. While goods originating in Northern Ireland benefit from the principle of mutual recognition, which governs the Act, goods originating in Scotland (or other parts of the UK) can only be imported into Northern Ireland if compliant with the EU single market rules mandated by the Protocol. Hence Northern Ireland is spared from some of the centralising tendencies identified above, whereas Scotland and Wales bear their full brunt.

Northern Ireland is also given a (small) role in shaping the overall EU-UK relationship. Most importantly, the democratic consent vote according to Article 18 of the Protocol gives the Northern Ireland Assembly an opportunity to terminate the trade elements of the Protocol (Articles 5-10). It is thus placed in the unusual position to autonomously decide on an 'excepted matter', which would normally be a no-go under the UK's devolution settlement.⁵

Additionally, in the New Decade, New Approach deal,⁶ the UK Government made a promise – as yet unfulfilled – that members of the Northern Ireland Executive would be invited to attend Specialised Committee meetings arranged under the Protocol, where these are also attended by the Irish Government as part of the EU's delegation.

Furthermore, since the start of the Brexit negotiations the EU institutions have made an effort to directly engage with Northern Irish politicians and stakeholders. While meetings took place with Scottish and Welsh representatives as well as Westminster opposition politicians during the Brexit negotiations, engagement with Northern Irish representatives was more intense and continues to this day. That level of engagement – including appearances by an EU Commissioner before a Stormont committee – with representatives of a sub-state entity of a third country is unprecedented.

There is some current discussion, as of mid-2021, about how and when devolved administrations are represented or present in the governance structures of the Trade and Cooperation Agreement. However, whatever emerges, there is no expectation that devolved representatives will have any decision-making role and they may, at best, have limited opportunities to actively participate.

Nonetheless, Scotland's strong desire to stay close to the European Union is evidenced in the Scottish Continuity Act, which provides a legal basis for continued alignment with EU law on devolved matters.⁷ The Act empowers the Scottish Government to enact new EU legislation into Scots law. The purpose of the Act is to allow Scotland to 'keep pace' with EU law developments in particular in the field of environmental law.⁸ However, the centralising effects of the Internal Market Act described above, may make the aim of 'keeping pace' with EU law more difficult to achieve.

Despite these centrifugal trends, there are interesting parallels in policy developments of late. Under the New Decade, New Approach deal, the Northern Ireland Assembly was tasked with (finally) bringing about a Northern Ireland Bill of Rights, which is one of the commitments contained in the Good Friday/Belfast Agreement. At the same time Scotland has embarked on an ambitious journey of providing much improved human rights protection and indeed leadership. A National Task Force for Human Rights Leadership produced a report recommending a new statutory human rights framework in Scotland, which would see improved protection for social, economic, cultural, and environmental rights in devolved areas.⁹ The Scottish experience has sparked much interest in Northern Ireland with several members of the Scottish task force giving evidence to the ad hoc Stormont committee on a Bill of Rights and informing its views.

Overall, Scotland and Northern Ireland face some common and some very different challenges post-Brexit. They share some common issues around devolution. They also face many differences both due to the existing structures of the Good Friday/Belfast Agreement and since the start of 2021 due to the impact of the Protocol. It is also worth noting that while there are a range of views and divisions on the Protocol in Northern Ireland, and between the UK government and EU, in Scotland, Nicola Sturgeon's government would positively want to have that degree of EU alignment but cannot (though how Scottish public opinion would react to a hard Scotland-England border is an open question).

1.2 Ireland-Scotland Relations

Ireland remains an EU member state with a firm commitment to EU integration both at the high political and the grassroots level with 84% of the population agreeing that it should remain an EU member.¹⁰ Ireland's involvement with and influence in the EU recently increased when the Irish minister for finances was elected President of the Eurogroup.

Ireland's EU journey will remain shaped by post-Brexit developments, however, as the Protocol has direct repercussions for the Ireland-EU relationship. In particular, it envisages the continued operation of the Common Travel Area, which is necessary to maintain an open border and is the key aim of the Protocol. This transforms Ireland's policy choice to opt-out from the Schengen arrangements into a legal duty.¹¹ It also means that Ireland is likely to maintain its opt-out from the Area of Freedom, Security and Justice as this guarantees Ireland the freedom to pursue its own policies on border checks and visas and to coordinate these with the UK.

Ireland recognised early on the threats that Brexit posed, in particular with regard to the border with Northern Ireland.¹² It used its preparedness early on in the Brexit talks to make the maintenance of the open border one of the EU's key negotiating objectives. This proved necessary given the UK government's wish for a hard Brexit outside the EU's customs union and single market.

Nonetheless, the Irish government saw from the start that it was going to have to develop a new Ireland-UK relationship and not let it be too deeply damaged by Brexit – though badly damaged it clearly was. It was clear, for Ireland's government, that sensitive though it was, strong relations with the UK in future also meant good relations with Scottish and Welsh governments and not only a concern with Northern Ireland, the Good Friday/Belfast Agreement and Ireland-UK relationships.

Ireland already had a Consul-General in Edinburgh at the time of Brexit – one of the most active and influential diplomatic postings in Scotland. By 2019, a new Consul-General posting was also opened in Cardiff – and, in July 2021, one in Manchester in England. Like elsewhere in the EU, Dublin was only too aware that Brexit had further intensified the Scottish independence debate that had not, anyway, gone away after 2014.¹³ But while many doubtless had strong sympathies for the Scottish National Party's (SNP) goal of independence in the EU, there was also full awareness in the Irish

government and diplomatic service of the sensitivity of the UK's constitutional debates and the need to be neutral on the Scottish independence question.

While these sensitivities made some in the EU reluctant to engage too much with Scotland, the Irish government and Oireachtas had a strong basis of existing relationships with Scotland, and plenty of experience of maintaining those relationships in the face of constitutional tensions. Indeed, notably soon after the Brexit vote, in November 2016, Nicola Sturgeon gave a high profile address to the Seanad Éireann. Both her Irish hosts and the First Minister herself were at pains to underline the centuries long, warm Ireland-Scotland relationship down to the present day.¹⁴ More low profile, but effective as part of continuing post-Brexit relationship-building, was the joint Irish-Scottish governments' project on their bilateral relations culminating in a report in January 2021 focusing on a range of cultural, business and educational areas for intensified future cooperation.¹⁵

Meanwhile, the Scottish government had opened a new innovation and investment hub in Dublin in 2016, followed by similar hubs, based in UK embassies, in Berlin and Paris, and a related office in London – alongside the longer-standing Brussels office of the Scottish government. While some in Scotland might see these hubs as proto-embassies or at least as a rather deliberate para-diplomacy, in bilateral relations they are presented as less controversial and lower key. Even so, there are some indicators that the UK government may be starting to scrutinise these hubs more carefully – or even neuralgically.¹⁶

Overall, as long as the current constitutional status quo stands together with the current EU-UK Trade and Cooperation Agreement, then both Irish and Scottish governments can be expected to continue to foster good relations. How straightforward or difficult this may be or become will depend too on whether current fractious relations both between the UK government and the EU, and between the UK and Scottish governments continue or not.

Section Two: Future Constitutional Change

Scotland and Northern Ireland differ in the constitutional position on their respective future position in the UK. The Good Friday/Belfast Agreement – and its implementing legislation, the Northern Ireland Act 1998 – provides a clear exit route for Northern Ireland if the majority of the people of Northern

Ireland voting in a referendum opt for a united Ireland. Scotland does not have such a pre-defined exit route. Moreover, Northern Ireland's power-sharing executive is, by its very design, split on the question of Irish unity, whereas Scotland's government is pro-independence.

Brexit has had a strong impact on constitutional debates both on the island of Ireland and in Scotland. Here we briefly consider how Scottish independence and Irish unification would impact on relationships across these islands.

2.1 Prospects for Scottish Independence

The Scottish National party (SNP) has been in power in Scotland since 2007. In the May 2021 elections, both the SNP and the pro-independence Greens made it clear that they want to hold an independence referendum during the current term of the Scottish parliament. The SNP won 64 seats in the 129 seat Scottish parliament, and the Greens 8 – between them giving a clear mandate to hold another referendum.

Nonetheless, Boris Johnson has insisted that, in the face of the pandemic, it is not the time to hold another referendum and that the question was resolved for a generation in 2014. Yet, cabinet minister Michael Gove also stated, after the Scottish elections, that the UK union is a voluntary one. Apparently Scotland can choose to leave the union but, in the view of the UK government, not yet and not now.

Nicola Sturgeon has said that she would like to hold a referendum during the first half of the parliament's term i.e. by the end of 2023. However, with the UK general election due in 2024, and the possibility that it might be held early in 2023 – and combined with the pandemic – this timing may be awkward, in the face of a continuing London-Edinburgh stand-off on holding a referendum.

For now (in 2021), Scottish opinion on independence is broadly split down the middle at 50:50 – although in the second half of 2020 there were over twenty polls in a row showing a majority for independence. The demographics around support for independence are also highly significant with majority support in those under 50 or 55 years old (depending on the poll).¹⁷

The SNP's goal is independence in the EU. Nicola Sturgeon, when looking to a referendum in 2023, mentioned 2026 as a likely date for independence. But the Scottish government is well aware that an independent Scotland would have to manage an accession process to rejoin the EU. Conceivably, this could be as fast as four or five years if Scotland has remained closely aligned to EU laws in the meantime.¹⁸

If Scotland were independent in the EU by, say, 2030, then its relationship with Ireland and Northern Ireland would be transformed. Scotland would have an open border to Ireland and to the rest of the EU, and it would then be on the EU side of the Protocol with respect to Northern Ireland, with an open border for goods. The cost of this is the imposition of an EU external border between Scotland and England and Wales – albeit an independent Scotland would doubtless, like Ireland, want to stay part of the UK-Ireland Common Travel Area.

For an independent Scotland, good relations with the rest of the UK would be important – much of those relations set by its EU membership (if it transpired) but with many other issues to discuss with England and Wales on their shared island. In the face of a Scottish independence vote, many in the EU will focus more, in fact, on what the fragmentation of the UK will do to England – and its impact on Irish unification if Scotland's decision comes first.

Ireland and Scotland might, in many ways, have much in common as two small Celtic states in the EU. Some also see an independent Scotland in the EU as almost another Nordic EU state. It is notable here too that Ireland published in 2021 a new Nordic strategy.¹⁹

Yet what sort of EU member state an independent Scotland would be is far from clear. The current Scottish government recognises that it will not regain any of the UK's previous opt-outs, except perhaps on Schengen given the Common Travel Area, and is not looking to emulate that British exceptionalism. Having said that, despite currency being a core issue in the independence debate, there is rather little focus on the Euro, with the assumption of many on the independence side being that joining the Euro would be pushed back indefinitely. The political ramifications of this – not being in the EU's inner core like Ireland – are rarely touched on.

In the end, Scottish independence in the EU would represent a huge political and constitutional step for Scotland – but a new 5 million population northern EU member state would not be so challenging for the EU. The real challenge – for the EU, and for Ireland too, would be in the impact on the rest of the UK, England, Wales and Northern Ireland of that independence.

2.2 Prospects for Irish Unity

Even though expressly provided for by the Good Friday/Belfast Agreement and the Northern Ireland Act, until Brexit Irish unification did not feature prominently in political debates outside of Irish republican circles in Northern Ireland, Ireland or the UK. This has now changed. While the Irish government pursues a cautious approach with a ‘Shared Island Initiative’, individual members of the governing parties have gone further and started to think (and write) publicly about the process towards and shape of a united Ireland.²⁰ The same is true for academic discourse, which had been largely dormant on the question. Since Brexit numerous individual publications and collaborative projects have begun to appear.²¹

While many questions concerning the procedural and substantive details of the process of Irish unification remain open, the European Council has made it clear that – following the German precedent – a united Ireland would automatically remain a member of the European Union.²² Irish unification would be preceded by negotiations between Ireland and the UK on its precise terms, which would in all likelihood result in a treaty between the two states. That treaty would also need to address the commitments in the Good Friday/Belfast Agreement, which would need to be adapted to reflect the new constitutional reality. Existing safeguards for those in Northern Ireland with a British identity – notably to be either citizens of Ireland, the UK or both – would need to be reaffirmed, and new ones – e.g. on representation in all-Ireland parliament or government – may need to be agreed.

Furthermore, the Protocol would most probably become redundant and could be removed from the Withdrawal Agreement. In its place, however, the EU and the UK might want to agree terms to protect the rights of British citizens in Northern Ireland under EU law: a continued participation of Ireland in the Common Travel Area – and its continued permissibility under EU law – might be one aspect; another might be the facilitation of movement for British nationals from Northern Ireland.

If the people of Northern Ireland voted in favour of Irish unity in a border poll, Scotland would be affected in a profound way. First, Irish unification

would remove one of the pillars of the UK's union. It would result in the eventual repeal of the Act of Union 1801, the Northern Ireland Act 1998, and either a repeal or a reform of the Ireland Act 1949. With the UK union weakened in this way, Irish unification would, in all likelihood, make calls for (another) Scottish independence referendum (even) louder and increasingly difficult to resist, calling the entire union of the UK into question.

Second, Irish unity would require a re-adjustment of the Good Friday/Belfast Agreement and the institutions established by it. Scotland plays an active part in the East-West relationship as a member of the British-Irish Council and host to its secretariat. An adjusted Good Friday/Belfast Agreement would probably envisage a continuation of the institutional side of this relationship, but Scotland would no longer be dealing with another devolved entity as its closest neighbour, but with a sovereign state, which is likely to affect the dynamics of this relationship.

Third, in economic terms a united Ireland would solidify the trade border in the Irish sea and extend it beyond goods to services (for Northern Ireland). It would also mean that the current open border for goods when going from Northern Ireland to Britain would become an EU external border in that direction too. However, assuming the Common Travel Area did stay in place, the free movement of people that the CTA allows does facilitate services trade even today between the UK and Ireland compared to services trade with the other EU member states (even while there are clearly substantial barriers to Ireland-UK services trade compared to before Brexit).

Overall, many consider that if one of these major constitutional changes happens – Irish unification or Scottish independence – it will have a substantial impact on the other, quite likely encouraging pressures for constitutional change in the one that has yet to decide.

Conclusions

Scottish-Irish relations overall are positive, but have been put under strain or at least made more complex due to Brexit as a consequence of the damage done to overall Irish-UK relations. Brexit has also set Scotland and Northern Ireland further apart as devolved entities.

Due to its continued participation in the EU customs union and single market for goods under the protocol, Northern Ireland will be spared from some of

the centralising effects of the Internal Market Act. Scotland's efforts to effect a softer Brexit for the UK as a whole as well as the alternatively proffered 'special deal' for Scotland came to nothing. Instead, Scotland is focusing its efforts on its light European strategy including maintaining relations with strategic EU partners – notably Ireland, the EU institutions and France and Germany – and on keeping its statute book in tune with EU law developments, so far as the devolution settlement allows.

The future Irish-Scottish relationship very much depends on whether and when constitutional change within the UK will occur on either side of the North Channel. While the legal avenues towards Scottish independence and Irish unity and their political contexts differ, either constitutional change would have significant repercussions for the other polity as it would call into question the future of the UK as a whole.

An independent Scotland would want to forge strong positive relations with Ireland – which is seen by many as a role model for an independent Scotland – and the same would be true for relations with the Nordic EU member states. Yet, Scottish independence would raise difficult questions concerning Scottish relations with England and in particular the common border, which would become an EU external border. Similarly, the current Irish Sea border for goods between Great Britain and Northern Ireland would become an international border and could potentially harden as a consequence of independence.

Overall, Scotland-Ireland relations are likely to continue to be dominated by the 'border' theme. The borders erected by Brexit between Scotland, Ireland, and Northern Ireland have already led to increased differentiation and complicated relations and this trend is likely to continue. That said, both the Irish and Scottish governments value their positive relationship and continue their work to ensure that their relations remain good and are deepening.

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The totality of relationships?

Hard truths instead of comfortable lies

Sarah Creighton

Sarah Creighton is a writer and commentator from Northern Ireland. She has written for *The Guardian*, *Belfast Telegraph*, *The Fabian Review* and *Sluggie O'Toole*. She is a qualified solicitor and currently works for a housing charity.



Writing about the history of Ireland, John Hewitt wrote, “Celt, Briton, Roman, Saxon, Dane and Scot,/Time and this island tied a crazy knot”.¹ Born before partition, and having grown up in Northern Ireland, Hewitt understood what the ‘crazy knot’ meant.

In the north, history and politics fuse together. Britishness, Irishness and Europe collide. It’s messy, complicated and, very often, painful.

Given the nature of relationships on these islands, one can see how Brexit shook the ground. In the five years since the referendum, co-operation between Northern Ireland, the Republic and Britain is at an all-time low. Trust is thin on the ground.

Over recent months there have been instances of violence on the streets of Northern Ireland, political chaos in the Northern Ireland Assembly and concerns that the institutions will collapse again. North-South Ministerial meetings aren’t taking place because of boycotts. Legal action is brewing over the British government’s failure to implement the Northern Ireland Protocol. The knot is under strain and, in some places, broken.

One of the great achievements of the Good Friday Agreement was that it recognised the relationships on these islands. Its authors understood that relations between north/south and east/west had to be embedded in the document. The knot is its main principle and its bedrock.

The Agreement isn't infallible or sacrosanct, but it remains the best framework to provide peace in Northern Ireland. Over the years it has been tested many times. There's no doubt that Brexit, and its consequences, have pushed its boundaries to the limit. Boundaries, of course, being at the heart of it all.

Instead of binding us together, the Agreement has become a weapon and a stick to beat each other with over the past few years. People speak of myths instead of truths. We've forgotten to listen and understand.

As the Agreement has come under strain, so have relations between the Republic and the UK. In the middle of it all sits Northern Ireland, buttressed on either side by self-interested actors who care little for its future. This didn't start with Brexit. The UK's exit from the European Union has merely allowed people to fall back on old habits.

We must recognise that the Agreement provides an unfinished road map. Politicians need to have bold, brave conversations about our institutions and our understanding of each other. Problems should be addressed with empathy, compassion and pragmatism.

With Brexit, and the Protocol, the intricate balance of relationships between north/south and east/west has been tipped out of balance. To find our way through the current quagmire, we need to return to the basic principles of the Good Friday Agreement. The knot must remain central and embedded in our political life.

The Agreement is divided into three strands.

Strand One focuses on relationships within Northern Ireland. It sets up the Northern Ireland Executive and the Northern Ireland Assembly. It is, "subject to safeguards to protect the rights and interests of all the community".²

Strand Two focuses on Northern Ireland's relationship with the Republic of Ireland. It is underpinned by the British-Irish Agreement, which represents the 'totality of relationships' between the UK and the Republic of Ireland. It establishes North-South bodies, including the North-South Ministerial Council. It aims to, "develop consultation, co-operation and action within Ireland".

Strand Three focuses on 'East-West' relations between the Republic of Ireland and the United Kingdom. It establishes the British-Irish Council and the British Intergovernmental Conference. The British-Irish Council aims to, "promote the harmonious and mutually beneficial development of the totality of relationships among the peoples of these islands".

For John Hume, the three strands represented the underlying relationships that existed on these islands. They were essential for the peace process to work.

Lyra McKee tweeted it one day as she visited America. She'd been meeting Americans and discussing Northern Irish life. "In Northern Ireland we need to tell fifty stories before we can tell one".

How did we get here? How long is a piece of a string? To start 800 years ago or 23? Before delving into Brexit, I think it's important to look at partition and the dynamics it created in Northern Ireland, the Republic and Britain.

It would take more than this article to sum up the consequences of partition on the island of Ireland. That's a debate that's still ongoing today. What is certain is that the division of Ireland into two different states created different mindsets across these Islands. Psychological borders exist alongside marked territory on maps.

The feelings of Northern Ireland's nationalist and republic minority are well documented. James A. Cousins argues that nationalists in Northern Ireland felt like a "trapped minority within the new state. [...] Feeling undervalued, abandoned and exploited by their peers in the South, the nationalists of Northern Ireland were also marginalised within a host state that regarded them with fear and suspicion"; Nationalists, he writes, "never ceased to identify with the Irish mother nation, even as they watched the prospect of

Irish Unity flounder under Dublin's trusteeship".³ One hundred years later, nationalists in Northern Ireland still feel connected to the Republic.

The Republic of Ireland maintained its claim on Northern Ireland until 1998 when it removed Clauses 2 and 3 from its constitution. Prior to that the government in the south moved from a policy of boycotting the northern state to a more conciliatory position. The Republic was involved in the peace process, negotiations with the British government and various attempts at bi-lateral agreement. In my lifetime the most significant include the Downing Street Declaration in 1992, the Anglo-Irish Agreement in 1989 followed by the Good Friday Agreement in 1998.

Despite the Irish government's long involvement with politics in Northern Ireland, many northern nationalists and republicans have often felt ignored and side-lined. Some believe that there is a partitionist mindset in the Republic, one that excludes them and the north. Some feel that their Irishness is not recognised and is diminished in public discourse in the south.

In recent years there has been some recognition that the Republic hasn't done enough to reach out to northern nationalists and republicans. One thinks of Leo Varadkar's comments in the Dáil in December 2017, where he stated that "no Irish government will ever again leave Northern nationalists and Northern Ireland behind".⁴

After partition many unionists and loyalists began to mentally detach themselves from their southern kin and turned their gaze towards Northern Ireland and Britain. Over time, the Republic became, for many, a foreign country, over there as opposed to here.

The above may seem strange, but I can attest to the experience in my own life. I grew up in East Belfast and didn't meet anybody with an Irish passport until I was in my twenties. We watched the BBC, not RTE. My parents talked only of politics in Westminster, not the Dáil. My parents supported the British Labour Party, not the Irish one. There was no question in our minds that Northern Ireland was part of the UK, the south somewhere else. The writer Newton Emerson has written about his own experience of this as well. In 2016 he said, "The older I get, the more I realize how much of my British identity I owe to two expected sources: direct rule and television".⁵

For unionists and loyalists, their relationship with Britain has always been complicated. Arlene Foster addressed this in a speech in 2017 entitled, 'The

awkward relationship'.⁶ The relationship between unionists and Britain has always been "strained," she said. It was understandable at times. Unionists were "hard to understand or relate to". Foster explained this attitude by explaining that unionists always felt that everyone was "out to get them" and she included Westminster in her analysis. "Our government acted against our interests," she said, "and over our heads, it was those hurts that often ran the deepest".

The relationship goes further than just awkwardness. Some believe that unionists and loyalists in Northern Ireland are simpletons to Britain, unaware that their British kin don't care for them. On the contrary, most unionists and loyalists know that people in Britain are indifferent to Northern Ireland. Know full well that they are not loved. Some have contempt for the British government. Some even resent it.

In his book, *Ghosts of the Somme*, Jonathan Evershed illustrates the complexity of the above in an interview with an East Belfast Loyalist:

"It's not about the British state. The British state has done f**k all for someone living in some s***hole street in London. But there's a difference between identity and government. [...] There's a difference to loyalty to the state and loyalty to an idea. My Britishness is not based on who is in power. [...] It is not for the state, or for Labour, or the Conservatives, to tell us who or what we are".⁷

What of Britain? Partition gave many permissions to mentally detach themselves from Ireland, Northern Ireland the old "Irish Question". Indeed, the detachment had probably begun before the Government of Ireland Act 1920. One thinks of John Redmond's letters to John O'Callaghan, the secretary of the United Irish League in the USA: "you have, in some or other, once more to impress the English mind that the Irish Question is a real, urgent one".⁸ The English mind, writes Alvin Jackson, has "an inability to dwell for the required time on Irish affairs".⁹

Northern Ireland was granted its own Parliament in 1921 and its own Prime Minister. With that, many politicians in Britain began to only care about Northern Ireland when it affected their own interests. The unionists had their own government, they said. They could sort out everything else. Or so they thought.

I woke up the day after the Brexit referendum with a message from my normally apolitical housemate that read: “There’s going to be a united Ireland”. I walked to work in a daze. My Dad, who voted Leave, looked shell-shocked as he told me, “I didn’t think they’d actually win”.

What was Brexit? I could write another article on that sole question. I believe the answer is multi-faceted. I think it was, as Hudson Meadwell writes, an “English-centric phenomenon”.¹⁰ It was a response to decades of anti-EU rhetoric from British politicians, a backlash against the status quo and dissatisfaction against politics in the UK. Xenophobia and racism against immigration was a factor.¹¹ Looking at polling, national sovereignty, and what that meant to different people, drove the Leave vote.

Approximately 55.8% of people in Northern Ireland voted to Remain in the European Union. 44.2% voted to leave. The vote foretold the problems to come. 85% of Catholics voted to Remain compared to 40% of Protestants. 88% of nationalists voted Remain compared to 37% of unionists.¹²

There are nuances and complexities within Northern Ireland’s multiple identities and political groups. The Leave/Remain split can’t be easily explained with reference to orange/green blocks. As John Garry has noted, “Leave voters in Northern Ireland tended to be those ‘left behind’ by globalisation (working class, less skilled and educated voters with socially conservative views) while the ‘winners’ of the globalisation process (young, educated, skilled multi-culturalists) tended to be pro- Remain”.¹³

The class dynamics of the Brexit vote in Northern Ireland are complicated as well. As Garry has pointed out, while Catholics in Northern Ireland were “quite homogenous” in terms of voting Remain, protestants in Northern Ireland were not.¹⁴ Garry states: “In contrast, the ‘left behind’ argument is much better at explaining variation in Protestant voting behaviour: higher skilled and educated Protestants were much more likely than lower skilled, lower educated Protestants to vote Remain”.¹⁵

The above is significant. Brexit was, to a certain extent, a pushback against globalisation. The European Union is seen, by some, as being part of a global economic system that has failed to protect them from economic humiliation. Humiliation that some Remainers have been protected from due to their class, status and privilege.

One only had to look at the Brexit vote in Northern Ireland to see that there could be problems ahead. In the Assembly, the DUP were overjoyed, the other parties deflated and angry. It was obvious that Leave and Remain could become shades of orange and green, the fault line running through a conflict and an open wound. But who was listening? Who actually cared?

There was, in the beginning, a brief hint at what could have been. On the 10th August 2016, Martin McGuinness and Arlene Foster wrote to Theresa May and reiterated their commitment to achieving the “best possible outcome for Northern Ireland,” in wake of the referendum. They warned about the, “difficult issues relating to the border throughout our history,” and stressed the importance of protecting Northern Ireland’s economy.¹⁶ There is no mention of a border in the Irish sea. Reading it now, it feels like a letter from another universe.

Some say that the Northern Ireland Protocol is what Leavers voted for, but it isn’t. Brexiteers didn’t need to take the path they did. Brexit meant something different to different people. “I want a red, white and blue, Brexit,” Theresa May said, when asked.¹⁷ It was a like a red flag, a warning of what was to come.

In her Lancaster House Speech, May confirmed that the UK would be leaving the single market and the customs union. With that, she put a hard border between North and South, and an Irish sea border, on the table.

Decades of ignoring Northern Ireland, of mentally detaching themselves from our problems, were personified in May’s speech. Northern Ireland wasn’t even an afterthought. We weren’t part of the picture. Denzil Davidson, Theresa May’s former adviser, said earlier this year: “We had a kind of collective failure in government at the time properly to understand the implications for Northern Ireland, for which I must share the guilt”.¹⁸

With the form of Brexit chosen, the three strands of the Good Friday Agreement were pulled in different directions. Within Northern Ireland, it added to the tensions within the political parties. It raised the prospect of North-South co-operation being disrupted and, as a consequence, strained relations between the Republic and Britain. It has fractured the relationship between Northern Ireland and Britain.

The Good Friday Agreement doesn't address customs borders either in the Irish sea or between North and South. The Agreement is predicated, however, on a careful, clever arrangement where the UK and the Republic are both members of the EU. It was the establishment of the EU's single market in 1993 that removed customs checks. The Agreement was signed, negotiated and affirmed when the lay of the land involved an invisible border between North and South, and no border in the Irish sea. The Agreement affirms Northern Ireland's place in the union.

Brexit and the Protocol do not breach the Good Friday Agreement. The problem with Brexit and the Good Friday Agreement has always been political instead of legal. The form of Brexit chosen by the British government upended the status quo forged by the Good Friday Agreement. It reemphasised the borders of the mind, those between North and South and down the Irish sea.

One could write endlessly about the mistakes made during the Brexit negotiations, how Leave and Remain failed to understand one another and compromise. How the DUP joined forces with Tories that neither cared for them or Northern Ireland. How the DUP, in backing a hard Brexit, pushed the Remain parties to back unique solutions for Northern Ireland to stop a hard border. How the Remain parties underestimated the backlash against the sea border. Mistakes, missed opportunities, obstinacy. They don't call us 'thran' for nothing.

The biggest mistakes lie, in different ways, with the British government and the European Union. Both had little understanding of the complexities of Northern Ireland's politics. Both actors allowed themselves to become advocates for opposing sides in Northern Ireland. Their actions affected and influenced how people thought on the ground.

Brexiters said they were protecting the Good Friday Agreement while pursuing a Brexit that would put a hard border between North and South. It was a slap in the face to border communities, nationalists and republicans who cared deeply about keeping the border open. They felt that the sensitivities around the border were being ignored. Many were enraged that the Agreement was being used to impose a hard border.

The British government has never been an impartial broker in Northern Ireland and that continued after Brexit. From the day after the Brexit, the

British government was seen to represent Leave voters, and by virtue of political theatre, political unionism in Northern Ireland. Then, when it was done, they threw unionists under the bus.

Remainers in Northern Ireland had to look elsewhere to have their concerns heard. They did that by looking towards Brussels and, crucially, Dublin.

Looking at the British press, you could be forgiven for thinking that Brexit was a one-way street, the European Union heckling the British government down the street as it planned its withdrawal. The EU has always acted in response to the British position and the red lines laid down by Theresa May.

That being said, the EU has made mistakes. Like the British government, it didn't take the nuances and complexities of Northern Ireland's politics into account. Like the British government, it has allowed itself to be seen as the vanguard and advocate for one side only.

The Irish government, unlike Downing Street, foresaw the problems that lay ahead for Northern Ireland. Its focus was solely on the impact of a hard border if one was imposed between North and South. The Republic's position was understandable. The Republic wanted to protect its own border and its own interests. It forgot, however, that north/south relationships are not the only dynamic to the Good Friday Agreement.

As the DUP and, to a certain extent, the UUP aligned with the British government's position, the other parties began to share a common position with the EU. The battle lines were drawn. The teams were picked.

That the EU was coming to be regarded as an opponent to unionism was evident in the statements from the DUP and the UUP. Speaking to the BBC's *Today* programme, Arlene Foster stated that "It really is time that Brussels started to listen to not just nationalism in Northern Ireland but unionism".¹⁹ The perception that the EU was ignoring the views of unionists continued right up until the Protocol was agreed.

Like the British government, the European Union appeared to be unconcerned that it was viewed as the advocate for one side only. As the EU agreed a sea border and claimed it was protecting the Good Friday Agreement, unionists were enraged. How, they asked, can the EU support the Good Friday Agreement but ignore half the community? The EU's position looked calculated and unprincipled.

The damage is done now. Despite its long history of contributing economically to the peace process, the EU is no longer an impartial broker in Northern Ireland. It will take a long time for the EU to get its reputation back. It may never recover.

After all that, incredibly, it didn't really matter what Northern Ireland thought.

After the Withdrawal Agreement was signed, the European Union and the British government patted themselves on the back for a job well done. In Northern Ireland, the Assembly did not give consent to the Protocol. Businesses in Northern Ireland sounded the alarm about its impact months before its implementation. Neither the EU nor the British government said anything about the irony.

Like the Government of Ireland Act 1920, the Protocol passed through Parliament in 7 hours without a single vote from a Northern Irish MP.

The principle of consent in the Good Friday Agreement is important to every community in Northern Ireland. It's a recognition that a united Ireland will happen if enough people support it. It prohibits Northern Ireland being dragged into the south against the wishes of its people. For many people, the Agreement gave them a sense of control over their destiny, the feeling that their voices would matter.

As the Supreme Court confirmed in the case of Miller, the principle of consent applies only to a border poll. That principle has been affirmed again in Allister's Application.²⁰ And yet, Brexit has tipped everything on its head. Despite the changes it has brought about, they have happened without the approval of people in Northern Ireland. This has made people feel powerless and angry.

Five years have passed since 2016 and, for Northern Ireland, the end result of Brexit is the Protocol. Northern Ireland remains aligned to the EU's single market and customs union rules. There is a trade border down the Irish sea. Northern Ireland can vote to get rid of Articles 5 to 10 of the Protocol in an Assembly vote in 2024.

Now, within Northern Irish politics, the Protocol is a festering wound at the heart of it all. Even though they opposed the Protocol, the SDLP, Alliance, Sinn Fein and the Greens see it as necessary to avoid a hard border. They support reform of the Protocol. In contrast, the DUP and the Ulster Unionists want it removed completely.

We are trapped in a box with the chaos of the past few years. Unionists blame the Irish government, in collaboration with Alliance, Sinn Fein and the SDLP for the Protocol. They, in turn, blame the DUP for supporting Brexit and bringing about the Protocol in the first place.

There is no collective approach in Northern Ireland to tackle the Protocol. Instead, people want punishment and retribution for the past few years. The Protocol is punishment as Brexit. The Protocol should be removed to punish the people who opposed Brexit. The cycle goes on and on.

The Protocol has proved problematic for businesses in Northern Ireland. But, for many unionists, the issue with the Protocol is constitutional. The Alliance Leader Naomi Long remarked on a television programme that, “Where you buy your sausages doesn’t determine your identity”.²¹ The comment was glib and unhelpful.

The recent court case of Allister (James Hugh)’s application in the matter of the Protocol has confirmed the fears of many unionists. In his judgment, Justice Colton stated that the Protocol had altered the relationship between Northern Ireland and Britain. They are no longer on an “equal footing”. Even more concerning for unionists, he confirmed that Article 6 of the Act of Union had been impliedly repealed.

When we talk about East/West relationships in the Good Friday Agreement we talk about the relationship between Britain and Ireland. We must also talk about the relationship between Northern Ireland and Britain. For many unionists, the Agreement affirmed Northern Ireland’s place in the UK. They feel that the Protocol ruptures that from within.

The Protocol does not take Northern Ireland out of the union. But Justice Colton’s comments are not to be taken lightly. They are significant, salt in the wounds of unionists during the centenary year. They add to a mood of malaise and sadness that many feel. That feeling that unionists have that “everybody is out to get them,” has been all but confirmed by the Protocol. They have no friends in the EU or in America. The British government signed the Protocol in the first place.

Because of the Protocol, there is little desire for co-operation with the South within unionism and loyalism. Many blame the South for the imposition of the Protocol. They see Varadkar's desire to get a unique solution for Northern Ireland as the concession that brought the Protocol into being.

The European Union's decision to idly trigger Article 16 on a late Friday afternoon without much thought has caused long term damage to trust as well. The mistake was rectified within hours but the fact that it occurred in the first place was, for many, a sign that the EU is not sincere in its commitment to Northern Ireland. That its warnings to the UK not to trigger Article 16 lest it damage the peace process were soundbites, not firm commitments. It was seen as a "mask off" moment. The move emboldened anti-protocol unionists to take a firmer stance.

To show their anger at the southern government, Unionists have boycotted the North-South Ministerial Council and disengaged from the Taoiseach's Shared Island unit. Worryingly, dangerous voices talk of directing violence against the South. Leo Varadkar has received death threats.

Along with concerns about the constitutional impact of the Protocol, unionists complain that Northern Ireland will be subject to EU rules without having any say in them. This is a common critique of the EU that existed prior to Brexit. When protesting the Protocol, people carried signs talking about "sovereignty".

Back to Brexit being, in part, about globalisation. The interweaving of economies and global market forces make people feel that they have less control over their economies. Some feel that the nation state has been eroded, that the ability of the state to safeguard employment and labour has been taken away. The European Union is a part of this system. As inequality increases across the world, as wealth goes to the top instead of the bottom, objections to globalisation are well founded and legitimate.

Are the DUP and the Ulster Unionists protesting the lack of accountability within the European Union from a socialist position? I highly doubt it. Are the people driving Brexit concerned about people left behind from globalisation? Absolutely not.

However, concerns that Northern Ireland will have little say over customs and single market rules are legitimate. People are rightly concerned that Northern Ireland will be subject to economic rules over which we have little

control. At least, when we were in the EU, Northern Ireland had its own MEPs.

The Specialised Committee on the Protocol connects with the North-South Ministerial Council and bodies like the Human Rights Commission. However, at a time when people feel more disconnected, disillusioned and angry with Northern Ireland's institutions, this is little comfort to people on the ground.

For non-unionists in Northern Ireland, the furore around the Protocol has been frustrating and exhausting. The argument coming from unionism that the Protocol should have been implemented with consent rankles with Remainers. Consent was not sought for Brexit. They were derided and mocked for supporting a soft Brexit, told to shut up and pipe down.

While unionists rage against the Protocol and its consequences, there is little understanding shown to those who fear a hard border, who see the Protocol as necessary to avoid it. In July, Jeffrey Donaldson issued a list of seven 'tests' the DUP would use to determine whether amendments to the Protocol were acceptable or not. There was no mention of preventing a hard border between North and South. The omission looks deliberate and callous.

Sensing that they've made a mistake, the British government is now trying to cover its tracks. In 2020, the government announced that it would be passing an Internal Market Bill to mitigate against the worst elements of the Protocol. At the time of writing, the British government is now talking about disapplying parts of the Protocol. It believes the conditions for invoking Article 16 have been met.

The government's flip-flopping on the Protocol is damaging relations between Ireland and Britain. Speaking of the EU, Simon Coveney said in March 2021 that the EU was negotiating with a partner it "simply can't trust".²² There is little good faith left.

Perhaps Johnson didn't really understand what the Protocol was when he signed up to it. Perhaps the British government is lying. As Sam McBride wrote, "The problem is that Mr Johnson lied about this issue so casually, so clearly and without a hint of embarrassment that it is now genuinely difficult to tell if he is telling the truth".²³

How to fix this tangled mess? I'm not arrogant enough to think I have the answer. There's no doubt, however, pragmatism, understanding and empathy are required. It requires leadership from within Northern Ireland, the British government and the European Union. People need to be prepared to listen to hard truths instead of comfortable lies.

Within Northern Ireland, the outcome of the Brexit vote, and its implications, needs to be recognised and understood. Those who voted Leave need to understand that, while their position was affirmed by the UK national vote, the majority of people in Northern Ireland did not want Brexit to happen. Their concerns are reasonable and legitimate.

Remainers need to recognise that, while Northern Ireland voted Remain, the rest of the country did not. A leave vote of 44% within Northern Ireland is not insignificant. Remainers need to acknowledge that many people had legitimate, valid reasons for voting Leave. Northern Ireland's remain vote must be recognised, but the Leave vote must be as well.

For many, Brexit is the original sin, the centre of all Northern Ireland's current problems. It has happened. It is done, and there is nothing anybody can do to change that. Even if it had not happened, there would still be division. People would still feel angry, alienated and unhappy with the European Union because they have not seen the benefit of it in their own lives. Reversing Brexit does not fix the wound that was always there.

Within Northern Ireland, there needs to be a recognition that most people do not want trade barriers between North and South or between Northern Ireland and Britain. In a recent Queen's University Tracker Survey, 44% of people opposed barriers on goods flowing East/West. 48.9% oppose trade barriers between North and South.²⁴ As pointed out by Shirlow et al, when 'Don't Knows' are removed from the same survey, two-thirds of respondents to the poll were opposed to trade barriers across these islands.²⁵

Some would ditch the Protocol and put the customs border between North and South. If that happens, the alternative must keep the border as open and seamless as possible. When the House of Commons Northern Ireland Affairs Committee looked at the issue it concluded that "technological solutions" to the border were possible if all sides adopted a position of "trust and goodwill". It noted, however, that any tech solutions to the Irish border would be a "substantial achievement" and a "world first".²⁶ A previous report

from the Committee concluded that “we have had no visibility of any technical solutions, anywhere in the world, beyond the aspirational, that would remove the need for physical infrastructure at the border”.²⁷

The past few years have shown that there is little trust or goodwill between the EU and British government. Brexiteers that advocate “tech solutions” to the border have made them less likely by treating the EU with disdain.

A hard border would be a disaster. That would only replace one problem with another. It would antagonise nationalists, republicans and harm border communities. It would not promote co-operation between communities, north/south and hamper east/west relations between the Republic and the UK.

Rather than bolster Northern Ireland’s place in the union, a hard border between North and South would do the opposite. It would drive people in the middle ground, nationalists and republicans towards voting for a united Ireland.

The Protocol is having a negative impact on some businesses in Northern Ireland.

We need to be realistic. The British government, for all its pathetic attempts to wiggle out of the deal it signed, isn’t proposing to ditch the Protocol. It is here to stay for the foreseeable future.

In short: we are where we are. And where we are is difficult, messy and complicated.

We have a team mentality in Northern Ireland. The British government and the EU are seen as advocates for different “sides” in the Brexit debate and, by virtue of that, orange and green. People assume good faith by their own “team” and rarely critique it when necessary. Politicians look like cheerleaders in a de facto culture war instead of principled advocates for people in Northern Ireland.

Instead of viewing the British government and the EU with rose tinted glasses, we should see them for what they are: actors who are only concerned with their strategic, economic interests. Northern Ireland is a piece on their chess board. Holding both to account would go some way to build trust and show understanding.

So much of the past few years has been about punishment and retribution. A united front, one that recognises the sensitivities and complexities in respect of the Protocol, would be helpful. Even if a common position can't be found on everything, politicians should work together when there is agreement. This could build commonality and provide formidable opposition to the EU and the UK government.

Discourse around the Protocol tends to frame the debate around two positions: rigid implementation or complete removal. The reality lies somewhere in between.

As reported in the Belfast Telegraph, a recent Lucid Talk poll for a research team in Queen's University Belfast found that 43% people in Northern Ireland think the Protocol is good for Northern Ireland. In contrast, 48% think it isn't. However, 56% think the Protocol provides opportunities for Northern Ireland. 69% are concerned about price rises. 61% are concerned about consumer choice.²⁸ Significantly, around 57% of people want the UK to align more with EU rules to alleviate the worst effects of the Protocol.

The Irish Sea border is nobody's first choice. Nobody is enthusiastic about it. Parts of the Protocol are impractical and having a negative impact on local businesses. People are prepared to get on with it and make it work.

Solutions are available if people want to take them. They include:

- The whole United Kingdom re-joining the single market and customs union. The UK would still be out of the European Union, the border between North and South would remain open, and the Protocol could be ditched. Given the strength of the Brexit vote, the position of the UK government and the British Labour Party, this option looks unlikely.
- Alternatively, the UK could sign an SPS/Veterinary Agreement with the EU. As proposed by the Northern Ireland Business Brexit Working Group, a trusted trader scheme could be incorporated into the current framework. Under this option, the whole UK would remain aligned to some EU rules but there would not be wholesale alignment. Most of the checks on the Protocol would be reduced. The border between North and South would remain open.

I believe an SPS/Veterinary deal with the EU would best address the complexities and concerns around the Protocol and Brexit. It would remove most of the Protocol checks and align the UK with some EU rules, but it would not be a precursor to re-joining the EU and joining the single market/customs union.

As Shirlow et al have pointed out, “each potential solution remains conditioned by political rigidities outside Northern Ireland”.²⁹ At the time of writing, the British government says an SPS deal is a “non-starter”. If political parties in Northern Ireland could move away from Brexit purity and push the government to change its red lines, we could see progress.

The Protocol offers many benefits to Northern Ireland. We have access to two economic markets and that sets us apart from the rest of Europe.

While there are many structural issues within Northern Ireland’s economy, parts of it, such as the tech sector, are growing and becoming world leading. Northern Ireland has a highly skilled workforce. Northern Ireland’s unique position within the EU and UK markets has given it a competitive advantage. This has already been recognised by companies such as Invest NI and Manufacturing NI.³⁰

One can’t help but be wary, however. Every time one reads about the benefit of the Protocol it’s because it’s being promoted by “wealth managers” and multi-million-pound businesses.³¹

Since the Good Friday Agreement, disaster capitalists have circled Northern Ireland like hawks. The “peace dividend” has found life in a “neo-liberal” peace project that has mainly benefited Northern Ireland’s middle class. As loyalist working class communities protest the Protocol while rich, powerful men talk about the “benefits,” you have to ask: *who* is going to get the best of both worlds here? *Who* is going to benefit? Are we being presented with an opportunity or are we being offered up on a platter?

To forge greater co-operation within Northern Ireland, the Protocol must work for the people on the ground. It must benefit ordinary people, not international finance and wealth managers with one eye on their bank balance.

As Shirlow et al have pointed out, an under-reported aspect of the Protocol is Article 2, which promotes the rights of individuals. It states that the UK,

“shall ensure [...] no diminution of rights, safeguards or equality of opportunity” as set out in the Good Friday Agreement. It also has a commitment to facilitate the work of the Northern Ireland Human Rights Commission and Equality Commission. This should be promoted more to enable more people to connect with the Protocol. It is more than just an economic arrangement.

The disconnect that people feel from the Protocol could be alleviated within its structures. The current structures link in with the North-South Ministerial Council and organisations like the Human Rights Commission, but there should be greater opportunities for civil society. Within the Joint Committee, another strand could be created to provide a forum for ordinary people, trade unions and civic groups.

The Loyalist Communities Council (LCC) was set up to address the perceived neglect of working-class communities in Northern Ireland. When launching in 2015 it stated it “will play a full and meaningful role in connecting loyalism to civic society” and “work to grow confidence within detached loyalist communities in Protestant areas”.³² These are admirable goals and ones that people within Northern Ireland should support. In respect of the Protocol, however, the LCC has increasingly issued dangerous and worrying statements that are unhelpful to the current political landscape. Some have drifted into incitement.

It’s important, when listening to voices within Northern Ireland, that those agitating and itching for violence are not given prominence. The LCC, while representative of some branches of loyalism, do not represent everyone. There are other constructive, conciliatory voices within Loyalism that should be listened to as well.

Discussion around the Protocol should not only focus on the voices of men. The views of women and marginalised communities in Northern Ireland are important too. The recent appearance of women’s groups at the Northern Ireland Affairs Committee, and the backlash they received, shows the importance of moving past gatekeepers and talking to people on the ground. The women’s sector in Northern Ireland has always worked across cross community lines. Co-operation is not something that should be done, but a part of day-to-day life.

While the Protocol addresses the north/south dimension of Northern Ireland’s relationship with the South, it has upset the balance between East

and West and Strand Three. Incorporating the East/West institutions, including the British-Irish Council and the Intergovernmental Conference could assist in helping Ireland and the United Kingdom to address concerns and strengthen relationships.

As suggested by Shirlow et al:

“Rather than apportioning blame, it is critical that each government recognises the delicate factors that can aggravate such tensions and, with sensitivity to each other’s context, commit to a diplomatic agenda that once again embeds mutual dialogue, continuous engagement, greater understanding and effective problem-solving”.³³

At the time of writing, a heatwave is rolling across Northern Ireland. We’ve recorded our highest temperature in somewhere called Ballywatticock. On Twitter, former Councillor Paul Butler pointed out that Ballywatticock is, “anglicised from the original name in Irish ‘Baile Uaiteacoc’ in the parish of Newtownards which was also anglicised from ‘Baile Nua na hArda’”. The knot again. The strange interweaving relationships on these islands.

Political tempers are boiling beneath the surface as well. In recent days, the UK government has released a command paper which proposes to rewrite certain parts of the Protocol.³⁴ It even proposes to remove a role for EU institutions, including the ECJ. Some unionists have welcomed the proposals. They have angered others. Northern Ireland braces itself for another round of political Punch and Judy.

In the command paper, mentioned several times, is the Good Friday Agreement. The government restates repeatedly that it is committed to the Agreement, that the Protocol was meant to protect the Agreement in all its parts. And yet, the government believes that the Protocol it negotiated, agreed and hailed as an “oven ready deal,” should be looked at again.

Insincere is too polite a word to use for this charade. The command paper was published a few days after the government announced that it is to backtrack on the 2014 Stormont House Agreement and implement a statute of limitations for soldiers, security services, IRA and loyalist paramilitaries that committed offences during the Troubles.

The Good Friday Agreement was forged and agreed by people in Northern Ireland sitting down, coming together, and working through difficult, intractable problems. It took many, many years of negotiating, talking and compromise to get the 1998 multi-party Agreement.

Since 1998 violence has, for the most part, disappeared. Northern Ireland's political crisis still seems never ending. Since that hopeful day in April, we've had the 2006 St Andrew's Agreement, the 2014 Stormont House Agreement, the 2015 Fresh Start agreement, and New Decade, New Approach in 2020. Peace is a process. It requires hard work. It takes time.

The Good Friday Agreement should not be used as a weapon when discussing Brexit or the Protocol. It can't be understood by listening to one community or one demographic. It shouldn't be used as a stick to beat one another with.

With the Protocol and Brexit, Northern Ireland finds itself in its most difficult, dangerous place yet. The Agreement doesn't provide all the answers, but it does offer some solutions.

People in Northern Ireland have always done the heavy lifting. Not the British government. Not the European Union. Not the person who sits in the White House. The peace process, the hard work that's been done over the past few decades, belong to us and no-one else

Partnership. Equality. Mutual respect. In the spirit of concord. To make our way through the current impasse, we should return to the basic, core principles of the Agreement. The three strands, and what they represent, provide a solution to the current deadlock. We must restore the knot and what it represents.

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Conditions for Cooperation

Whither Civil Society?

Tara Farrell

Tara Farrell is the Chief Executive Officer of Longford Women's Link (LWL). A native of Roscommon, Tara has over 20 years' experience in the Community, Voluntary and Education sectors, working in a variety of areas including Project Management, Social Economy, Women's Human Rights, Conflict Resolution and engaging in Broadcast and Social Media. Tara is the Chairperson of AONTAS, the National Adult Learning Organisation and a Director of Irish Rural Link and Roscommon Women's Network.



She is a member of the Steering Group of the New Common Charter and is also part of the Ad-Hoc Group for North-South East-West Co-operation as well as a member of the recently formed All-island Women's Forum. Tara also lectures in Human Rights and Equality at St. Angela's College (National University of Ireland Galway) in Sligo. She holds an LLM in International Human Rights Law and has also lectured in Political Science in the University of Limerick and Management Development at Dublin City University.

*I also wanted one piece of ground:
One city trapped by hills. One urban river.
An island in its element.*

Eavan Boland, "The Lost Land"

Introduction

We are known on this island for our stories. Our myths and legends, from Queen Medb of Connacht to the ancient fort of Emain Macha are widely documented; but there are also the stories of our families, our communities and our history – or histories. They weave a rich tapestry of legend and chronicle. Stories are passed down from generation to generation, shaped no doubt by experience and belief. But stories have an element of danger. They are not always rational or practical but instead relay anecdotes, bring the imagination to life and provide connections. They are not necessarily hard cases, nor do they contain data or graphs. But they are important and it is important that we dare to provide a stage for our stories. They are often told from a particular viewpoint and position and it is important to ask, who tells our stories?

Since the result of the Brexit referendum, and more recently the onset of the Covid-19 pandemic, we have heard many stories. Stories of communities, of those impacted, of resilience and bravery and of mistrust and fear. Stories of people living among us, and it is those people who tell our stories, and not the protocols or committees, specialised though they may be. Whether it be celebration or concern, we turn to our people and our communities. Now, in the aftermath of Brexit and subsequent protocol fallout, there seems to be a reluctance from our political leaders to hear those stories and listen to what is being said.

This article explores the role played by civil society within our communities in a post-Brexit context, against the backdrop of an ongoing pandemic. It presents current working models of civil society engagement as well as reflecting on the all too often absence of women's voices. Finally, it examines the ways in which social conditions might be strengthened for the benefit of all who live on these islands through a series of recommendations.

Background to LWL Cooperation and Engagement on these islands

Longford Women's Link (LWL) is a social enterprise founded in 1995, which provides services to over 1200 women and children in Longford annually, including education, entrepreneurship, community employment and domestic violence via its unique model of Integrated Service Delivery. LWL engages in widespread regional and national advocacy, and one of our

flagship programmes – the Women’s Manifesto Programme – is a unique model of local democratic participation. The aim is to support women in Longford and other counties to play an active and meaningful role in their local decision-making structures, and LWL has identified barriers to accessing these structures that are critical factors in preventing full and equal participation of women in rural communities. In 2019, LWL launched the SHE Project with 50:50 North West, supported by the Department of Housing, Local Government and Heritage, which aims to change the face of local government in rural Ireland, supporting women in rural Ireland to play an active role in public life.¹ LWL and the Women’s Manifesto Programme have been active members of the *Towards a New Common Charter* initiative since 2015, and see it as a key all-island programme of sustained engagement as we move beyond the Brexit referendum result.² LWL is also part of the *Ad-Hoc Group for North-South and East-West Cooperation* – a grouping of organisations involved in front-line support and delivery of various initiatives on the island of Ireland, and between the island of Ireland and Great Britain.³ Both programmes of work are overseen by the Centre for Cross Border Studies. From 2018 to 2020, LWL was also a member of the Steering Group of *The Next Chapter* programme with Politics Plus, Irish Rural Link and NICVA.⁴

An island perspective – where lies the onus?

A routine question for a West of Ireland native, working with an organisation in the Midlands is, how and why did LWL become involved in this work? Having spent a number of years working and living in Drogheda during the post Belfast/Good Friday Agreement landscape, working with women’s groups on both sides of the border as well as historical groups under the Peace II Programme, I always believed that maintaining positive North-South and East-West relations was central to the future of our people. Whatever our beliefs, faiths and backgrounds, we are all living together on this island. The words of the educator Aidan Clifford, who spoke about the ‘moral imperative’ of ‘the totality of people on these two islands’ to engage in the peace process remain with me.⁵ This article does not overlook the many differences (historical, cultural and political) that must be overcome, but there are others more qualified than I to speak on those issues.

Engagement makes absolute sense in the name of reconciliation and peace-building, but also in the name of sharing our knowledge and learning. To share the experiences of Foyle Women’s Centre and LWL. To explore the rich

cultural traditions of our languages. To do, as was done in Louth in the early 2000s, examine the historic similarities between the walled cities of Drogheda and Derry. To explore the role of women in non-traditional spaces as the *Connecting Futures* project between LWL and Women'sTec in Belfast is currently doing. This may be an often used phrase but there is more that unites than divides us if we delve a little deeper into our stories.

Just over a decade ago, Brian Harvey traced the history of community development along the border and highlighted the models of funding and practice that existed both North and South, including the PEACE programmes.⁶ In Drogheda in the early 2000s during the implementation of PEACE II, there was a particular focus on 'lessons learned from the conflict'. Traditionally, the PEACE programme funding was primarily focused on border towns and within Northern Ireland itself. However, in 2003, while based at Drogheda Community Forum, I decided to conduct a piece of local research into the displacement that occurred from Northern Ireland to the Drogheda area at the height of the Troubles.⁷ *Dispelling the Myths* was conducted against a backdrop of increased displacement from other nations to Ireland as a result of global conflicts during the 1990s. While the initial focus of our work was set in the 1970s, it became very evident that the events of that time bore a resemblance to the displacement occurring thirty years later. As part of the research, stories were collected from those who had been displaced from the North which outlined life in the Gormanstown Camp from 1969-1972. Archive footage of Gormanstown Camp from RTE was also obtained, and while there was some sympathy for those who had been displaced from their homes, it was embedded in patronising tones which belied the traumatic nature of events. Although the research itself was localised and conducted with a small budget, it did have the effect of raising questions about the longer term impact of the Troubles and the need to expedite those 'lessons learned' and seek meaningful ways to cooperate. Harvey also pointed out that the EU PEACE and INTERREG programmes were the main source of funding for cross-border activities at this time, but there was very little by way of government funding on this island as well as the absence of a cohesive strategy to promote and support cross-border cooperation.⁸ Therefore, the timing was right to move beyond previous approaches, some of which were more focused on the binary issues of nationalism rather than meaningful impacts on communities. Civil society groups have always engaged with each other because they recognised that they should. A more cohesive approach from the sector has formed a model of cooperation within and between these islands.

A model of cooperation – The New Common Charter

In the heady days before protocols and pandemics, LWL accepted an invitation from the Centre for Cross Border Studies to participate in a process of engagement with community groups. This process took place in 2015, prior to the Brexit referendum and initially involved a number of groups from Northern Ireland and the Republic of Ireland discussing the value and indeed the need for meaningful cross-border cooperation and the benefits it could yield for communities. Later, we would be joined by our colleagues from Scotland, Wales and England and the result was the *New Common Charter for Cooperation Within and Between these Islands*.⁹ The impetus both for taking part and progressing the development of the Charter was driven by the desire of all groups to see sustained grassroots community, social and economic development, not just on this island but between our islands. It is fair to say that the conversations held as part of the development of the Charter were not always easy, but they took place amidst a backdrop of respect and a willingness to hear others' views and experiences as well as to exchange knowledge of good practices. In this context, there was a considerable commitment on behalf of participants to listen, engage and learn from each other.

Notably, when civil society initially looked for support, inspiration and encouragement for this programme, we looked to the North and South, East and West rather than upwards to those in places of power and leadership. However, that came later, and since 2019 The New Common Charter has been presented to a number of political leaders and elected representatives in Oireachtas Committees, the British Irish Parliamentary Assembly, MPs in the House of Commons and MSPs in the Scottish Parliament.

Others have written much more extensively and expertly on the central tenet and totality of the Belfast/Good Friday Agreement but for the purposes of this article, the implementation of all three strands in relation to civil society engagement is emphasised. Therefore, in relation to the social conditions for cooperation and relations on and between these islands, it is imperative that we look at existing models such as The New Common Charter as a mechanism on two fronts – firstly as a platform for grassroots civil society organisations to engage and build positive relations on and between these islands and secondly, as an opportunity for political and business leaders to engage with civil society in a structured manner. Working at the grassroots level, as the Charter most definitely does, is absolutely critical if meaningful

cooperation and community development is to be realised alongside an empowered civic society across these islands. There is a need for recognition and valuing of this grassroots work but also recognition of the potential that the New Common Charter has for collaboration, cooperation, sustaining and preserving peace and building inclusive communities, especially in the current political landscape. The fact that the old Common Chapter was never reinstated was always a concern, in terms of ensuring political commitment to cross-border cooperation.¹⁰

We have seen with Brexit what happens when civil society is largely excluded from central discussions and civil society voices, based within our communities not only need to be heard but are essential in building inclusive and resilient communities. There is significant potential within the New Common Charter to do this.

Exits and Epidemics – the untapped potential of Civil Society

Much has been written on the role of community and voluntary organisations throughout the Covid-19 pandemic. Civil society organisations have been to the fore during this crisis with the majority of their services being designated as essential. If civil society are deemed as essential during a pandemic and were relied upon to ensure supports were delivered within communities, then surely they are essential in the post-Brexit context also? In practice however, it is difficult to see any real commitment to recognising the role and voices of civil society. The Command Paper published by the UK Government in July 2021, 'Northern Ireland Protocol: the way forward',¹¹ makes just two references to civic society, neither of which offer much in terms of hopes for realistic engagement. The Belfast/Good Friday Agreement heralded a new dawn for the people of these islands – it promised much in the way of establishing a platform for civil society to facilitate dialogue and cooperation. Unfortunately, measures such as the all-island consultative forum have not been realised. Further calls for this forum as part of the St Andrews Agreement in 2006 remain unanswered. Perhaps in the celebratory days of Easter 1998, we did not fully plan for peace and its subsequent requirements?

There is some evidence of engagement. For example, there have been a number of meetings between various actors with the Ad Hoc Group for North-South East-West Cooperation, yet there remains to be established a

structured and strategic process as opposed to piecemeal engagements. And there are many questions which remain unanswered – What happens in the aftermath of meetings with civil society representatives? How are civil society voices heard within current Protocol mechanisms? Where are the supports for both North-South and East-West mechanisms to ensure civil society is represented at the table? Where indeed is the home for civil society as a collective on these islands? There are potential solutions, some of which focus on transparency, as outlined later in this article. Others are more straightforward, such as establishing clear and open lines of communication with civil society actors via an established structure. Secondly, current engagements with civil society and communities are peppered with acronyms and well-meaning soundbites that do not necessarily offer practical routes to engagement, e.g. ‘Building Back Better’, ‘New Decade, New Approach’, ‘Our Rural Future’, etc. It would also be helpful if meetings were held thematically, which in turn would facilitate monitoring of issues on the ground.

The cynical amongst us might point to the ever increasing administration and bureaucracy faced by civil society organisations, which often silences their voices and might question whether this is by accident or design. The decimation of the community sector in the aftermath of the Celtic Tiger’s demise in the early 2010s would direct that cynicism towards the latter. Funding to the sector was reduced by 45% and staffing levels cut by a third, with supports for advocacy work severely restricted.¹² Suspension of the Northern Ireland institutions in 2017 also had an effect on the sector north of the border, and with a reduction in funding for peace and reconciliation initiatives, cross-border cooperation was very much scaled back as organisations dealt with uncertainty and funding cuts. In the aftermath of the Brexit referendum result and as part of what appears to be renewed efforts at providing funding streams to support all-island collaboration, new initiatives such as the Department of the Taoiseach’s Shared Island initiative and the Community Foundations for Ireland and Northern Ireland’s All-Island Fund have emerged. These co-exist with the long-standing Department of Foreign Affairs’ Reconciliation Fund and appear to have inspired a renewal in cross-border initiatives in recent times. Some organisations such as AONTAS, the National Adult Learning Organisation, are engaging in meaningful cooperation and collaboration and have extended membership to adult and community education organisations and individuals in the North. In 2019, AONTAS launched the Network for Adult Learning Across Borders

(NALAB) at its Lifelong Learning Summit in Dublin.¹³ NALAB is an umbrella partnership of leading organisations within the field of adult and community education in England, Scotland, Wales, Northern Ireland and the Republic of Ireland, advocating for educational equality for adults as part of its regional platform. It is a positive and timely example of North-South and East-West collaboration that is rooted in shared vision and mutual respect, recognising the benefits of cooperation from an advocacy perspective. Similarly, the 2021 edition of Irish Rural Link's annual conference, in partnership with Rural Action NI, explored the issue of cross-border collaboration and funding opportunities.¹⁴

One of the critical aspects of the Brexit coverage in the Republic in the last eighteen months has been the domination of Covid-19 news in the media. This was to be expected as the pandemic took hold, but throughout 2020 and into 2021 there was a sense that other issues were almost secondary. There will be a time, hopefully in the not too distant future, when the battle with Covid-19 will be won but it has obviously left and will continue to leave a legacy for many families and communities. However, Brexit will also leave a legacy. Failure to uphold the spirit of the Belfast/Good Friday Agreement will be a significant part of this legacy for communities on this island. There will also be considerable impacts on our communities if the discourse solely focuses on economics and trade and fails to engage with civil society. Of course trade and industry are vital elements of functioning economies but the future of these islands is about more than trade. It is about people. People who live and work in our communities and we cannot underestimate the role of civil society in a functioning economy. The pace of change in the last eighteen months has been swift – the shifting sands of both Brexit and Covid-19 have resulted in considerable instability yet our sector endures. We have yet to see the long term impact of the pandemic on our society – many of us have observed the alarming increase in incidences of violence against women and children as well as the impact of isolation on our communities. Yet we know that civil society organisations will be to the fore in supporting those who need it most.

Finally, the issue of transparency is critical – one of the central principles of LWL's democratic engagement programmes has been the need for timely and transparent information from elected representatives. This means unambiguous information on the current volume of committees and working groups that have been established around the Withdrawal Agreement and Protocol. Publication of membership, terms of reference, agendas and

minutes are all necessary if there is to be a transparent process with which civil society can engage. Without a spirit of openness it is very difficult to establish a workable roadmap for civil society engagement.

There are those who would use the current situation for their own political ends – these ends cannot be allowed to hijack the process of ensuring civil society voices are at the table. Issues such as education, healthcare, early years care and community leadership were central to the discussions as part of the birth of the *New Common Charter* – focusing solely on the protocol means that these issues do not get the attention that they need and deserve and sideline important voices as we strive for positive relations on these islands.

Therefore, there are important conversations that must take place between civil society and political leaders/committees for a number of reasons, but chiefly to ensure that the conditions for North-South cooperation (specifically under the Protocol) are accurately presented. There are practical consequences of the Protocol that require clear and transparent information, which could be accurately channelled via engagement with civil society. Those working at grassroots level within communities know all too well the dangers of information vacuums and the potential for increased fear and tension within communities. In the aftermath of the 2016 referendum result, the roadmap for subsequent years was unwritten and very much untested. Five years later it is very evident that this is a long-term process, which to date has often entangled itself in timelines and deadlines to the detriment of the entire process. Whether we like it or not, Brexit has come to pass and the protocol is a riptide that must be carefully navigated, not just in the coming months but for years to come. Civil society organisations working together for many years already transcend these difficult navigations but now require our political leaders to commit to considered and enduring engagement with our models of good practice. There is strong leadership within civil society – it is now time for political leadership to foster a spirit of dialogue as opposed to division.

Where are the Women?

At seminars on the impact of Brexit on women, and particularly rural women, I have often spoken about the importance of citizenship engagement and the role of civil society and grassroots organisations in highlighting the issues for

our communities on the island of Ireland and in relation to the monitoring of the Belfast/Good Friday Agreement. LWL, as a women's organisation, has highlighted a number of issues impacting on women in a post-Brexit context, in particular the disproportionate impact of both Brexit, and subsequently the pandemic on women.

The impact of the failure to implement UNSCR 1325 on women requiring access to abortion services in Northern Ireland is just one such issue, with a key question being how can things be so different for women by virtue of living just a few miles away on the same island?¹⁵ Furthermore, who is listening to the voices of these women? There are many other issues including the impact of violence against women in the border region, particularly when dealing with different jurisdictions, the lack of clarity on EU structural funds in the region and critically, the absence of women at the decision-making tables as the protocol is implemented. These are specific issues that impact on women and girls in our communities – particularly for those whose lives are entwined with the border, who live and work on both sides and who are now fearful that as the realisation of the impact of Brexit on peace and stability begins to dawn, there is a risk to hard won protections and rights. There is a very real policy basis for this work – looking at Ireland's Second National Action Plan on Women, Peace and Security 2015-2018, which expressly states that the underrepresentation of women hampers peacebuilding and reconciliation. LWL have provided input to the consultation on the Third National Action plan, specifically on the areas of models of good practice around Domestic Violence support and also in relation to our Women's Manifesto Programme focusing on women in decision-making.

While it is true that both of the main political parties in Northern Ireland were led by women during much of the discussions about Brexit, the fact remains that women remain underrepresented in political and public life right across this island. The SHE Programme reports that while the 2019 local elections in the Republic saw 226 women councillors elected (the highest number since the beginning of the State), this is just 24% of the overall number of councillors in the country.¹⁶ Less than a quarter of TDs in Dáil Éireann are women. The figures for female elected representative are not much better in the North at just 33% of MLAs and 26% of local councillors.¹⁷ Despite being 50% of the population, women's voices have been absent from the discussions and debates both pre- and post-Brexit. Yet from a civil society perspective, six out of ten CEOs in the community and voluntary sector in

the Republic are women,¹⁸ and there is also a predominance of women leaders in the sector in Northern Ireland.

Looking back at the Opsahl Commission of 1993, the experience of Marianne Elliott mirrors the experience of LWL, the Women's Manifesto Programme and more recently, the SHE programme. Women were 'surprised at the thought of actually participating in politics',¹⁹ yet what they were already doing was woven into the fabric of their communities, very much grassroots and very much political, but poorly supported by statutory bodies. The ten-year tenure of the Women's Coalition increased the awareness of women in political life and provided inspiration for many in its wake. Over a quarter of a century after Opsahl, programmes like SHE are providing women with the opportunity to consider channelling their activism and community experience into roles in political and public life.

It must also be pointed out that women are not a homogenous group. While there is an overall underrepresentation of women at our decision-making tables, there are many women whose feet have not graced any platforms, political, public or otherwise and whose voices are not being heard. Giving voice to views does bestow a certain power but we must continue to ask – whose voices are we not hearing? When women do get those rare opportunities to sit at these tables, we must also question why others are not with us – Traveller women, migrant women, disabled women, rural women and women who have spent years supporting and often leading already marginalised communities and who now bear much of the brunt of tension and unrest. Sometimes we can get side-tracked by cycles of blame – we may ascribe blame to our elected representatives, but as women in civil society organisations we are often told that our opinions and voices have not been put forward. Yet if we have no avenues, how can we engage? There are models of practice such as the Women's Manifesto and SHE Programmes which provide effective examples of democratic engagement, supporting women to ensure their voices are heard. The recently announced *From Grassroots to Government* programme by Longford Women's Link, in collaboration with NIRWN and funded via the Department of Foreign Affairs' Reconciliation Fund will also provide a platform for women to develop their role in civil and political life.

Maintaining (or manufacturing?) the necessary conditions for cooperation

Looking at the necessary social conditions required to ensure cooperation, there is a need to be realistic and suggest actions where outcomes can be achieved rather than continuing with aspirations.

This issue of engagement has been raised at number of meetings of the Ad Hoc Group for North-South East-West Cooperation – there is simply insufficient engagement with civil society, and specifically women in our communities on the impact of the seismic changes since 2016. The focus has been very much on trade, tariffs and travel, and very little on the impact on our communities. Therefore, this article makes a number of recommendations.

- I referenced the ‘lessons learned’ element of cross-border work carried out in Drogheda in the early 2000s. Very simply, **our political leaders must reconnect to civil society**. The civil society networks have been established but who is connecting with them? We must learn the lessons of the past and at the very least, accept that failure to commit to meaningful dialogue that goes beyond tariffs and trade will be to the detriment of all who live on these islands. We must ensure that citizens are as prominent in the discussions as goods and trade are. There are many potential impacts on citizens’ lives as well as livelihoods.
- **Strong commitment to a process of civil society engagement** from the relevant institutions in all jurisdictions, including the EU is the primary requirement. This includes a move away from the plethora of consultation processes that civil society organisations engage in without any established outcomes.
- There are conversations to be had on and between these islands from a civil society perspective in relation to working collaboratively. Anecdotal evidence from an LWL perspective would suggest that those communities who are more distanced from the border region either have not considered the opportunities or have actively decided against them due to the current uncertainties. Therefore, it is incumbent on all of us who work in the sector to **explore and encourage pathways to collaboration** – The New Common Charter is an excellent starting point.

- Staying with the New Common Charter, it is imperative that **models of good practice are recognised for their potential**. It is equally important that these models are resourced. If the ultimate goal is an effective, democratic society that embodies the spirit of the Belfast/Good Friday Agreement with active and engaged citizens and communities then we need:
 - Political support for the New Common Charter
 - Support for Civil Society organisations, which means financial support, but it is an investment in our communities and the future of these islands.

There has been no other space for grassroots organisations to engage in this level of dialogue on such a sustained basis. If this grassroots dialogue is not facilitated, it will result in a lack of understanding of issues faced by communities across these islands, both on a cross-border and cross-sectoral basis. Many of our challenges, our experiences, our aims, our hopes are very similar, therefore if we have the platform to engage the opportunities are very real – the chance to cooperate for the benefit of all our communities.

- The failure to fully implement all elements of the Belfast/Good Friday Agreement, e.g. Bill of Rights, Civic Forum etc., has the potential to undermine cooperation and collaboration on these islands and there is a significant risk to North-South institutions. The UK and Irish governments, as co-guarantors of the Belfast/Good Friday Agreement must reinforce that they are committed **to the totality of the Belfast/Good Friday Agreement**. Brexit is not necessarily the root cause of this but as Etain Tannam has pointed out, it has exposed certain fragilities, particularly on an East-West basis.²⁰
- Critically, many civil society leaders have pointed to the fact that while the Protocol is not the root of all issues, the perception that it is responsible for them is a very real concern, and the impact of these perceptions has been very visible in recent months. Therefore, we need **clear, unambiguous communication from our political leaders** that facilitates more productive dialogue. Without clarity we cannot have the necessary conditions for cooperation.

- The pattern of sporadic and often fragmented engagement that is taking place between political leaders and civil society needs rapid change. **A sustainable roadmap of engagement must be established in consultation with civil society representatives.** Such a roadmap must contain clear pathways of engagement and dialogue with specific monitoring and review of agreed actions and timelines. There are specific avenues of engagement that could fulfil this point, but there must be a clear definition of the ‘who’ and the ‘how’ of these interactions. This is not to say that civil society are not being listened to, for example, via the Ad Hoc Group, but the ‘next steps’ element of the process are never clearly defined. One of the few opportunities to emerge from Covid-19 has been the ability to connect digitally on a global scale, therefore the mechanisms are already in place for regular engagement.
- It has been over twenty years since the Belfast/Good Friday Agreement, and while we have seen little increase in the number of women elected to political life both North and South, women in our communities continue to campaign on a range of social, political and economic issues, including advocating for women’s voices to be included at the decision-making tables. There are examples to be modelled, e.g. the NI Women’s Budget Group, and the Women’s Manifesto and SHE Programmes. One of the aims of the latter has been to cut through the aforementioned jargon and acronyms which often discourage women from participating in various forums and public groups. The SHE programme developed its online political education platform – SHESchool – against the backdrop of the pandemic, which has seen over 700 women register for online political education programmes in the past year. Our experience shows that **programmes such as SHE must continue to be supported if women’s voices are to be heard**, and that women need to be fully involved in public decision-making to safeguard women’s rights and strengthen policy making that works for women. Brexit has intensified the need for the insights of women at the grassroots level, especially in rural communities where the over-representation of men in formal political institutions is particularly acute. An optimum strategy for the pursuit of consensus is the inclusion of a plurality of perspectives obtained through participatory grassroots forms of organising.
- Finally, a brief reference to media coverage is warranted. There is a

responsibility on those reporting on current events to **avoid sensationalist language and refrain from adopting singular (and unhelpful) perspectives**. This was particularly notable in relation to reporting of travel flows between North and South during the Covid-19 pandemic, particularly when the timing of the lifting of restrictions varied between both jurisdictions. In the absence of a unified approach to managing the pandemic, it has been unhelpful to perpetuate the ‘them and us’ narrative, the observations of different colour registration plates etc., primarily driven by the issues around Covid, but both issues now interlinked. We cannot see a return to these narratives which belong firmly in the past.

Conclusion

I was struck by the words of Martin Mansergh a number of years ago when he posed the question – what is the maximum strain that the peace process can bear? He believes that ‘it will surely hold, as there could be no conceivable gain to anyone from going back, only a huge loss to both communities and to the whole island’.²¹ On a utopian level I agree, but it is imperative that the peacebuilding efforts and dialogues which led to the 1998 Agreement and the continuation of that work are never taken for granted. In one sense, the work being done by our civil society organisations goes a long way to ensuring that any potential ‘maximum strain’ is not tested beyond its limits. Throughout my work in this area I have had many challenging conversations and I look forward to continuing those conversations because without them, we cannot have the optimum conditions for cooperation. Peace must be the ultimate goal – peace and stability and an island where we come together for the good of our communities, our children and our future stories. To paraphrase Marianne Elliott, we can decide our future as opposed to remaining as onlookers while it is decided for us. We cannot be tourists on this journey to peace and reconciliation.

Endnotes

- ¹ For more details, visit www.seeherelected.ie.
- ² For more on the New Common Charter for Cooperation Within and Between these Islands, visit <https://crossborder.ie/towards-a-new-common-charter/>.
- ³ See <https://crossborder.ie/ad-hoc-group-for-north-south-and-east-west-cooperation/>.
- ⁴ See <https://www.irishrurallink.ie/the-next-chapter/>.
- ⁵ See Andy Pollak, 'Farewell to Education for Reconciliation' (2012), <https://crossborder.ie/farewell-to-education-for-reconciliation/>.
- ⁶ Brian Harvey, 'Community Development along the Border: An instrument for the development of the crossborder region?' (2010), <http://www.crossborder.ie/pubs/journal5.pdf>.
- ⁷ See <https://www.independent.ie/regional/droghedaindependent/news/learn-lessons-from-the-past-urge-refugees-from-troubles-27108010.html>.
- ⁸ Brian Harvey, 'Community Development along the Border'.
- ⁹ <https://crossborder.ie/towards-a-new-common-charter/>.
- ¹⁰ The "Common Chapter" on cross-border, North-South and East-West cooperation had existed in Ireland's National Development Plan and Northern Ireland's Structural Funds Plan.
- ¹¹ HM Government, 'Northern Ireland Protocol: the way forward', https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004581/CCS207_CCS0721914902-001_Northern_Ireland_Protocol_PRINT__1__2_.pdf.
- ¹² See Brian Harvey, 'Back to the "dreary steeples"?' (2019).
- ¹³ For further details, visit <https://www.aontas.com/european/nalab>.
- ¹⁴ See <https://www.irishrurallink.ie/3529-2/>.
- ¹⁵ Our colleagues at Northern Ireland Rural Women's Network (NIRWN) have written extensively on this issue. See, for example, 'Rural Voices: Action Research and Policy Priorities for Rural Women' (March 2018), <https://www.nirwn.org/wp-content/uploads/2018/03/NIRWN-Rural-Voices-Research-Report-March-2018.pdf>.
- ¹⁶ See www.seeherelected.ie.
- ¹⁷ Michael Potter, 'Who Runs Northern Ireland? A Summary of Statistics Relating to Gender and Power in 2020' (13 January 2020), http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2017-2022/2020/assembly_exec_review/0120.pdf.
- ¹⁸ See https://www.wheel.ie/sites/default/files/media/file-uploads/2020-11/GenderPayGapReport2020Web_0.pdf.
- ¹⁹ Marianne Elliott, 'The Role of Civil Society in Conflict Resolution: The Opsahl Commission in Northern Ireland, 1992–93' (2013), p.91.
- ²⁰ Etain Tannam, 'The British-Irish Relationship and the Centrality of the British-Irish Intergovernmental Conference' (2021), www.jstor.org/stable/10.3318/isia.2021.32b.29.
- ²¹ Martin Mansergh, 'The Background to the Peace Process' (2018), p.157, <https://www.jstor.org/stable/10.3318/irisstudinteaffa.2018.0145>.

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The UK's Withdrawal from the EU

Impact on the political, social and legal conditions for cross-border civil society cooperation

Charles Whitmore

Charles Whitmore is a research associate with Cardiff University's Wales Governance Centre (WGC) and Wales Council for Voluntary Action (WCVA), the national membership body for voluntary sector organisations in Wales. He has a background in European Union Law and Internal Market studies and has worked in the third sector in health and social care. He is currently the coordinator of the Wales Civil Society Forum on Brexit, a partnership between the WGC and WCVA funded by The Legal Education Foundation to provide legal and policy expertise to the voluntary sector in Wales on the legal, administrative and constitutional implications of the UK's Withdrawal from the EU.



Introduction

Historically, the EU plays a significant and varied role in facilitating civic society cross-border cooperation. In direct terms, it provides funding which facilitates this. Interreg and Erasmus are very clear examples, but the EU funds civil society to achieve goals as diverse as policy work to peacebuilding.¹ Civil Society Organisations (CSOs) in EU member states also work across borders influencing EU policy and in so doing create valuable opportunities to share best practice and knowledge. Especially in non-unitary states like the UK, EU membership also creates an impetus for internal cross-border cooperation to optimise influence at the European level – with feminist CSOs in the UK providing an excellent example of this.²

The EU also fosters civic society cooperation with its neighbours. The European Neighbourhood Policy (ENP) is an example of this,³ and civic society cross-border dialogue is one of its core features.⁴ It has also become common practice for the EU to include what this article refers to as Civil Society Mechanisms (CSMs) for domestic and transnational civic society cooperation within its trade agreements. These are formal institutions written into the text of the treaties that provide a role for CSOs to cooperate in overseeing the social dimensions of trade.

It shouldn't come as much of a surprise then that the UK's transition to third country status will have a profound impact on the landscape for cross-border cooperation within these islands and with the EU. This article seeks to provide a preliminary answer to the question of how the conditions for this cooperation are changing as a result – from a legal, social and political perspective. The commentary is by necessity preliminary as many of the developments discussed have either yet to take full effect, to be implemented or are still subject to significant uncertainty. Furthermore, the UK is the first country to withdraw from the EU and by that fact alone the emerging landscape for cross-border cooperation is filled with novelty. For the EU – building civic society bridges across borders is often in part an exercise in Europeanisation,⁵ yet the UK fits neither into the category of states seeking accession, nor does it fit within those states with whom a trading relationship is articulated around regulatory convergence. Instead the UK/EU Trade and Cooperation Agreement (TCA) is novel in seeking to manage divergence. As a result, the context for future UK/EU civic society cooperation is different from all EU precedents. One might talk instead of limiting de-Europeanisation or perhaps of re-Europeanisation – a process of re-evaluation and learning to navigate new reasons, opportunities and challenges for cross-border cooperation from an ex-member state perspective. This article will examine this emerging landscape from two dimensions. The first, spread across two sections, will examine lessons from the EU's previous use of formal structured CSMs, to inform the implementation of those in the TCA and their use by CSOs. The final section will more briefly look at how the social and political landscape for informal, less structured cooperation has been impacted by Brexit.

1. The EU's use of Civil Society Mechanisms (CSMs) in its Trade Agreements

The EU has a distinct approach to providing formal structures for CSOs to cooperate domestically and transnationally with each other in monitoring the implementation of the social dimension of trade agreements.⁶ The TCA is the latest example of this practice and stakeholders are still agreeing how to implement the provisions. Given the timing and the unique purpose of the TCA, it is useful to briefly reflect on the EU's history as some lessons can be extracted to inform this process.

1.1 From vague provisions to Domestic Advisory Groups and Civil Society Fora

Data collected by Van den Putte *et al* show that the earliest instances of the EU writing a role for civil society into its trading relationships can be found in its Mexico (1997)⁷ and Cotonou (2000)⁸ agreements. These were relatively weak however. The former stated only that periodic consultation with civil society shall happen, and the latter broadly defined civil society as a non-state actor with which the parties should cooperate. Vague terms like 'regular consultation' and 'ongoing dialogue' were not prescriptive and left much room for limited implementation.

There was a step change with the 2002 EU-Chile agreement,⁹ which included institutional provisions for civil society in the shape of a Joint Consultative Committee tasked with promoting transnational civic society cooperation and dialogue.¹⁰ With that said, other provisions on consultation and financial support were optional. Nevertheless, this treaty marked the start of a more systematic embedding of a role for CSOs to monitor the implementation of sustainable development objectives.¹¹

A further paradigm shift occurred with the EU-South Korea Trade Agreement in 2011, which has come to be known as the first of the 'new generation' trade agreements.¹² It adopted the current setup of Domestic Advisory Groups (DAGs) for domestic CSO/state dialogue, and a Civil Society Forum (CSF) for transnational meetings.¹³ This agreement had several key details that would become common features:

- Governments would facilitate engagement with its civil society to monitor the implementation of the sustainable development provisions (defined as the environment and labour) either by giving an existing body a new function or by creating a DAG.
- DAGs are to be comprised of independent CSOs reflecting a balanced representation of environment, labour and business organisations (as well as other stakeholders).
- Each party is free to determine their own DAG setup. The EU systematically establishes a single DAG for each new agreement, but the practice varies amongst its partners. Canada opted to have separate labour and environmental DAGs, for example, and for regional trade agreements, different countries can set up their own DAGs.
- Members of each party's DAGs meet at a CSF, usually yearly though there have been gaps.
- The views, opinions and findings of the CSF can be submitted to the parties.
- The practice has also developed to allow observers at DAGs and the CSF.

Over the following decade several trade agreements followed aspects of this model, including central America in 2012, Moldova in 2014 and the South African Development Community in 2016. The implementation of the CSMs was sometimes very slow and stakeholders have also been clear in highlighting challenges.¹⁴

1.2 What can we learn from pre-TCA EU civil society mechanisms?

Several of these challenges stem from a lack of concrete and shared definition of the purpose of the EU's CSMs.¹⁵ For example, environmental CSOs and business groups tend to place different emphases on influencing. There is a relatively loose understanding that CSMs aim to facilitate knowledge exchange, increase democratic oversight and input/output legitimacy, to monitor implementation and to ultimately influence policy. However, this vision is not usually clearly defined in the text of agreements and therefore not necessarily translated into appropriately suited

mechanisms in practice. This can lead to inefficiencies, loss of interest by CSOs, different interpretations by the parties,¹⁶ and make it easier for Governments to avoid meaningful implementation and to steer conversations away from sensitive topics.¹⁷

The South Korean agreement illustrates some of these terminological challenges, with references to ‘conducting of a civic society dialogue’, undefined use of ‘balanced representation’, and lack of direction on how DAG members are recruited (though these last two are common criticisms across EU CSMs). Consequently, disagreements have taken place over the Korean Government’s appointment of DAG members that were almost all supportive of its policies, and around unwillingness to discuss questionable labour practices.¹⁸ Similar challenges have been reported with the Peru, Central America and CARIFORUM agreements,¹⁹ leading some commentators to recommend that Governments use open recruitment calls.²⁰

The purpose of CSMs in EU treaties is best articulated by Martens et al’s framework. They conceptualise these functions as a ladder, with the effective fulfilment of each rung constituting a necessary precondition for the next to also be effectively implemented. In order, they are:

- **An instrumental purpose** of providing platforms for structured dialogue.
- **An information sharing purpose** allowing CSOs to share expertise, knowledge and information between each other, and with the parties.
- **A monitoring purpose** by which CSOs gather and share information on the implementation of the agreement with a view to highlighting potential failures and breaches.
- **And a policy impact purpose** whereby CSOs through a combination of the previous functions, can influence change.

Combined these functions are intended to increase legitimacy and democratic oversight, but commonly recurring systemic challenges around transparency, resourcing, domestic government engagement, and accountability have typically led to mixed results.

Transparency, Awareness and representativeness challenges arise, particularly in the EU’s trading partners where CSO engagement is sometimes less institutionalised and where basic procedures to enable CSOs to

participate in meetings are sometimes not clear.²¹ Group membership, meeting schedules, minutes and other necessary information should be publicly available online. Issues typically also extend to the selection process for DAG membership in the trading partners, and to the lack of transparent structured channels for CSOs to interact domestically with their governments. Transparency and promoting awareness of the CSMs is considered essential if CSOs from outside of the DAG(s) are to be able to support them.

Resourcing and capacity issues are present in both the EU and its trading partners. The European Economic and Social Committee (EESC), which serves as the nerve centre of the EU's CSMs by providing the secretariat for DAGs and by organising CSFs, has highlighted that the increasing number of demands placed on it have not been accompanied by appropriate increases in financial resources.²² This is making it increasingly challenging to meet transparency objectives. Nevertheless, the EU's institutionalised approach to this guarantees a level of financial support. The problem is much more acute in the EU's trading partners where the effective operation of DAGs is known to have been undermined due to a lack of resourcing.

The EU's **institutionalised channels of communication** between CSOs and executive bodies and its tripartite mobilisation of civil society along trade union, employer, and wider third sector lines are not always paralleled in its trading partners. This is generally considered a hindrance, but it becomes an acute problem when CSOs struggle to engage with their domestic government. The EU-CARIFORUM agreement is held up as one of several examples where the lack of a domestic counterpart to the EESC and overall lack of CSO/Government coordination led to significant delays in implementing the CSMs. With the infrequency of DAG and CSF meetings, the absence of structured CSO/state engagement outside of these structures also creates continuity problems. It is generally necessary for there to be options for continuous follow-up between domestic governments, their DAGs and wider CSOs outside of the DAG and CSF meetings to advance work and coordinate in anticipation of upcoming transnational events.

A fourth set of challenges pertain to **accountability**,²³ or the provision of formal feedback loops. There is evidence of successful influence flowing from these mechanisms, as a case study on the EU-Chile agreement showed that Chilean CSOs learned advocacy strategies from EU counterparts through CSMs to successfully uplift domestic labour standards.²⁴ However, cross-

cutting assessments have argued that overall, CSMs' influence has been limited.²⁵ The reluctance of domestic governments to take on board issues raised within CSMs, sometimes stemming from a culture of opposition to CSO/government dialogue, is a significant factor here. Influence can even be challenging for the EU at times owing to gaps in trade agreement enforceability, though third country CSOs have noted that participation in CSMs and the communication with EU institutions this opens up, affords them greater influence on their own government than domestic opportunities.²⁶ This is a striking parallel with the experiences of CSOs in the UK using EU connections to engage around the Withdrawal Agreement and TCA negotiations.

Further gaps in the CSMs' ability to influence lie in:

- the absence of a formal requirement for the EU or the Governments to consider advice or recommendations
- the lack of clarity around the precise remit of the CSMs to influence
- the absence of formal channels for DAGs to trigger enforcement and dispute resolution procedures. The creation of a procedure by which DAGs can formally recommend the instigation of dispute resolution mechanisms has been suggested to address this.

In 2015 and 2017 the Commission suggested several steps to addressing some of these issues, including enhancing the advisory role of DAGs and Joint Fora.²⁷ However, recent empirical study has also shown that many of these challenges are still present, going so far as to conclude that DAGs have not been able to monitor compliance with the sustainable development provisions of existing treaties, and have had little political relevance due to a lack of dialogue between DAG members, DAGs and Governments.²⁸

2. What are the UK/EU TCA CSMs and how might they play out in the UK?

The CSMs in the UK/EU Trade and Cooperation Agreement are in Title III on the Institutional Framework and have yet to be implemented – in fact at the time of writing the UK Government has just launched a consultation.²⁹

- Article 12 spells out an overarching duty to consult civil society on the implementation of the Agreement, in particular through DAGs and the CSF.
- Article 13 provides that: (emphasis added)
 - the parties shall consult with new or existing DAG(s) comprising a representation of **independent civil society organisations** including non-governmental organisations, business and employers' organisations, as well as trade unions, active in economic, sustainable development, **social, human rights, environmental and other matters**. It also notes that each Party may convene its DAG(s) in **different configurations** to discuss the implementation of different provisions.
 - The Parties **shall consider the views and recommendations submitted by its DAG(s)** and that they should aim to **consult them at least once a year**.
 - In the interest of raising awareness, there is also a commitment to **'endeavour' to publish** the list of DAG(s) members.
 - A final provision states that the parties shall promote interaction between their respective DAG(s), including by exchanging where possible the contact details of the members.
- Article 14 covers the CSF, which:
 - Shall **'conduct a dialogue** on the implementation of Part two'. Furthermore, the Partnership Council, which is the transnational political institution at the summit of the TCA's institutional hierarchy, shall adopt the Forum's **operational guidelines**.
 - Shall meet at least **once a year unless otherwise agreed by the Parties**.
 - Shall be open for the participation of independent civil society organisations established in the territories of the Parties, **including members of the domestic advisory groups** referred to in Article 13. Each Party shall promote a **balanced representation**, with specific examples mirroring those in article 13.

2.1 The TCA Civil Society Mechanisms – a mixture of progress and continuity

There are both similarities and differences in these provisions when contrasted with previous EU practice that reflect progress and a lack thereof. Noteworthy progress has been made in introducing an express role for the DAG(s) in dispute resolution, for example. However, the level of detail on the CSM functions is again limited. The agreement refers only to the Parties' duty to consult the DAGs and for the CSF to 'conduct a dialogue'. The EU-Ukraine agreement by contrast goes into some detail around information sharing and states clearly that the DAGs advise the parties on implementation. The CSF's functions are as vague as in the TCA but are supplemented by a more specific Civil Society Platform, which benefits from a commitment to keep it informed and has an explicit function to make recommendations.

The TCA DAGs can submit views and recommendations to the Parties, but the CSF has no explicit mandate to do so. Furthermore, the UK successfully sought to limit the remit of the CSF to part two of the agreement which may have several ramifications. Firstly, this means that the CSF can only discuss the economic dimensions of the TCA.³⁰ Secondly, the CSF will have a narrower remit than the DAGs – a departure from EU practice. Aside from any logistical issues this may create, the resulting articulation between substantive scope and membership also seems inconsistent. Advocacy groups are likely to have insights into other parts of the treaty's implementation – particularly as human rights groups are specifically enumerated as participants for both the DAGs and the CSF, yet a significant part of the treaty's human rights provisions pertain to part three (law enforcement and judicial cooperation). Ongoing reviews of Part 5 (Participation in EU programmes) may also be of interest.

Overall the TCA explicitly mentions a wider range of CSO stakeholders for both the DAGs and CSF than previous EU agreements, perhaps due to its much wider scope. Typical EU practice is to have a dedicated sustainable development chapter involving independent labour, business and environmental CSOs. This has been replaced by a wider list which also includes NGOs active in economic, social, human rights and other matters. However, again at the request of the UK, the requirement for 'balanced representation' in the DAGs was removed (though it is retained for the CSF). The intention behind this is unclear, but it creates a situation where the potentially 'less balanced' groups of CSOs have a wider remit than the more inclusive CSF. It should be noted that the lack of details around the operation of the TCA's CSMs may leave room to pre-emptively address ambiguities and

challenges as the parties draw up operational guidelines. This was done in the EU-Korea agreement for example,³¹ where the institutions also decided to accept recommendations from both the DAGs and CSF.

There is another difference in how the TCA addresses representativeness in the CSF. Older EU Agreements saw the CSF specifically as a meeting of DAG members, with some treaties working around this limitation by creating a separate platform for wider CSOs. Over time the practice has evolved so that the CSF allows for both DAGs and wider CSOs to meet, while separate transnational DAG-to-DAG meetings also take place prior to the CSF. The TCA makes this distinction clearer by explicitly noting that the CSF is open to CSOs, including DAG members, though it is perhaps to be regretted that the DAG-to-DAG system is not recognised in the agreement text.

In terms of transparency, the TCA has inherited a certain hesitancy towards binding commitments. While the rules in Annex 1 provide that agendas are to be published prior to meetings and that minutes will be published after approval, neither commitment comes with a timeframe. The agendas for the first TCA committee meetings were published, at least in one case, only the day before the meeting took place.³² Furthermore, it is not mandatory for the parties to publish the decisions and recommendations of the Partnership Council. At the time of writing, the recently published UK Government consultation on the UK DAG and CSF contains only a minor commitment to 'endeavour' to publish the membership and contact details of the DAG. The EU although not immune to criticism in this area, currently has a slightly more comprehensive web space for communicating with stakeholders around potential complaints relative to the TCA³³ and for publishing materials pertaining to the work of the various specialised committees.³⁴

In summary does the text of the TCA provide the conditions for CSMs to effectively discharge their functions?

- **Instrumental function:** In principle yes – as with previous agreements there is a textual basis for the DAGs and CSF, but the treaty is, like its predecessors, lacking in basic transparency commitments. Furthermore, there are no commitments in the text of the treaty for the Parties to financially support their CSOs to participate in these mechanisms. While this is likely less of a problem for the EU – there are significant questions around this in the UK context.

- **Information sharing:** The effective discharge of this function requires a baseline level of transparency, for example by publishing the contact details of the DAGs and their members to facilitate communication outside of formal meetings. There are loose commitments to this in the treaty and more generally to promote interaction between DAGs. This function also benefits from a high degree of representativeness, and as explained above, there are questions on what the removal of ‘balanced representations’ means in practice.
- **Monitoring:** There are improvements in relation to this function in the TCA relative to previous EU agreements as the DAGs have an explicit role in dispute resolution, and there are duties placed on the parties to make information available to them in this process. Nevertheless, expertise, resourcing and capacity challenges are still likely, and the TCA’s highly novel non-regression and rebalancing mechanisms are further sources of uncertainty.
- **Influence:** There is little in the text of the TCA to support the exercise of this function aside from a welcome acknowledgement that the DAGs can submit recommendations and views to the Parties. There is, however, no duty on the Parties to respond to these submissions. Whether this function will work in practice, depends more on how the CSMs are implemented, especially in the UK.

2.2 Implementing the TCA’s Civil Society Mechanisms in the UK context

While the text of the TCA provides some insights – there is significant scope for practice in this area to differ from how it is addressed on paper.³⁵ As a result, despite the UK Government’s reluctance to meaningfully engage CSOs on Brexit, there may be scope to influence the initial formation of these systems, particularly as these changes are taking place in a wider context of shifting patterns of territorial governance in the UK.

The first of two overarching factors this section discusses is the relevance of devolution. The UK DAG(s) will need to be adapted to the territorial governance of civil society in the UK and the roles of the devolved governments. Without appropriate input from the devolved level, there is a risk that the contributions will not be representative. This is problematic because there are considerable differences in social values, culture and expectations with regards to how civil society is engaged in policy making

across the UK. Wales bears the closest resemblance to the EU in this regard as third sector/government engagement has a statutory basis. There are highly structured geographic (Third Sector Support Wales) and thematic (Third Sector Partnership Council) groups coordinated by Wales Council for Voluntary Action (WCVA), the national membership body for that sector, that have regular structured engagement with the Welsh Government. It is a similarly common practice in Scotland to involve CSOs in policy making, and while Northern Ireland has attempted to institutionalise engagement with bodies like the Civic Forum under the GFA,³⁶ the disrupted political situation has made progress difficult.

The situation is different in England, and the absence of embedded structures for systematic engagement, the lack of an engagement culture in Whitehall, and a general lack of understanding of devolution became particularly evident throughout the Brexit process.³⁷ This stands in stark contrast to the EU's highly institutionalised approach, where as well as the EESC, the Commission organises a 'Civil Society Dialogue' mechanism to ensure regular consultation and information exchange in addition to any formal trade agreement structures.³⁸ Experience suggests that left unaddressed, this issue will frustrate the implementation of the TCA's CSMs, as it has in other countries.³⁹

A similar complication stems from countries having sometimes a substantially different definition of civil society than that of the EU,⁴⁰ where structures are organised around a tripartite taxonomy of employers, workers and the 'diversity' group.⁴¹ Very different understandings of civil society and its role in democratising governance has previously frustrated CSM implementation, particularly in the early stages. Sometimes, as is the case with the UK, this means that there is no parallel body that can fulfil the role of the EESC in bringing together different strands of civic society at the national level. This typically hinders domestic and transnational civic society cross-border dialogue,⁴² and indeed this appears to have translated into the early stages of the UK/EU relationship, with the latter already far more advanced in its implementation process. Recently, parts of the voluntary sector, the TUC and business groups in the UK have been discussing the need for such a body.⁴³ However, early efforts by CSOs to engage the UK Government on the TCA's CSMs have been slow to yield results, in part due to delays in ratification of the TCA itself and the commencement of the institutional provisions in the UK. As a result, CSOs have already had contingency discussions on the possibility of a 'shadow' mechanism to guarantee more appropriate levels

of civic society representation. These bear a striking similarity to how Peruvian CSOs successfully created a shadow DAG in response to the Peruvian Government's reluctance. This shadow body engaged more successfully with the EU's DAG than its official counterpart and was ultimately successful in prompting pressure from the EU for Peru to increase transparency and reform its domestic DAG setup.⁴⁴

Careful consideration is needed on how to reflect the UK's devolved structure in its DAG and wider non-DAG channels of communication. Experience from the EU's CSMs with Peru/Colombia and the CARIFORUM states has shown the importance of internal domestic coordination across regions prior to transnational CSMs.⁴⁵ One suggestion could involve a system of DAG(s) comprised of sub-groups within which finer devolved and thematic representation could be catered to. Systems should also be considered for separate devolved level dialogue between CSOs and their local governments to generate input that can be used in intergovernmental work. This would also be useful for CSOs in their wider connections, including with the UK DAGs, the CSF and the EESC's newly formed UK Follow-up Committee which has been agile in connecting with the devolved regions by capitalising on pre-existing relationships with the UK's ex-EESC members. Building a wider ecosystem of structured channels of communication alongside the formal CSMs will help ensure continuity of dialogue outside of the relatively infrequent DAG and CSF meetings.

Thought will also need to be given to the importance of an appropriately placed and resourced secretariat to manage the domestic DAG system. Resources saved on digital meetings could be used to fund a more developed, representative and open domestic mechanism. This is also important to ensure that discussions and actions progress outside of formal meetings, and to ensure sufficient capacity for the transparent management of agendas, minutes and contact details. If the UK Government is to make funding available to support engagement, consideration will also need to be given to ensuring that this does not compromise independence, as the use of non-disclosure agreements and gagging clauses by the UK Government has become an issue for the sector.⁴⁶

A second UK specificity to consider after devolution is the novelty of the UK's situation and pre-existing relationship with the EU. Awareness of EU CSMs domestically within its trading partners is typically low, resulting sometimes in implementation over several years. This is less of an issue in the UK given

the high-profile nature of the TCA. Discussions have already taken place between EESC representatives and large infrastructure CSOs in the UK, whilst CSOs have been active in considering the CSMs and members of the House of Lords have been questioning the Government.⁴⁷

Despite this, awareness of CSMs in trade agreements prior to the TCA appears to have been low. This is at least partially explained by domestic CSOs' reliance on EU civic society in this area, even for those with a trade specialism. This was of course justified as the centre of decision making on trade has long been at the EU level. However, with the UK now taking this responsibility back domestically, a rethinking of the sector's needs and role may be helpful. The UK Government has had to invest heavily in staff training in this area but with perhaps the exception of the environmental and labour sectors, there is currently little expertise and awareness amongst CSOs of the role they can play in the democratic governance of external trading relationships. Yet evidence shows that this lack of awareness and capacity amongst small and medium sized CSOs and businesses hinders cooperation both domestically and transnationally.⁴⁸ Unfortunately this problem is compounded by the UK Government's requirement that participants in its Trade Advisory Groups sign non-disclosure agreements.⁴⁹

The UK is negotiating several new trade agreements. It has relatively typical EU CSMs to facilitate engagement with, and has rolled over many EU trade agreements – thus far leaving unaddressed the very valid question of whether those agreements' CSMs will now also be applied between the UK and its trading partners. There is currently little information, coordination and no discernible plan at the Government level on how the UK's implementation, not only of the EU's CSMs will take place, but more broadly on what the vision of the UK's landscape for domestic and transnational CSMs in trade will be. A shift in thinking will likely need to occur within CSOs and the devolved and UK Governments if effective use is to be made of these opportunities for cross-border civic society cooperation. At the very least civic society stakeholders will likely need investment in their sector to upskill and raise awareness of the role they can play. However, it is also crucial that the governments of the UK consider jointly how this aspect of the post-Brexit landscape will be addressed. Simple steps like creating an online portal akin to the European Commission's, which summarises the membership, and other relevant information across all its trade CSMs in one place,⁵⁰ would be an initial step.

3. How has Brexit impacted other forms of civic society co-operation?

In addition to the TCA's provision of new structures, Brexit has also altered the social and political landscape domestically for civic society cooperation outside of any formal treaty structures. This last section will briefly explore this in four connected points.

The first is that Brexit had an immediate and acute impact on the need for internal coordination and capacity sharing amongst CSOs across the UK to identify, unpack and respond to policy issues. It created a ream of salient concerns from labour and environmental standards, human rights, rule of law and constitutional issues, EU funding and EU citizens' rights to pressing 'no-deal' concerns. Forming networks to maximise impact is a common practice for civic society in the UK, however the complexity, high pace and extremely politicised nature of Brexit made it particularly challenging for stakeholders to mobilise and influence. This was recognised by funders including The Legal Education Foundation, Lloyds Bank Foundation, New Philanthropy Capital, the Joseph Rowntree Foundation and the Paul Hamlyn Foundation, who went on to fund projects to increase sector capacity and understanding. Some of this was aimed in particular at empowering devolved voices.

The second point is that Brexit did not have to be implemented in a fashion that is so diametrically opposed to cross-border cooperation. Very much in line with its efforts to emphasise the opportunities of Brexit, the UK Government could have taken steps to work with civil society across the UK to rethink how cooperation takes place within these islands and with the EU in a post-Brexit context. There is little evidence to suggest that this was ever a consideration or a future interest however. On the contrary, the political decisions to also withdraw the UK from cross-border cooperation programmes like Interreg, Erasmus, Creative Europe and the European Solidarity Corps are likely to result in an overall reduction of opportunities. Funding from the UK Government to support civic society through Brexit has been very limited – with the only two notable examples being aimed at supporting EU citizens to access Settled Status,⁵¹ and the relatively inaccessible Brexit Readiness Fund.⁵² Funding has been made available in other parts of the UK but has targeted more immediate concerns – like access to food in Scotland,⁵³ or providing support around hate crime⁵⁴ and for Disabled People in Wales.⁵⁴

The Welsh example bears further commentary as it illustrates how widely differing visions for the country and strained intergovernmental relationships are leading to an increasingly variegated social and political landscape for cross-border cooperation. Erasmus is a clear example of this: the Turing Scheme will be available UK-wide, Northern Ireland is retaining access to Erasmus+, the Welsh Government is introducing its own scheme⁵⁵ and Scotland is investigating the potential of doing the same. The Welsh Government was early in stating that the UK should seek to maintain access to as many EU programmes as possible,⁵⁶ arguing that losing access to these would be detrimental to cross-border cooperation.⁵⁷ This point was reiterated in its 2020 International Strategy which provided a policy backdrop for increasing cross-border cooperation with the EU, its Member States, regions and in particular with Ireland. Over the course of 2019 and 2020, it developed a portfolio of policy proposals which again, sought to provide the conditions necessary for cross-border cooperation in a post-Brexit landscape. Its Regional Investment Framework, for example, developed in partnership with stakeholders including civic society, provided concrete proposals for replacing EU funding in Wales.⁵⁸ It contains a section on cross-border and international working developed from proposals by its Regional Investment for Wales Steering Group, which argued that cross-border working should be 'in the DNA' of future regional investment.⁵⁹ The framework also contained plans for two new funds to support the development of and access to small and large scale cross-border opportunities. A significant challenge to the implementation of these plans has emerged however, as post-Brexit changes to the UK's territorial governance are so far seeing the UK Government centralise post-EU funding. While the Levelling Up white paper, and the prospectus for the Shared Prosperity Fund are still forthcoming, there is little to suggest either will have a focus on cross-border activities. The Welsh Government has also sought to mitigate the eventual loss of the Ireland-Wales European Territorial Cooperation programme. To this end it has recently issued a call under the SCoRE Cymru grant scheme, which for the first time will have two strands:⁶⁰ one to maximise engagement in Horizon Europe by overcoming access barriers and to help build initial partnerships, and another in direct response to the recently agreed Joint Action plan with Ireland,⁶¹ to increase cooperation around the Irish Sea.

The final point is that early civic society discussions show significant interest for less structured, informal civic society cross-border cooperation. This is consistent with EU CSOs' experiences as many regularly work with or have

members from outside the EU. There are several reasons behind this, one being that despite the lower direct interest in influencing EU policy, many social issues worked on by CSOs are shared across borders. This is likely even more the case for the UK given pre-existing relationships. A second reason is that the EU acts both as an internal arena and externalising vehicle for promoting human rights, environmental, and other social values that provides opportunities to strengthen local CSOs' ability to influence domestic policy.⁶² In this spirit, the Welsh and Scottish Governments both have stated objectives to monitor EU policy, and the EU Civic Society space remains open to UK participation, as evidenced by the inclusion of UK organisations in the 2020-2021 EESC Civic Solidarity Prize,⁶³ and UK CSOs being able to participate in the Conference on the Future of Europe.

Conclusion

In answer to the introductory question, Brexit-related changes to the social, political and legal conditions for cross-border civic society cooperation are creating both new challenges and opportunities. However, the resulting landscape is still in a significant state of flux. Relatively direct impacts like the UK's withdrawal from EU cooperation programmes have yet to be fully felt and are still caught up in turbulent domestic politics. Recent comments by Mark Drakeford on the UK Internal Market Act suggest ongoing frustrations⁶⁴ – likely because its centralising effect on the UK's territorial constitution is a significant barrier to devolved ambitions like strengthening cross-border cooperation.

However, new opportunities are also due to emerge. The EU/UK TCA is introducing a form of institutionalised cross-border civic society dialogue that is new to the UK, though it remains to be seen how this will play out in practice as results from other EU agreements are mixed. Formal meetings within the context of these structures can be infrequent and a significant determinant of their impact lies in how CSOs and Governments allow for dialogue in between and around these critical junctures. This will require a paradigm shift in how UK Government engages with civil society across the UK and in how CSOs view their role in the democratic governance of external trade to be effective.

Finally, the underlying reasons for cooperation remain broadly the same, and early signs suggest significant interest in continued cooperation. For example,

WCVA and its Irish counterpart, The Wheel, are in the early stages of a new joint Erasmus project and other groups are seeking funding to establish new UK/EU relationships. There will be challenges of course, concrete EU assistance facilitating non-EU member state cross-border cooperation is limited, and where support is provided administrative burdens limit accessibility for many.⁶⁵ As a result it is usually up to individual CSOs to identify and seize opportunities to cooperate. Nevertheless, the societal challenges they address will still be best tackled collectively across borders and experience suggests that organisations will find ways to overcome barriers to cooperation – as there is still much to share and learn from each other.

Endnotes

- ¹ Giada Lagana, *The European Union and the Northern Ireland Peace process* (2001), p.137.
- ² See Rachel Minto, 'Sticky Networks in Times of Change: The Case of the European Women's Lobby and Brexit' (2020), p.1587.
- ³ See Regulation (EU) No 232/2014 establishing a European Neighbourhood Instrument, for the instrument covering the 2014-2020 multiannual framework (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0232&from=EN>), and regulation (EU) 2021/947 for its successor covering the 2021-2027 period (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021R0947&from=EN>).
- ⁴ European Parliament, 'Report on Strengthening the European Neighbourhood Policy' (26 October 2007), available at: https://www.europarl.europa.eu/doceo/document/A-6-2007-0414_EN.html; European Commission, 'A Stronger European Neighbourhood Policy' (5 December 2007), COM(2007) 774 final, available at: [http://aei.pitt.edu/38883/1/COM_\(2007\)_774.pdf](http://aei.pitt.edu/38883/1/COM_(2007)_774.pdf).
- ⁵ Katy Hayward, Cathal McCall, and Ivo Damkat, 'Building peace and crossing borders: The North/South dimension' (2011).
- ⁶ Myriam Oehri, 'Comparing US and EU labour governance 'near and far' – hierarchy vs network?' (2015), p.732.
- ⁷ EU-Mexico Economic Partnership, Political Coordination and Cooperation Agreement, article 36, [2000] OJ L 276/52, https://eur-lex.europa.eu/resource.html?uri=cellar:f95ad1a3-795e-4fb0-84e1-28351b99415c.0004.02/DOC_2&format=PDF.
- ⁸ Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, [2000] OJ L 317/3, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A22000A1215%2801%29>.

- ⁹ Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part.
Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:f83a503c-fa20-4b3a-9535-f1074175eaf0.0004.02/DOC_2&format=PDF.
- ¹⁰ See Articles 32 (2) (3) and 41 for further new civil society provisions on strengthening influence on public policy and awareness raising. See Article 10 for the institutional provisions and article 11 for a broader commitment to promoting civic dialogue.
- ¹¹ This process can also be traced in successive EU Commission policy documents see: European Commission, 'Global Europe: Competing in the World – a Contribution to the EU's Growth and Jobs Strategy', COM (2006) 567 final; European Commission, 'Trade, Growth and World Affairs – Trade Policy as a Core Component of the EU's 2020 Strategy', COM (2010) 612 final; European Commission, Trade, growth and development Tailoring trade and investment policy for those countries most in need', COM (2012) 22 final.
- ¹² Jan Orbie, Deborah Martens and Lore Van den Putte, 'Civil Society Meetings in European Union Trade Agreements: Features, Purposes, and Evaluation' (2016).
- ¹³ EU-South Korea Free Trade Agreement, [2007] OJ L 127, articles 12 and 13.
- ¹⁴ Lore Van den Putte, 'Involving Civil Society in Social Clauses and the Decent Work Agenda' (2015), p.222.
- ¹⁵ Deborah Martens, Jan Orbie, Lore Van den Putte and Yentyl Williams, 'Civil Society Meetings in EU Trade Agreements – Recommendations and Lessons from EPAs' (2016), p.3.
- ¹⁶ Martin Westlake, 'Asymmetrical institutional responses to civil society clauses in EU international agreements: pragmatic flexibility or inadvertent inconsistency?' (2017), pp.9-10; Jan Orbie, Deborah Martens and Lore Van den Putte, 'Civil Society Meetings in European Union Trade Agreements' (2016), p.38.
- ¹⁷ Lore Van den Putte, 'Involving Civil Society in Social Clauses and the Decent Work Agenda' (2015), p.225.
- ¹⁸ Judith Kirton-Darling, 'EP INTA hearing on sustainable development chapters in trade agreements' (27 November 2013).
- ¹⁹ Deborah Martens et al, 'Civil Society Meetings in EU Trade Agreements – Recommendations and Lessons from EPAs' (2016), p.6.
- ²⁰ Lore Van den Putte et al, 'What social face of the new EU trade agreements? Beyond the "soft" approach' (2015), p.3.
- ²¹ Deborah Martens et al, 'Civil Society Meetings in EU Trade Agreements – Recommendations and Lessons from EPAs' (2016), p.5.
- ²² Martin Westlake, 'Asymmetrical institutional responses to civil society clauses in EU international agreements' (2017), p.11.
- ²³ Lore Van den Putte, 'Involving Civil Society in Social Clauses and the Decent Work Agenda' (2015), p.225.
- ²⁴ Evgeny Postnikov and Ida Bastiaens, 'Does dialogue work? The effectiveness of labor standards in EU preferential trade agreements' (2014), pp.927-928.

- ²⁵ Deborah Martens, Diana Potjomkina and Jan Orbie, 'Domestic Advisory Groups in EU Trade Agreements – Stuck at the Bottom of Moving up the Ladder?' (November 2020), p.37.
- ²⁶ D. Martens et al, 'Domestic Advisory Groups in EU Trade Agreements – Stuck at the Bottom of Moving up the Ladder?', p.37.
- ²⁷ European Commission, 'Trade for all - Towards a more responsible trade and investment policy' (2015), https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf; European Commission, 'Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)' (11 July 2017), https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf.
- ²⁸ D. Martens et al, 'Domestic Advisory Groups in EU Trade Agreements – Stuck at the Bottom of Moving up the Ladder?', p.37.
- ²⁹ UK Government, 'Consultation on engagement with business and civil society groups' (8 August 2021), <https://www.gov.uk/government/consultations/consultation-on-engagement-with-business-and-civil-society-groups>.
- ³⁰ This covers trade, transport, fisheries and other arrangements (including intellectual property, public procurement, aviation, road transport, energy, social security and visas for short term visits).
- ³¹ Lore Van den Putte, 'Involving Civil Society in Social Clauses and the Decent Work Agenda' (2015), p.230.
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Balancing regulation, devolution, and trade: *A global issue rendered acute in Northern Ireland*

David Henig

David Henig is one of the UK's leading authorities on trade policy. He is Director of the UK Trade Policy Project at the think-tank European Centre for International Political Economy (ECIPE) and has written extensively on the trade implications of Brexit. He also looks more widely at global trade issues such as USA-China tensions, the future of the WTO, and EU trade agreements, including in a weekly column for the Borderlex trade website. David regularly discusses trade issues in the media, and advises global business on the implications. He previously worked for the UK Government on EU-US trade negotiations and China-US issues in particular, in business as a consultant, and graduated from Oxford University.



Introduction

The aim of many essays is to simplify. This one seeks instead to demonstrate the complexity of the post-Brexit political and economic environment of Northern Ireland, and, crucially, how much this is shared with many developed countries.¹ The interplay of regulation, devolution, trade, and democracy in modern economies create many challenges that are routinely underestimated, and probably as a result are far too little discussed.

The Northern Ireland Protocol of the UK-EU Withdrawal Agreement was agreed in October 2019, ratified in January 2020, and implemented in January 2021. With only 19 Articles it is not long by the standards of international treaties, and a year between signing and implementing could have allowed for discussion of the likely impacts. This did not happen.

One reason for the lack of discussion is that the main impacts of the Protocol come in the annexes. It is there we find lists of the more than 300 EU regulations to apply in Northern Ireland. Many are lengthy, to the extent that it is far from clear that anyone has read them all including this author.²

These come in addition to other regulations and treaties which those doing business in Northern Ireland must follow. There is the UK-EU Trade and Cooperation Agreement, a preferential arrangement compared to World Trade Organization rules. Then agreements with other countries, some of which have Northern Ireland specific elements.³ To this must be added the entire set of UK wide regulations, including the Internal Market Act setting out the balance between devolution and free trade in goods and services.⁴ Many of these are currently similar to EU regulations, but there will be future variance and addition on both sides.

Such regulatory volume is normal in developed countries, where virtually every economic activity is regulated and subject to treaty, probably many times. Understanding that 21st century reality is a crucial foundation for the specific application to Brexit and Northern Ireland.

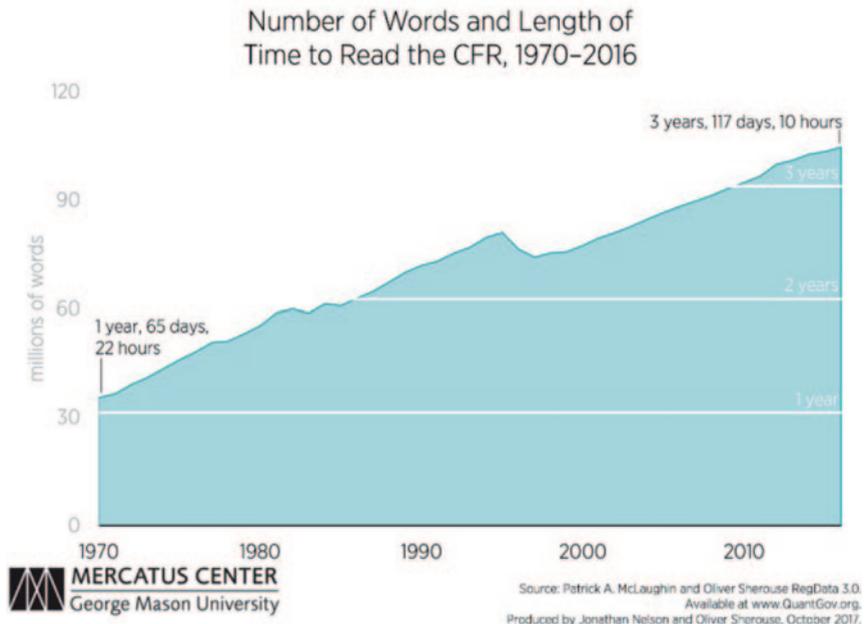
The rest of this essay develops the picture from generic to specific. It starts by examining the growth of regulations, then the different levels of government involved, from local to global. This naturally leads to considering trade and regulation, a balance requiring government coherence. Ultimately this must be subject to democratic consent.

No single element is simple; taken together this fundamental complexity at the heart of modern politics and economics leads to many challenges. Arguably Brexit itself was one result. Equally, once the UK sought to leave the EU even greater issues for Northern Ireland were inevitable. The final section offers some principles which may assist in resolving them both there and elsewhere.

The regulated world

A regulation can be defined as “a rule or order issued by an executive authority or regulatory agency of a government and having the force of law”.⁵ This may be too broad, in which case perhaps a subset of laws that apply to specific objects or situations.⁶ These could include provision of safe workplaces, suitably qualified professionals, and protected consumer transactions. Over time demands for government action have seen nearly every product or service in developed economies regulated,⁷ from defining a banana to protecting a bank account.

Regulation as a core and widespread state function is relatively new. One of the few quantitative measures comes from analysis of the US Code of Federal Regulations by the Mercatus Center at George Mason University. This finds a steady accumulation in the word count from 35.4 million in 1970 to 104.6 million in 2016.⁸ UK or EU regulations are not compiled in a way allowing similar analysis, but it is reasonable to believe this is a global trend, starting with general rules around health and safety in the workplace, moving to ever more detailed product and service specific rules evolving alongside the market for them.



Factors that may account for the general rise in regulation in developed countries include:

- Moving from state provision of services to regulation of private providers;
- Widely reported failures leading to public harm in numerous subjects from pharmaceuticals to buildings;
- Public campaigning by trade unions, consumer groups, media and others;
- Belief that government intervention in private sector provision is required for protection;
- Incumbent business seeking greater specificity for certainty or to protect market position;
- Increased trade requiring clarity of rules;
- Creation of new markets by defining rules governing competition.

It seems unlikely that we will move away from extensive regulation given these causes, and growth in new fields such as artificial intelligence or driverless vehicles seems likely. Deregulatory initiatives in numerous countries including the UK have achieved little, not helped by a lack of understanding of why countries regulate. The regulated state should now be seen as normal.⁹

This regulatory reality should ideally lead to answering foundational questions, focusing on what should and should not be covered, by and involving whom, through what means, and with what costs and benefits. In general, however, none of these are a significant subject of political discussion theoretically or practically. It is loosely assumed that regulation is something public authorities should undertake with some public engagement, but otherwise there are few well established common principles.

Yet the implications of widespread regulation for an economy and a democracy are significant. It can advantage some businesses over others, often incumbents over small challengers, and help make or break markets. Some consumers and workers will have more protection than others. Inadequate regulation has been directly linked to deaths in dangerous buildings and the global financial crisis.

Despite nearly everything being regulated we barely talk about the subject. This is not a promising start for considering what regulations should be followed in Northern Ireland in the future.

Regulation and Devolution

Given regulations are now ubiquitous, one of the biggest questions should be at what level they are made. There are competing beliefs from the local to the international.

For many, including the current UK government, the natural entity of governance is the nation state, uniform national regulations therefore set by the democratically elected executive of the day. This allows the unimpeded flow of goods and services within a country in a single market. The approach has been stated most clearly by the UK's chief negotiator, Lord Frost, in stating that "sovereignty is about the ability to get your own rules right in a way that suits our own conditions".¹⁰ As we shall see, this is overly simplistic given constant tensions between devolution and international cooperation.

Nation state single markets are in fact rather less common and complete than is broadly assumed. The most obvious example is the US, where there is a constant tension between the rights of Congress under the Constitution to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" (Article 1, Section 8, Clause 3)¹¹ and the 10th Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people".¹² Notwithstanding federal regulation, in effect this allows states regulatory powers, meaning that, for example, qualifications earned in one state might not be valid in another.¹³

Another notable example comes in the same continent, given the Canada Free Trade Agreement implemented in 2017 is actually an internal measure with the objective "to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services, and investments within Canada and to establish an open efficient, and stable domestic market".¹⁴ There is a regulatory reconciliation process to address barriers that companies may experience when doing business across provincial and territorial borders.¹⁵

Even the UK could not be said to have a full single market prior to Brexit. The example most often cited is the barriers in legal services between England

and Scotland,¹⁶ but equally the status of Northern Ireland, as a separate epidemiological unit on an all-island basis meant a barrier. Legal services is unsurprisingly one of the areas that is exempted from requirements under the 2020 Internal Market Act that established a new framework for the UK,¹⁷ despite objections from devolved governments.¹⁸

Oddly enough the trans-national regulatory area in the EU is among the more complete single markets. There was considerable debate in the 1980s and the 1990s about the principle of subsidiarity as introduced in the Treaty on European Union, which holds that where the EU does not have exclusive competence it should only regulate when objectives cannot be sufficiently achieved by the Member States.¹⁹ In practice, the EU has consistently expanded its regulatory reach. Other shared regulatory zones exist, though with a lesser scope, such as between Australia and New Zealand,²⁰ or in the Caribbean Community.²¹

Even at a global level, there are many membership bodies such as the OECD and international treaties which contain in some form regulatory commitments.²² Although not likely to lead to a global single market, these have an impact on the extent of meaningful devolution and national sovereignty, and are considered further in the next section as being particularly relevant to trade.

We can confidently say that both internal barriers to trade within countries and global regulatory cooperation between them are common. Such regulatory differences within or pooling without do not necessarily have to impact sovereignty.

Regulation, Devolution and International Trade

In 2018 California's voters passed Proposition 12, the Prevention of Cruelty to Farm Animals Act,²³ in a referendum. The measure establishes minimum space requirements for calves raised for veal, breeding pigs, and egg-laying hens. It will also, when implemented, ban the sale of products from animals confined to areas below such requirements, from other countries or other US states.

California has a history of regulating more strongly, particularly on environmental issues, than the rest of the US. This in turn leads to a "California Effect", as named by academic David Vogel,²⁴ in which other states follow suit, with previous examples including emissions standards.

Such increasing regulation at devolved and particularly national level creates obvious international trade issues. Broadly, the economic gains of trade are predicated on producing and selling at scale, generating efficiencies. Most countries want to export, and gain greater choice and lower costs from being open to imports. However, if providers of goods and services have to meet numerous different regulations such gains are lessened. Smaller exporters unable to afford multiple production lines may be particularly disadvantaged. Further, local producers could entrench their positions by encouraging discriminatory regulations.

For these reasons there are disciplines on regulations within World Trade Organization rules, though predominantly tackling the last issue of non-discrimination. This in fact dates back to the founding of the General Agreement on Tariffs and Trade (GATT) in 1947. Article 1 states that “with respect to all rules and formalities in connection with importation and exportation [...] any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties”.²⁵ Like products should thus be treated equally.

However, there are exceptions, including most notably under Article 20:

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health”.²⁶

More recently, as part of the founding of the WTO in 1995, there were new texts relating to differing regulations in food (SPS, or Sanitary and PhytoSanitary)²⁷ and other goods (TBT, or Technical Barriers to Trade).²⁸ These specified in more detail restrictions on members, with Article 2.2 of the TBT agreement, for example, stating “Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade”; or 2.2 of the SPS Agreement stating that “Members shall ensure that any sanitary or

phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence”.

Backing up such rules are a plethora of bodies which set international voluntary standards. Regulations which conform to these standards are in turn presumed to be consistent with WTO rules. Thus, such bodies as the United Nations Economic Commission for Europe (UNECE)²⁹ and Codex Alimentarius³⁰ should be important in facilitating trade.

However, such global rules and international bodies together do not prevent differing regulations, and therefore border checks. Nor does the principle of equivalence, of accepting products made to different regulations, avoid this. Article 4 of the SPS Agreement introduces the concept, stating that “Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own [...] if the exporting Member objectively demonstrates... that its measures achieve the importing Member’s appropriate level of sanitary or phytosanitary protection.”

Such equivalence has to be proven, which usually happens in a trust-building process involving inspections of other countries’ systems, exchanges of information, and checks of a certain proportion of imports. Unsurprisingly, this is particularly common for food products given the immediate risks posed by contamination. There are understandable concerns, for example, of food unchecked between production and consumption, or plants carrying infections dangerous to native species. Industrial goods are typically subject to different regimes involving some but fewer border checks and more market surveillance. All countries have border inspections.

The main exception to border checks is for trade between EU members. Considerable effort goes into this, including common rules, common systems of justice and redress, extensive cooperation between domestic authorities, and strong external controls. There is an incentive on all countries to cooperate, and an ever-present fear of the reintroduction of border controls if they don’t. Neighbouring countries such as Switzerland may choose specific alignment to join the free flow of goods.³¹

Border checks symbolise differing regulations, which in turn are the most important barrier to modern trade. This leaves countries with major decisions to make about balancing regulatory sovereignty at state and national levels

with the desire to trade. Set your own regulations and risk fewer trade gains; accept international best practice, particularly those of regulatory giants the US and EU, and reduce national control. Indeed, the EU and US aim to sign trade deals that will see their regulations accepted more widely, while other countries struggle with balancing the often conflicting approaches between the two.

Navigating a balance between domestic regulations and international trade is difficult for all countries. Their businesses and consumers will have differing views. WTO rules are of limited use.

Regulation, Devolution, International Trade and Coherence

The relationship between domestic regulations at different levels and international trade considerably increases the complexity of each. For any given product or service regulation the needs of many different groups must be considered, including consumers, businesses of different sizes and locations, exporters and importers, and so on. What may deliver the best economic result may not suit domestic interests. Regulations can be restrictive, but they can also be market-making. They can add cost to business, or provide certainty and reduce costs. Meanwhile, international trade agreements can help ease today's barriers at the cost of future regulatory choices.

This balancing act over regulations and trade is at the heart of modern government, and means continual choices with winners and losers. There is no simple model and countries adopt a mix depending on the sector, the nature of the lobbying to which they are subject, political importance, international ties and many other factors besides. They also try to cooperate with other countries to reduce the costs of divergence.

Collectively, as well described by Robert Reich in *Supercapitalism*, this leads to world capitals containing "a clamour of competing business interests – a cacophony so loud as to almost drown out any serious deliberation of the public good".³² There are battles between governments at different levels, between government departments (for example, those regulating and those trying to minimise or remove rules), between domestic and trading businesses, between business and consumer, and so on, across a vast range of activity. In the UK Brexit has made this even more visible.

Given the scale and pressures it is difficult to emerge with a coherent overall regulatory agenda, and indeed that is what we see. Governments theoretically have control, but in practice the enormous volume of subjects and players predicated against coherence. The problem is also growing as new regulations are added such as on climate change. There are frequent calls for wholesale regulatory removal, which are both unrealistic and tend to distract from seeking overall coherence.

Governments increasingly establish independent agencies outside of their own direct control to deal with some of the problems. In the UK this can be seen in bodies such as the Food Standards Agency or Animal and Plant Health Agency. In theory these agencies are better able to adjudicate purely technical matters without political interference. However, they are subject to the same lobbying efforts, and decisions are rarely purely technical. Equally, without political control they may be seen as more remote and unresponsive.

This in turn raises the question of trust in a government's handling of regulatory issues. Given the nature of the decisions that have to be made, there may be questions on how they are approached, whether the devolved, national or international levels are prioritised, and which stakeholders seem to have priority. This is in turn linked into a broader question of government performance. In some ways we can see the rise of populism as a response not only to economic failure but also to a sense of government on the side of elites when setting regulations. This is however difficult to fix, as becomes clear when we bring democracy into the consideration.

Regulation, Devolution, International Trade, Coherence, and Democracy

“Take Back Control” was a brilliant slogan for the 2016 UK referendum campaign, playing on several interlocking concerns, including several related to regulations and trade. One was a view that only Brussels regulates, extensively amplified by the UK press, though incorrect. Then the feeling that there are simply too many regulations stopping people doing what they used to be able to do. Adding in the notion that all of this happened without democratic consent made it more powerful. Then there was the related view that economic downturns, particularly in left behind areas, were caused by decisions of unaccountable global multinationals encouraged by favourable regulation.

In the debate that has taken place in the UK since 2016, the Remain and Leave factions have tended to focus their attention on the first concern, on whether the EU did have too much regulatory reach in UK life. This has obscured other concerns, of change towards an increasingly remote regulatory state, that are unsurprising given the little discussed complexities outlined above.

Above all, the question of democratic control over regulatory decisions is scarcely discussed. Few voters are likely to be making their decisions on specific regulatory matters. Few MPs pay much attention to the details of regulations new or changing, leading to much of the real work being done by full time officials. These officials may take their tasks seriously and apply themselves diligently, or not, but that still leaves a large potential accountability gap.

It is reasonable to suggest that said officials may be more influenced by businesses they meet and even their peers in other countries, than by the views of individual voters. There are also plenty of occasions on which regulation appears to be determined by a view that ‘something needs to be done’ rather than well thought through and considered.³³

In short, the link between democracy and regulation is often weak in a parliamentary system. Even where referenda are used they cannot possibly apply to all subjects, though being run on selected high profile ones may be helpful. The sense of regulation as something being done to you, rather than something in which you had a say, can be quite strong.

No government is exempt from the problems: devolution brings regulation closer to voters but creates problem for an internal market; taking international regulations suggests national interests are secondary; national regulations create trade barriers and issues of democracy; you can't have referenda on all subjects; independent agencies can be distant and unaccountable; parliamentary regulations can be overly political; deregulation is unpopular with beneficiaries of regulation which can be quite wide, but some will perceive freedoms removed by regulation. Few MPs will be experts on individual regulations. Then there is the sheer weight of regulations.

One suggested answer to these problems is the Rodrik trilemma, which holds that it is impossible to attain deep economic integration, national sovereignty and democracy simultaneously.³⁴ However, it could be said that this is just a

simplification of the business of government in the 21st century. There are going to be difficult trade-offs between regulation and trade.

Arguably, it was when the trade-offs suddenly became visible in the process of the UK leaving the EU that those involved started to struggle, not least given a lack of understanding of the complexities. That applied to the whole of the UK choosing to leave the EU single market. When several hundred years of history, a fragile post-conflict situation, and diplomatic disagreements between countries were added, in the case of Northern Ireland, it is scarcely surprising that we have not yet found stability.

The special case of Northern Ireland

As described above, many of the issues covered by the Northern Ireland Protocol are common to other developed countries. Balancing regulation, devolution, trade, and democracy is complex, nobody does it particularly well, and it is all too rarely discussed. There are also many misunderstandings on the subject, such as the EU being uniquely regulatory, national level being the natural level to set regulation, or the absence of border checks being normal.

That said there is no doubt that unique circumstances are at play in Northern Ireland. Coming in addition to a much misunderstood but common complexity, the trade and political relationship between Great Britain, Northern Ireland, and the EU single market must inevitably be problematic.

Those unique circumstances must start with the Good Friday / Belfast Agreement of 1998, and in particular this paragraph from the section on constitutional issues:

“(v) [The participants will] affirm that whatever choice is freely exercised by a majority of the people of Northern Ireland, the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities”.³⁵

It is reasonable to assume that at the moment equal treatment for the identity of both communities includes, for nationalists, the absence of significant barriers between Northern Ireland and the Republic, and for unionists similarly between Northern Ireland and Great Britain. Neither have been absolute; for example, there were pre-2016 checks on animals entering Northern Ireland from Great Britain, while there have recently been restrictions on travelling North-South due to Covid restrictions. Nonetheless, this is the broad case, previously enabled by the UK and Ireland being in the same single market and customs union, and sharing a common travel area.

Once the UK government decided to leave the EU's customs union and single market as a result of the Brexit referendum vote some form of change was inevitable. However, all possible specifics are hugely contested because those involved have conflicting positions which are fundamental for them:

- The EU has strong external controls on goods entering the single market from all countries without alignment, to prevent internal checks between member countries;
- The UK did not want to align with EU regulations;
- Ireland intended to remain in the EU;
- Nationalists felt any infrastructure around the border between North and South breached the 1998 agreement;
- Unionists felt similarly about checks between Northern Ireland and Great Britain.

No solution is possible to the conundrum of Northern Ireland and Brexit without at least one and possibly more of those involved changing a fundamental position. This bluntly simple statement of reality tends to be ignored, not least given competing narratives around the Protocol, of EU against UK, remain against leave, and nationalist against unionist. Given the complexities of regulations, devolution, trade, and democracy, there may be disguises available, but they will and indeed have been quickly noticed. Ultimately something fundamental has to change.

Ireland made it clear it had no interest in leaving the EU or single market. The EU stated it was prepared to be flexible but not fundamentally change the nature of the operation of its single market. In both cases there was an underlying thought that as it was the UK that chose to leave the EU, it should be the UK that had to find a solution.

The UK for most of the period since 2016 suggested it did not want to align with EU regulations, though under the May administration came to the view this may be required. That was reversed once Boris Johnson became Prime Minister. This in turn meant a choice of checks on the island of Ireland, or on entry to Northern Ireland.

The finally signed Northern Ireland Protocol of the Withdrawal Agreement of the UK from the EU predominantly chose checks at ports of entry to Northern Ireland,³⁶ through the means of adopting around 300 EU product regulations to apply solely in the territory. While the means of their implementation could be discussed, the implication was clear.³⁷ In particular for agricultural goods extensive processes are defined, which have become an issue in operation. The nature of the Protocol and the subsequent UK-EU Trade and Cooperation Agreement also means that in terms of the less visible barriers to services trade, these were put in place on a North-South basis.

Northern Ireland Protocol Problems

Since agreeing the Protocol in October 2019 UK government messaging on implications has been inconsistent. For some time it denied there would be checks on goods going to Northern Ireland,³⁸ subsequently it has suggested these are too onerous as a result of EU interpretation.³⁹

The position for goods coming from Northern Ireland to Great Britain is still unclear. The UK government has indicated that there would not be checks on Northern Ireland made products entering Great Britain, and codified this in the Internal Market Act formalising the UK single market.⁴⁰ However, there are implications to this commitment.

If in future the UK government regulates to a higher level than the EU, and by implication Northern Ireland, this will be potentially compromised without checks on entry. Similarly, the EU CE quality marking will be required for products on sale in Northern Ireland,⁴¹ including those made there, and therefore to prevent extra procedures should also be acceptable in the rest of the UK, which would de facto extend to all similar products from the rest of the EU.

The UK government has not fully implemented inbound checks, explaining in part why the issue has yet to arise. However, the complexities of regulation and trade are also a factor. Though the UK government wishes to have the

freedom to diverge from EU regulations there is as yet little demand from UK business for such action given the likely impact on trade. While again little discussed the Northern Ireland Protocol probably supports the case for the UK remaining close to EU laws in a way that the UK government is not wholly comfortable with.

At times since 2016 there have been suggestions that the UK forced to follow EU regulations would be some sort of 'vassal state', and that non-EU Member States within the European Economic Area are in this position. There is both an element of truth and of simplification in such a characterisation. A consultation process is in place, but in reality the countries have to apply EU laws.⁴² However, given the 'Brussels Effect' whereby EU rules are often adopted by other countries,⁴³ they may have adopted them anyway. We have to wait to see how much the UK will actually diverge.

Even more than for regulations generally, democratic consent is a big issue in the implementation of the Protocol. No Northern Ireland MP has voted in favour of either the Withdrawal Agreement or the Trade and Cooperation Agreement in the UK Parliament. This has not mattered, suggesting that the overall sovereignty of Parliament is deemed in the UK to allow different parts of the country to follow different regulations.

In implementing the Protocol Northern Ireland then follows numerous EU regulations with no direct democratic involvement, which must be a concern given the discussion above. There is a consent arrangement for the Protocol as a whole,⁴⁴ but in terms of individual changes direct involvement is limited to lobbying publicly and through joint structures established under EU-UK agreements. It should be said that there have also been nerves in the EU that the UK could have undue say over the EU single market, by appealing over the impact on Northern Ireland, but as yet this has been limited.

It seems reasonable to suggest that the Northern Ireland Protocol is a problematic text on a number of levels, not least as the full implications of following 300 regulations are hidden from the main text. The UK government has equally been culpable of inconsistency in describing the deal.

Yet conversations about the Northern Ireland Protocol have tended to assume that there is a good solution that should be reached if only one or more sides would realise that fact. We would be far better to reset to a point in which there is no possibility of perfection, only a messy compromise involving politics, identity, regulation, borders, and single markets. This

probably initially has to be a political reset, for while there is much that can be achieved by technical experts, ultimately the fundamentals for all those involved are deeply political and won't simply disappear.

Principles for managing regulatory realities

Given the complexities and trade-offs of managing regulatory choice, democracy and trade, we should be thinking much more about the best way to do this, including but not just for Northern Ireland. While there is good practice to learn from, it does not seem like anyone has a definitive answer. Given the lack of understanding it is probably best to think of principles to guide consistent consideration and understanding. These could include the following:

- Perfect solutions to balance trade, regulation, and democracy do not exist in general, or as above, in the specific case of Northern Ireland. Compromise and trade-offs are essential, which may be a particular problem in low trust or zero-sum politics, hence why this is first and foremost a political problem;
- Regulations are political even if run by independent organisations: Outcomes typically balance different groups in society, including business, consumers, and workers, and maybe other factors like different geographies. Such a process is at the core of politics, and will be so even if there is nominally an independent agency;
- There is a constant churn in regulations at all levels: We often think of regulations as being static, and indeed individually it is likely that over a year a single regulation will not change. But the overall regulatory framework is constantly evolving, with new regulations added, changes made to existing ones, some simplifications where that is possible, and so on. Given the same process in numerous countries, the business environment is constantly changing;
- There is no such thing as pure regulatory autonomy in a trading democracy: With similar regulatory processes occurring in multiple countries overlaps are inevitable. These can include the sharing of best practice, insistence that certain processes are followed to export goods or services, how courts might rule about products unsafe in one country but on sale in another, particularly in a common law

jurisdiction where the duty of care applies,⁴⁵ and much more besides. Even if governments resist the demands of businesses operating across borders to converge, pure regulatory independence is a chimera;

- Modern trade deals are regulatory whether WTO, FTA or single market: Given the prevalence of regulations leading to barriers to trade, countries will enter agreements to address them. In different ways these apply to each of the WTO, Free Trade Agreements or a single market. The WTO is the lightest touch, requiring non-discrimination, a form of equivalence, and not “more trade-restrictive than necessary to fulfil a legitimate objective”.⁴⁶ A single market should ensure products on sale in one market can be on sale in another without further checks. A Free Trade or Equivalence Agreement is likely to fall some way between the two. In all cases there are numerous implications to the exact nature of agreed text to be considered;
- You cannot balance local democracy and global trade fully satisfactorily: It should be understood that signing a treaty in some way fetters domestic autonomy – that is ultimately the point. By signing the GATT countries were agreeing not to put in place discriminatory regulations against other countries. The only way then to do so would be to leave the agreement, which is possible but a very high bar. Thus is democracy affected. Similarly, countries that put in place regulations to check goods on entry, for safety, are placing barriers on international trade. Both are entirely normal, as is a shared regulatory framework in the case of a trans-national single market;
- International standards are helpful but not decisive: It is often said by those involved in balancing regulations and trade that international voluntary standards are the missing piece of jigsaw, as a single ‘best practice’ in each area which merely needs to be implemented. Certainly such bodies have important roles, but ultimately cannot substitute for local preference or custom. In general, they provide a minimum upon which those involved will want to build, particularly for sensitive consumer products like food;

- There is no single way to 'do' regulations: This speaks to a bigger principle, which is that given the sheer volume of regulation it is not realistic to speak of a single approach, be that light-touch or in line with international norms. Countries have to decide their regulatory policy mix on an ongoing basis, and perhaps one of the most pertinent criticisms of single markets is that they may prevent some of this initiative, though they may also prevent hasty decisions later reversed;
- Democratic processes are essential: All of these principles neatly return us to the political nature of decisions concerning regulations, and therefore the need for democratic involvement. This is particularly the case where issues such as devolution overlap with identity and sovereignty. It isn't possible to state with certainty what such involvement should entail, for example in terms of representative versus participatory democracy. But a clear and relatively fair process must at least be seen.

With questions of regulation and trade at the heart of many modern political issues, from Brexit to tackling climate change, these principles need much further consideration and practice. Given its specificity, the Northern Ireland Protocol is perhaps not the ideal place to start, except in being sufficiently important to finally draw attention to a widespread problem.

Conclusion

For five years the UK political system has been dealing with the aftermath of the decision to leave the EU. Many of the most challenging issues have related to regulations, not least in terms of the future balance between the EU single market, domestic regulatory autonomy, and wider trade deals. Much of the accompanying government-led debate has been rather shallow, and based on incorrect assumptions such as there being something called regulatory autonomy, or the nation state being the natural place for regulation.

Although UK discussions are probably more shallow than those in other democracies, at worst this is only likely to mean economic cost. By contrast, in Northern Ireland matters of regulation and trade have mixed with those of identity and borders to become existential in the minds of many, and thus immediately in need of consideration.

We do not know in general how to best balance regulation and trade, or how democracy can be overlaid on such decisions. We now have to learn very fast in the case of Northern Ireland. So far the signs have not been good, as the substantive issues are obscured by numerous relationship issues, and the reasons for the situation are not well understood. It is beyond time to make a change, starting by understanding better the challenges that are being faced.

Endnotes

- ¹ I am grateful to Alex Horne for comments on an earlier version of this article.
- ² I am not aware of a single comprehensive analysis of the regulations that Northern Ireland has to follow according to the Protocol.
- ³ Article 1.9, paragraph 5 of the 2020 UK/Japan Agreement for a Comprehensive Economic Partnership, for example, starts: “In the event of an inconsistency between this Agreement and the Protocol on Ireland/Northern Ireland to the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, signed in London and Brussels on 24 January 2020”; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/929181/CS_Japan_1.2020_UK_Japan_Agreement_Comprehensive_Economic_Partnership_v1.pdf.
- ⁴ A useful overview of UK regulation can be found at <https://www.regulation.org.uk/index.html>.
- ⁵ <https://www.merriam-webster.com/dictionary/regulation>.
- ⁶ The National Audit Office’s ‘A Short Guide to Regulation’ (2017) offers the slight alternative: “Regulation is used to protect and benefit people, businesses and the environment and to support economic growth”; see <https://www.nao.org.uk/wp-content/uploads/2017/09/A-Short-Guide-to-Regulation.pdf>.
- ⁷ By definition illegal products are not regulated, but it is hard to think of other examples.
- ⁸ Patrick McLauhlin, Jonathan Nelson, Jim Pagels and Oliver Sherouse, ‘The Impossibility of Comprehending, or Even Reading, All Federal Regulations’ (23 October, 2017), <https://www.mercatus.org/publications/regulation/impossibility-comprehending-or-even-reading-all-federal-regulations>.
- ⁹ There was a debate ahead of the 2016 referendum over how much of UK regulation was derived from the EU, with an assumption being made by some on the leave side that the EU regulated more than others. There is no particular evidence that is the case, for more on the dispute, see Clive Coleman, ‘Reality Check: How much UK law comes from the EU?’, *BBC News* (8 June 2016), <https://www.bbc.co.uk/news/uk-politics-eu-referendum-36473105>.

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- ¹¹ U.S. Constitution, <https://constitution.congress.gov/browse/article-1/section-8/clause-3/>.
- ¹² U.S. Constitution, <https://constitution.congress.gov/constitution/amendment-10/>.
- ¹³ See also Diana Fitzpatrick, ‘Qualifying to Do Business Outside Your State’, <https://www.nolo.com/legal-encyclopedia/qualifying-do-business-outside-state-29717.html>.
- ¹⁴ The Canadian Free Trade Agreement, <https://www.cfta-alec.ca>.
- ¹⁵ Regulatory Reconciliation and Cooperation, <https://www.cfta-alec.ca/regulatory-reconciliation-cooperation/>.
- ¹⁶ See, for example, ‘Scotland’s courts refuse to let an English barrister address them for first time since 1532’, *The Herald* (25 April 2015), <https://www.heraldsotland.com/news/13211082.scotlands-courts-refuse-let-english-barrister-address-first-time-since-1532/>.
- ¹⁷ United Kingdom Internal Market Act 2020, <https://www.legislation.gov.uk/ukpga/2020/27/contents/enacted>.
- ¹⁸ Kenneth Armstrong, ‘Governing With or Without Consent – The United Kingdom Internal Market Act 2020’ (18 December 2020), <https://ukconstitutionallaw.org/2020/12/18/kenneth-armstrong-governing-with-or-without-consent-the-united-kingdom-internal-market-act-2020/>.
- ¹⁹ Eeva Pavy, ‘The Principle of Subsidiarity’ (2021), https://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.2.pdf.
- ²⁰ See Ministry for Primary Industries, ‘Introduction to Australia-New Zealand co-operation’, <https://www.mpi.govt.nz/food-business/food-safety-codes-standards/australia-new-zealand-co-operation/australia-new-zealand-co-operation/>.
- ²¹ See CARICOM, <http://csme.caricom.org>.
- ²² For example, the OECD’s anti-bribery convention: <https://www.oecd.org/corruption/oecdantibriberyconvention.htm>.
- ²³ See Ballotpedia, ‘California Proposition 12, Farm Animal Confinement Initiative (2018)’, [https://ballotpedia.org/California_Proposition_12,_Farm_Animal_Confinement_Initiative_\(2018\)](https://ballotpedia.org/California_Proposition_12,_Farm_Animal_Confinement_Initiative_(2018)).
- ²⁴ David Vogel, ‘Environmental Regulation and Economic Integration’ (1999), https://www.iatp.org/sites/default/files/Environmental_Regulation_and_Economic_Integrat.pdf.
- ²⁵ World Trade Organization, The General Agreement on Tariffs and Trade (GATT 1947), https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm.
- ²⁶ *Ibid*, https://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm.
- ²⁷ World Trade Organization, The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm.
- ²⁸ World Trade Organization, Agreement on Technical Barriers to Trade, https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm.
- ²⁹ For more information on UNECE, visit <https://unece.org/mission>.

- ³⁰ Further details are available at <http://www.fao.org/fao-who-codexalimentarius/about-codex/en/>.
- ³¹ See, for example, the Swiss Confederation's Federal Food Safety and Veterinary Office, 'Veterinary Agreement between Switzerland and the EU', <https://www.blv.admin.ch/blv/en/home/das-blv/kooperationen/internationale-abkommen/veterinaerabkommen-schweiz-eu.html>.
- ³² Robert Reich, *Supercapitalism*, pp.142-3.
- ³³ A well-known UK example – the Dangerous Dogs Act – is discussed in the Institute of Legal Secretaries and PAs' online *Legal Secretary Journal* (1 November 2010), at https://www.legalsecretaryjournal.com/dangerous_dogs_act.
- ³⁴ Dani Rodriks, 'The inescapable trilemma of the world economy' (27 June 2007), https://rodrrik.typepad.com/dani_rodriks_weblog/2007/06/the-inescapable.html.
- ³⁵ For the full text of the Agreement, see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf.
- ³⁶ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019), [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/TXT\(02\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/TXT(02)&from=EN).
- ³⁷ For example, the UK government's October 2019 impact assessment of the European Union (Withdrawal Agreement) Bill made clear there would be checks on entry to Northern Ireland, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/841245/EU_Withdrawal_Agreement_Bill_Impact_Assessment.pdf.
- ³⁸ David Blevins, 'The PM said there would be "no checks" but there will be', *Sky News* (20 May 2020), <https://news.sky.com/story/johnsons-deal-for-northern-ireland-is-not-what-was-agreed-11991803>.
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- ⁴⁰ See Jess Sargeant and Alex Stojanovic, 'The United Kingdom Internal Market Act 2020' (11 February 2021), <https://www.instituteforgovernment.org.uk/publications/internal-market-act>.
- ⁴¹ For more on CE marking and Northern Ireland, visit <https://www.nibusinessinfo.co.uk/content/ce-marking>.
- ⁴² See Roch Dunin-Wasowicz, "'You'll hate it": why the Norway option amounts to self-inflicted subservience to the EU' (20 November 2017), <https://blogs.lse.ac.uk/brexit/2017/11/20/youll-hate-it-why-the-norway-option-amounts-to-self-inflicted-subservience-to-the-eu/>.
- ⁴³ See Alan Beattie, 'The Brussels Effect, by Anu Bradford', *Financial Times* (27 January 2020), <https://www.ft.com/content/82219772-3eaa-11ea-b232-000f4477fbc>.
- ⁴⁴ See Jess Sargeant, 'Northern Ireland protocol: consent mechanism' (1 March 2021), <https://www.instituteforgovernment.org.uk/explainers/northern-ireland-protocol-consent-mechanism>.

- ⁴⁵ The relationship between modern regulations and common law is another under-explored topic where vague statements such as common law countries requiring less regulation appear to be inaccurate. See, for example, HASpod, 'The Duty Of Care At Work Explained For Employers And Employees' (10 March 2020), <https://www.haspod.com/blog/management/duty-of-care-at-work>.
- ⁴⁶ Article 2.2 of the TBT agreement.

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The Business Community in Northern Ireland and Post-Brexit Conditions

Aodhán Connolly

Aodhán Connolly is the director of the NI Retail Consortium and Trade Advisor to the British Retail Consortium, responsible for engagement with the NI Assembly, Westminster, Europe and others. He has been to the fore of the Brexit debate with the NIRC's Fair Deal for Consumers Brexit campaign and is the Convenor of the Northern Ireland Business Brexit Working Group. He is a Commissioner on the UK Trade and Business Commission and is part of the UKG Joint Consultative Committee on Customs for Northern Ireland and the UKG NI Business Engagement Forum. He was part of the Government's DEXEU Alternative Arrangements Working Group.



Introduction

The business community have in turn been praised and vilified for their work on Brexit and especially on the Ireland/Northern Ireland Protocol. However, in recent Queens University Belfast/Lucid talk polling NI business is the group who is most trusted to manage NI interests when it comes to the NI Protocol.¹ We enjoy levels of public trust that are at least twice that of any other stakeholder group, including the NI civil service, and ten times that of the UK Government and Whitehall. We are trusted people from all political viewpoints, including Leave and Remain. In this paper I will explain the journey that the business community has been on, the current situation and the needs of the NI Business Community going forward.

How we Got Here as a Business Community

The business community in Northern Ireland had been working together loosely, and on an ad-hoc basis from 2016, to look at what the ramifications of the UK departure from the EU would mean. Although there was some joint working and joint representations to both the UK government and Europe, each industry and sector had their own priorities. In my own industry of retail, the emphasis was on how it would affect Northern Ireland shoppers and households, and in fact our campaign was called *a fair deal for consumers*.²

But things had started to solidify by spring of 2019 and more structured work was being done by the business community in response to the various proposals that were being mooted, and by the Autumn of 2019 there was a groundswell of opinion within business that a concerted joint effort must be made.

It was to this end that the Northern Ireland Business Brexit Working Group was formed in December 2019 in response to the passage of the Withdrawal Agreement Bill (WAB) to highlight the concerns of the over 85% of Northern Ireland business that it represents.³ One of its first actions was to write amendments to the WAB to benefit the free flow of trade and support NI business and households.

These amendments did not pass, nor were they expected to with a government that had an eighty-seat majority in the House of Commons. However, this work did achieve two significant and important outcomes. Firstly, it broke the narrative that Northern Ireland was “sorted” under the Protocol. And secondly, and no less important, was the fact that all five of the major parties supported these amendments, something that quite frankly few in business or politics thought would be possible.

A lot of water has passed under the bridge since then, and the Northern Ireland Business Brexit Working Group has made representation to the UK Government, the NI Executive, the EU, the Irish Government, the USA as well as a host of EU member states and other stakeholders. It has also produced research and analysis on the needs and concerns of the business community with regard to leaving the EU, and continues to be focussed on the pragmatic needs of NI business and households.⁴

The Northern Ireland Protocol and Early Implementation

There has been much misrepresentation and vilification of the Northern Ireland business community on the Northern Ireland Protocol. So, let's put this to bed once and for all. The Northern Ireland business community did not want the Northern Ireland Protocol; they did not want a border down the Irish Sea. They did not want any borders anywhere. The business community were aware more than most that the economic success of Northern Ireland was based not only on the peace we have enjoyed since 1998, but on the fact that we have had access to both the EU and GB markets for import and export markets, for ingredients and for selling our final products. A sea border would affect the supply of goods and materials from GB and displace supply chains, while a land border would affect everything from dairy processing to the 7,000 small and microbusinesses that rely on cross-border trade each and every day.

There was no fanfare from business whenever the Protocol was agreed. In fact, when it was announced, I said that the Prime Minister had not listened to Northern Ireland business, nor had he listened to Northern Ireland communities. But it is the law, and the business community have made our best endeavours to make this work.

But we must be pragmatic and realistic about the challenges instead of letting these challenges be used for political point scoring and again using Northern Ireland as a pawn in some bigger ideological game.

If we again look at my own industry of retail as an example, there are those who said at the start of 2021 that Northern Ireland had only empty shelves and that simply was not true. There were also those who said that there were absolutely no problems at all, and again that was absolutely untrue. In fact, by saying those things they are doing a disservice to the hard-working men and women in the retail industry and in logistics who worked tirelessly to make sure that food got on our shelves.

The truth is that the average supermarket carries between 40,000 and 50,000 product lines, but there were only ever a few hundred product lines that were missing. That is a choice issue, not a food shortage issue. And that was not just because of the NI Protocol. We must remember that for seven days at the start of 2021 food could not go from the EU to Britain, and therefore onto Northern Ireland, because of Covid restrictions.

We are also in the middle of a lockdown that means people aren't eating out at restaurants or cafés, and that again put pressure on the grocery supply chain. On top of that, we are completely out of our growing season. That means about 65% of our fresh fruit and veg comes from the EU, and even 90% of lettuce and 85% of tomatoes, so it isn't unheard of for us to have supply difficulties for certain items at this time of year.

There have been difficulties though. We have had to fill in customs forms for those 50,000 product lines that grace our shelves among other new responsibilities which causes friction, and where there is friction there is cost. But there was a huge train of complexity, friction and cost heading down the tracks to us. The UK Government's decision to unilaterally extend the grace periods should instead have been taken with the EU. But be in no doubt, the decision needed to be taken otherwise there would have been severe issues with supply chains. Retail is not a light switch. You cannot just turn it off and on, so we needed a decision in time for us to secure our supply chains and keep choice and affordability for the people of Northern Ireland.

The challenges of retail are reflected in the wider business community in the recent Northern Ireland Business Brexit Working Group survey.⁵ The most significant difficulties encountered by most respondents which they were still struggling to resolve were the additional paperwork and bureaucratic requirements, the lack of timely, detailed and clear information on new procedures, and understanding the Rules of Origin requirements. The lack of preparation for 1 January on the part of suppliers (mainly in GB), and problems accessing support had also caused problems.

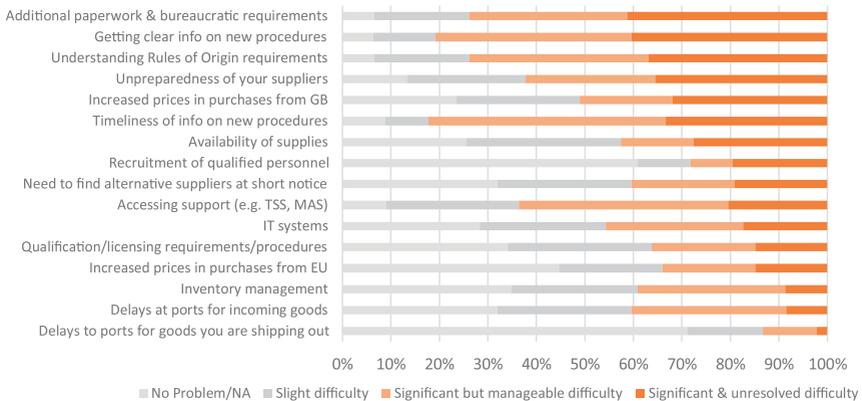


Fig.1. Protocol-related difficulties experienced by NIBBWG survey respondents

The Current Situation

We continue to hear that the EU and UK are committed to their assertion in the preamble to the Ireland/Northern Ireland Protocol, which states that both sides are “DETERMINED that the application of this Protocol should impact as little as possible on the everyday life of communities in both Ireland and Northern Ireland”, and we are heartened by the increased level of engagement that has been reported and that we have had in recent months.

However, while we welcome the engagement, we need to see that our faith in this process is validated by the delivery of solutions. We need to see that not only are we being listened to and understood, but that both the UK and EU are willing to work together to deal with the impact of the Protocol. We want to ensure that trading arrangements under the Protocol can work to benefit business and communities across Northern Ireland, now and in the future.

We continue to experience challenges that the end of the transition period on 1 Jan 2021 brought to the NI business community. We continue to do our best to make the Protocol work, but if solutions to significant challenges are not forthcoming and soon, multiple pressures will increase on businesses. And it is not clear that all businesses will be able to cope. Moreover, we are operating in a context of increased tensions within some communities here in Northern Ireland.

For sectors across all of the industries represented by the Northern Ireland Business Brexit Working Group there is a need for certainty and stability if they are to be able to plan and to garner investment for the future. This year’s political, social and economic instability and uncertainty could be the foundation for five years of economic stagnation or worse.

Notwithstanding increased costs and additional administration, business has adapted to the current arrangements and continue to support them as the basis for Northern Ireland’s trading position. However, for the protocol to be sustainable, a flexible approach is required from all parties to the Withdrawal Agreement, and in our view there are a number of outstanding issues that must be resolved. With the right approach, we believe that these arrangements have the potential to deliver prosperity in Northern Ireland.

The Headline Principles that the Business Community Needs Delivered to Make the NI Protocol Work:

Certainty: Long term workable solutions that are done *with* business not *to* business. We need the EU and the UK Government to work with our technical experts to design solutions that work for businesses and the people of Northern Ireland. That includes issues such as the *island-of-Ireland-economy* and quotas.

Simplicity: Adopting digitisation to deliver auditable and certified supply chains as part of a modern, simplified and verifiable Trusted Trader agreement. This needs to be proportionate to the low level of risk that UK retail goods coming into Northern Ireland might pose to the EU Single Market, due to the dead-end-host principle. In addition, a veterinary agreement would also reduce frictions.

There must be a consideration of a large expansion of the UK Trader Scheme, which allows commercial processors into the easement, and alongside that surely a simplified declaration would be enough and no need for supplementary declarations for those who exclusively sell in NI and back to GB.

Affordability: As both the EU and UK have agreed in the preamble to the Protocol, trading arrangements must be delivered with the least possible disruption to communities in Northern Ireland. That means the costs of new processes must be kept to a minimum to allow us to continue to give NI households the choice and affordability they need as well as keeping business competitive.

From these key principles flow the following specific asks:

- **Trusted Trader** – This certified and auditable supply chain should facilitate a “green channel” at ports of entry, based upon the low risk level of goods entering Northern Ireland; and we need it to encompass as wide as possible a group of goods and traders from food to non-food, electronics and clothing. This will not only keep prices down for NI households who have half of the discretionary income of households in Great Britain,⁶ but will reduce time spent at ports for traders and will release capacity amongst officials to deal with wider customs issues. This would be a registered scheme where retailers and

manufacturers demonstrate their supply chains are strictly controlled and suppliers manufacture to EU standards.

- **A Veterinary Agreement** – A veterinary agreement could remove up to 80% of checks and documentation that would otherwise be needed. It will support the agri-food and retail industries as well as farming, and will keep prices low and choice high for NI families. We realise there are divergent opinions on the precise contents of such an agreement but, even a time-limited agreement would assist us in the short and medium term and provide some relief to the current pressures – both trade and social. In the absence of a veterinary agreement, divergence will be a major problem and it must be managed. But such a veterinary agreement would not only help the Northern Ireland economy and consumers. Welsh farmers would be able to sell their lamb into the EU without friction and the same would be true of Scottish fishermen and their catch, while at the same time keeping choice and availability for GB consumers.
- **Consultative Group** – When the Northern Ireland business community met early in 2021 with Michael Gove and Maroš Šefčovič, as co-chairs of the Joint Committee, it was agreed that a Business Consultative Group would be formed so that NI business could have a direct conduit into both the European Commission and UK Government. This has been sorely lacking over the past two years, and because of this lack of formal engagement especially on solutions, it has meant that business has had little input into the decision making process and has not been able to feed in to temper ambition with realistic practicalities. For example, when the grace periods were announced on the 8 December 2020, we wrote to the Commission and the UK Government two days later to explain that three months until the end of March 2021 would not be a suitably long time frame in which to deliver a system to remove frictions GB-NI, let alone for retailers to implement the new system. This has not happened formally as yet and there is a need for this to happen as a matter of urgency. These meetings need to be regular and substantive.
- **At Risk** – We welcome that legal texts permit the Joint Committee to amend at any time its decisions in respect of the “At Risk test” and in doing so, shall have regard to the specific circumstances in Northern Ireland. We are firmly of the view that this issue needs to be revisited

urgently as it is now becoming a barrier to trade that puts some businesses in an unsustainable position. The reality is that switching to an EU supply chain for most is neither practical nor possible. The result is that GB businesses benefit from free trade with the EU but NI businesses do not. The definition of “at risk” is too wide, particularly as regards commercial processing, with NI businesses not benefitting from tariff-free trade with either the UK or the EU. This is resulting in both a loss of competitiveness and significant cashflow implications for NI businesses, particularly for manufacturers. The at risk test as currently set out means that the full benefits of NI’s place in the UK Customs territory cannot be achieved, and also goes beyond EU Customs Union requirements under the UCC as EU duties become payable on some goods before entry of goods into the EU even happens, which is overreaching UCC requirements.

- **Establishment** – We need to extend and embed the UK Trader Scheme easement for those businesses with “no fixed place of business in NI”, so GB-based businesses can continue to declare goods ‘not at risk’. The current interpretation of eligibility for the scheme after the easement period seems to go beyond what is required under the UCC where non-established entities can use Indirect Representatives to act as declarants for customs import purposes, which although currently provided for by using the Trader Support Service (TSS), will no longer be an option after 31 October 2021. Arguably, the eligibility criteria goes beyond what is required by the Decision No 4/2020 of the Joint Committee.⁷ If the current approach is not changed, there will be immediate and wide-ranging supply issues. We can anticipate further GB-based companies no longer supplying the NI market.
- **Rules of Origin** – continues to be an area of confusion and our ‘ask’ is for clarity and a simpler approach that can be easily understood and delivered upon from the largest to the smallest trader. If the “at risk” test issue was addressed, this issue would become less of a difficulty.
- **Access to Quotas** – There is a serious issue for NI Business if there is no access to EU import quota and UK quotas. If not addressed NI will fall foul of the “goods at risk” clauses and be taxed at the Common EU external tariff, creating the “worst of both worlds” outcome.

- **Supplementary Declarations** – The work associated with this return continues to be onerous and information is not readily available. We would request a process review and for other viable alternatives to be considered, which would reduce needless bureaucracy for traders. Indeed, for goods not at risk (remaining in the UK customs territory) supplementary declarations are a purely bureaucratic activity of no value, given that entry summary declarations and trader declarations provide all the information at point of entry to make the goods at risk decision. Surely alternatives, such as self-assessment and post-entry audits by HMRC could be used to better target risk and comply with UCC requirements for goods that leave the UK customs territory and enter the EU.
- **Education of supply chains and customers** – NI businesses are still facing trading challenges with both their supply chains and customers based in GB and EU. There continues to be an information gap with respect to documentation required for shipments to/from NI, both within GB and the EU. This is causing delays in goods movements and is resulting in shipments being left in a state of limbo while issues are resolved, which in turn is causing cashflow challenges and prompting suppliers/customers to look at alternatives to NI businesses for their needs.
- We continue to request a targeted information campaign around the customs status/requirements for NI goods within the EU and GB, with a possible interim measure being consideration of a standard certification for NI goods to confirm customs status. Also, as we have previously stated, there is the need for educating EU customers, supplier and authorities that NI goods are supposed to have the right to freely circulate, but as our survey shows 46% of EU suppliers are unaware, unprepared or unwilling to supply to NI, and 29% of firms say their sales to the EU have been negatively impacted.
- A well-executed information campaign should also note the opportunity for GB and EU businesses to have unfettered access to both UK and EU markets if established in Northern Ireland, which in turn could drive inward investment.
- **XI EORI numbers** – Under the Protocol, NI businesses that have an XI EORI number are supposed to be recognised by EU member states

customs systems without the need to apply for a further EU EORI number.⁸ In the vast majority of cases, the member states have not updated their customs systems to recognise the XI EORI number as a valid EU number for the purposes of import and export transactions. As we understand the Irish AIS/AEP system has only recently been updated,⁹ but there is a long way to go to give NI businesses the ability to trade freely across the EU as promised.

- **Resource solution** – A funding/resource solution to counter the uplift in business costs associated with the implementation of the NI Protocol on a day-to-day basis – the additional procedures required by the NI Protocol have had an adverse impact on cost with additional staff time and documentation required. This was largely absorbed by business in Q1 of 2021, however businesses are no longer able to absorb this and have indicated their intention to pass these costs onto their customer base. This is a sentiment reflected across all sectors, ranging from heavy manufacturing to pharmaceutical and retail, and will negatively impact competitiveness in international markets as well as potentially higher prices faced by local consumers.

North-South Co-Operation & the Good Friday Agreement

The Protocol is intended to protect the “Good Friday Agreement in all its dimensions”, and further commits to maintaining the conditions necessary to protect North-South co-operation. Prior to the conclusion of the Trade and Co-operation Agreement and the ratification of the Withdrawal Agreement, the UK and the EU carried out a joint mapping exercise in respect of how common membership of the EU facilitated North-South co-operation.

The business community believe that this exercise should be repeated, post-TCA, to understand the key challenges facing the all-island agri-food industry, higher education, transport, civil judicial co-operation for cross-border commercial disputes, and in cross-cutting issues like data, the mutual recognition of professional qualifications and the movement of people, in order to ensure that the Good Friday Agreement is protected in all its dimensions as intended.

Opportunities

While this past year has seen a pile-on around the challenges that have come from the Protocol, we have seen (for various reasons) less of an emphasis on the opportunities. A recent freedom of information request to InvestNI showed that there are over 50 investment opportunities in motion at the moment, and the importance of the Protocol in this cannot be understated. We have also seen some success stories come through in everything from food production to manufacturing which have been attributed to the Protocol. But neither the media nor some in the body politic want to share these great wins.

There is a need for some mapping of the protocol opportunities for NI and these to be funded to attract investment. Both the UK Government and the EU need to commit to promoting the opportunities that exist through Northern Ireland's unique position under the Protocol. If both sides want the Protocol to work, then they must sell the opportunities and promote the gains achieved.

The UK Command Paper and the Future

Recently, CEOs from the UK's leading supermarkets, and the Chief Executive of the British Retail Consortium, Helen Dickinson, wrote to Brexit Minister, Lord Frost, and Vice President of the European Union, Maroš Šefčovič, outlining their concerns over grocery choice and affordability in Northern Ireland after new checks and controls are set to be introduced from October 2021. On 21 July in Parliament, Lord Frost and the Secretary of State for Northern Ireland, Brandon Lewis, set out their vision for removing friction GB-NI in a new command paper.¹⁰ So why wasn't the business community celebrating?

Well, we did see some good in the Command Paper. It is clear that the UK Government has listened to business and especially the retail industry with regard to those checks, controls and certificates that are due to come in for goods moving from GB to NI. They recognise the friction, and they recognise the associated costs that will come with it – costs that neither the retail industry nor Northern Ireland households, with half of the discretionary income of GB households, can afford.

Particularly helpful is that the UK Government have put a request to the EU for a “standstill” of existing arrangements and grace periods. This is meant to avoid a ‘cliff edge’ when the existing grace periods ends, with the current arrangements and status quo continuing to operate whilst both sides have on-going discussions to agree longer term solutions. This would mean no change to existing customs and regulatory requirements for the duration of the standstill.

The main thrust of the UK proposals is to focus more on final destination of goods that are actually at risk of entering the EU. Therefore, they propose changes on the basis of how the “at risk” tests would work for goods moving from GB into NI, and offer greater flexibility around UK origin goods sent to NI as end destination. This would not change the current requirements around EU origin goods moving through GB and on to NI.

To do this, the UK wants to focus on supply chain information, through a trusted trader scheme, and a light touch registration scheme. This would be available to established British businesses and would thus be a lot more flexible than the current established UK Trader Scheme. The UK Government ambition would try to avoid requirements for NI establishments to register on the scheme and this would also cover the movement of parcels.

The UK has also stated that at this stage the UK Government are not minded to trigger Article 16, even though they believe they have the right to do so given current difficulties with some aspects of the Protocol.

However, there is a “but”, and it is a huge “but”. The UK Government has listened to the problems facing retailers and the aims of what they are seeking to do are laudable, but any solution that is not agreed by both sides cannot provide the certainty and stability that retailers and Northern Ireland consumers need.

The UK Government are seeking to renegotiate significant parts of the Protocol in respect of Customs and regulatory requirements in particular. For the EU, there is no appetite for renegotiation. But even if they did, there are things in this command paper that are simply unpalatable to the EU, like the proposed removal of the European Court of Justice’s jurisdiction on Single Market matters in Northern Ireland, which doesn’t happen anywhere else where the Single Market is in force, and is one of the reasons why some of the member states signed up to the Withdrawal Agreement and the Northern Ireland Protocol.

So, there are some good ideas in the command paper but they are only workable if they can be agreed. Northern Ireland is in a unique situation, which requires a unique solution with the backing of both the UK and EU. There is a real urgency now to deliver an agreed solution that works for consumers. It is hugely difficult for businesses to plan for the future or invest if there is no stability. We need both sides to make further progress to allow us to continue to give NI households the choice and affordability they require. We in business can see solutions such as a trusted trader scheme or a veterinary agreement; we now need to see the political will to deliver them.

The Future. Are we Really Post Brexit?

It is inaccurate to say that the business community in Northern Ireland are operating in a post-Brexit environment. For us Brexit remains the single biggest issue for discussion across boardrooms and not just in Northern Ireland, but across the UK. There is no certainty and no stability, the two greatest asks of business. We see opportunities for North/South and East/West co-operation in all areas of commerce and business, but we need to have a trading environment which has as much friction as a possible removed, and we are nowhere near that at the moment. We have long recognised that Brexit and the Protocol would mean changes. What we want to do is to mitigate the worst of this change so that communities in Northern Ireland can grow in prosperity and peace.

Endnotes

- ¹ David Phinnemore et al, 'Testing the Temperature II: What do voters in Northern Ireland think about the Protocol on Ireland/Northern Ireland?' (June 2021), <https://www.qub.ac.uk/sites/media/Media,1125200,smxx.pdf>.
- ² See, for example, *News Letter*, 'NIRC calls for fair deal as figures shows potential Brexit costs' (23 April 2018), <https://www.newsletter.co.uk/business/nirc-calls-fair-deal-figures-shows-potential-brexit-costs-300780>, and BRC, 'A Fair Deal for Consumers: EU Trade Roadmap' (Spring 2020), <https://brc.org.uk/media/674001/a-fair-deal-for-consumers-february-2020.pdf>.
- ³ The membership of the NI Business Brexit Working Group includes: Northern Ireland Retail Consortium, FSB, CBI NI, Hospitality Ulster, Logistics UK, IoD, Manufacturing NI, Northern Ireland Chamber of Commerce and Industry, NIE Networks, KPMG, Dairy Council, NIFDA, NI Meat Exporters Association, NI Grain Trade Association, Mineral Products Association Northern Ireland, TradeNI, Ulster Farmers Union.
- ⁴ See, for example, NI Business Brexit Working Group, 'Implementing the Northern Ireland Protocol: What Business in Northern Ireland needs & why' (29 May 2020), <https://brc.org.uk/media/674951/implementing-the-protocol-what-business-in-ni-needs-why-nibbg-030620.pdf>.
- ⁵ Northern Ireland Business Brexit Working Group Survey (March 2021).
- ⁶ See Clodagh Rice, 'Northern Ireland still has UK's lowest disposable income' (25 January 2017), *BBC News NI*, <https://www.bbc.co.uk/news/uk-northern-ireland-38746308>.
- ⁷ Decision No 4/2020 of the Joint Committee on the determination of goods not at risk (17 December 2020), https://ec.europa.eu/info/publications/decision-no-4-2020-joint-committee-determination-goods-not-risk_en.
- ⁸ For an overview on the Economic Operators Registration and Identification (EORI) number for those moving goods to or from Northern Ireland, see <https://www.gov.uk/eori/eori-northern-ireland>.
- ⁹ For more on Ireland's Automated Import System (AIS), see Revenue, Irish Tax and Customs, <https://www.revenue.ie/en/customs-traders-and-agents/customs-electronic-systems/ais/what-is-ais/index.aspx>, and for the Automated Entry Processing (AEP) system, see <https://www.revenue.ie/en/customs-traders-and-agents/customs-electronic-systems/aep/aep-trader-guides-and-appendices.aspx>.
- ¹⁰ HM Government, 'Northern Ireland Protocol: the way forward' (July 2021), <https://www.gov.uk/government/publications/northern-ireland-protocol-next-steps>.

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Legal frames for socio-economic cooperation on the island of Ireland: incrementalising approximation through using the “Protocol”?

Dagmar Schiek

Dagmar Schiek is Professor of Law and the Vice Dean for Research in the School of Law at University College Cork. From December 2020 she has held the Synnott Family Chair in EU Law, and from September 2011 she has been a Jean Monnet ad personam Chair for EU law. She has been a professor of European Union Law from 2000 (University Carl von Ossietzky, Oldenburg), having a background as comparative labour lawyer and anti-discrimination lawyer (in which capacity she also drafted anti-discrimination legislation in Germany). She migrated to the UK in 2007 as a professor of EU Law in the UK (University of Leeds - 2007, Queen’s University Belfast - 2014), and held visiting positions with the University of Maastricht (The Netherlands), London School of Economics (UK), Kiyv Mohyla Academy of Law (Ukraine), University of Canterbury (New Zealand) and University Viadrina Frankfurt Oder (Germany).



1. Introduction

If there is one ‘Brexit’ document which has been debated thoroughly, it certainly is the Protocol on Ireland/Northern Ireland (Protocol for short),¹ with a plethora of coverage by political scientists² and a fair amount of legal commentary.³ Yet, the question whether it provides a suitable frame for socio-economic and civic cooperation on the island of Ireland, possibly in combination with other elements of the new EU/UK relationship, or can be developed in that direction, remains underexplored. Thus, awaiting more learned comment in the very near future, here is a provocative proposal: as

long as its constituent parts are partially within and without the EU, life on the island of Ireland needs a better legal frame than the protocol offers presently, and it is possible to improve that frame below the threshold of Northern Ireland or the UK re-joining the European Union. This fairly optimistic position presupposes that agreements between a state (the UK) and the European Union are capable of providing a reliable legal frame for cooperation in societies.

The article will proceed as follows: the next section explores the potential relationship of law, and more specifically transnational and international law, on the one hand and socio-economic and civic cooperation on the other hand. The third section summarises the dilemmas created by the UK's withdrawal from the EU, taking into account also the extent to which the Good Friday Agreement legally requires socio-economic and civic cooperation on the island of Ireland. Among the agreements concluded between the EU and the UK in order to "get 'Brexit' done", the Protocol seeks to address these dilemmas, and the fourth section analyses the extent to which this succeeds, also considering other elements of the post-withdrawal relationship between the EU and the UK. The final section considers how the remaining void can be filled incrementally.

2. Providing a legal frame for socio-economic cooperation transnationally

The whole argument presupposes an understanding what a suitable legal framework for transnational socio-economic and civic relationships needs to ensure. The idea that legal frameworks can frame socio-economic or civic cooperation captures the enabling side of law. Laws not only restrict actions, thus "intervening" into markets or other institutions. Laws provide a reliable structure upon which cooperation on markets, in social relationships or in civic spheres can be developed. Legal frameworks have the capacity to sustain and ground societal activity, to obviate the need to build trust anew for each interaction, because there is trust in all parties following the rules established. It is this capacity which denotes laws' role in integrating societies, and which remains relevant for the notion of European integration through law.

This focus on socio-economic and civic relationships draws on the branch of European integration theory which stresses the effect of transnational

transactions in the establishment of a European identity, European social spaces and thus ultimately defines a potential for the success of European integration.⁴ The relevance of transnational interaction was the basis for devising the European Economic Communities as a peace project, and the idea that socio-economic relationship will stabilise peaceful interaction has also been recognised as a common basis for the Irish peace process and European integration.⁵ Socio-economic relationships consist of market-based exchange as well as the less economically motivated interaction of citizens in education, tourism and culture. Civic interaction encompasses the additional dimension of engagement for the common good. Both aspects are relevant for European integration as well as the Irish peace process.

National laws, even if they apply to the actions of foreigners, do not frame transnational cooperation on the basis of equal agency. Any related rights derive from the benevolence of the host state. International law addresses that deficit by mediating involvement of citizens through their states as negotiators. Socio-economic and civic interaction is typically addressed not only by general treaties, but also by trade agreements, or agreements on cultural cooperation. However, the state-centred creation of international law means that its enforcement is entrusted to those states, which also mediate the degree to which citizens as socio-economic or civic actors can effectively rely on these international agreements. Dualist countries such as the UK and Ireland require implementation through national legislation for any citizens' rights to emerge. Ineffective or incomplete implementation only violates the international law agreement and cannot typically be challenged before national courts.

International agreements, especially relating to human rights, have developed mechanisms giving a legally relevant voice to affected citizens. The European Court of Human Rights constitutes a specific example, in that citizens can accelerate conflicts to its bar. Reporting mechanisms involving civil society organisations for UN conventions relating to discrimination constitute another, less legalistic example. None of these enables direct reliance on international agreements per se.

The law of the European Union constitutes a unique model to overcome the state-centrist character of agreements between states. It creates rights and obligations for citizens which can be enforced before national courts directly. Citizens can invoke socio-economic rights against each other, and can challenge inadequate implementation of their own Member States,

ultimately also through litigating for damages, all of which is a consequence of the related principles of direct effect and supremacy.⁶ Further, the EU Commission as an institution enforcing EU law against Member States as well as economic actors in specified fields can be addressed by aggrieved citizens directly, who can also petition the European Ombudsman. While some national constitutional courts have questioned the success of EU legal integration through the related principles of direct effect and supremacy recently,⁷ Irish⁸ and UK⁹ courts did accept the doctrine, although in the latter case it was alien to constitutional traditions.¹⁰ This enables citizens and business to operate on the basis of a coherent and enforceable legal framework in socio-economic and civic interaction.¹¹

European Union law is thus structurally better suited to provide a stable framework for socio-economic and civic cooperation beyond nation states than both national and international law, although international agreements can be enriched by procedures enabling transnational cooperation. The Protocol as an emanation of international law entails elements approximating some of its provisions to EU law, as will be detailed below.

3. Which dilemmas did the UK's secession from the EU create for socio-economic cooperation on the island of Ireland?

The *raison d'être* of the Protocol is usually presented as a clash between the UK's withdrawal from the EU and the 1998 Agreement concluded on Good Friday in Belfast (Good Friday Agreement, GFA). Addressing the question of what exactly this clash consists of remains difficult, not least due to the character and content of the Good Friday Agreement.

3.1. Legal quality of the Good Friday Agreement

The Good Friday Agreement was concluded as a peace agreement, with the ambition to lock in the concession of the IRA to lay down its weapons, initiate a congruent disarmament of loyalist paramilitaries, overcome biased policing and other aspects of human-rights averse governance in Northern Ireland, while also convincing Ireland to give up its territorial claim to Northern Ireland, and improving the socio-economic situation in Northern Ireland after nearly 30 years of armed conflict. The Good Friday Agreement itself is a multi-party agreement between organisations in Northern Ireland as well as the UK and Ireland, which is accompanied and endorsed by an agreement between Ireland and the UK, which is clearly an agreement under

international law.¹² The Good Friday Agreement's chapter 11 entrusts its review and implementation to institutions established by its strands one to three, "in consultation as necessary with the relevant government or governments", while "each government will be responsible for action in its own jurisdiction". The agreement sets up a plethora of bodies, but not any institution establishing joint oversight of the correct implementation, or any procedure to resolve dispute on the content of its clauses. This encourages conflicting views on its content, and also on the question whether the Protocol protects or violates the Good Friday Agreement.

3.2. In how far does the Good Friday Agreement legally presuppose common EU membership of Ireland and the UK?

Any friction between the Good Friday Agreement and the UK's withdrawal from the EU would result from a link between common EU Membership of Ireland and the UK and the Agreement itself. Whether there is such a link is disputed.¹³

a) no legal presumption in relation to strands one to three

The institutional provisions, contained in chapters 3-5 do not create legal obligations that clash with the UK's withdrawal from the EU. They set up new governance structures in three strands. Strand 1 creates the Legislative Assembly governing Northern Ireland, alongside an Executive, which must be given substantial competences by the UK. Strand 1 also demands impartiality of that governance in relation to the ethno-political communities of nationalists and unionists respectively. Relying on liberal consociationalism, it attaches political privilege to affirming those identities in relation to establishing a cross-community majority for important matters. Strand 1 has thus set into motion a dynamic which entrenches the conflict which the agreement seeks to resolve.¹⁴ Strand 2 constitutes one institution for North-South cooperation on the island of Ireland, the North South Ministerial Council, and envisages that there will be bodies for at least six matters of cooperation, while an annex specifies nine potential areas of cooperation, of which the NSMC selected six for incorporation. Strand 3 constitutes two institutions governing East-West relations, the British Irish Council and the British Irish Intergovernmental Conference. EU membership may have had practical relevance in that the EEC institutions provided an arena where British and Irish politicians could practice collaborating as equals,¹⁵ but it does not constitute a legal precondition for any of the three strands to function,

even though they endorse compliance with EU law in their operation.¹⁶ Reference to the Protocol protecting the Good Friday Agreement in all its dimensions is thus purely political insofar as it is used to justify any equal protection of the North-South and East-West dimensions in relation to socio-economic cooperation.

b) *hybridity of territory and citizenship*

It is more likely that EU membership constitutes not only a political enabler but also a necessary legal frame for those elements of the Good Friday Agreement that constitute Northern Ireland as a hybrid territory and encourage its inhabitants to develop hybrid identities. These provisions are underpinned by the central dilemma which the GFA sought to resolve, namely that its population entailed a non-negligible proportion who identified as Irish, and viewed Northern Ireland as Irish (referred to as “Nationalists”),¹⁷ and who should enjoy “parity of esteem” (Chapter 1 section 1 (iv)), even while Northern Ireland remained part of the UK, in line with the wish of the then majority population identifying as Unionist.¹⁸ This goal is achieved by hybridity of territory and citizenship.

First, chapter 2 together with the International Agreement between the UK and Ireland, to which the GFA is annexed, constitutes a hybrid status of Northern Ireland itself, and hybridity of citizenship for the people of Northern Ireland. The former results from the acceptance by both states that Northern Ireland only provisionally remains part of the United Kingdom and will (also provisionally) become part of Ireland if there are concurrent majorities in Northern Ireland and Ireland respectively. A special interest of the Irish government in Northern Ireland is recognised, which may render imperative common discussion of issues not devolved to Northern Ireland in the British Irish Intergovernmental Conference.¹⁹ The Agreement makes provision for hybridity of status through the Strand Two political institutions, but only in an eclectic selection of areas:²⁰ Strand Two names twelve areas of North-South Cooperation,²¹ while the 1999 British Irish agreement and implementing national legislation creates six cross-national bodies.²²

The common EU membership of both parties to the Good Friday Agreement in 1998 rendered such eclecticism inconsequential. EU membership constitutes sharing of sovereignty, which again

establishes opportunities for creating and sustaining hybrid territories, e.g. through creating formal administrative units and processes for regions that constitute a natural socio-economic unit though divided by a national border, and funding for such cross-border regions.²³

Accordingly, establishing socio-economic and civic integration on the island of Ireland while maintaining a national border on that same island never depended on the British/Irish intergovernmental cooperation under the Good Friday Agreement or otherwise. It could be achieved under EU membership, and partially was an automatic consequence of EU law. Insofar as hybridity of territory meant not only the theoretical option of changing Northern Ireland's formal allegiance from the UK to Ireland and back, but also extended to maintaining hybrid and changeable identity, EU membership and the resultant socio-economic and civic cooperation constituted a decisive underpinning for the GFA's functioning. Northern Ireland, while remaining a part of the UK, from 1998 was also a common interest of Ireland and the UK, and after 2020 remains a common interest of the EU and the UK. Because the idea of shared sovereignty is central to the European Union, the EU took on the stewardship for the continued effectiveness of the Good Friday Agreement in negotiating the Withdrawal Agreement, much to the UK's surprise.

As regards personal hybrid identity, the Good Friday Agreement demands that the "people of Northern Ireland" may decide whether they are British, Irish or both, while not excluding successive reversion(s) of that decision. That element is expressly taken up in the British/Irish Agreement to which the Good Friday Agreement is annexed, in Article 1 (vi). Annex 2 to that agreement defines the people of Northern Ireland for the purposes of this provision as persons born in Northern Ireland to parents who have permanent residence rights, including British or Irish parents.²⁴ This definition excludes, rather eclectically, British, Irish and EU citizens who moved to Northern Ireland from the category of persons who may claim Irish or British citizenship on the basis of the Good Friday Agreement, i.e. without complying with conditions of other routes of naturalisation in the relevant state. That differentiation between the legitimate residents of Northern Ireland remained mainly inconsequential while EU derived rights for British, Irish and other EU citizens levelled any privileges of those born in Northern Ireland, with the exception of

rights to which EU citizenship did not give access, such as the full panoply of voting rights. After the UK's withdrawal from the EU, only those having dual EU and UK citizenship can avail of most of the same rights as before, excluding full family reunification rights in the UK, but for specific protection of pre-'Brexit' rights in the Withdrawal Agreement (including the Protocol) or otherwise.

c) *"rights, safeguards, equality" – improving the socio-economic situation in Northern Ireland*

EU citizenship and socio-economic rights underpin the Good Friday Agreement's chapter 6 on Rights, Safeguards and Equality of Opportunity.²⁵ This chapter constitutes a less than coherent assortment of provisions: it starts with state-centred obligations in the human rights area, consisting of a mix of liberal rights (free political thought, freedom and expression of religion, right to pursue national and political aspirations as well as constitutional change in a peaceful and democratic manner) with basic economic and social rights (to freely choose one's place of residence, right to equal opportunity in economic and social activity, stressing class, creed, disability, gender and ethnicity), and equality rights (freedom of sectarian harassment and women's rights to political participation). These rights should be safeguarded by the UK's proper implementation of the European Convention on Human Rights (ECHR) in Northern Ireland and equivalent steps of Ireland, underpinned by the creation of commissions for human rights and equality in both parts of the island.²⁶ The next section evokes the relevance of supporting victims of the paramilitary conflict for consolidating peace and political agreement, also through financial assistance.

The next section, headed "Economic, Social and Cultural Issues", combines a positive obligation of the British government to further economic growth and stability in Northern Ireland through promoting the social inclusion of communities and women, as well as progressing the regional and economic development strategy for Northern Ireland and the realisation of employment equality, in particular in relation to the two communities, i.e. nationalists and unionists. There are also two paragraphs demanding the recognition of and organisational and financial support for language and cultural diversity.

These provisions are partially congruent with EU derived rights: the economic freedoms, and from 1993 Union citizenship, prevent

Member States from subjecting citizens to any detriment if they move to another Member State. This strengthened the right to determine where to live on the island of Ireland before the UK's withdrawal. EU legislation requires for Member States to issue anti-discrimination law, including ethnic and racial origin, sex, religion and belief, as well as sexual orientation, age and disability, covering employment law for all these grounds, and extending to social security, social protection, housing and goods and services in relation to ethnic and racial origin and sex. It is worthy of note that the Good Friday Agreement contained the UK's promise to establish anti-discrimination law in employment for all these grounds, including sexual orientation.

The obligation to improve the socio-economic situation in Northern Ireland is imposed on the United Kingdom, due to the historic neglect of the region and the negative impact of the conflict. The phrasing presupposes that overcoming inequalities is an element of furthering economic growth, and this refers to inequalities of the ethno-political groups as well as between women and men. However, there is scope for the argument that due to the remote location of Northern Ireland within the UK, such improvement will not be realistic without some integration of "the province" into an all-island socio-economic space. The Good Friday Agreement itself does not provide any of this space, in spite of tasking the North-South Ministerial Council with establishing an all-island dimension in an eclectic selection of areas. Accordingly, the Good Friday Agreement presupposes the integration of both parts of the island into the EU, both in relation to the internal market and as a space for civic cooperation.

3.3. What are the real dilemmas deriving from 'Brexit' for (Northern) Ireland?

The debate on the island of Ireland after 'Brexit' has mainly focused on border controls, based on the realistic assumption that such controls would bring back traumatising experiences and also attract paramilitary violence.²⁷ This derives from the definition of the conflict over Northern Ireland as a border problem.²⁸ Such framing provokes the legal critique that the Good Friday Agreement does not formally require eliminating borders, as it is a border-management instrument.²⁹ In the Brexit context, this was followed up by proposals on how to electronically manage a border in such ways that it becomes invisible.³⁰ Of course, such reasoning can be countered with the argument that the GFA equally does not refer to the elimination of any 'sea-

border’, and that coastlines are a geographical fact, while land borders are political creations, thus leading both sides of the argument into a dead end.

While the relevance of physical controls at the land border, with their potential to perpetuate intimidation, should not be underestimated, there are certainly more aspects to the conflict placated by the Good Friday Agreement. These include the systematic discrimination and exclusion from public life and civic participation on the basis of ascription of being “Nationalist” as an ethno-political identity, spatial segregation on the basis of both Unionist and Nationalist ethno-political identity in education, housing and leisure, as well as the successive relegation of Northern Ireland towards a problem region within the UK, but also on the island of Ireland from an Irish perspective. The Good Friday Agreement did not only rely on political processes, as the obligation to ensure socio-economic prosperity in Northern Ireland testifies. The improvement of the socio-economic situation is as legally relevant as the institutional obligations and the human rights provisions. It is this obligation which triggers a need to establish all-island processes in socio-economic integration.

Because socio-economic prosperity in Northern Ireland is an objective of the Good Friday agreement, the recent findings on trade in goods between Northern Ireland on the one hand and Great Britain, Ireland, and other EU Member States on the other hand indicate unsatisfactory implementation. Northern Ireland has a trade surplus with Ireland and other EU countries, but a ‘trade deficit’ with Great Britain, while trade flows with Great Britain are also more voluminous than in the other direction.³¹ A region which still needs to catch up in terms of prosperity should strive to achieve a trade surplus with its largest trade partner, not a deficit. From the perspective of promoting prosperity, the often-conjured “East-West Dimension” of the Good Friday Agreement is thus relevant insofar as income flowing into Northern Ireland from Great Britain should be enhanced, and not the other way round. This does not diminish the relevance of “Strand 3” of the political governance arrangements. However, the debates on revising the Protocol presently often aim at protecting the British ‘trade surplus’ with Northern Ireland.

The dilemmas created by ‘Brexit’ for the Good Friday Agreement thus include the necessity to retain the legal frames for transnational cooperation on the island of Ireland in relation to trade in goods, but also, and perhaps even more so, transnational cooperation between persons in economic and civic

capacities. It is this cooperation which can balance the formal loss of Irishness, and it was in the past based on the EU internal market and its citizenship provisions.

4. How is Socio-economic and civic cooperation protected under the Protocol and elsewhere?

Thus, the question to be asked is how far does socio-economic and civic cooperation on the island of Ireland remain protected. For this, the Protocol is relevant, but so is the remainder of the new EU/UK relationship.

4.1. Goods

As is well known, and widely debated,³² the Protocol ensures that Northern Ireland largely remains within the EU's Internal Market for goods. This has been criticised politically as creating barriers for GB traders to continue profiting from the NI market without adapting their supply chains – although such adaptation would often work to the advantage of the NI economy. It has been criticised legally as endangering the UK's internal market.³³ This critique does not sufficiently highlight that Northern Ireland's continued participation in the Internal Market for goods is incomplete. Under Article 5, paragraph 5, of the Protocol, only quantitative restrictions of exports and imports between Northern Ireland and the Union are prohibited, not – as in Articles 30, 34 of the Treaty on the Functioning of the European Union (TFEU) – measures of equivalent effect. This subtle change between a 2017 draft and the Protocol's final version acknowledges that the UK intends to pursue a path of regulatory divergence from the EU, with a downward tendency for standards. The EU and its Member States must thus retain the option of creating new regulatory non-tariff barriers of trade. Such regulatory non-tariff barriers for free trade can be created between Northern Ireland and the Union. The exemption of Northern Ireland from all but those consumer protection standards which are fixed into products is one of the consequences: regulations on consumer credit may differ, even though they create market barriers.³⁴ If the Good Friday Agreement only requires the absence of physical border controls, all this is justifiable. If it requires a functional all-island economy, there is much work for the Joint Committee and its Northern Ireland subcommittee to improve integration, as discussed below.

The Protocol constitutes a positive achievement in that any dispute on profiting from the opportunities of the market in goods remains governed by the principles of direct effect and supremacy of EU law: Article 12, paragraph 4, of the Protocol ensures that the EU institutions retain their competences. This includes the Court of Justice of the European Union, and of course also the EU Commission. The Commission can thus continue to raise infringement procedures against the UK if it does not comply with its obligations in relation to enabling Northern Ireland's access to the single market in goods. Further, references can be brought by Northern Irish courts in this regard, which opens an indirect avenue for Northern Irish citizens to the Court of Justice. Accordingly, the effects of EU law are endorsed and continued by the Protocol as far as free movement of goods is concerned.

4.2. People & Services

a) substantive provisions of the protocol and the rest of the Withdrawal Agreement

Since the Protocol only includes Northern Ireland in the EU Internal Market in order to avoid physical border posts, but not to enhance its economic prosperity, there are no provisions extending other free movement rights to Northern Ireland. Access to the Internal Market for services, freedom of establishment and EU citizenship rights remain unprotected.

This gap is not remedied by the Withdrawal Agreement's citizenship chapter. It only protects some free movement rights for those who have exercised their EU citizenship rights by living in a Member State other than that of their nationality under EU law, who may continue to do so (Article 13-39 Withdrawal Agreement). The UK rejects the option that Irish citizens who originate from Northern Ireland are protected by this provision, because they have not moved to Northern Ireland.³⁵ This position is not in line with a purposive interpretation of EU citizenship law, which arguably has motivated the ECJ to protect a Spanish citizen who also acquired UK citizenship after she moved to the UK, against the UK. The better reasons speak in favour of recognising the EU citizenship rights of Irish citizens in Northern Ireland. If they were protected, they could continue exercising their citizenship rights in Northern Ireland along with more generous family related provisions. However, the Withdrawal Agreement does not protect UK citizens who remain in Northern Ireland, even if they

provide services across the border. The continuity of cross-border activity is only protected for workers and those self-employed persons who move physically to work in the other jurisdiction. This means that swathes of socio-economic interaction remain unprotected.

b) no diminution of rights?

While under EU law, free movement of services and free movement of workers, self-employed persons and citizens for non-economic reasons are different categories, for the Good Friday Agreement the conglomerate of any of these rights are partially encompassed under the chapter on “rights, safeguards and equality”. As discussed, the Human Rights part of this section contains the right to freely choose one’s place of residence. This would imply that it should not matter where one lives in order to engage in economic activity in Ireland, or the other way round. Such choice in relation to residence and economic or professional activity was protected by the EU economic freedoms granting rights to become a cross-border worker as employee (Article 45 TFEU and secondary law) or a self-employed person (Article 49 TFEU and secondary law), or to serve both parts of the island as a service provider (Article 56 TFEU and secondary law). The Human Rights part also guarantees the right to equal opportunity in all economic activity irrespective of, inter alia, ethnicity. Insofar as the two “communities” whose parity is protected by the Good Friday Agreement are ethno-political entities,³⁶ the notion of ethnicity may well encompass unionists and nationalists in Northern Ireland. Possibly, opportunities for nationalists might be better if transnational activity as established above is maximised.

It is not necessary, and perhaps also not useful to pursue this line of thought. The fact remains that EU rights derived from the economic freedoms ensured free choice of residence. The question then arises whether Article 2 of the Protocol protects these rights under the notion of “no diminution of rights”. Article 2 (1) clearly envisages the continued application of a body of EU anti-discrimination directives in Northern Ireland.³⁷ The same paragraph also requires the UK to ensure that no diminution of rights results from its withdrawal from the EU in relation to any “rights, safeguards and equality of opportunity encompassed in that part of the 1998 Agreement entitled Rights Safeguards and Equality of Opportunity”. The provision extends beyond discrimination law. It encompasses the extent to which legal

guarantees of the Good Friday Agreement's chapter 6 are congruent with EU rights. There should be little dispute that the right to choose one's residence is encompassed. Accordingly, the rights derived from EU economic freedoms and citizenship should be encompassed as well.

All these arguments rely on the assumption that chapter 6 applies to all residents of Northern Ireland, and not just the limited category of persons encompassed by Annex 2 of the British-Irish agreement. This derives from a systematic interpretation of the agreement, which stresses equality in several dimensions throughout. Thus, EU economic rights would have to be protected for all inhabitants of Northern Ireland, not just the ones who are born in Northern Ireland.

There are two conceptual flaws in the protection under Article 2. First, this provision generates a unilateral obligation of the United Kingdom. The UK does not have the capacity to open the EU's market for services or adopt its free movement rights beyond its borders. All it can achieve is not to limit the rights of Irish citizens living in Northern Ireland to engage in economic activity and make use of their citizens' rights on its territory. While there is no doubt that Irish citizens in Northern Ireland can engage in economic activity due to their Irish (and thus EU) citizenship in Ireland, the UK is unable to generate the same rights for its own citizens, even if they live in Northern Ireland. As an international agreement cannot create impossible obligations, the free movement rights remain unprotected in this very important dimension.

Further, even in so far as they are protected, the effect of the provisions follows Article 4 of the Withdrawal Agreement, according to which the United Kingdom has to ensure that the law of the Withdrawal Agreement has the same effect as EU law by way of national legislation. This in practice means that the effects of EU law are mimicked by way of national law, while citizens are unable to use the mechanisms of EU law enforcement to their advantage. Should the EU consider that this mimicking is not sufficient, this can be discussed in the Joint Committee implementing the Withdrawal Agreement and ultimately brought before an arbitration panel. All this may eventually result in pecuniary damages or retaliation, for example through tariffs (Part Six Title III Withdrawal Agreement). This is far less

stringent than direct supervision by the EU Commission and the opportunity for citizens to involve the Court of Justice of the European Union. However, the Protocol requires the UK to ensure continued protection of the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland in relation to supervising Article 2. Accordingly, there is an instance where citizens could raise complaints.

c) *Common Travel Area?*

One might wonder why this shaky ground is used instead of the well-trodden path of the Common Travel Area, which according to Article 3 of the Protocol the UK and Ireland are able to maintain.³⁸ The main reason is that Article 3 does not create an obligation, but only an opportunity. Further, the value of that opportunity is limited by two aspects. First, the Common Travel Area only applies to UK and Irish citizens, thus not to all inhabitants of Northern Ireland. This is significant, because according to the Northern Ireland Statistical and Research Agency (NISRA), about 10 % of the population are neither Irish nor British, and about half of these are EU citizens, who would have had EU derived rights. Second, the Common Travel Area is not legally binding, and has yet to be placed on a firm legal footing in order to produce any obligations of its two parties, namely Ireland and the UK. This would not lead to direct effect or supremacy. There is of course the option to create an avenue for those who are right bearers under the CTA to lodge a complaint to a Commission, for example the Irish or Northern Ireland Human Rights Commission, in relation to all-island movements. However, this is fully voluntary, and not encompassed by any obligation under Article 3 of the Protocol. Due to the limited scope of application the deficits outlined above could not be overcome via this route.

d) *Trade and Cooperation Agreement between the UK and the EU*

The Trade and Cooperation Agreement between the UK and the EU (TCA)³⁹ does not protect free movement of persons and services as such. The chapter on services contains a subchapter 4 relating to entry and temporary stay for natural persons for business purposes (Articles 140-145), which does not exceed the provisions in the GATS agreement and EU Neighbourhood Agreements by much.⁴⁰ This limitation is owed to the UK's preferences, since the EU Commission had drafted a chapter on person mobility. In contrast to some of the

EU's agreements with other neighbouring countries, the TCA does not contain any provisions on movement of workers. Mirroring those agreements, but also the EU-Canada Comprehensive Economic and Trade Agreement (CETA), the TCA covers travel in order to receive services as well as for provision of services. The latter covers free movement rights of independent service providers (i.e. self-employed persons under EU law) as well as those contracted to provide services, similar to posted workers. Further, there are rudimentary provisions covering professional qualifications. Under EU law, there was an elaborate system of mutual recognition. Article 155 TCA clarifies that this is discontinued, but also provides for the opportunity for professional bodies to develop joint recommendation for appreciation by the partnership council. These recommendations can become annexes to the TCA and legally binding, if the UK and the EU agree, in the future.

All this demonstrates that there clearly is a void.

5. Filling the void?

Since the Protocol does not fully replace the former legal frame for socio-economic and civic interaction on the island of Ireland, the question remains whether this void can be filled. There are a few avenues through which this could be achieved.

First, the Protocol is a dynamic instrument. This does not only apply in relation to goods movement, where extensive activities of the Joint Committee are foreseen to specify the free movement of goods from Britain to Northern Ireland insofar as this does not endanger the Internal Market (Article 5 (2) Protocol). In relation to People and Services, as well as for a range of civic activities, Article 11 of the protocol is dedicated to areas of North-South cooperation which are not encompassed by Articles 5-10 (movement of goods). That article replicates the eclectic list contained in the Good Friday Agreement and the British-Irish Agreement. However, this is clearly not a closed list of areas in which North-South cooperation should be extended.

Article 11 gives the UK and Ireland leave to continue bilateral negotiations building on the Good Friday Agreement "in full respect of European Union Law". This reservation will limit the extent to which Ireland can grant UK

citizens better rights than are provided for EU citizens of other Member States, though Ireland would not be prevented from giving UK citizens equivalent rights. Such rights should be reciprocal so as not to counter the equal treatment rights endorsed under the Good Friday Agreement. This would overcome the limits of Article 2 of the Protocol in preventing the loss of rights for UK citizens resident in Northern Ireland.

Secondly, the Joint Committee is obliged to keep under review the extent to which the Protocol suffices to maintain necessary North-South cooperation and make recommendations to the UK and the EU for extending the scope of the Protocol. Recommendations of the Specialised Committee on the Protocol must be considered. Under Article 14 of the Protocol, the Specialised Committee on Ireland/Northern Ireland has to consider proposals from the North-South Ministerial Council as well as matters brought to its attention by the Northern Ireland Human Rights Commission (NIHRC), the Equality Commission for Northern Ireland (ECNI) and the Joint Committee of the representatives of Human Rights Commissions of Northern Ireland and Ireland. This constitutes a potential road to subject the Protocol to a continuous cycle of revision by civil society organisations which have access to these Commissions. At the same time, this establishes an institutional link between the Good Friday Agreement and the Protocol. It is not excluded that the recommendations developed via this route address the deficit in enforcing obligations and potential rights under Articles 2 and 3 of the Protocol.

Further, there is of course the option that the Joint Committee recommends extending economic free movement rights and citizenship rights to those living in Northern Ireland. This could be additional provisions modelled on the existing Articles 5-10. Those provisions should also be included in Article 12 (4), in order to ensure a truly transnational quality of any new rights to be created.

6. Instead of a conclusion

The legal frames for socio-economic and civic cooperation on the island of Ireland have clearly been weakened by the UK's withdrawal from the EU. The process has invigorated the discussion enclosing Northern Ireland into the European Union through unification with Ireland, an option which must remain open under the Good Friday Agreement. However, there are clearly

avenues by which an incremental re-approximation could be achieved. Given the heightened tensions between the ethno-political communities in Northern Ireland, incrementalism seems a more realistic perspective anyway. The potential to build Northern Ireland into a real bridge between the UK and the EU could even appeal to liberal Unionism. After all, that bridge function may presuppose that Northern Ireland remains a part of the UK for the time being, while also enhancing its proximity to the European Union. The geographical reality of a coastline dividing the Atlantic islands may, however, be underlined by a slow diversification within the UK itself.

Endnotes

- ¹ Protocol on Ireland/Northern Ireland to the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ EU L 29 of 31 January 2020, pp.101-145, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12020W/TXT&qid=1630329008861&from=EN>.
- ² For example: Katy Hayward and Mary C. Murphy, 'The EU's influence on the peace process and agreement in Northern Ireland in light of Brexit' (2018); Cathy Gormley-Heenan and Arthur Aughey, 'Northern Ireland and Brexit: Three Effects on the Border in the Mind' (2017); Mary C. Murphy, *Europe and Northern Ireland's Future* (2018); Mary C. Murphy and Jonathan Evershed, 'Constesting sovereignty and borders: Northern Ireland, devolution and the Union' (2021); Paul Teague, 'Brexit, the Belfast Agreement and Northern Ireland: Imperilling a Fragile Political Bargain' (2019).
- ³ The legal commentary includes specific chapters on Northern Ireland in a number of 'Brexit' related books, (e.g. Gordon Anthony, 'Britain Alone! A view from Northern Ireland' (2016); Graham Butler, 'Understanding the EU Customs Union, Free Movement of Goods, and Enforcement Mechanisms in the Protocol on Northern Ireland' (2021); Eileen Connolly and John Doyle, 'Brexit and the Northern Ireland Peace Process' (2021); Michael Dougan, 'The 'Brexit' Threat to the Northern Irish Border: Clarifying The Constitutional Framework' (2017); John Doyle and Eileen Connolly, 'Brexit and the Northern Ireland Question' (2017)), as well as two forthcoming collections specifically on the Protocol by legal scholars Federico Fabbrini, *The Law and Politics of Brexit - Volume 4: The Protocol Ireland/Northern Ireland* (2022); Chris McCrudden, *The Law and Practice of the Ireland/Northern Ireland Protocol* (2022). See also Colin Murray and Clare Rice, 'Into the Unknown. Implementing the Protocol on Irlenad Northern Ireland' (2020).
- ⁴ The idea that transactions would further integration was first developed by Karl Deutsch (Karl W. Deutsch, 'The Growth of Nations: Some Recurrent Patterns of Political and Social Integration' (1953); Deutsch, et al., *Political Community and the North Atlantic Area. International Organization in the Light of Historical Experience*

- (1957)). Although his transactionalism is often referred to as outdated, it has recently been invoked as part of the basis of an empirical enquiry in European identity (Theresa Kuhn, *Experiencing European Identity. Transnational Lives and European Identity* (2015); Kuhn, 'Grand theories of European integration revisited: does identity politics shape the course of European integration?' (2019)) and Europeanness (Sabine Israel, et al., 'Connected Europe(ans): does economic integration foster social interaction?' (2016)). In combination with social field theories building on Bourdieu it serves as a theoretical base for exploring the transnationalisation of social fields in Europe (Martin Heidenreich, 'The Europeanisation of social fields and the social space. A theoretical framework' (2019)).
- ⁵ David Phinnemore and Katy Hayward, *UK Withdrawal ('Brexit') and the Good Friday Agreement* (2017).
 - ⁶ While these are explored in any good EU law textbook, the succinct summary of the ECJ's Grand Chamber in its 2018 Wightman ruling is still instructive: "45 According to settled case-law of the Court, (...) EU law is characterised by the fact that it stems from an independent source of law, namely the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions, which are applicable to their nationals and to the Member States themselves. Those characteristics have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the European Union and its Member States reciprocally as well as binding its Member States to each other" (C-621/18, Wightman et al, 10 December 2018, ECLI:EU:C:2018:999).
 - ⁷ The most prominent one is the German constitutional court, with its successive rulings on aspects of Economic and Monetary Union, lately in relation to the Public Sector Purchase Programme (BVerfG 2 BvR 859/90 et al, on which see Kelemen, et al (2020); and Schiek (2020)), preceded by the Danish Supreme Court in its Ajos ruling in relation to age discrimination (Case 15/2014 UfR 2017.824H, on which see Rask Madsen, et al (2017)), and succeeded by the Polish Constitutional Court in relation to the Polish judicial system (P 7/20 | 14 VII 2021, ruling of 14 July 2021).
 - ⁸ This even held for the disputed austerity measures; see Peter Charleton and Angelina Cox, 'Accepting the judgements of the Court of Justice of the EU as authoritative: the Supreme Court of Ireland, the European Stability Mechanism and the importance of Legal Certainty' (2016).
 - ⁹ The UK Supreme Court ruling in Miller is a model case demonstrating how the Supreme Court follows the doctrine of supremacy and direct effect of EU law. *R. (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61.
 - ¹⁰ See on this Kenneth Armstrong, '(Br)Exit from the European Union - Control, Autonomy and the Evolution of EU Law' (2021), text between footnotes 8 and 16.
 - ¹¹ In more detail, see Dagmar Schiek, 'Brexit on the island of Ireland: beyond unique circumstances' (2018), pp.372-373; see also Butler (2021), and Tobias Lock, 'A Common Travel Area? Brexit and the New (Northern) Irish' (2022).
 - ¹² Registered with the United Nations as 2114UNTS 473 as "Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland with annexes". The main annex consists of the Multi Party Agreement, which is the basis on which this agreement is also classed as an

international agreement. The text of both can be retrieved from a neutral source, the UN peacemaker data base:

https://peacemaker.un.org/sites/peacemaker.un.org/files/IE%20GB_980410_Northern%20Ireland%20Agreement.pdf.

- ¹³ Undisputedly, EU law does not underpin the chapters on decommissioning arms, security, policing and justice, which shall be neglected here.
- ¹⁴ For more detail and references to the political science literature supporting and criticising consociationalism, see Murphy and Evershed (2021), pp.5-7.
- ¹⁵ See, for example, John McGarry and Brendan O’Leary, *Explaining Northern Ireland* (1996), pp.302-6; and Elizabeth Meehan, ‘Britain’s Irish Question: Britain’s European Question?’ *British-Irish relations in the context of European Union and The Belfast Agreement*’ (2000).
- ¹⁶ Even for Strand One, paragraph 31 demands that the Westminster government and the Northern Ireland assembly effectively coordinate policy input in EU matters, and for Strands Two and Three this is repeated; see Schiek (2018), p.375.
- ¹⁷ This reference strikes any observer from beyond Northern Ireland as ideological: both Unionists and “Nationalists” have nationalist agendas, though the Unionists allege to strive for a multinational union, while it remains unclear whether they want the Irish to be part of this.
- ¹⁸ On the subsequent changes in the majority and the potential development of a neutral category see John Coakely, ‘Is a middle force emerging in Northern Ireland?’ (2021).
- ¹⁹ Chapter 5, Strand Three, No 5 of the Good Friday Agreement.
- ²⁰ John Bradley, ‘The The Irish–Northern Irish Economic Relationship: The Belfast Agreement, UK Devolution and the EU’ (2018).
- ²¹ Agriculture (animal and plant health), Education (teacher qualification and exchanges), Transport (strategic planning), Environment, Waterways, social security/social welfare, tourism, relevant EU Programmes (covered by a body), inland fisheries, Aquaculture and marine matters, health (accident and emergency services), urban and rural development.
- ²² In the fields of waterways, food safety (partially overlapping with animal and plant health), trade and business, special EU programmes (congruent with the above), languages, fisheries and lighthouses (see also above).
- ²³ See European Commission, ‘Boosting growth and cohesion in EU border regions’ (2017).
- ²⁴ There is a dispute on whether that definition also determines the right to decide the future fate of Northern Ireland in terms of it becoming mainly Irish or remaining mainly British, which is beyond the scope of this paper. It is partially documented in Volume 32, issue 2, of *Irish Studies in International Law* (2021), a publication by the Royal Irish Academy.
- ²⁵ See for a more detailed account Schiek (2018), pp.376-379, and the Joint Committee of the Irish Human Rights and Equality Commission and the Northern Irish Human Rights Commission, ‘Policy Statement on the United Kingdom withdrawal from the European Union’ (2018).

- ²⁶ These are what are now the Irish Human Rights and Equality Commission (in the Republic of Ireland), the Northern Ireland Human Rights Commission, and the Equality Commission for Northern Ireland.
- ²⁷ Mary E. Daly, 'Brexit and the Irish Border: Historical Context' (2017); Gormley-Heenan and Aughey (2017); Adrian Guelke, 'Britain After Brexit - The Risk to Northern Ireland' (2017); Cathal McCall, 'Brexit, Bordering and Bodies on the Island of Ireland' (2018).
- ²⁸ Katy Hayward, 'Defusing the Conflict in Northern Ireland. Pathways of Influence for the European Union' (2004). In extremis, the EU is defined as a border management regime; see McCall (2018).
- ²⁹ Victoria Hewson and Austen Morgan, 'A Hard Question? Managing the Irish Border Through Brexit' (2017), p.51.
- ³⁰ Lars Karlsson, 'Smart Border 2.0. Avoiding a hard border on the island of Ireland for Customs control and the free movement of persons' (2017).
- ³¹ See Northern Ireland Statistics and Research Agency, 'Overview of Northern Ireland Trade' (2020), and House of Lords European Union Committee, 'The Protocol on Ireland/Northern Ireland' (2020), pp.24-25.
- ³² For a summary see Butler (2021).
- ³³ Stephen Weatherill, 'The Protocol on Ireland/Northern Ireland: protecting the EU's internal market at the expense of the UK's' (2020), pp.229-231.
- ³⁴ See for a more extensive elaboration Weatherill (2020), p.227, who does not address the lack of full inclusion of Northern Ireland in the free movement of goods provisions.
- ³⁵ This restrictive position relies on two judgments by the Court of Justice, which initially confirmed the UK position that Irish citizens in the UK could not rely on rights derived from EU free movement rights against the UK (Case C-434/09 McCarthy v Secretary of State for the Home Department), and later modified this position only in relation to dual citizens who had moved to the UK before becoming naturalised (C-165/16 Lounes v Secretary of State for the Home Department (2017) EU:C:2017/862).
- ³⁶ For supporting evidence on this see Murphy and Evershed (2021), pp.2-3), and Coakely (2021), pp.41-45.
- ³⁷ See on this Dagmar Schiek and Aislinn Fanning, 'Equality' (2022).
- ³⁸ See on this also Lock (2022).
- ³⁹ Trade and Cooperation Agreement (UK-EU) (adopted 30 December 2020, entered into force 1 May 2021) OJ EU L149, 30.4.2021.
- ⁴⁰ Catherine Barnard and Emiliya Leinarte, 'Mobility of Persons in the New UK-EU Relationship' (2021).

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Tel: +353 (0)1 700 5635

EMAIL ADDRESSES

a.soares@qub.ac.uk
a.okane@qub.ac.uk
tricia.kelly@qub.ac.uk
m.mcclatchey@qub.ac.uk

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