



The Centre for
Cross Border Studies

Brexit and the UK-Ireland Border

Briefing Paper series

Briefing Paper 2: Citizens' Rights and the UK-Ireland Border

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Executive Summary

- The UK-Ireland border is not simply a physical line that separates Northern Ireland from the Republic of Ireland. Instead, the border exists in the way the law, policies and associated practices are applied within and across the different parts of these islands.
- Rather than through physical checks at the geographical borderline, control of the border after Brexit will be exercised through legislative changes and administrative processes that regulate citizenship- and socio-economic rights and entitlements.
- Border control can be achieved through ‘points of contact’ – your landlord, bank or GP can be required to check on your immigration status. This can have negative implications for the loss of individual privacy and for social cohesion.
- All citizens will be affected by such changes, regardless of their nationality.
- The continued openness of the UK-Ireland border to the movement of different categories of people after Brexit cannot be deduced or guaranteed on the basis of the progress achieved through the EU-UK Brexit negotiations so far.
- Leaving the European single market and customs union means that checks on all kinds of movement through the UK-Ireland border will be necessary.
- Numerous categories of EU citizens (e.g. depending on time of accession or circumstances of previous residence) already exist in Northern Ireland and they will enjoy different rights to movement after Brexit. Such differentiation of rights within Northern Ireland will be damaging to social cohesion.
- Equally damaging is the potential for creating a differentiation of citizens’ rights and entitlements between Irish and British citizens within Northern Ireland. There has been no discussion to date in relation to the rights of Northern Ireland-born citizens who choose not to exercise their right to an Irish passport.
- The Charter of Fundamental Rights and the Human Rights Act of 1998 protect a number of citizens’ and human rights in Northern Ireland, while the European Convention on Human Rights is embedded in the Good Friday Agreement to safeguard the work of the democratic institutions in Northern Ireland. Plans to withdraw from or repeal any or all of these protections undermines the equivalence of a rights regime north and south of the UK-Ireland border and the ability for structured North-South co-operation.

1. Introduction

Citizens' rights, and the mechanisms in place to protect them, are part of the legal regime of a border and can tell us a lot about how it regulates the movement of people. Leaving the European Union means shedding off its legal regime, including the legal base for some citizens' rights¹ and, therefore, opens the question of the effects of such change on the UK-Ireland border.

In this paper² we examine the relationship between citizens' rights in Northern Ireland after Brexit and the UK-Ireland border. To understand this relationship it is important to remember, as we argued in Briefing Paper 1, that:

- Borders are not simply physical lines that separate states. Instead, borders exist in the way different legislation, policies and associated practices (e.g. with respect to citizens' rights, immigration, or trade) are applied within and between states.
- Border regimes (i.e. systems of legal rules, policies, and their associated practices) regulate not just movement (of people or of goods and services) across borders but extend to every aspect of social and commercial life.
- Changes in the rules and practices for regulating one type of movement (e.g. of people) affect a border's openness to other types of movement (e.g. of goods);
- The lack of visible physical infrastructure at the post-Brexit UK-Ireland border would not in itself mean that the border will remain 'open' or 'frictionless'.

Below we first explain the significance of changing citizens' rights for the future of the UK-Ireland border. We then outline current areas of agreement between the UK and the EU in negotiating the future of reciprocal EU-UK citizens' rights and protections after Brexit. We further discuss how Brexit may affect citizens' rights associated with the Belfast/Good Friday Agreement and the Common Travel Area, before summarising the main implications for the UK-Ireland border.

¹ See discussion in McCrudden, C. (2017) 'The Good Friday Agreement, Brexit, and Rights'. A Royal Irish Academy – British Academy Brexit Briefing, p. 11. Available at:

https://www.britac.ac.uk/sites/default/files/TheGoodFridayAgreementBrexitandRights_0.pdf. The author notes that although the UK government has committed to translating EU law into domestic law through the EU (Withdrawal) Bill (currently being debated in Parliament), future administrations will be 'under no obligation to retain EU standards' so that 'provisions for and protections of citizens' and human rights in the UK which are currently derived from, or supported by, EU law can be changed over time'.

² Prepared for CCBS by Dr Milena Komarova, Research Officer.

2. How are citizens' rights important for the future of the border?

It is essential to appreciate that while the effects of Brexit on the border will be more obviously experienced by people who move across it regularly (for instance frontier workers), or who live in a border area, *exiting the EU will affect everyone resident in Northern Ireland*. Because citizens' rights are enacted on a daily basis at every point of contact with public institutions, services or private businesses, 'the border' comes into existence for citizens on every occasion when their eligibility to avail of these services is judged.

An example of how the border works specifically to control movement and immigration is, by the UK government's own admission,³ through controlling access to the labour market and social security, rather than simply controlling 'entry at the UK's physical border'. It has been argued in this respect that the current immigration law in the UK⁴ 'already extends immigration responsibilities amongst non-state actors' by requiring landlords, driving license agencies, banks, employers and hospitals to check on a person's immigration status, or risk being penalised for failure to do so.⁵

This is why 'changes to the border do not necessarily mean the installation of guard towers and razor wire'.⁶ Instead, changes to the border are effected through changing the law and the administrative processes that regulate citizenship- and socio-economic rights and entitlements, as well as the mechanisms for their protection. Border control can be achieved through 'points of contact' – your landlord, bank or GP can be required to check on your immigration status.

The implementation of these sorts of checks will undoubtedly have worrying implications for the loss of individual privacy, and for social cohesion.

Furthermore, specific to Northern Ireland are a number of rights, presently outlined in the Belfast/Good Friday Agreement, that have their legal basis in EU law and which will be affected by the UK leaving the EU. Also with direct implications for the UK- Ireland border will

³ HM Government (2017) 'Position paper on Northern Ireland and Ireland', p. 11, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/638135/6.3703_DEXEU_Northern_Ireland_and_Ireland_INTERACTIVE.pdf

⁴ E.g. the 2016 Immigration Act which builds on the 2014 Immigration Act.

⁵ O'Hagan, F. (2017), BrexitLawNI blog, <https://brexitlawni.org/blog/brexit-immigration-control-northern-ireland/>

⁶ de Mars, S., Murray, C., O'Donoghue, A., and Warwick, B. (2017) 'Policy paper. The Common Travel area: Prospects After Brexit', p. 2. Durham University, <http://dro.dur.ac.uk/20869/1/20869.pdf?DDC71+DDD19+DDC108+dla0ao>

be any changes to UK and Irish citizens' rights associated with the loose body of UK-Ireland agreements that constitutes the Common Travel Area. We discuss each of these questions in separate sub-sections below.

3. Progress on agreeing reciprocal EU-UK citizens' rights and protections

One of the three key issues identified by the EU-27 on which 'sufficient progress' was needed in order to proceed to the second phase of Brexit negotiations⁷ was centered on the rights of EU and UK citizens residing in each other's territories.⁸ Broadly speaking, the main rights of EU citizens across the Union are set out in Articles 20-24 of the *Treaty on the Functioning of the European Union* (TFEU) and include, among others, the right to move, work and reside freely within the territory of the member states.⁹ EU law also provides specific political (e.g. voting) rights and rights relating to trade, professional activities and social security within the EU.¹⁰

Furthermore, the TFEU¹¹ provides for two main legal instruments that guarantee the protection of human rights and of fundamental freedoms within the Union: *The Charter of Fundamental Rights of the European Union* (the Charter) and the *European Convention for the Protection of Human Rights* (the Convention).¹² The continued application in the UK of both the Charter and the Convention after Brexit is under question: While there are no immediate plans to withdraw from the Convention, notably the 2017 Tory Manifesto only commits to the UK remaining signatories to the Convention 'for the duration of the next parliament'.¹³ At the same time, the UK Government does not plan to convert the Charter into UK law after Brexit.

⁷ Expected to address the future relationship between the EU and the UK, including trading relationships.

⁸ The other two issues being the so called 'divorce settlement' bill, and to address the problems that arise for the Republic of Ireland/Northern Ireland from Brexit.

⁹ For a fuller discussion of mobility rights within the EU see our previous work, including CCBS (2016) EU Referendum Briefing Papers Briefing Paper 4 'The UK Referendum on Membership of the EU: Citizen Mobility', <http://crossborder.ie/site2015/wp-content/uploads/2016/06/CCBS-and-Cooperation-Ireland-EU-Referendum-Briefing-Paper-4.pdf>; See also CCBS (2016) 'The Referendum on UK Membership of the EU: Freedom of Movement of People' Border People Briefing, <http://borderpeople.info/wp-content/uploads/2016/06/Briefing-5-revision15June2016.pdf>; For a discussion of how Brexit may affect the rights of UK and Irish citizens who live in each other's countries see CCBS (2016) 'Brexit and UK-Irish Relations' Briefing Paper, <http://crossborder.ie/site2015/wp-content/uploads/2016/10/Brexit-and-UK-Irish-Relations-v2.pdf>

¹⁰ As discussed in greater detail by Gallagher, C. and O'Byrne, K. (2017) 'Report on How Designated Special Status for Northern Ireland within the EU Can be delivered', p. 17, http://www.guengl.eu/uploads/publications-documents/NI_Special_status_report_161017_FINAL_crops.pdf. These rights include the right for goods to be sold or purchased anywhere in the Union without import duties; for workers to seek employment anywhere in the Union; and for citizens to be treated by the administrative or judicial authorities of a country of the Union in the same way as the nationals of that country.

¹¹ TFEU, consolidated version of 2012, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT>

¹² Rights are also derived from 'a variety of [other] international and European sources', including 'the European Treaties and the case-law of the Court of Justice' (Gallagher and O'Byrne, 2017: 20).

¹³ The Conservative and Unionist Party 2017 Manifesto 'Forward, Together. Our Plan for a Stronger Britain and a Prosperous Future', p. 39, <https://www.conservatives.com/manifesto>

Two implications of a possible UK withdrawal from the European Convention on Human Rights after the lifetime of the current Parliament are of particular concern: First, the Convention protects the human rights of people in countries that belong to the Council of Europe. Withdrawal from it would put a question mark over UK's membership of the Council of Europe. Second, the Convention is also embedded in Strand One of the Belfast/Good Friday Agreement. It safeguards the protection and successful participation 'of all sections of the community'¹⁴ in the operation of the democratic institutions in the region. Withdrawal from the Convention would, therefore, contravene the Good Friday Agreement.

The Charter¹⁵ only applies when a member state is implementing EU law but the rights it protects extend, in many cases, beyond those protected by the Convention.¹⁶

Many of the rights contained in the Charter of Fundamental Rights of the EU will remain protected within domestic UK law, including through the Human Rights Act of 1998 (HRA 1998). However, the Conservative Party promises to reconsider the role of the HRA 1998 after Brexit¹⁷. In addition, rights specific to the Charter are not protected in the UK domestic law at present.¹⁸ It has been suggested therefore, that in the absence of the Charter, protection of such rights will become more fragmented.¹⁹ Such weakening of rights protections will undermine both the equivalence of rights regimes north and south of the UK-Ireland border, and the ability for structured North-South co-operation – both of which are required by the Good Friday Agreement.

Furthermore, the UK and the EU negotiating positions have differed on the issue of the future role of the European Court of Justice (ECJ) in the UK post-Brexit. While prior to the negotiation break-through of 8 December, 2017 (discussed below) the UK Government had repeatedly stated that the ECJ will no longer have authority in the UK after Brexit, the EU negotiators had

¹⁴ 'The Agreement'. Strand One: Democratic Institutions in Northern Ireland, p. 7,

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf

¹⁵ Containing 50 rights in six chapters, including socio-economic, civil and political rights.

¹⁶ See discussion in Gallagher and O'Byrne (2017), p. 21.

¹⁷ 'We will not repeal or replace the Human Rights Act while the process of Brexit is underway but we will consider our human rights legal framework when the process of leaving the EU concludes' (Conservative and Unionist Party Manifesto, 2017), p. 39. See footnote 13 for a full reference.

¹⁸ As explained by Gallagher and O'Byrne (2017), these are rights associated with the plurality of the media, freedom of the arts and sciences, choosing occupation and engaging in work, conducting a business, and environmental protection.

¹⁹ See Gallagher and O'Byrne (2017) and McCrudden (2017), footnotes 1 and 10.

maintained the position that the ECJ should continue to have a role in the enforcement of EU citizens' rights in the UK, and in future dispute resolution.²⁰

3.1. Areas of progress at the end of Phase I of Brexit negotiations

As a result of a breakthrough in the EU-UK Brexit negotiations, announced on 8 Dec, 2017, progress on the question of reciprocal EU-UK citizens' rights discussed between the EU and UK Brexit negotiators has now been recognised. Therefore, the negotiations between the EU and the UK will proceed to their second phase, expected to commence in March 2018.

The agreement of 8 December, 2017 is not a guarantee of the successful negotiation in the future of a Withdrawal Agreement between the EU27 and the UK, nor an assurance of its content. Rather, it is an outline of general principles that can *at best serve as a framework for the direction of future negotiations*.

The continued *openness of the UK-Ireland border* to the movement of different categories of people after Brexit is *not guaranteed* on the basis of progress achieved through the EU-UK Brexit negotiations so far.

In this section of the paper we list and comment upon the agreed principles for citizens' rights and their protection, as outlined in a Joint Report of the EU and UK negotiators.²¹

3.1.1. Who will be subject to the future withdrawal agreement?

Fact Box 1

Falling within the scope of a future withdrawal agreement will be:

- 'Union citizens who in accordance with Union law legally reside in the UK' (para 10);
- 'UK nationals who in accordance with Union law legally reside in an EU27 Member State by the specified date' (para 10);
- Their 'family members as defined by Directive 2004/38/EC who are legally resident in the host State by the specified date' (para 10);
- 'Family members who were not residing in the host State on the specified date' but who will be 'entitled to join a Union citizen or UK national right holder after the specified date for the life time of the right holder, on the same conditions as under current Union law' (para 12);

²⁰The agreement of December 8th 2017 establishes that the rights of EU citizens living in the UK prior to the date of withdrawal will '[follow] on from those established in Union law during the UK's membership of the European Union' and since 'the CJEU is the ultimate arbiter of the interpretation of Union law', '**UK courts shall ...have due regard to relevant decisions of the CJEU after the specified date**'. While the role of CJEU will thus be only advisory, a mechanism will be established to enable UK courts or tribunals to ask the CJEU questions of interpretation of citizens' rights '**which should be available for litigation brought within 8 years from the date of application of the citizens' rights Part**' (para 38, emphasis ours).

²¹ TF50 (2017) 19 – Commission to EU 27, 'Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union', https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf

- '[P]artners in a durable relationship' with a Union citizen/UK national whose entry and residence will be facilitated by the UK and EU27 member states' (para 13);
- 'Those who on the specified date are working as frontier workers, as defined under Union law' (para 15).

A future Withdrawal Agreement between the UK and the EU27 will guarantee *only* the rights of EU/UK citizens already legally residing in the UK and in EU member states 'by the specified date'. Certain rights for family reunification may still apply.

The rights of EU citizens travelling to/settling in the UK and of UK citizens in the EU after 'the specified date' will not be the subject of a Withdrawal Agreement but of respective national law.

How UK national law will change in the future, and with what effects on the control of movement and immigration, is as yet unclear. However, given the wide-spread anticipation of an imminent clampdown on immigration in the UK, the movement of other categories of people (e.g. third country nationals) and of EU citizens to the UK after the date of withdrawal, will likely become the subject of stricter controls.

Border controls may be exercised not simply through more general legal instruments (such as regulations for access to the labour market and social security) and 'points of contact' (landlords, employers, hospitals, banks) but through spot checks on major routes (such as current checks on the Belfast to Dublin bus-route). After Brexit such spot checks may increasingly rely on 'racial profiling', with obvious potential for discrimination and increased social and political tensions.

3.1.2. Obtaining a residence status

Fact Box 2

- It has been agreed that 'The UK and EU27 Member States can require persons concerned to apply to obtain a status conferring the rights of residence as provided for by the Withdrawal Agreement and be issued with a residence document attesting to the existence of that right' (para 16).
- The sides also commit that 'Administrative procedures for applications for status will be transparent, smooth and streamlined', and that the principles of 'proportionality, flexibility and discretion' will be applied to these (paras 16 and 17).
- Furthermore, 'adequate time of at least two years [after the specified date] will be allowed to persons within the scope of the Withdrawal Agreement to submit their

applications. During this time period, they will enjoy the rights conferred by the Withdrawal Agreement. Residence documents under the Withdrawal Agreement will be issued free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents' (para 17e).

- '[T]hose already holding a permanent residence document issued under Union law at the specified date will have that document converted into the new document free of charge, subject only to verification of identity, a criminality and security check and confirmation of ongoing residence' (para 23).

An EU citizen legally resident in the UK has not previously been obliged to apply for a residence card,²² and thus most such citizens will not have been issued with this document. In practice, a huge majority of the nearly-3 million EU citizens in the UK will therefore need to apply for a certificate of residence in the future. They will also become subject to verification of identity, a criminality and security check, and confirmation of ongoing residence.

A real mish-mash of categories of EU citizens already exists and it is not clear what differences in outcome will result from the application process for confirmation of residence status. For instance, will EU citizens who already hold permanent residence documents from before their countries acceded to the EU (therefore not 'under Union law') need to apply for residence status anew?

The resulting differentiation of status and rights between different categories of EU citizens (including of Irish citizens) will inevitably be damaging to social cohesion within Northern Ireland. It may also result in inequalities of rights and entitlements on the different sides of the UK-Ireland border.

The proposals listed in the Joint Report of 8 December, 2017 are not to be confused with the existing UK proposals for a 'settled status'. The UK Government has proposed that the criteria for granting a resident ('settled') status to EU citizens arriving in the UK after the specified date remain 'as per the conditions set out in Article 16 of Directive 2004/38 (5 years of continuous and lawful residence as a worker, self-employed person, student, self-sufficient person, or family member thereof)'.²³

It is unclear how precisely some aspects of such a 'settled status' and the rights therein will differ from previous rights for EU citizens in the UK applying under the rules of 'permanent

²² Unless when applying for citizenship, residence cards have not been required as proof of rights and entitlements.

²³ HM Government (2017) 'Technical Note: Citizens' Rights – Administrative Procedures in the UK', <https://www.gov.uk/government/publications/citizens-rights-administrative-procedures-in-the-uk/technical-note-citizens-rights-administrative-procedures-in-the-uk>

residence'. Advocacy groups for EU citizens in the UK²⁴ have been critical of this 'settled status' proposal and have suggested that it: does not adequately deal with social security co-ordination; means that EU citizens in the UK would automatically become illegal unless they apply for grant of status; and gives an excuse for conducting systematic criminality checks.

3.1.3. Social security and healthcare entitlements

Fact Box 3

The joint report of 8 December 2017 also states that 'Social security coordination rules set out in Regulations (EC) No 883/2004 and (EC) No 987/2009 will apply'. These will cover:

- 'Union citizens who on the specified date are or have been subject to UK legislation';
- 'UK nationals who are or have been subject to the legislation of an EU27 Member State'; and
- 'EU27 and UK nationals within the scope of the Withdrawal Agreement by virtue of residence' (para 28);
- 'Those rules will also apply, for the purposes of aggregation of periods of social security insurance, to Union and UK citizens having worked or resided in the UK or in an EU27 Member State in the past' (para 28);
- Further, 'Rules for healthcare, including the European Health Insurance Card (EHIC) scheme, will follow Regulation (EC) No 883/2004. Persons whose competent state is the UK and are in the EU27 on the specified date (and vice versa) – whether on a temporary stay or resident – continue to be eligible for healthcare reimbursement, including under the EHIC scheme, as long as that stay, residence or treatment continues' (para 29).

In practice, specific details of any future arrangements for social security co-ordination have not yet been agreed and will need to be made depending on the category of citizens (e.g. cross-border workers, or migrant workers from different EU countries). In the case of cross-border workers, for instance, it is suggested that social security contributions from previous employments (e.g. up to the specified date) will not be affected by Brexit. However, it is unclear how social security contributions associated with future employments may be affected.

Additionally, a number of practical questions must be addressed with respect to the future rules for healthcare (as discussed in para 29 of the Joint report). For instance, what authorities will EU/UK citizens need to apply for a European Health Insurance Card to?; Which country will be making the associated health insurance contributions?; and What kind of contact (if at all) will be needed between the respective payee and individual beneficiaries?

²⁴ The 3 Million (2017), 'Registered residence Rights not 'Settled Status' for EU Citizens in the UK', https://docs.wixstatic.com/ugd/0d3854_381d010cc48f4447bdeda7ae680da3a8.pdf?index=true

4. Rights, the Belfast/Good Friday Agreement and the border

The Good Friday Agreement can be understood as one of a number of border regimes operating on the island of Ireland. This is so for a number of reasons, not least since, through all of its strands, the Agreement defines the constitutional status of Northern Ireland within the UK and with respect to the Republic of Ireland, with whom it shares an international border.

Rights and their protections are principal elements in each of the Agreement's three strands²⁵ and are either directly or indirectly underpinned by EU law. Having to disassociate parts of the Agreement from EU law as a result of Brexit will have consequences for such rights and their protections²⁶ and, therefore – for the future of the UK-Ireland border.

4.1. What rights may be affected?

- A critical aspect of the Agreement is its recognition of 'the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both' and 'their right to hold both British and Irish citizenship' (GFA 1998, 4). Both of these rights, as we have previously discussed, are essential to the Agreement.²⁷ Brexit does not affect the principal basis of these rights. Indeed, all sides to the EU-UK withdrawal negotiations have purposely committed to safeguarding the GFA 'in all its parts'.²⁸ However, it is important to note that the specific content and scope of citizens' rights for British, Irish and other EU citizens, particularly where based on EU legislation, will probably change after Brexit. This will have practical consequences for the different types of entitlements and socio-economic rights of each of these categories of citizens in Northern Ireland.
- The GFA also contains provisions for achieving an equivalence of human rights between the Republic of Ireland and the UK. Maintaining such an equivalence after Brexit, however, may become more problematic; subject to divergence of regulations and arrangements for rights protections in each jurisdiction.
- In addition, a wide range of rights are afforded to people in Northern Ireland directly under EU law. These include the four freedoms (of movement, goods, capital, services, and people) associated with the European Single Market, equality and anti-discrimination rights.²⁹ Given the UK's planned withdrawal from the European single market and the European legal regime as a whole, those rights will be directly affected.

²⁵ Strand One of which enshrines the devolution arrangements for Northern Ireland within the UK, while Strands Two and Three legislate for north-south and east-west cross-border relationships respectively.

²⁶ More detailed contributions on this subject include: Human Rights Consortium (2018) 'Rights at Risk. Brexit, Human Rights and Northern Ireland', <http://www.humanrightsconsortium.org/rights-risk-brexit-process/>; See also sources listed in footnotes 1, 9 and 10.

²⁷ See for instance CCBS (2017) Response to HM Government 'Position paper on Northern Ireland and Ireland', <http://crossborder.ie/?s=northern+ireland+and+ireland+position+paper>

²⁸ European Council (2017) 'European Council (Art. 50) guidelines for Brexit negotiations', p. 2, <http://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexit-guidelines/pdf>; HM Government (2017) 'Northern Ireland and Ireland Position Paper', p. 1, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/638135/6.3703_DEXEU_Northern_Ireland_and_Ireland_INTERACTIVE.pdf

²⁹ As discussed by McCrudden (2017), see footnote 1.

4.2. What rights protections may be affected?

- ‘Individual rights in Northern Ireland are currently protected under the GFA, the Human Rights Act 1998, and the Charter of Fundamental Rights of the EU’.³⁰ However, as already mentioned, there are plans that the HRA 1998 is repealed and replaced post-Brexit, while the Charter will not be converted into UK law.
- Even though the GFA envisages that the role of the Charter in protecting citizens’ rights in Northern Ireland should be supplemented by a Bill of Rights for Northern Ireland, such a Bill is not yet in existence.

4.3. Implications for the border

The rights most likely to be affected are those based in EU law and directly associated with EU membership, including some labour and employment rights, and the right to an effective legal remedy. Changing regulations for access to the labour market and associated entitlements to social security and health care can be expected to widen the gap between the exercise and protection of such rights North and South of the UK-Ireland border and among different categories of citizens within Northern Ireland.

While the UK government has recognised that ‘[a]s long as Ireland remains a member of the EU, Irish citizenship also confers EU citizenship’,³¹ there has been no discussion in relation to the rights of Northern Ireland citizens who choose not to exercise their right to an Irish passport.³² The potential exists for creating a differentiation of citizens’ rights and entitlements among the population of Northern Ireland after Brexit; a differentiation that would align with existing divisions along ethno-political lines. As previously noted, this has serious potential for further damaging already fragile social cohesion in Northern Ireland.

The changing arrangements for rights protections are equally a source of unease. Our misgivings about an eventual UK withdrawal from the Charter of Fundamental Rights and the Convention on Human Rights are expressed in Section 3 above. The Good Friday Agreement requires an equivalence of human and equality rights and protections between Northern Ireland and the Republic

³⁰ Gallagher and O’Byrne (2017), p. 5.

³¹ HM Government (2017) ‘Northern Ireland and Ireland Position Paper’, p. 5

³² As pointed out by CCBS in their public response to the HM Government ‘Northern Ireland and Ireland’ Position Paper (full reference in footnote 27).

of Ireland. *Therefore, any stripping away of the legal mechanisms that ensure this equivalence contravenes the Good Friday Agreement.*³³

5. The Common Travel Area (CTA) and rights

As previously discussed,³⁴ together with the Belfast/Good Friday Agreement, the Common Travel Area (originally created in 1922, with the establishment of the Irish Free State) is one of a number of currently operating border regimes that shapes the governance, functions and effects of the UK-Irish border.

The CTA is not a single formal agreement between the Republic of Ireland and the UK. Instead, it is both a set of practices that reduce the need for passport controls for British and Irish citizens when travelling between the UK and Ireland, and a set of policy and legal provisions which allow British and Irish citizens to ‘reside and work in either jurisdiction, without the need for special permission’.³⁵

The CTA is not simply a legal travel regime but a regime of citizens’ rights which include access to public services, to healthcare and social benefits, and some voting rights.³⁶ Crucially, of course, it does not apply to citizens who are neither Irish, nor British, nor does it apply to any other type of movement, beyond that of people.

As a bilateral UK-Ireland arrangement the CTA is recognised in Article 2 of Protocol 20 to the Lisbon Treaty³⁷ which confirms that Ireland and the UK “*may continue to make arrangements between themselves relating to the movement of persons between their territories*”.³⁸ In fact, the UK Government has already stated that the negotiations progress of 8 December 2017 ‘protects the rights enjoyed by British and Irish citizens under the CTA after the UK leaves the EU’:

This means that no UK or Irish nationals will be required to apply for settled status to protect their entitlements in Ireland and the UK respectively. The rights to work, study, access social security and public services will be

³³ As discussed by McCrudden (2017) and Gallagher and O’Byrne (2017).

³⁴ See briefing paper Number One in this series, <http://crossborder.ie/site2015/wp-content/uploads/2017/11/Brexit-and-the-Border-BP1-with-Exec-Summary.pdf>

³⁵ ROI Government (2017) ‘Common Travel Area. Information Note from Ireland to the Article 50 Working Group’, p. 2. Accessed September 8, 2017. <https://merriestreet.ie/Brexit/Info%20Note%20CTA%20FINAL.docx>

³⁶ As de Mars et al (2017) point out: ‘The few exceptions to this equal treatment are political in nature: though Irish citizens can run for the UK parliament, UK citizens cannot be elected to the Dáil, nor can they vote in constitutional referenda or Presidential elections’, p. 3. For a full reference see footnote 6.

³⁷ As listed in Official Journal of the European Union (26.10.2012), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012E%2FPRO%2F20>

³⁸ As quoted by Gallagher and O’Byrne (2017), p. 25.

preserved on a reciprocal basis for UK and Irish nationals. There will also be full protection and maintenance of the current arrangements for journeys between the UK and Ireland. This includes movement across the land border between Northern Ireland, protecting the uninhibited movement enjoyed today.³⁹

However, as de Mars et al (2017: 3) point out, the CTA is 'not an international treaty or concrete agreement' but a 'collection of legal provisions in each of the relevant jurisdictions'. Many of these provisions, particularly relating to the economic and social entitlements of Irish citizens in the United Kingdom at present arise from their position as EU citizens. There are two important consequences that:

First, the continuation of a special status for Irish citizens in the UK after Brexit will need to be *ensured* by revising current CTA legislation so as to base such a status unequivocally on national law, amending the Immigration Act of 1971, and introducing further legislation to protect the social and economic rights of Irish citizens.⁴⁰

Second, some changes to how the CTA regulates the status of British and Irish citizens in each-others' territories, or to the rights associated with this status, appear necessary. For instance, de Mars et al (2017: 3) point out that because at present the CTA treats British and Irish citizens as 'nationals' in each other's countries in most respects', without changes to the CTA after Brexit, 'UK citizens in Ireland will need to be granted rights equal to those of EU citizens'. Yet, no such precedent exists in the EU. Consequently, the UK might not wish to offer preferential treatment to Irish nationals without reciprocity on the part of the Republic of Ireland.

Additionally, though under the terms of the CTA the movement of UK/Irish citizens will continue in principle not to be subject to passport checks at the UK-Ireland border, any form of customs checks that will need to be introduced as a result of the changing arrangements for the travel of goods, will affect the travel of people. While the UK government have suggested they 'will seek to ensure that individuals travelling to the UK from the EU, and vice versa, can continue to travel with goods for personal use as freely and as smoothly as they do now',⁴¹ it is necessary to discuss how this can be achieved without introducing additional degrees of friction or visibility to the border.

³⁹ <https://www.gov.uk/government/publications/citizens-rights-uk-and-irish-nationals-in-the-common-travel-area/citizens-rights-uk-and-irish-nationals-in-the-common-travel-area> Published on Dec. 22nd, 2017.

⁴⁰ As pointed out by Ryan, B. (2016) 'Written evidence. Submission to House of Lords European Union Committee inquiry on *Brexit: UK-Irish Relations*', <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/european-union-committee/brexit-ukirish-relations/written/39488.html>

⁴¹ HM Government (2017) 'Northern Ireland and Ireland Position Paper', p. 8.

5.1. What effects on the border?

Many commentators have already pointed out that that there is no possibility for the border and the movement of goods, services and individuals across it to remain as they currently are.⁴² This is particularly the case since the UK government has stated its plans for leaving the European customs union and single market.

The UK government's decision to leave the European single market and customs union means that access to the common market for goods and for people will need to be regulated through border control and that some checks on the flow of people, goods and services between Northern Ireland and the Republic of Ireland will be necessary.

Remembering that border controls are not simply exercised at the physical borderline, this means that the UK-Ireland border will not remain as open or frictionless as it currently is. The extent and ways in which the UK-Ireland border will harden after Brexit will affect how the rights of British and Irish citizens under the CTA will be implemented and protected. Despite the UK Government's positive affirmation that these rights will be protected after the UK leaves the EU, the onus remains on the government to propose workable protection measures.

Last but not least, the CTA does not apply to non-Irish and non-British citizens, nor does it protect the movement of services. In this context, very little, if any clarity has been provided about the rights of other EU citizens (i.e. citizens of Member States other than Ireland and the UK) who reside in Northern Ireland. As CCBS have previously written,⁴³ it is of some concern that the UK Government hopes to achieve agreement on acceptance by the EU of this bilateral arrangement between the Irish and UK Governments without reference to other issues related to citizens' rights. Gallagher and O'Byrne (2017: 16) note in this respect that

Denying rights of free movement across the border to EU citizens of Member States other than Ireland would create a differentiation in the rights afforded to EU, UK and Irish citizens, as well as practical problems for other EU citizens living and working in border areas or otherwise travelling across the border.

⁴² See for instance Northern Ireland Affairs Committee Oral evidence: The land border between Northern Ireland and Ireland, HC 329, Wednesday 11 October 2017, witnesses K. Hayward, P. Mac Flynn, S. de Mars, <https://www.parliament.uk/business/committees/committees-a-z/commons-select/northern-ireland-affairs-committee/news-parliament-2017/land-border-ev1-17-19/>

⁴³ Response to HM Government Position Paper on Northern Ireland and Ireland (2017), (full reference in footnote 27).

6. Summary

- Citizens' rights, and the mechanisms in place to protect them, are part of the legal regime of a border and can tell us a lot about how it regulates the movement of people. Leaving the European Union means shedding off its legal regime, including the legal base for some citizens' rights and, therefore, opens the question of the effects of such change on the border.
- The UK government has repeatedly stated that it seeks to avoid a hard border. However, there continues to be no clarity about what this means or how it can be achieved in the face of the UK's exit from both the European single market and customs union. 'There could still be a range of onerous checks and restrictions put in place, that many would view as 'hard', or at least a significant upset to the established operation of the border' (de Mars et al, 2017: 7).
- The Joint Report of 8 December does not set out the terms of a future Agreement for the withdrawal of the UK from the European Union. Instead, it outlines some broad principles that each of the sides to the Brexit negotiations accepts thus far. This does not guarantee the exact shape and content of a future Withdrawal Agreement and a number of details with respect to citizens' rights are yet to be worked out.
- What the Joint Report does make clear is that a future Withdrawal Agreement will address *only* the rights of EU/UK citizens already legally residing in the UK and in EU-member states prior to the specified date. Any changes in the rights of EU citizens arriving in the UK after the specified date will be the subject of UK immigration law. It is anticipated that such citizens will become the subject of stricter border controls through restricting access to the UK labour market and social security provisions, among others.
- It has been agreed that The UK and EU27 Member States *can* 'require persons concerned to apply to obtain a status conferring the rights of residence as provided for by the Withdrawal Agreement' (Joint Report, para 16). Whether or not the states concerned will make this a requirement, and what system and exact criteria will be put in place for those making such an application is yet unclear but the UK Government have published proposals for extending to qualifying persons a UK 'settled status'.
- Rights under the Belfast/Good Friday Agreement which are either directly or indirectly underpinned by EU law, and the remedies and protections associated with them, will also be affected by Brexit. How such rights will be

affected will depend on the extent to which future arrangements (both a would-be international Withdrawal Agreement and the EU Withdrawal Bill) can guarantee and protect the continued implementation of the GFA in all its parts. Critical issues will include continued provisions for ensuring an equivalence of human rights between the Republic of Ireland and the UK, and equality and anti-discrimination rights and protections.

- Rights are also central to the continued implementation of the Common Travel Area since it is not just a travel regime but a regime of rights for British and Irish citizens residing in/travelling to each-other's countries that includes access to public services, to healthcare and social benefits, and some voting rights. Since at present some of these rights arise from the positions of UK and Ireland as EU member states, post-Brexit the CTA will need to undergo revisions ensuring the continued protection of such citizens' rights under UK national legislation. Such revisions will need to take into account issues around reciprocity and divergence of rights arising from the UK's exit from the EU.
- Because the UK plans to leave the European single market and customs union, some forms of control on the movement of goods, services and individuals across the UK-Ireland border will be required. Therefore, how protecting the rights of British and Irish citizens under the CTA will be implemented in practice largely depends on the extent and ways in which the UK-Ireland border will harden after Brexit. It remains for the UK Government to propose workable protection measures for the rights that British and Irish citizens currently enjoy under the CTA.