

## A Hard Question? Managing the Irish Border Through Brexit

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The impact on the Irish border of the United Kingdom leaving the European Union has been widely discussed and debated. This article reviews the legal frameworks applicable to the movement of goods and people around and between the island of Ireland and the United Kingdom, and places them in political and economic context.

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The European Union (EU) and the United Kingdom (UK) have begun the process of negotiating the UK's exit from membership of the EU (Brexit). As the border between Northern Ireland and the Republic of Ireland (ROI) is the UK's only land border with an EU member state, it presents a unique challenge. The problems which Brexit will cause for the island of Ireland in general, and at the border in particular, are serious but not insoluble. This paper considers solutions that enable the Common Travel Area (CTA) between the UK and the ROI to be upheld and for a low-visibility, low-friction land border to operate between Northern Ireland (NI) and the ROI, with wider applicability to the UK and EU as a whole. We begin with a brief summary of the geographical, political and legal situation of the border. We then consider in turn the future legal architecture of border controls and formalities as they affect the movement of goods and of people.

### The Brexit Context

On June 23, 2016, the people of the UK (plus Gibraltar) voted by 52 percent to 48 to be the first member state to leave the EU. UK–Irish relations have been put forward, by some as a major obstacle to Brexit.<sup>1</sup> This paper, in contradistinction, submits that that bilateral policy area is readily manageable—given the necessary political will in the two national capitals, as the UK enters into negotiations with the EU over the next 18 months. The prospect of progress in this area is due to the existing, and long-established, CTA that embraces the two member states—an arrangement which has been recognised in EU primary law (and cannot be readily altered). Trade matters with regard to goods and services and customs arrangements at the Irish border lie beyond the scope of what can be bilaterally agreed between the UK and ROI, but mechanisms are available to the EU and UK acting together—and failing that, to the UK acting unilaterally—to mitigate and manage issues for businesses trading across the border, and to provide inspiration for effective and innovative customs arrangements for the whole of the UK and the EU.

On March 29, 2017, the UK government issued its notification to Brussels pursuant to Article 50 of the Treaty on European Union (TEU).

Before negotiations started between the UK and the EU, both sides publicly acknowledged the 'special situation' of the Irish border, and stated that any measures in the negotiation process will be prioritised to protect the peace process.<sup>2</sup> In her letter giving notice under Article 50, UK prime minister Theresa May said: 'we must pay attention to the UK's unique relationship with the Republic of Ireland and the

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<sup>1</sup> The House of Lords EU Committee published six reports on (in order): UK–Irish relations; trade; acquired rights; financial services; security; and fisheries. We refer below to: EU Committee, 6th Report of 2016–17, *Brexit: UK–Irish Relations*, HL paper 76.

<sup>2</sup> Letter from Theresa May to Donald Tusk (29 March 2017); and the European Council, *Guidelines following the United Kingdom's Notification under Article 50 TEU* (EUCO XT 20004/17 2017) 6.

importance of the peace process in Northern Ireland ... we want to avoid a return to a hard border between [the UK and the Republic of Ireland], to be able to maintain the common travel area between us, and to make sure the UK's withdrawal from the EU does not harm the Republic of Ireland'. In its guidelines issued in response (the 'Guidelines'), the European Council stated that it 'welcomes and shares the UK's desire to establish a close partnership between the [EU] and the UK after its departure'. It also reiterated the aim of avoiding a hard border ('while respecting the integrity of the Union legal order') and noted that the EU should 'recognise existing bilateral agreements and arrangements between the United Kingdom and Ireland which are compatible with EU law'. This was followed by the negotiation directives given by the Council to the Commission (the 'Directives'), which state that 'the unique circumstances and challenges on the island of Ireland will require flexible and imaginative solutions. Negotiations should in particular aim to avoid the creation of a hard border on the island of Ireland.'

It is important to note that the Guidelines provide for negotiations to determine 'transitional arrangements which are in the interests of the Union and ... bridges towards the foreseeable framework for the future relationship', rather than a full and final free trade agreement (FTA). They also set out a phased approach, reflected in the Directives, which provide for dealing first with withdrawal arrangements, comprising financial settlement, rights of citizens, certain matters in relation to goods already placed on the market, and administrative and governance matters. According to the Directives, the framework for the future relationship and transition to it will be discussed 'only after sufficient progress has been achieved' under new negotiating directives. It is, as the UK's Secretary of State for Exiting the European Union David Davis has commented,<sup>3</sup> difficult to see how the Irish border issues can be addressed separately from the future trading relationship, as the solutions required for the border will be driven by the agreements on tariffs, rules of origin, product standards, sanitary and phytosanitary measures ('SPS': food safety and animal and plant health), and mutual recognition of conformity assessment and market surveillance. Therefore, unless the EU opens up negotiations to include these aspects at an early stage, we submit that it will not be possible for it to achieve its objectives of finding solutions for the Irish border and avoiding the creation of a 'hard border'.<sup>4</sup>

This inconsistency was underlined by the statement of EU chief negotiator Michel Barnier at the end of the first negotiation session between Barnier and Davis on 19 June 2017, where the two sides agreed on priorities for the negotiation.<sup>5</sup> In effect, the UK agreed to the EU's position on a phased approach; however, it was also agreed that 'a dialogue on Ireland' would be started to urgently discuss the protection of the Belfast Agreement and maintenance of the CTA. Interestingly, Barnier referred to 'the question of the borders, in particular in Ireland' as part of the objective of agreeing on 'key challenges' as soon as possible. While he maintained that negotiations would move on to 'scoping the future relationship on trade and other matters' only after sufficient progress had been made on the financial settlement, it remains to be seen how agreeing on the 'question of the borders' can be achieved without including trade matters in the discussion.

In any event, it is clear that there is a high-level agreement in principle that the Irish border presents a unique set of circumstances that warrant bespoke arrangements, and broadly that a 'hard border' is to be avoided. The challenge will be to achieve this while 'respecting the integrity of the Union legal order', as required by the Guidelines. This constraint applies principally to the measures that the ROI side can deploy,<sup>6</sup> as it will be open to the UK to unilaterally recognise EU standards, conformity assessment, and Authorised Economic Operators (AEOs)<sup>7</sup>, and even unilaterally eliminate tariffs, which would

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<sup>3</sup> Interview on ITV's *Peston on Sunday* (London, 14 May 2017), he described this as 'wholly illogical'.

<sup>4</sup> At time of writing, it is the intention of the European Union to review progress at the European Council in October 2017.

<sup>5</sup> Speech by Michel Barnier, the European Commission's chief negotiator, following the first round of Article 50 negotiations with the UK (Brussels, 19 June 2017) <[http://europa.eu/rapid/press-release\\_SPEECH-17-1704\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-17-1704_en.htm)>.

<sup>6</sup> Although there are instances of member states operating non-standard border arrangements with their neighbours, such as Estonia/Russia, Romania/Moldova and Spain/Morocco, it may be difficult for ROI to sustain material departures from the *acquis* due to the circumstances and high profile of Brexit.

<sup>7</sup> Authorised Economic Operator is a scheme operated under the UCC that enables qualifying businesses to benefit from customs facilitations.

substantially reduce the burdens of border clearances for imports into NI.<sup>8</sup> The UK government position paper published in August 2017<sup>9</sup> confirms that the UK favours such a liberal approach, with no physical controls at the border for goods, and the CTA to continue in its current form.

The Irish government has noted<sup>10</sup> that it is for member states voting in Council to determine whether 'sufficient progress' has been made and that the Taoiseach will therefore have a say in this; it is their intention to 'leverage [their] position within the EU27 negotiation team, to shape the EU27 approach to negotiations which includes aiming for the closest possible future relationship between the EU and the UK'.<sup>11</sup> Other member states with significant reliance on trade with the UK (in particular, for example, the Netherlands, Belgium, Cyprus, and Malta) are similarly incentivised to move forward expeditiously to trade matters in order to build alliances and advocate their positions.

The UK prime minister and the Irish Taoiseach have held bilateral meetings, and the Irish government has met with EU lead negotiator Michel Barnier at an early stage, which should place the ROI in a position to play an influential role.

The UK, and other member states that wish to prioritise progress on trade, could argue that progress has been sufficient when agreement in principle has been reached establishing an outline methodology for calculating the financial settlement. In respect of citizens' and acquired rights, the EU's negotiating paper<sup>12</sup> included some aggressive positions on the scope of the settlement and the role of the Court of Justice of the European Union (CJEU), but here at least there is agreement at a high level that the rights and interests of citizens exercising their treaty rights in the respective territories should be protected, so the benchmark for progress could be reached in short order.

## The Irish Border

When the withdrawal agreement contemplated by Article 50 (Withdrawal Agreement) takes effect, or the UK leaves the EU without such an agreement, the Irish border, having previously been an internal frontier, will become part of the external frontier of the EU. The ROI will remain part of the internal market. And the UK will become (as it was before 1973) a third country.

The Irish border is an international frontier between two states, the UK and the ROI. It is relatively long-established and certain (except in one respect). Geographically, it is also long, at 499 km (310 miles) from end to end.

The Irish land border stops at a northern end, Lough Foyle (near Londonderry), and at an eastern end, Carlingford Lough (near Dundalk). There is an element of uncertainty regarding both Lough Foyle and

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<sup>8</sup> Clearly tariff elimination would be a significant policy undertaking for the UK, as under the 'most favoured nation' rules under the World Trade Organization (WTO) General Agreement on Tariffs and Trade (GATT), it would have to be applied to all imports, not just goods from the EU. This may be a necessary and beneficial measure, for at least some goods, especially if no zero-tariff deal is agreed with the EU. It would also have the advantage of reducing the requirements to prove the origin of imported goods, which can be burdensome under preferential trade arrangements.

<sup>9</sup> Northern Ireland Office and Department for Exiting the European Union, *Northern Ireland and Ireland, Position paper by the United Kingdom*.

<sup>10</sup> *Ireland and the Negotiations on the UK's Withdrawal from the European Union: The Government's Approach* (2017), 31 <[www.merrionstreet.ie/MerrionStreet/en/EU-UK/Key\\_Irish\\_Documents/Government\\_Position\\_Paper\\_on\\_Brexit.pdf](http://www.merrionstreet.ie/MerrionStreet/en/EU-UK/Key_Irish_Documents/Government_Position_Paper_on_Brexit.pdf)>

<sup>11</sup> *ibid* 40.

<sup>12</sup> European Commission, Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU, 'Essential Principles on Citizens' Rights' (24 May 2017) <[https://ec.europa.eu/commission/sites/beta-political/files/citizens-rights-essential-principles-draft-position-paper\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/citizens-rights-essential-principles-draft-position-paper_en.pdf)> accessed 23 August 2017.

Carlingford Lough. Despite the 1998 Belfast Agreement, the UK and the ROI continue to dispute these two estuaries due to conflicting interpretations of applicable international law.<sup>13</sup>

Neither state appears willing, or able, to determine finally this international frontier, to the north or to the east. UK and Irish ministers agreed in 2011 to try and resolve the disputes, but the secretary of state for NI, James Brokenshire, has stated recently: 'Like the Irish government, we do not anticipate these issues forming part of the negotiations over the UK's exit from the European Union.'<sup>14</sup>

The line of the border lies in the Irish system of county councils and borough councils (based on medieval administrative counties), provided for in the Local Government (Ireland) Act 1898. These were related, in turn, to parliamentary constituencies. The idea of partition before World War I, in which the UK government excluded four, and then six, Ulster counties from Irish home rule, was based upon this administrative arrangement.<sup>15</sup> Then, the Government of Ireland Act 1920 provided for a parliament for six counties:<sup>16</sup> the origin of NI (and a Dublin parliament for the remaining 26 counties—which existed briefly in 1921–2, as Southern Ireland, within the UK).

The Irish Free State (IFS) was created as a dominion, within the British Empire or Commonwealth (with the same status as Canada), on 6 December 1922. The IFS became a state, in international law, through international recognition probably between 1925 and 1931.<sup>17</sup> As a state, it acquired its own territorial seas.

The Irish land border as an international frontier serves to delineate the territorial jurisdictions of the UK and the ROI. It is there even if there is no signage ('you are now entering ...'), save for road traffic regulation.<sup>18</sup> Since the EU referendum, the idea of a 'soft' or a 'hard' border has come into play. The reasons for the current softness are often not identified clearly. In many cases, the fears of hardness are asserted rather than reasoned. There is currently a border between NI and the ROI. All international frontiers perform a number of functions, regarding the transnational movement of goods and services, people, and—unfortunately—criminals, including smugglers and terrorists. It may be said that there are three principal Irish borders: a trade border; an immigration border; and a security border. It is the interaction of these three conceptual borders that will determine the degree of softness/hardness, when crossing between NI and the ROI, principally by private or public road vehicle. This, in turn, will depend on the willingness of the EU to agree that any agreement is secure (including in terms of revenue protection and regulatory compliance) and does not impede free movement of goods, services, and people into the ROI from the European Economic Area (EEA).

### The Economic Context

Upon the creation of the IFS on December 6, 1922, Belfast and Dublin quickly sought to protect their respective markets. Cross-border trade diminished, against a background of little economic integration in pre-partition Ireland. North–south trade did not benefit from World War II, then there was a London–Dublin trade agreement in 1948, and, in December 1965, an FTA between the two states; quotas and tariffs were to be abolished over ten years.

The 1965 FTA readied both states for the European Economic Community, on January 1, 1973. However, it was to be another 20 years before the European Community finally abolished border controls on goods between member states. Since January 1, 1993, there has, of course, been no trade border between the ROI and NI. After more than four decades of the UK and ROI's respective

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<sup>13</sup> James Brokenshire, Secretary of State for Northern Ireland, Written Parliamentary Answer (C52620, 16 November 2016).

<sup>14</sup> *ibid.*

<sup>15</sup> Thus, Sir Winston Churchill's 'dreary steeples of Fermanagh and Tyrone': HC 16 February 1922, vol 150, col 1270.

<sup>16</sup> Section 1 (2) reads: 'For the purposes of this Act, Northern Ireland shall consist of the parliamentary counties of Antrim, Armagh, Down, Fermanagh, Londonderry and Tyrone, and the parliamentary boroughs of Belfast and Londonderry, and Southern Ireland shall consist of so much of Ireland as is not comprised within the said parliamentary counties and boroughs.'

<sup>17</sup> Austen Morgan, *The Belfast Agreement: A Practical Legal Analysis* (1st edn, Belfast Press 2000), 62–6.

<sup>18</sup> Miles in Northern Ireland; kilometres in the Republic of Ireland.

membership, the economy of NI (treating it as a national economy for the moment) remains, to a surprising extent, bound in to the UK economy, with little north–south integration in the EU single market.

According to the latest data published by the Northern Ireland Statistics and Research Agency<sup>19</sup> 66.0 percent of sales by NI businesses are within NI and 21.0 percent to mainland Great Britain (GB), making a total of 87 percent within the state. A further 6 percent is exported to the rest of the world. The figures for sales to the ROI and the rest of the EU are a great deal less: 5 percent to the ROI; and 3 percent to the rest of the EU. Agricultural produce that is processed in the ROI and returned to NI for sale there or elsewhere accounts for some of the 5 percent of sales made to the ROI. Broadly, the pre-1973 trade pattern, with roots in the 19th century, has proved remarkably resilient.

Similarly, exports of goods from the ROI to NI are only 1.6 percent of total ROI exports<sup>20</sup>. Although the figures do not precisely match the NI turnover figures (partly because the NI figures include services), together these indicate that this cross-border trade is less than might generally be expected.<sup>21</sup>

ROI's trade figures with GB demonstrate that it will be as important to the ROI to secure beneficial trade and customs arrangements for its trade with GB, which accounts for 12.3 percent of goods exports and 24.1 percent of goods imports. There is also a high volume of services trade between the ROI and the UK. Equally, the ROI is a key trading partner for GB, so while managing the land border is vitally important for political, cultural, and security reasons, a trade solution for trade between the ROI and GB is of critical importance for the ROI and the UK as a whole. It can be seen that the ROI has a strong incentive to push for progress on trade aspects of the Article 50 negotiations and to advocate a zero-tariff agreement with maximum market access.

The sectors of key importance to NI trade are agriculture, manufacturing, and chemicals. The nature of such products means that recognition of standards and SPS measures will be key to ensuring that trade of goods in these sectors between GB, NI and the ROI encounters minimal disruption.

## Trade Agreements

Negotiations between the UK and the EU will start from the premise that, absent agreement otherwise, the UK will be able to impose its tariffs at the Irish border (and the rest of its external frontier), while the ROI—regardless of its all-Ireland concerns—will have to impose the EU Common External Tariff (CET) and adhere to the Union Customs Code (UCC)<sup>22</sup>. The UK has confirmed that in the first instance its tariffs will mirror the CET,<sup>23</sup> and it will need to establish its own customs legislation.<sup>24</sup> The rights and responsibilities conferred under World Trade Organization (WTO) rules will apply to both sides, including the non-discrimination and reciprocity principles.<sup>25</sup>

It has been suggested in various quarters that NI alone should stay either in a customs union with the EU or in the single market (by way of membership of the EEA), in order to avoid the need for a hard

<sup>19</sup> Northern Ireland Research and Statistics Agency *Broad Economy Sales & Exports Statistics* (2015) <<https://www.nisra.gov.uk/publications/current-publication-broad-economy-sales-exports-statistics>>. These figures remain experimental as they are based on a new measure under development by the agency.

<sup>20</sup> Central Statistics Office, *Brexit Ireland and the UK in Numbers* (2016)

<sup>21</sup> The Irish ambassador to the UK illustrated this noting that he thought trade levels were high but should be higher: in one answer to the House of Lords EU Committee: 'I cannot remember the figure, but quite a high percentage of Northern Ireland exports come to the south. Our economic links in Ireland are below the level they should be for two neighbouring jurisdictions on an island.' Oral and written evidence, Q8, 6 September 2016, <[www.dfa.ie/irish-embassy/great-britain/news-and-events/2016/ambassador-remarks-hof-eu-committee-brexit/](http://www.dfa.ie/irish-embassy/great-britain/news-and-events/2016/ambassador-remarks-hof-eu-committee-brexit/)>

<sup>22</sup> Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code [2013] OJ L 269/1

<sup>23</sup> Liam Fox, Secretary of State for International Trade, to the House of Commons, *UK's Commitments at the World Trade Organization* (5 December 2016, HCWS316).

<sup>24</sup> A customs bill is due to be brought before Parliament in autumn 2017.

<sup>25</sup> The UK and the ROI both joined the WTO on January 1, 1995 as EU members, but were founding members of its predecessor, the General Agreement on Tariffs and Trade.

land border. Aside from the reality that modern customs borders are both efficient and low-impact,<sup>26</sup> the proposition that staying in the customs union would mitigate the border measures misunderstands the functions of a customs border and the features of a customs union.

A customs union involves uniform external tariffs applying to imports, which removes the need for duties to be paid and origin proved when goods move between member countries. Monitoring and enforcement of tariff compliance is only one part of the operation of a border. Other policies covering security, SPS and technical barriers to trade (TBT) (such as product regulation compliance), treaty obligations such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and anti-fraud and counterfeiting are also controlled at a goods border. None of these matters are affected by membership of a customs union as such. Customs unions membership for NI alone would be damaging, therefore, to its most important trading relationships (with GB and third countries) and would not remove the need for border controls at the Irish border. Similarly, membership of the single market would mitigate the need for controls on SPS and product regulation to be in place at the Irish border, but unless combined with a customs union, there would still need to be border controls for tariff compliance. Each of these would also have the effect of establishing a border with GB (to control entry into the NI and ROI market of imports from the mainland) and depriving NI of the advantages of being able to move away from the EU's SPS regime, which is restrictive and arguably violates WTO rules. As well as being economically counterproductive, this is politically untenable. The Democratic Unionist Party, for example, has specifically rejected internal borders between NI and GB.<sup>27</sup>

UK government policy is that in order to duly implement the 2016 referendum decision and benefit from the opportunities of leaving the EU, both in domestic policy and in the sphere of international trade, the UK as a whole needs to leave both the customs union and the single market.<sup>28</sup> The objectives of the UK government, which are shared by the EU, are to achieve this with as little disruption as possible, and to enter into a new, close, and ambitious trading relationship. The conclusion of the agreement or agreements underpinning such a new relationship will probably be preceded by an interim agreement to enable trade to continue while legal matters are resolved and systems and policies are put into operation with the UK as a third country vis a vis the EU. We focus here on the transitional and interim steps to smooth the exit process for both sides and prepare businesses for trading as (or with) a third country. The interim measures applicable to the generality of the UK–EU relationship but of particular interest to NI/ROI trade, could include:

- the UK and the EU agreeing to maintain zero tariffs and no quotas on trade between them; and
- the UK and the EU agreeing comprehensive mutual recognition of regulations, conformity assessment and accreditation bodies,<sup>29</sup> and SPS measures, for so long as the UK agrees to maintain the *acquis* in the relevant fields (with a view to agreeing longer-term, equivalence based, mutual recognition and management of divergence from the *acquis*).
- the UK agreeing to maintain the CET as its bound rates on imports from third countries, and preferential arrangements for countries where the EU has agreed an FTA (subject

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<sup>26</sup> Technology solutions and legal mechanisms are used in Canada and Australia that enable these countries to clear huge volumes of goods with their neighbouring territories—the USA and New Zealand, respectively—in the absence of customs union or single-market arrangements. For more details, see Shanker Singham and Victoria Hewson, *Brexit, Movement of Goods and the Supply Chain*, (February 2017) <[www.li.com/activities/publications/special-trade-commission-brexit-movement-of-goods-and-the-supply-chain](http://www.li.com/activities/publications/special-trade-commission-brexit-movement-of-goods-and-the-supply-chain)>.

<sup>27</sup> Democratic Union Party, *2017 Westminster Manifesto*, (2017) <[www.mydup.com/publications/view/2017-westminster-manifesto](http://www.mydup.com/publications/view/2017-westminster-manifesto)>.

<sup>28</sup> See for example Theresa May, *The Government's Negotiating Objectives for Exiting the EU* (London, 17 January 2017) <[www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech](http://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech)>.

<sup>29</sup> As, for example, the EFTA members have done; see Annex I (No. 1/2013) to the European Free Trade Association Convention (Stockholm, 4 January 1960).

to any negotiations required with such third countries), to enable a zero-tariff deal between the UK and the EU with no need for origin to be proved.<sup>30</sup>

At the same time, the UK may wish to continue to participate in (and fund) agencies like OLAF<sup>31</sup> in respect of its work on customs duties, until such time as it has been able to replicate systems and implement a co-ordinated approach on customs controls and anti-fraud and counterfeiting with the EU.

These measures (which are outlined here at a high level only; there is flexibility around the available approaches) would effectively maintain the status quo for a fixed period,<sup>32</sup> to be replaced with permanent measures that enable the UK to diverge in its policies and regulations, within the parameters of a comprehensive FTA. The arrangement would give customs authorities sufficient time to allow technology solutions and logistics facilities to be established to facilitate the soft border desired at the Irish border and at all other ports of entry for trade between the UK and the EU. The interim period in respect of this logistical work, completion of which would enable the UK to depart from the CET and implement full customs controls on trade with the EU, need not be tied to the duration of a zero-tariff interim agreement. However, as the UK lowers its applied tariff rates against the rest of the world, rules of origin must inevitably be applied between the UK and the EU, so a programme of education and advice will be required to support businesses to make any necessary changes to their supply chains and to obtain necessary certification so they can continue to take advantage of any preferential tariff deal agreed with the EU and other FTA partners.<sup>33</sup> It will also be vital for the authorities in the ROI, in NI, and at Westminster to undertake consultations with, and provide training to, businesses on the customs facilitation measures available to them. Assuming that the UK largely mirrors the EU customs code (which seems likely and desirable),<sup>34</sup> the uptake of schemes like AEO should be promoted and supported.

There will also need to be comprehensive treatment of movement of workers (separately from the matter of citizens who are already exercising treaty rights at the exit dates), both to accommodate EU demands and to fulfil UK labour market needs. This could be achieved by way of an FTA chapter on Mode 4 services,<sup>35</sup> recognition of qualifications and similar measures, and a programme in the UK for skilled and seasonal/sectoral worker visas for EEA nationals. We have not considered services in detail in this paper, as the considerations in respect of services are largely the same for GB and NI, but as local services providers will continue to travel across the Irish border to provide services, Modes 1 and 3<sup>36</sup> access will be required by businesses in the ROI and NI. Specific arrangements for border regions, which would not require the same conditions to apply on a most favoured nation basis, are permitted under the WTO General Agreement on Trade in Services (GATS), Article II (3). Any agreement on this

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<sup>30</sup> If no such agreement is in place, rules of origin will have to be applied to support any preferential arrangement on tariffs and quotas, which would have a material impact on businesses which trade with the EU, to be balanced against the interests of the vast majority of businesses (which various sources estimate to be around 95 percent) which do not.

<sup>31</sup> The European Anti-Fraud Office.

<sup>32</sup> It is important that this is a defined period in order to qualify as an interim agreement under Article XXIV of GATT, although both parties would probably look to a much shorter period for certainty and, in the UK's case, to enable the operation of its independent trade policy. The European Council Guidelines state that 'transitional arrangements must be clearly defined, limited in time and subject to effective enforcement mechanisms'.

<sup>33</sup> Utilisation of EU preferential trading arrangements by partner countries importing from EU member states has been estimated at around 75 percent; Lars Nilsson, *EU Export and Uptake of Preferences: A First Analysis*, (September 2015) <[www.etsg.org/ETSG2015/Papers/155.pdf](http://www.etsg.org/ETSG2015/Papers/155.pdf)> accessed 23 August 2017.

<sup>34</sup> Queen's Speech 2017: background briefing notes, (21 June 2017) <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/620838/Queens\\_speech\\_2017\\_background\\_notes.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/620838/Queens_speech_2017_background_notes.pdf)>.

<sup>35</sup> Defined in GATS as 'services supplied by a service supplier of one WTO member, through the presence of natural persons of a member in the territory of any other member'.

<sup>36</sup> Defined in GATS as 'services provided respectively, from one territory into another, and by way of commercial presence (or establishment) in the other'.

basis would probably not cover financial services, however, where a more bespoke arrangement will be necessary.<sup>37</sup>

Clearly the legal and governance arrangements underpinning these arrangements will be contentious, as it is clear that the EU will be expecting to maintain a role for the CJEU and other institutions. These are matters of wider impact than the Irish border, and will be for negotiation between the UK and the EU.

### Customs and the Border

The introduction of new customs controls on the Irish border do not mean a return to the 1960s, or even the 1990s, with two border posts and uniformed customs officers. In current practice, in admitting imports from outside the customs union in compliance with the UCC, the UK border authorities physically inspect only 4 percent of consignments, and the Irish authorities only 1 percent.<sup>38</sup> To replicate this level of efficiency (or better) at the Irish border, an integrated system is possible. It can, and should, be largely remote, using electronic technology at the border and ongoing inspections and audits by authorities away from the border.<sup>39</sup>

In its position paper on the matter<sup>40</sup>, the UK government has proposed that no physical infrastructure at all will be required at the border, and all compliance checks will be carried out electronically or at premises inside the border. Small and medium sized enterprises (SMEs), which it defines as business with up to 250 employees, would be exempt from customs formalities, and thus spared the cost of border frictions. Its position seems to be that false declaring and smuggling can be deterred by spot checks and audits away from the border, and enforcement achieved through criminal sanctions and/or civil penalties (again, practices that are common under existing EU customs regulation).

Smuggling takes place at all borders, and in fact takes place under the current border arrangement. The Irish border and smuggling have been synonymous since the 1920s. Fuel, tobacco, and cigarettes have been smuggled across the Irish border on industrial scales, with consequential revenue losses.<sup>41</sup>

If a zero-tariff deal is not agreed between the UK and the EU, there will be potential evasion of tariffs at the Irish border. If the ROI is required to impose the CET on imports from the UK, that could encourage illegal trade from NI and/or GB. The destination would principally be the ROI, but such trade could move further into the EU. If the UK also applied the CET, which will be its opening position as at the exit date, there could be a flow of goods into the ROI, from the rest of the EU, destined for NI or—more likely— for GB, in order to evade these duties.

In the short term, under the interim measures outlined above, and for as long as the UK mirrors the CET and EU regulatory standards, there would be no incentive for smuggling, either for SMEs or for larger operators who may be indeed to use SMEs as vehicles to avoid tariffs or regulatory requirements. Even if tariffs diverge as the UK pursues independent trade policies with other countries and unilaterally, the categories of goods where tariffs are high enough to incentivise smuggling are limited<sup>42</sup>, and may be amenable to controls away from the border. All but the smallest operators must account for VAT so

<sup>37</sup> See Paul Edmondson, Shanker Singham, and Victoria Hewson, *A New UK/EU Relationship in Financial Services: A Bilateral Regulatory Partnership*, (May 2017) <[www.cms-lawnow.com/regzone/articles/2017/march/cms-li-brexite-and-financial-services?cc\\_lang=en](http://www.cms-lawnow.com/regzone/articles/2017/march/cms-li-brexite-and-financial-services?cc_lang=en)>.

<sup>38</sup> World Bank Logistics Performance Index 2016.

<sup>39</sup> Advance electronic submission of customs declarations is already required in the vast majority of cases for imports from outside the customs union.

<sup>40</sup> Northern Ireland Office and Department for Exiting the European Union, *Northern Ireland and Ireland, Position paper by the United Kingdom* (August 2017) <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/638135/6.3703\\_DEXEU\\_Northern\\_Ireland\\_and\\_Ireland\\_INTERACTIVE.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/638135/6.3703_DEXEU_Northern_Ireland_and_Ireland_INTERACTIVE.pdf)>.

<sup>41</sup> Northern Ireland Affairs Committee, *Fuel Laundering and Smuggling in Northern Ireland*, (27 March 2012, Third Report of 2010–12, HC 1504).

<sup>42</sup> According to the WTO, the trade weighted average tariff on goods under the CET is 2.3%, with quotas and much higher rates of duty applying to food and agricultural products. Cars are also a high tariff item at 9.4%.

it should be possible for authorities to establish whether smuggling and evasion are occurring at a large enough scale to outweigh the benefit to ROI of exempting local trade from formal customs compliance.

The UK's approach is bold, but given the historical and political context, and the amount of trade carried out by smaller businesses, understandable. It would require either the EU to agree derogations from the UCC, or for ROI to apply a very liberal enforcement of it. If the ambition of a border with no physical presence is not ultimately achievable, technology solutions are available to implement low visibility border surveillance, which would address concerns that ROI could become a 'back door' for goods to enter the EU market as UK and EU tariffs and regulatory standards diverge in coming years, while minimising the costs and other impacts.

Automatic number-plate recognition is already used by the Police Service of Northern Ireland in crime prevention and detection. The network of static cameras could be expanded to record all cross-border transit, which would also be useful in preventing current smuggling. The Norway–Sweden border implements a similar model for the routes across the border permitting freight,<sup>43</sup> and the congestion charge for drivers in central London is another analogous example. There is an opportunity to use innovative blockchain products to give secure and fully integrated access across operators and authorities, that could become a world-leading model. However, the extent to which the Irish border can be regulated in this way will be determined by how it can be accommodated within the framework of EU law and whether technology solutions will be cost-effective. Implementing innovative technology will require an integrated approach from the UK and ROI/EU, but would reflect the stated commitment to flexible and imaginative solutions and would provide a precedent that could be applied for all trade between the UK and the EU. They will also take time to design and implement, emphasizing the need to move quickly to the EU's envisaged phase 2 of negotiations and the necessity to have an interim period holding close to the status quo while the border systems and policies are implemented. It should be borne in mind in this context that technology and logistical solutions can only implement and facilitate the enforcement and monitoring of rules. A legal architecture needs to be in place in the first instance.<sup>44</sup>

Existing successful borders between the EU and third countries include the EU–Norway border and the EU–Switzerland border. They are regulated in practice by formal agreement between the relevant contracting countries.<sup>45</sup>

The agreements apply to inspections and formalities concerning the carriage of goods between the customs territories of each contracting party. The parties are obliged to carry out such inspections and formalities with the minimum delay necessary and, in so far as possible, in one place, while implementing measures to ensure the free flow of traffic as far as possible. There is a focus on making customs facilitation technology-based and with minimal disruptions, with inspections to be carried out by way of random checks on a consignment-by-consignment basis or otherwise based on computerised risk analysis. Similarly, there is an express obligation on the contracting parties to use simplified procedures and data-processing and data-transmission techniques for the purpose of export, transit, and import of goods. The parties agree to recognise each other's custom checks and certifications.

There is emphasis on co-operation and close consultation between the contracting parties, particularly in relation to customs security matters. Administration of the EU–Switzerland agreement and the EU–Norway protocol rests on joint committees, which are made up of representatives from the EU and Switzerland, and the EU and European Free Trade Association (EFTA) members, respectively. The committees are responsible for ensuring proper implementation of the agreements, as well as deciding matters under question or seeking to agree resolution to disputes. The existing close cooperation mechanisms between the UK and ROI and between the UK and EU should enable such joint

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<sup>43</sup> Agreement on the European Economic Area (1994, OJ No L 1), Protocol 10.

<sup>44</sup> Katy Hayward and Milena Komarova of Queen's University Belfast, written evidence submitted to the 'Northern Ireland Affairs Committee Future of the Land Border with the Republic of Ireland Inquiry' (5 December 2016) <[www.qub.ac.uk/home/EUReferendum/Brexitfilestore/Fileupload,735708,en.pdf](http://www.qub.ac.uk/home/EUReferendum/Brexitfilestore/Fileupload,735708,en.pdf)>.

<sup>45</sup> Agreement between the European Community and the Swiss Confederation on the simplification of inspections and formalities in respect of the carriage of goods and on customs security measures (2009, L199); and Agreement on the European Economic Area (1994, OJ No L 1), Protocol 10.

management to be replicated for the purposes of the Irish border and the other points of entry for UK/EU trade.

### Considerations for Trade in Agriculture

Agriculture is a key sector traded between the ROI, NI, and GB. This includes not just products for placement on the market but also intermediate processing—for example, currently, livestock (particularly bovine) is regularly moved across the Irish border for dairy and slaughtering, and milk for processing. In our view, the only barrier preventing such practice from continuing would be if the EU refused to mutually recognise the UK's agricultural products standards and claimed risk of a transfer of disease, for example, bovine tuberculosis. The UK should seek to address this as a priority, as it will apply equally to agricultural exports to all other EU member states.

A baseline for these discussions will be the WTO SPS Agreement. Article 4 of the SPS Agreement provides that:

Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.

Since European and British standards for the production of agricultural products are presently identical, determining equivalence should be a relatively straightforward process after exit from the EU, and it is likely that any blocking of UK exports would be a violation of these equivalence provisions. The EU has, however, been historically reluctant to grant equivalence to other major agricultural producers in the first world, notably the US. As well as the cost of trade disruption to importers and consumers in member states, the UK has two forms of leverage in this area:

- it will (once it is outside the EU) be able to bring WTO cases on violations of the SPS Agreement, as other WTO members have done in respect of the EU's policies in this area, many of which have already been found to be violations.<sup>46</sup> This could ultimately involve costs and retaliatory measures being taken against the EU.
- it will also be in a position to liberalise its own requirements for imports of agricultural products, both by way of tariff reduction and by according recognition to the SPS standards of other countries currently locked out of the EU market, thus increasing competition to EU producers and lowering prices. If the UK's SPS measures are not recognised by the EU, we would not recommend that the UK reciprocate, which would only compound the damage.<sup>47</sup> Unilateral equivalence recognition of the EU would be a strong signal of openness to the rest of the world and would put the UK in a strong position to bring action against the EU as outlined above. The EU would have lost leverage over the UK, as it would not be able to withdraw recognition on the grounds of non-compliant third-country products being allowed into the UK market. Ultimately, SPS and TBT measures would form an integral part of an eventual UK–EU FTA.

In the longer term, the UK may wish to diverge from the EU's SPS standards and regulations that are currently in operation, both to liberalise trading arrangements with third-country trading partners and to improve innovation and productivity in the sector. As long as the measures in place continue to meet the EU's overall objectives of SPS protection, access to the EU market should continue under the terms of the SPS Agreement, even if the substance of the measures changes. In time, it could be that the

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<sup>46</sup> See, for example, *United States v European Communities* [2009] DS26.

<sup>47</sup> And, logically, would itself violate Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures 1994.

opportunity cost of maintaining alignment with EU standards outweighs the benefits of market access, if export markets to third countries can be improved and products can be imported more cheaply from them, but this is a determination that can be made over time. A more detailed sectoral analysis will be required to establish whether the retention of the EU SPS measures in NI might be of more value than preservation of borderless trade in agriculture between NI and GB. Analysis by Oxford Economics suggests that, in light of prevailing market conditions in beef and dairy farming, establishing appropriate support payments post-Common Agricultural Policy may be more critical than market access.<sup>48</sup>

### An Immigration Border

The Irish border will be a part of the EU external frontier. Whether there is a Withdrawal Agreement or not, the question of the CTA, which remains—despite its age—remarkably uncodified, will need to be addressed.

When Ireland was divided in 1920–2, policymakers did not talk about emigration or immigration. Most people across the British Empire were British subjects, under recent statutory law on citizenship: the British Nationality and Status of Aliens Act 1914. People came and went as they wished, though increasingly passports were required to cross international frontiers.

The creation of the IFS in 1922 did not see a transfer of immigration and nationality powers. Travel between the IFS and the UK continued as if it had remained a part of the UK. This is the origin of the so-called CTA, which applies throughout the British Islands,<sup>49</sup> following a trilateral political acceptance of the Irish border, by Dublin, Belfast, and London, in 1925.<sup>50</sup> As for Irish citizenship law, this developed slowly (the Irish government providing administratively for Irish passports only in 1935): the main legal instrument was the Irish Nationality and Citizenship Act 1956 (with extra-territorial effect in NI). The two states provided for reciprocal citizenship rights, and the ROI and the UK both deemed the other's citizens not to be aliens in their law.<sup>51</sup>

The CTA may be presumed (disregarding the Channel Islands and Isle of Man) to have existed from shortly after December 6, 1922.<sup>52</sup> There is no express London–Dublin agreement, whether a treaty or otherwise. It was first acknowledged in Dáil Éireann on June 4, 1925, by the minister for justice.<sup>53</sup> The CTA was largely a matter of administration, and agreement between ministers in two national governments. In 1953 the UK referred to the CTA for the first time in legislation—in the Aliens Order 1953. If someone landed in the UK, including NI, they were permitted to travel on to the ROI. Equally, if someone landed in the ROI, they could travel on to NI and GB. Each state acted as an agent for the other. Contemporary UK immigration control dates from the Commonwealth Immigrants Acts 1962 and 1968. The Irish enacted the Aliens Order 1962. In 1999 the two legal systems were largely aligned: Aliens (Exemption) Order 1999 (ROI). UK law today is based upon the Immigration Act 1971 (and a succession of statutes), while the British Nationality Act 1981 (amended by immigration statutes) still deals with nationality.

The CTA—generally considered to be a success<sup>54</sup>—has had a mixed history in the past ten years. First, in 2008–9, on the back of the plan to introduce identity cards,<sup>55</sup> the UK Home Office tried (unsuccessfully) to set up electronic immigration controls between Irish (including NI) and British sea-

<sup>48</sup> Henry Worthington, *The Economic Implications of a UK Exit from the EU for Northern Ireland: A Briefing Paper*, (Oxford Economics, February 2016).

<sup>49</sup> The British Islands comprise the UK, the Channel Islands, and the Isle of Man: Interpretation Act 1889 52 & 53 Vict c 63 s 18 (1); Interpretation Act 1978 c 30, Sch 1.

<sup>50</sup> Aliens Order 1925 SI No 2/1925.

<sup>51</sup> Aliens Act 1935 Act No 1935 14 (Éire); Ireland Act 1949 c. 41 12 and 13 Geo 6 (UK).

<sup>52</sup> There is reference to an informal agreement of February 1923.

<sup>53</sup> Dáil Éireann, *Debates*, (1926) vol. 15, cols. 316–18. His questioner, Tom Johnson, leader of the Irish Labour Party, had been born in Liverpool

<sup>54</sup> For a discussion of Irish support for the CTA see Bernard Ryan *The Common Travel Area Between Britain and Ireland* *Modern Law Review* (2001) 64(6) MLR 855-874.

<sup>55</sup> Following the Identity Cards Act 2006 c 15.

and airports. Technology drove this policy, which was defeated in the House of Lords. Second, following a change of government (and repeal of the identity cards law), the UK and the ROI signed a non-legally binding agreement, on December 20, 2011, committing to a joint programme of work on 'measures to increase the security of the external Common Travel Area border' (there was also a non-binding memorandum of understanding, on visa data exchange).<sup>56</sup> And third, on the back of this public affirmation, the two states have, since 2014, provided for the mutual recognition of visas of some third countries<sup>57</sup> again, with each state acting as agent for the other, programmes that could usefully be expanded.

The CTA is, after nearly 100 years, a profound basis for UK–Irish co-operation, where the smaller state is, if anything, the more enthusiastic partner. This is how the Irish Justice Minister justified the 2011 agreement:

The CTA came into being in the 1920s and is based on the principle of free movement for nationals of the UK and Ireland. The CTA reflects ties of history and kinship and also labour market and business needs. It continues to be of immense importance to the economic, social and cultural wellbeing of both jurisdictions.<sup>58</sup>

Maintenance of the CTA is one of the 12 negotiating priorities of the UK government as set out in its Brexit White Paper<sup>59</sup> and a core feature of the proposals in the August position paper, including a suggestion that it could be formally recognised in the Withdrawal Agreement. Technically, because it may require amendment to the treaty protocol recognising it, other member states could resist this, but given the Council's published position on constructive solutions for the Irish border, this would seem to be unlikely. This may also represent the moment for the arrangement to be made into a formal, public agreement between the UK and ROI, a development that has been mooted over the years but that has not materialised.<sup>60</sup>

The CTA can only work if both, or neither, of the UK and ROI participate centrally in the Schengen Area; at present, neither party does or has. The Schengen system began to operate within the EU in 1985 with the Schengen Agreement, covering the five member states which wished to establish a borderless territory between themselves and a common external border. Under the agreement, border controls on persons within the area were abolished. The Schengen Area (or Zone) now covers nearly all EU member states, EEA member states, and Switzerland. Under the 1997 Amsterdam Treaty, the Schengen *acquis* became a part of EU primary law,<sup>61</sup> and there are a number of regulatory measures that establish systems and rules to operate the controls and the external border. For present purposes, there are three relevant protocols to the current treaties: first, the protocol on the Schengen *acquis* integrated into the framework of the EU; second, the protocol on certain aspects of Article 26 of the Treaty on the Functioning of the European Union (TFEU); and third, the protocol on the position of the UK and the ROI in respect of the area of freedom, security, and justice. The second protocol above, which refers expressly to the CTA, permits the UK and the ROI (for as long as the CTA remains in

<sup>56</sup> Joint Statement by Mr Damian Green, Minister of State for Immigration, The United Kingdom's Home Department and Mr Alan Shatter, Minister for Justice and Equality, Ireland's Department of Justice and Equality, regarding co-operation on measures to secure the external common travel area border, (20 December 2011) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/99045/21197-mea-sec-trav.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/99045/21197-mea-sec-trav.pdf)>.

<sup>57</sup> See UK Government, *British–Irish Visa Scheme Guidance* (December 2015) (available at [www.gov.uk/government/publications/british-irish-visa-scheme/british-irish-visa-scheme](http://www.gov.uk/government/publications/british-irish-visa-scheme/british-irish-visa-scheme)).

<sup>58</sup> Department of Justice and Equality, *Ireland-UK accord to further secure the Common Travel Area* press release (20 December 2011) <<http://www.justice.ie/en/JELR/Pages/PR11000267>>.

<sup>59</sup> Department for Exiting the European Union and The Rt Hon David Davis MP, *The United Kingdom's Exit from and New Partnership with the European Union White Paper*, February 2017, updated 15 May 2017) <<https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union--2>>.

<sup>60</sup> *ibid*; Ryan (n 53) 874.

<sup>61</sup> The legal base is now in consolidated versions of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) (2012/C 326/01) Treaty on the Functioning of the European Union (2012/C 326/01), Articles 67 and 77 TFEU and Article 3 TEU.

place) to exercise border controls against essentially EEA nationals (verification). This control is open to reciprocity by other member states against the UK and the ROI if they should so choose.

When the UK leaves the EU, the treaties will no longer apply to it. They will apply to the ROI, and that includes the (second) protocol on certain aspects of Article 26 of the TFEU. In EU law, the ROI will be the only state permitted to control immigration from the EEA (with Irish emigration subject to possible reciprocal control in the other 26 member states). Those controls will not just be against third-country immigrants (including asylum-seekers), but will also include EEA nationals exercising treaty rights. It is, of course, the case that one set of laws will apply to the former, while EEA nationals will be able to rely upon the principle of the free movement of persons.<sup>62</sup> Nevertheless, the UK will be able to assert that, as long as the ROI continues to affirm the CTA (and it does<sup>63</sup>), then the ROI will be controlling movement of third-country nationals into the ROI and the UK, and EEA nationals into the ROI pursuant to ROI's treaty obligations, and onward to the UK as third country nationals.

This should be feasible, as it simply represents the current arrangement whereby the UK relies on checks on entry at the Irish border, with random checks at the crossing to NI and GB to counter illegal immigration into the UK. The House of Commons Northern Ireland Affairs Committee has noted that requiring checks on people travelling between different parts of the UK would be 'highly undesirable'.<sup>64</sup>

In reality, to counter crime, smuggling, illegal immigration, and human trafficking, it is already done. The number and spread of crossing points mean that a determined immigrant would be unable to pass unchecked, but this is already a known issue with the current operation of the CTA.

Issues with working and overstaying will remain a matter for the Home Office inside the UK border. The UK government noted in its position paper that, in common with other member states, 'controlling access to the labour market and social security have long formed an integral part of the UK's immigration system'. This element would be no different for EEA nationals than for visitors from any other territory where nationals are permitted visa-free entry, but resourcing and enforcement may need to be intensified. This will be a wider concern, not just with reference to entrants to the UK via the ROI. The situation would become more complicated if visa requirements were introduced for visitors who are EEA nationals<sup>65</sup>, or if the UK sought actively to restrict entry to the UK on grounds of criminal convictions or other grounds on which the ROI would not be permitted to exclude EEA nationals, such as previous immigration violations or refusal of entry to the UK. The UK government asserts in its position paper that 'the CTA can continue to operate in its current form and can do so without compromising in any way Ireland's ability to honour its obligations as an EU member state, including in relation to free movement for EEA nationals in Ireland.'

It may be conceivable that Irish immigration officials could ask EEA nationals whether they intend to travel onward to the UK, and if so, whether they intend to work, study, or stay; or if they have ever been denied access to the UK before or have a criminal record, which would mean a visa may be required. Such officials could then pass intelligence on to the UK Border Force, but they could not, as things stand—barring agreement otherwise with the EU—prevent them from entering the ROI.

## Security

It can be argued that it is unrealistic, and therefore irresponsible, to suggest there might be a return to violence in NI, but that does not mean that security concerns, regarding crime and terrorism, have not had an impact on the immigration and goods border, or that all efforts should not be made to ensure that peace is maintained, irrespective of trade considerations.

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<sup>62</sup> TFEU, Articles 45–8.

<sup>63</sup> See, for example, the address by the Taoiseach to the Institute of European Affairs, *Ireland at the Heart of a Changing European Union*, (Dublin, 15 February 2017).

<sup>64</sup> Northern Ireland Affairs Committee, *Northern Ireland and the EU Referendum*, (26 May 2016, First Report of Session 2016–17, HC 48).

<sup>65</sup> There is no indication that this is the intention of the UK Government.

In 1997, the ROI empowered its immigration officers to begin checking the identity of passengers entering from, and leaving for, the CTA: Aliens (Amendment) (No. 3) Order 1997.<sup>66</sup> The underlying reason was the wave of migration in the 1990s, which, in Irish political discourse, saw the problem of Irish emigration replaced by that of foreign immigration. These identity checks applied to Irish and UK nationals, in the sense that their CTA rights had to be verified. But they also applied to all passengers within the CTA, mainly those travelling by air, to a lesser extent by sea, and only occasionally, and initially, by land. Checking identity, as might have been foreseen, elided with immigration control, and significantly undermined the CTA. In December 2011, one Irish High Court judge (Gerard Hogan), referring to the requirement of passengers from the UK to show their passports at Dublin Airport despite the existence of the CTA, was provoked to comment: 'Whatever about anyone else, Joseph Heller [author of *Catch-22*] certainly would have approved.'<sup>67</sup>

In practice, we understand that the inspection of passports is advised but rarely carried out.

Similarly, Operation Gull, a UK initiative dating from 2005 and supported by the ROI, seeks to bear down on illegal immigrants in the CTA. It is implemented mainly by the police in NI.

The UK's participation in the Schengen Information System (SIS) and other EU security and justice programmes following the exit date will be a matter for the wider negotiations, but would clearly assist in maintaining the CTA at an adequate level of security on both sides of the Irish border. This would also need to be supported by the UK and the ROI actively using SIS and (in the ROI's case, at least) exercising their rights to exclude individuals who pose a risk to security.

Although participation in the SIS to date has been asymmetric, as between the UK and the ROI, bilateral arrangements between law enforcement authorities are in place, working to deal with cross border crime, and can be maintained and strengthened in the interests of both the UK and ROI and the wider EU.<sup>68</sup>

### The Belfast Agreement

The 1998 Belfast Agreement (also known as the Good Friday Agreement), between the UK and the ROI, involving political parties in NI, does not, we would contend, materially impact the question of the Irish border. After the EU referendum, claims were made by NI legal parties, with support from Scotland, to the effect that the constraints of the settlement provided for under the Belfast Agreement prevented the UK government from issuing notification under Article 50. These claims were rejected by the High Court in Belfast, and did not impress the justices in the UK Supreme Court: by 11 to nil, they held that the Belfast Agreement, and the resultant Northern Ireland Act 1998, had no effect on the question of Article 50 notification to the EU.<sup>69</sup>

There is some relevance in the Strand Two (north–south) part of the multi-party agreement, annexed to the British–Irish agreement. That led to another international agreement, of March 8, 1999 (which entered into force on December 2, 1999), establishing six north–south implementation bodies, or international organisations created out of the two states. The bodies deal, respectively, with: inland waterways; food safety; trade and business development; special EU programmes; language; and aquaculture and marine matters.<sup>70</sup>

<sup>66</sup> See, further, Immigration Act 2004 SI No. 473/2014.

<sup>67</sup> *Pachero v. Minister for Justice* [2011] IEHC 491, para 18.

<sup>68</sup> See Dr Maria O'Neill, 'A Europe that Protects: Moving to the Next Stage of Cross-Border Law Enforcement Cooperation', (2011) 84 2 *Police Journal* 125.

<sup>69</sup> *R (Miller) v. SoS* [2017] UKSC 5, paras 126–52 & 242, 243, and 277.

<sup>70</sup> This body is called the Foyle, Carlingford and Irish Lights Commission. London and Dublin have failed to agree regarding Irish lighthouses (which were never transferred by the UK to the ROI). The UK's recent response to questions concerning Foyle and Carlingford is to refer to this body. But co-operation regarding aquaculture does not address the two aspects of the territorial dispute.

It will be beneficial for NI and ROI authorities to continue to work together using existing bodies as vehicles where relevant. Co-operation across the border in this way will be key to devising, implementing, and then overseeing and developing measures to minimise disruption and maximise opportunities for the UK and the ROI following the exit date, as well as preserving the existing co-operation and interdependence between the ROI and NI in key sectoral areas.

## **Conclusion**

Drawing together the threads above, we show how the Irish border might be managed in a way to minimise disruption and enable the UK as a whole to pursue opportunities from the date it formally leaves the EU, on March 28, 2019 or before. The issues in connection with the Irish border are complex and varied, but they are capable of resolution; and such resolution does not require broad derogations for NI from wider UK–EU arrangements, which would have negative effects on the much more important trade between NI and GB.

There is a broad consensus for maintaining the soft border of recent years. How hard the border needs to become depends upon:

- the extent to which the ROI implements EU policy (and how flexible that policy might be); and
- the interaction of the three conceptual borders discussed above: trade; immigration; and security.

While we have looked at each of these borders alone, it is the interplay of all three which determines how hard the Irish border needs to be.

We have outlined a number of measures to deal with the goods border, first on an interim basis and ultimately as part of a deep and wide-ranging FTA. We have also outlined mitigating steps that the UK can take if the EU insists that the ROI puts trade barriers in place. Ultimately, the balance of trade and structure of the NI economy are such that the ROI (being unable to unilaterally take mitigating steps) is likely to be damaged more by such barriers (on account of its trade with GB).

The CTA is key to the Irish border after the UK's exit from the EU. It rests on Irish and British self-interest—namely, the desire to travel freely across the border and trade without impediment. There is no international agreement; it rests on ministerial co-operation, which has taken different forms at different times. The CTA has also appealed to UK self-interest, not least having the Irish state act as its agent on the immigration front. There are a number of issues: (1) Could the CTA be articulated as a bilateral international agreement on the occasion of Brexit (with or without any reference to the EU)? (2) While the principle of reciprocity has been important, could this be maintained by London and Dublin with the EU external frontier shortly to intrude? Indications from the EU so far in its Guidelines and Directives indicate that it can.

Arrangements around the Irish border with respect to immigration should continue to manage these security concerns while allowing the CTA to function properly. In practice, this is an issue that the ROI and the UK have been dealing with for many years, and they will continue to do so.

It is the argument of this paper that, with the ROI as a member of the EU, the key to managing movement of persons across the Irish border (as part of the EU's external frontier) will be the UK proposing that the CTA comes under a bilateral agreement, which will continue to have effect through the EU treaties. Further, it is argued that freedom of movement for UK and Irish nationals will not be undermined by excessive security concerns provided that both the UK and the ROI are able to continue their participation in the SIS and other security co-operation mechanisms, at both EU and bilateral level. On this basis, and on the assumption that the UK does not introduce visa requirements for visitors from EEA members, there would be no practical difference in border controls within the CTA, although behind-the-border monitoring and enforcement would need to be increased.