

Irish Centre for European Law
The legal Implications of Brexit

A view from Dublin
by Dr. John Temple Lang*

Introduction

If the United Kingdom decides to leave the European Union, the legal relationships between the UK and Ireland will necessarily alter in various ways. These alterations are summarized in this paper.

It is assumed here that Scotland and Northern Ireland will remain in the UK, and that Ireland will remain in the EU and in the Eurozone. The advantages of EU membership for Ireland would far outweigh any benefits that Ireland might obtain by following the UK. (In 2012, almost 38% of services exported from Ireland went to the EU excluding the UK, and this was twice the services exported to the UK). It is difficult to see any reason to believe that the UK would be able to negotiate more favourable arrangements with the EU than it has today as an EU member State. It is also difficult to see any reason to believe that the UK, negotiating new trade agreements with every country in the world, and doing so without the bargaining strength of the EU, would be able to negotiate more favourable terms than it has at present as a EU member State.

Even if the UK leaves the EU, because Ireland will certainly remain an EU Member State, in most respects the relationship between the UK and Ireland will be the same as the relationship between the UK and all the other EU Member States. Exactly what that relationship proves to be will depend on the result of negotiations between the UK and the EU. That relationship is not discussed in detail here¹.

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¹ See Piris, If the UK votes to leave: the seven alternatives to EU membership (2016, Centre for European Reform)

It will certainly be the policy of the Irish Government to keep to the absolute minimum any changes in the existing legal, political and economic links between the two countries, and in particular to maintain in all respects the existing arrangements concerning Northern Ireland. These are, in particular, the 1998 Belfast “*Good Friday*” Agreement, the Downing Street Agreement of 2012, and the Stormont House Agreement of December 2014. None of these Agreements would require amendment, and neither government would wish to amend them in any way, although the context in which they would operate would have changed. As far as possible the UK will have the same policy of continuing all existing arrangements, but the UK’s measures will bring about a number of changes. Certain changes would be inescapable as results of Brexit, even if efforts were made to minimize their effects.

A Customs and added-value tax frontier

The most immediate and obvious change would be that there would be a customs and added-value tax frontier between the UK, on the one side, and Ireland and the rest of the EU, on the other. This frontier would be along the existing Border between Northern Ireland and the rest of Ireland. This would cause considerable loss and inconvenience to those living and doing business close to the Border, although no doubt everything possible would be done to minimize this. All goods moving in either direction would have to comply with the customs procedures applying to UK-EU trade. Rules of origin would need to be applied to goods moving in either direction, to prevent diversion of trade from third countries outside the EU.

An immigration frontier

A second immediate change would be that the UK immigration regime, whatever it might be, would apply to movement of individuals between Ireland, on the one side, and Northern Ireland and the rest of the UK, on the other side. The Common Travel Area that has existed for many years between Ireland and the UK would no longer exist. Ireland stayed out of the Schengen agreement in order to maintain this Common Travel Area. No doubt everything possible would be done to minimize the resulting inconvenience, but it would be unavoidable that UK immigration controls would have to be set up at every crossing of the Border, and at airports and harbours handling traffic between Ireland and the UK. Ireland could not impose restrictions on movement of persons from elsewhere in the EU into Ireland, in effect on behalf of the UK. Although the UK would need to minimize the loss and inconvenience caused in Northern Ireland, it could not allow the immigration controls on the

Border to be so lax as to allow a back door into the UK to develop. How much difference this would make, of course, would depend on the terms of the UK's immigration control policy. Ireland would no longer have any reason to stay out of the Schengen Area.

Economic consequences on the Northern Ireland Border

The ill-effects on both sides of the Border would not be limited to the inconvenience and cost due to customs posts and immigration control. Brexit would deprive Northern Ireland of guaranteed access to the EU Single Market. The costs of trade between Northern Ireland and the rest of Ireland, for companies on both sides of the Border, would rise. One of the attractions of Northern Ireland for foreign direct investment, full guaranteed access to the EU Single market, would end. The considerable harm that would be caused to the economies of the regions along the Border would be made more serious because those regions would no longer be eligible for EU funds designed to promote cooperation across intra-EU borders. There would be considerable pressure on the UK government to provide some form of compensation for Northern Ireland as a whole, which would suffer greatly from "*Brexit*". At least for the parts of Northern Ireland near the Border, which would suffer most, compensation of some kind would obviously be called for. It is not clear whether the EU could be persuaded to provide assistance to the areas south of the Border.

In fact, "*Brexit*" would be likely to do considerable economic harm to Northern Ireland, unless the UK adopted measures to compensate Northern Ireland and to protect it from the most serious of these consequences. The consequences would be much more serious for Northern Ireland than for the rest of Ireland.

Police and judicial cooperation

A third area of unavoidable legal change would concern the EU police and judicial cooperation measures to which the UK has opted-in. (The UK opted out of over a hundred EU measures under Protocol 36 of the Lisbon Treaty, and chose to opt-in to a smaller number, in November 2014). If the UK left the EU, the EU measures to which the UK opted in would no longer apply to the UK. So they would have to be replaced by similar or identical agreements between the UK, on the one side, and Ireland or the EU, on the other side. Because of the land frontier along the Northern Ireland Border, and because of the continuing tensions in Northern Ireland, these arrangements would be particularly important in Ireland. But some arrangements between the UK and all the EU Member States would be

needed to replace the EU rules that the UK has opted in to, and there is no obvious reason why these arrangements would be unsuitable in Ireland. At most, they might need to be supplemented by bilateral arrangements. The Irish and UK authorities make considerable use of European Arrest Warrants. They would want to maintain the same or similar arrangements.

Fisheries

The fisheries regime in the very large sea area within the jurisdiction of Ireland would continue to be subject to the EU common fisheries policy as at present. The UK and the EU, and perhaps also Ireland, would need to negotiate new arrangements dealing with *e.g.* fish stocks in the Irish sea such as the Mourne and Man herring fisheries, and fishing in Irish coastal waters such as Foyle.

The European Convention on Human Rights

The 1998 “*Good Friday*” Agreement between Ireland and the UK obliged the UK to “*complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency*”.

It would certainly be necessary to continue to fulfil this requirement in Northern Ireland. The governments of Ireland, the UK, and Northern Ireland would all agree on this. However, if the UK were to repeal or modify the UK Human Rights Act, there might be significant differences between the legal position in Northern Ireland and that elsewhere in the UK. This might appear curious and anomalous, but would not necessarily create legal difficulties. Brexit would necessarily mean that the courts in Northern Ireland could not refer questions of EU law to the European Court of Justice. But if, as has been suggested, the UK were also to seek to modify its obligations under the European Convention on Human Rights, other issues would arise. The 1998 Agreement gave residents of Northern Ireland a right to complain to the European Court of Human Rights, and that right under the bilateral 1998 Agreement could not be taken away by unilateral action by the UK. The right to complain to the European Court of Human Rights is clearly different from the right merely to go to the UK Courts to argue that some measures would be contrary to the European Convention if the Convention were applicable, in particular since one of the objectives of altering the UK law would be to avoid the UK courts being bound by the judgments of the Court of Human

Rights. So one hopes that the UK will not significantly alter the human rights legislation that is now has.

Non-Tariff and Technical barriers to trade

It appears that one of the objectives sought by the UK if it left the EU would be to adopt its own regulatory requirements, not complying or being obliged to comply with EU harmonization measures. Goods exported from the UK to the EU would have to comply with the EU requirements. Insofar as the UK adopted new and different requirements, companies in Northern Ireland and in the rest of Ireland would probably have to produce separate lines of products, one to comply with UK requirements and the other to comply with EU requirements. The same thing would of course happen to companies in the UK, but it would be particularly inconvenient for companies on both sides of the Border because a high proportion of their sales are made across the Border. How important this difficulty would be would depend, of course, on how often and how far the UK's regulatory requirements diverged from those of the EU. At this stage this is unknown.

State aid and taxation

The UK would no longer be bound by EU State aid controls, and might make use of this freedom to give subsidies or other aid to UK companies that might cause considerable harm to their Irish competitors.

In addition, the UK might use State aid aggressively to attract foreign direct investment that would otherwise have gone to Ireland. This effect might be partly offset because some investors would prefer to invest in Ireland, a State within the EU, than in the UK, a State outside the EU.

The Stormont House Agreement envisages the devolution of corporation tax to Northern Ireland in 2017. The result presumably would be a reduction in the rate of corporation tax in Northern Ireland, bringing it more into line with the tax on companies in the rest of Ireland. Similar measures applying to Scotland would also increase competition between Ireland and the various parts of the UK for foreign direct investment. However, it is not clear how far Northern Ireland and Scotland will be able to afford the reduction in tax revenues that would result from substantially reducing company tax rates.

Consequences of various alternatives to EU membership

Many of the legal consequences and almost all of the economic consequences of the UK leaving the EU would depend on the new arrangements that would apply to UK-EU relationships, and to the trade agreements that the UK would need to make with non-EU States.

It is not clear which of the theoretically possible alternatives the UK might seek to negotiate, in particular as all of them appear unsatisfactory or unacceptable either to the UK or to the EU, or both. Any new arrangements would have to resolve difficult economic, financial, and institutional questions². But it may be useful to mention these alternatives briefly, to indicate the issues that might arise and which might be relevant in Ireland.

One obvious possibility would be for the UK to join the European Economic Area, like Norway. But this would lead the UK to pay almost as much to the EU as it does today, free movement of persons would continue, and the UK would be bound to copy EU legislation without being able to influence it. The UK would be also required to comply with the judgments of the EFTA Court, which presumably would be just as unattractive to the UK as the European Court of Justice. If the UK were in the EEA, the UK would need to negotiate its own trade agreements, without the benefit of the bargaining strength of the EU: the EEA has not got a common commercial policy.

The EU would not be prepared to allow to the UK to make a series of bilateral agreements, as Switzerland has done. As a result of its experience with Switzerland, the EU wants radically to revise its relationship, to establish a single treaty ensuring harmonized laws, with a Court to enforce it, essentially similar to the EEA (the European Commission

² For an analysis of the institutional issues that arose in the negotiations for the European Economic Area, see Temple Lang, Institutional aspects of EC-EFTA relations, in Robinson and Findlater (eds.), *Creating a European Economic Space* (1990, Irish Centre for European Law). See Baudenbacher (ed.), *The Handbook of EEA Law* (2016, Springer)

From the UK viewpoint, all the alternatives to full membership of the EU have several serious disadvantages. The UK would have no right to vote on or veto new measures adopted by the EU. In particular, the UK would have no right to vote or veto any measures regulating services, in particular financial services. The EU would not agree to any comprehensive agreement unless it was interpreted and applied by a Court. The EU will not agree to the UK imposing national restrictions on free movement of individuals. It is not clear how far these difficulties could be minimised.

has suggested that Switzerland should join the EEA). The EU is insisting on an “institutional” framework. The EU-Swiss arrangements do not apply to financial or other services, so similar arrangements would not benefit the City of London.

The UK might try to negotiate a new kind of relationship, the nature of which is wholly unclear. One feature that has been suggested is that the UK, although no longer a Member State, would have the right to vote on some EU measures. This would have the effect of allowing the UK to keep some of the advantages of membership, and to avoid the disadvantages. This would be unacceptable, for several reasons. EU membership is designed as a balanced package of rights and obligations, and no State would be allowed to obtain the rights without reciprocal obligations. All Member States benefit from some features of the EU, and are inconvenienced by others. It would be impossibly complicated to have a non-Member State appearing in the Council and the Parliament to vote on some issues and not on others. Problems would arise over the scope and the definition of the areas on which the UK could vote. It would be unjustifiable to give one non-Member State rights that have never been given to others, such as Norway. Any such arrangement would involve re-writing the entire Treaties. In any case, the UK’s objections to the European Court of Justice would remain. The whole idea is entirely unrealistic and ill-considered.

Whatever details might be suggested, the EU would insist on contributions to the EU budget, free movement of labour, overall reciprocity of economic obligations, and primacy of EU law over UK law. In exchange for access to the EU market in any given sector, the UK would have to be bound by the same rules. The UK might agree to apply some EU rules, but would not be able to influence them. In any case, the EU would be reluctant to agree to a series of agreements for different sectors, since the result would be complicated and inconvenient. Any such arrangement would seem too similar to the present arrangements for Switzerland to be acceptable to the EU. Insofar as the UK would be limiting movements of persons, the EU would not agree to the UK discriminating between citizens of different EU Member States.

It is difficult to see any reason to believe that the UK would be able to negotiate any arrangements more favourable than those that it has at present as a Member State of the EU.

The other possibilities are a customs union (like Turkey), a free trade agreement such as EFTA (which would not apply to financial or other services and would not eliminate

technical barriers to trade), or relying on WTO rules (which do not provide freedom for services, and would not protect UK exports against non-tariff barriers). None of these seem likely to be attractive to the UK.

Possible consequences, depending on the new UK-EU arrangements

Apart from the unavoidable consequences of the UK leaving the EU, mentioned above, there are a large number of possible consequences that would depend on the new arrangements that would need to be made between the UK and the EU.

For example, the new arrangements would have to make it clear whether UK companies would have the right to bid for public contracts in the EU, substantially as at present, and correspondingly whether EU companies would have the right to bid for public contracts in the UK. If this were agreed, the UK would have to agree to keep its procedures on public contracts in line with EU standards (since otherwise there would not be reciprocity), but without having any right to influence changes in EU standards. This issue, though important from an economic viewpoint, could not be dealt with in isolation. UK companies presumably would be able to set up subsidiary companies in the EU, and when they had done so the subsidiaries would have all the usual rights of EU-based companies. So the right to bid for public contracts could not be separated from the rights of establishment and services.

This illustrates a wider issue. UK companies, by setting up subsidiaries in the EU, could still get some of the benefits of membership in the EU. The EU negotiators would be well aware of this, and would want to insist that EU companies would be free to establish themselves in the UK on satisfactory conditions. This would mean that, to ensure meaningful reciprocity, the UK would need to accept certain obligations to give subsidiaries of EU companies corresponding rights in the UK.

Broader legal consequences

A number of broader legal consequences for Ireland would result from UK withdrawal for the EU.

Ireland would remain in the Eurozone, and its financial links with the UK would therefore be subject to whatever arrangements were made to govern the relationship between the Eurozone and the UK.

There would only be three common law Member States in the EU (Ireland, Cyprus and Malta) and the influence of the common law on EU law would therefore be substantially reduced.

Ireland and the UK have been consistently opposed to the EU adopting measures to harmonise direct taxation. If the UK leaves, it will be much more difficult for Ireland to resist moves towards tax harmonization.

Being outside the EU, universities in the UK would be free to charge Irish students higher fees than UK students, and might choose not to participate in the EU Erasmus student-exchange programme, or to participate in it less. This would certainly reduce the number of Irish students studying in the UK, and would similarly reduce the number of UK students studying in Ireland.

More generally, the effect of the UK and Ireland being EU Member States for the past forty years, on a formally equal basis, has led to closer and better relations between the capitals. This undoubted though imprecise effect would be lessened, though not eliminated, if the UK left the EU. The UK would still need to try to get Ireland to influence EU decision-making in ways favourable to the UK, since the UK would no longer be able to influence them directly.

The UK's other objectives

Apart from the aims already mentioned (control of immigration, modification of the effects of the Human Rights Convention), the UK apparently wishes to be dissociated from the EU objective of an "*ever closer union*". Though Ireland has never dissented from this objective, the Irish government would probably agree to dropping it, at least as far as the UK is concerned, if that were necessary to satisfy the English voters. If the UK leaves the EU, it will not, of course, be concerned with the EU's long term ideals.

The UK also wishes to cut tax and social welfare benefits for lower paid workers. The EU would never agree to this being done on any basis that discriminated against foreign

workers. However, EU law already allows non-contributory social welfare payments to be withheld from individuals who are economically inactive (the *Dano* judgment³). The UK could adopt this approach at any time if it wished to do so. Outside the EU, the UK would have only the non-discrimination obligations resulting from the European Convention on Human Rights. As it is not yet clear what the UK would intend to do, it is not clear whether it would have any special consequences for Ireland.

No need for another Irish referendum

It has been tentatively suggested that the UK might be able to negotiate changes to the EU Treaties, and that if this occurred it might be necessary to have a referendum in Ireland to approve the changes. This seems most unlikely, because any changes in the Treaty might apply only to the UK, and any changes would tend to reduce and not to increase the obligations of Member States. They would therefore not necessitate a referendum in Ireland.

³ Case C-333/13, *Dano*, EU : C : 2014.