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The legal Implications of Brexit – Dublin Conference

Brexit – Unavoidable consequences and uncertainties for Ireland

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Introduction

If the United Kingdom decides to leave the European Union, the legal relationships between the UK and Ireland will alter in various ways. These alterations are summarized in this paper. Although some changes are unavoidable, the details are not yet clear, and would not be known until the new relationship between the EU and the UK has been negotiated, which would take some time.

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). In addition, 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

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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.

It will certainly be the policy of the Irish Government to keep to the 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.

Unavoidable consequences

The unavoidable consequences of the UK leaving the EU concern:

- A customs and value-added tax frontier on the Border between the two parts of Ireland
- An immigration frontier
- Technical changes in the arrangements for police and judicial cooperation
- The Northern Ireland courts will no longer be able to refer questions of EU law to the European Court of Justice in Luxembourg.

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

¹ See Piris, *If the UK votes to leave: the seven alternatives to EU membership* (2016, Centre for European Reform); Paul Gallagher, *Brexit: Legally Effective Alternatives* (2015, Institute for International and European Affairs); O’Ceallaigh and Gillespie, *Britain and Europe: The Endgame, an Irish perspective* (2015, Institute for International and European Affairs).

the rest of Ireland, and of course between Ireland and the rest of the UK. 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.

This will be particularly important in the sector of agricultural products, in which there cannot be completely free trade, because the UK will have to introduce its own agricultural policy, to compensate UK farmers for the loss of the EU farm policy.

In addition, there will be an added-value tax frontier, because all sales from Ireland into Northern Ireland and the rest of the UK will be export sales, and all imports into Ireland will be imports from outside the EU. The effect will be to multiply the number of VAT returns that need to be made. This will be necessary whatever sales tax regime is ultimately adopted by the UK.

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 along 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, and of all the benefits of the EU agricultural policy and the EU regional funds. 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 harm that would be caused to the economies of the regions on both sides of the Border would be more serious because those regions would no longer be eligible for EU funds designed to promote cooperation across intra-EU borders. 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 were to adopt 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 UK². So they would have to be replaced by similar or identical agreements between the UK, on the one side, and Ireland or the EU (or perhaps both), 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

² No doubt the UK would adopt transnational legislation maintaining EU regulations in force by virtue of UK law, until they had been formally replaced by national legislation.

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 EU fisheries Control Regulation 1224/2009 grants access rights to UK and Northern Ireland fishing vessels. These will no longer apply, as UK boats will no longer be EU vessels. The UK would need to negotiate with the EU to obtain access to much of the eastern Atlantic.

References to the European Court of Justice in Luxembourg

It would be unavoidable, if the UK leaves the EU, that the courts of Northern Ireland would no longer be able to refer questions of EU law to the European Court of Justice in Luxembourg. There would therefore be no guarantee that EU law, including the EU Charter of Fundamental Rights, would be applied in Northern Ireland in accordance with the case-law of the ECJ.

At the Irish Centre's Seminar in Belfast on Brexit on 26th February 2016, John Larkin Q.C., the Attorney General of Northern Ireland, made a prepared speech in which he argued that human rights would be better protected in Northern Ireland if it were no longer possible to send questions to the ECJ. The only reason that he gave was that Opinion 2/13 of the ECJ (concluding that the EU could not accede to the European Convention on Human Rights on the terms proposed) was unsatisfactory. He did not suggest how the rights given by the Agreement could be protected as well or better if the procedures for protecting them before the European Court in Luxembourg were no longer available.

The termination of the right of Northern Ireland courts to refer questions to the European Court of Justice might not be contrary to the Agreement. But it would significantly reduce the effectiveness of protection of human rights, because the Court of Justice applies

the Charter of Fundamental Rights throughout the sphere of EU law. In that sphere, the Charter must be interpreted so as to give at least as much protection to human rights as the Convention³, on the points to which both documents apply. In addition, the Charter gives certain rights that are not mentioned in the Convention. Human rights would therefore be less well protected in Northern Ireland than in the rest of Ireland. The Charter is directly applicable in national courts, and it is easier and quicker to get a human rights issue decided by a reference to the Court of Justice in Luxembourg than by the Court of Human Rights in Strasbourg⁴. The Court of Justice cannot decline to answer a question referred by a national court.

The right to complain to the European Court of Human Rights in Strasbourg

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 has been suggested by some UK Ministers that the UK might repeal or modify the UK Human Rights Act, to alter the UK’s relations with the European Court of Human Rights. The 1998 Agreement gave residents of Northern Ireland a right to complain to the European Court of Human Rights, and that right could not be taken away by unilateral action by the UK. The right to complain to the Court of Human Rights is clearly different from the right merely to go before the UK Courts to argue that some measures would be contrary to the European Convention, in particular since one of the objectives of altering the UK law would apparently 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 it now has, and certainly that it will not limit the right to go before the Court in Strasbourg. It would be inconceivable for the UK Parliament to withdraw the right to complain to Strasbourg in Britain, and to let it stand in Northern Ireland.

³ Charter, Article 52 (3).

⁴ Temple Lang, *Precedents and Judicial Dialogue in European Union Law, Present and Future*, in Baudenbacher & Planzer (eds.), *International Dispute Resolution: The Role of Precedent* (2011, German Law Publishers) 141-174, at pp.158-160.

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. But goods exported from the UK to the EU would anyway have to comply with the EU requirements, and UK financial institutions doing business in the EU would have to comply with 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. Mutual recognition would be possible, but only on a sector-specific basis.

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 or other EU 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.

It is unlikely that the EU would agree to free trade in industrial products without agreeing on constraints on State aids in the UK, and some institutional mechanism for ensuring that the constraints were correctly applied. Norway is bound by the State aid provisions of the European Economic Area Agreement, which are applied by the EFTA Surveillance Authority and the EFTA Court. The EU is insisting on institutional arrangements in its relations with Switzerland to ensure that the State aid provisions of the existing EU – Swiss agreements are fully respected. But it seems that the UK would be

reluctant to agree to any agreement by which it would be subject to the jurisdiction of any “foreign” court⁵.

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, in particular in the economic uncertainty resulting from Brexit.

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. Those who advocate Brexit are not agreed on what they would try to negotiate, and they do not seem to have thought about it seriously. Any new arrangements would have to resolve difficult economic, financial, and institutional questions⁶. But it may

⁵ If the UK were to join the EEA (this seems unlikely,) the UK would nominate the judge in the EFTA Court.

⁶ For an analysis of the similar 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.

be useful to mention these alternatives briefly, to indicate the issues that might arise and which would certainly be relevant in Ireland.

One obvious possibility would be for the UK to join the European Economic Area, like Norway⁷. 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. The EEA is a free trade area, not a customs union, so it has rules of origin defining the products that benefit from the free trade, and excluding goods originating in third countries. Many rules of EEA law correspond to those of the EU : the objective of the EEA is “homogeneity” with the EU. This would be convenient in Ireland, because the law would be similar in Ireland and the UK. 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.

In 1989 the Irish Centre for European Law held a conference in Dublin on the relationship of the EU (as it now is) with the then EFTA countries. The papers of the conference were published by the Centre. They explain why it is not possible to give non-Member States of the EU rights comparable to those of Member States. Sweden, Austria and Finland reached this conclusion, and they joined the EU after remaining in the EEA for only one year.

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 existing relationship with that country, to establish a single treaty ensuring harmonized laws, with a Court to enforce it, essentially similar to the EEA (the European Commission 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.

⁷ See the Norwegian government report on the working of the EEA, *Outside and Inside: Norway’s Agreements with the EU* (2012).

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 sometimes 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 dislike of the European Court of Justice would remain. The whole idea is entirely unrealistic and ill-considered. The EU will have no reason to make concessions after the UK has chosen to leave.

Whatever details might be suggested, the EU would insist on contributions to the EU budget, free movement of persons, overall reciprocity of economic obligations, and primacy of EU law over UK law⁸. 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 be 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.

In short, it is impossible 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.

⁸ Those who advocate Brexit object to the principle that EU law prevails over national law. But if it did not, any State could escape from its treaty obligations merely by adopting legislation inconsistent with them: Temple Lang, *Basic Principles of European Law applying to National Courts*, 96 *Svensk Jurist Tidning* (2011) 129-149 and 299-312.

The other possibilities are said to be 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 the proposed EU- Canada agreement (which does not deal fully with financial services), 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.

If the UK decides to leave the EU, the arrangements that were recently agreed will be dropped, and the UK would need to negotiate from scratch, and from a position of weakness. The EU will no longer have any incentive to give the UK favourable terms.

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 similar 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.

Duplication of procedures

Broadly, Brexit would lend to duplication of procedures for all kinds of approvals, because separate approvals would be needed from whatever UK authority was responsible and from the European Commission (assuming that EU law provided one approval for the whole EU). This would occur in connection with e.g. approvals for mergers of companies under competition law, approvals for drugs and medicines, genetically modified organisms, and products subject to safety standards.

How often duplication would occur would depend on the extent to which the UK adopted technical regulatory requirements that would be different from those of the EU, and how far it might be possible to arrange mutual recognition of approval decisions in specific sectors. Duplication would be unavoidable in competition cases, with the risk of inconsistent results.

Scotland

It seems possible that a majority in England would vote to leave the EU and a majority in Scotland would vote to remain in. If this occurred, the Scottish government would almost certainly insist on another referendum, to be held soon enough for Scotland to remain in the EU without interruption. If a majority in Scotland then voted for the separation from England, it would be necessary for Northern Ireland to choose whether to leave the EU with England or to remain in with Scotland. Northern Ireland would have better prospects of getting financial assistance from London than from Edinburgh. The government in London, having created the difficulties for Northern Ireland, would have a very strong moral and political obligation to mitigate them as far as possible. This would be in spite of the fact that Northern Ireland has more affinity with Scotland than with England. Northern Ireland would have a relatively small area of territorial sea, between the large Scottish and Irish sectors.

Broader legal consequences

A number of broader legal consequences for Ireland would result from UK withdrawal from 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. Scotland is a civil law country, although its legal system has been much influenced by UK legislation.

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 decisions in ways favourable to the UK, since the UK would no longer be able to influence them directly.

The UK's other objectives

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 openly against foreign workers. However, EU law already allows non-contributory social welfare payments to be withheld from individuals who are economically inactive (the *Dano* judgment⁹). The UK could adopt this approach at any time if it wished to do so. Outside the EU, the UK

⁹ Case C-333/13, *Dano*, EU : C : 2014.

would no longer be bound by the Charter, and 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.

Concluding comment

It will be clear that I believe that “Brexit” would be a bad mistake for the UK, and for Northern Ireland is particular. It should also be said that it would be sad for the EU if the UK, which did so much to end tyranny in World War II, were to leave what John Hume rightly called the greatest dispute settlement mechanism in history.