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Brexit on the island of Ireland: beyond unique circumstances

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Abstract

This article offers an original analysis of Ireland's and the UK's common EU membership in the light of Brexit, identifies socio-economic decline and threats to the functionality of the Good Friday Agreement as decisive threats emanating from Brexit, and suggests that these can be counteracted by providing a sustainable legal framework for hybridity of Northern Ireland in the categories of citizenship and territory, as well as for deepening socio-economic and civic integration on the island of Ireland, alongside securing antidiscrimination law in Northern Ireland. Instead of protecting these elements, the Draft Protocol on Ireland/Northern Ireland to the EU–UK Draft Withdrawal Agreement sacrifices the indivisibility of the Internal Market by limiting Northern Ireland's access to markets in goods. Concise changes to the draft are proposed to address these shortcomings and to secure participation of Northern Ireland's representatives in its implementation.

Keywords: Ireland/Northern Ireland; Brexit; European Union law; Draft Protocol Ireland/Northern Ireland Withdrawal Agreement; hybrid citizenship; antidiscrimination law

1 Introduction

The position of the island of Ireland – comprising Ireland and Northern Ireland – has gained prominent recognition in negotiating the first ever departure of a Member State from the European Union (EU). A special task force of the EU Commission and the UK negotiating teams on the withdrawal process addressed the ‘unique circumstances on the island of Ireland’,¹ and a special chapter in the Draft Withdrawal Agreement is dedicated to them. Initially, the Commission had even pledged not to negotiate as much as the outline of the EU–UK future relationship before these unique circumstances were addressed. However, the ‘Irish question’ has since escaped any agreed solution, although the Draft Withdrawal Agreement has reduced it to the aim of avoiding two ills: a hard border between

* Thanks go to feedback by the anonymous referees and discussants of these thoughts at the conference from which this work originates, as well as in the context of the TREUP project (see also introduction to this issue). All internet sources were last accessed on 28 August.

1 This term was included in the European Council's (Article 50 TEU) negotiation mandate for the EU Commission of 22 May 2017 (Council of the European Union, XT 21016/17 <www.consilium.europa.eu/media/21766/directives-for-the-negotiation-xt21016-ad01re02en17.pdf>).

Ireland and Northern Ireland and the diminution of rights in the context of the Good Friday Agreement.

This article argues that the unique circumstances on the island of Ireland are of pivotal relevance to the EU as a whole. Since the UK and Ireland acceded to the European Economic Community (EEC) without being required to address human rights violations or territorial conflicts first, their EU membership has been based on the assumption that such problems would be solved by membership itself. The 'Irish question' thus highlights the potency of the EU's socio-economic integration project for enabling sustainably peaceful relations between the peoples of Europe. It is thus imperative for the EU to solve the 'Irish question'. Accordingly, the temptation may become compelling to redefine it narrowly and/or to agree to a feigned solution. Both strategies not only fail to solve the 'Irish question', but also have the potential to undermine the EU integration project as a whole.

In order to develop this argument, the article proceeds as follows: section two recalls the state of affairs on the island of Ireland at the time of UK and Irish accession to the EEC, identifying the unresolved status of Northern Ireland as the core problem. Next, it considers the relevance of common EU membership for the Good Friday Agreement, which after all is viewed as having resolved that problem. This part concludes that EU law is indispensable for the realisation of two central ambitions of the Agreement, namely a hybrid position of Northern Ireland in terms of territory and citizenship and the improvement of the socio-economic position in Northern Ireland. Section three summarises how the 'Irish question' has been reflected upon academically and politically in relation to the UK's withdrawal from the EU. This part concludes with an analysis of the relevant parts of the Draft Withdrawal Agreement in relation to the two central areas where EU membership remains a pivotal precondition for the Good Friday Agreement. The fourth part discusses how far the Draft Withdrawal Agreement must be considered as betraying the indivisibility of the Internal Market as a central EU value, and how this is likely to impact on the conclusion of the withdrawal process. In conclusion, tentative perspectives to overcome its shortcomings will be offered.

2 The UK and Ireland in the EEC, EC and EU

It is worthwhile to recall the concurrent accession of Ireland and the UK to the EEC in order to identify the specific problems caused for the island of Ireland by the UK's unilateral withdrawal from today's EU.²

2.1 JOINING THE EEC: NORTHERN IRELAND AS A CORE ISSUE

While both states joined at the same time, their motives could not have been more different.³ For Ireland, EEC membership constituted a further step towards full

2 Today's EU started out as European Economic Community in 1957, which was its name when the UK and Ireland acceded. The Maastricht Treaty (1993), in force when the Good Friday Agreement was negotiated, renamed the EEC to EC, while also creating the EU as a roof over three pillars, the EC (to which the EEC was re-baptised), the Common Security and Justice Policy, and its three-pillar structure triggered a long-lasting academic discussion on whether the EU was an independent entity and the overarching identity of the EC and the EU or whether the EC was the only relevant category. This debate is now superfluous, as the Treaty of Lisbon has merged the EC and EU into the EU.

3 Anthony M Collins, 'EU Law in Ireland Post-Brexit' (2018) 21 *Trinity College Law Review* 9–30, 8.

international recognition of the young state,⁴ as well as the opportunity to overcome the structural disadvantages of a small state through pooling of sovereignty.⁵ Joining the EEC underlined its aspiration to open up the country to international trade, and offered the opportunity to lessen the pressure of external competition as a lever to modernisation, an aim that would also be eased by access to EEC structural funds and agricultural subsidies. The concern of losing access to the UK market competed with the aim of overcoming an ‘unbalanced economic relationship with Britain’,⁶ while the option to soften the division of the island of Ireland constituted an added advantage.⁷ The accession process was accompanied by a public debate, stressing the progressive nature of European integration, and completed by a referendum, just as any future Treaty change,⁸ resulting in a relatively high level of public awareness of the EEC, EC and EU.

By contrast, the UK is viewed as a reluctant applicant.⁹ It rejected the offer to participate in the European Coal and Steel Community (1951) and the EEC (1957) on the grounds that it wished to retain preferential trade relations with the Commonwealth countries and could not succumb to free movement of workers. It aspired to a free trade association of the Organisation for European Economic Co-operation states with the new EEC, which would allow it to access the Common Market without such obligations. When the EEC states refused such an arrangement, the UK supported the Norwegian initiative to form a European Free Trade Association (EFTA), which did not cover factor mobility and had no judicial authority. The ink under the 1960 EFTA agreement had barely dried when the UK applied for EEC membership in 1961: the access to the EEC Common Market appeared more relevant due to its size. These economic motives to accede to the EEC became more pressing with a weakening economy, forcing the UK to apply for International Monetary Fund support in 1967, and inflating unemployment figures at the turn of the next decade.¹⁰ The accession was portrayed as merely related to the Common Market. When acceptance by a referendum was sought in 1975, this was for internal political reasons rather than as a constitutional requirement.

While joining the EEC, the UK and Ireland had an ongoing territorial disagreement: The UK claimed Northern Ireland as part of its territory, and also effectively governed the province, while the Irish Constitution of 1937 stated in Article 2 that Ireland encompassed all 32 counties on the island of Ireland, though Article 3 conceded that

4 Ireland had only become formally independent from the UK in 1922, i.e. 50 years before joining the EEC, at the price of giving up sovereignty over six of its 32 counties. It fully surpassed its status as a UK dominion and Member of the British Commonwealth as late as 1949. Its membership application to the UN only succeeded in 1955. See further Birgit Laffan and Jane O’Mahoney, *Ireland and the European Union* (Palgrave Macmillan 2008) 12–17.

5 Laffan and O’Mahoney (ibid) refer to sharing (13) or pooling of sovereignty (31), while Katy Hayward wonders why Ireland would give up sovereignty to the EU: Katy Hayward, *Irish Nationalism and European Integration* (Manchester University Press 2009) 11, 45.

6 Collins (n 3) 13.

7 This motive is stressed by Adrian Guelke, ‘Britain after Brexit: The Risk to Northern Ireland’ (2017) 28 *Journal of Democracy* 42–52, 43; see also Hayward (n 5) who depicts the accession to the EU as (among others) motivated by feeding a new narrative for Irish nationalism which would include the North.

8 Gavin Barrett, *Why Does Ireland Have All Those EU Referendums?* (Institute for International and European Affairs 2012). See, on the rejection of the Treaty of Lisbon, Anthony Arnall, ‘Ireland and the Lisbon Treaty: All’s Well that Ends Well?’, in Anthony Arnall (ed), *A Constitutional Order of States?* (Hart 2011) 77–91.

9 See for a summary with hindsight, Simon Bulmer and Lucia Quaglia, ‘The Politics and Economics of Brexit’ (2018) 25 *Journal of European Public Policy* 1089–98, 1090–2; from a contemporary perspective, see Lee Burke, ‘Britain and the EEC’ (1967) 130 *World Affairs* 163–76.

10 Desmond Dinan, *Europe Recast: A History of the European Union* (2nd edn, Palgrave Macmillan 2014) 99–100, with further references.

Irish parliamentary legislation would not encompass Northern Ireland. In Northern Ireland, the dispute was one of the bases for a paramilitary conflict between two ethno-political groups: the Unionists (often of Protestant affiliation) supported the union between Britain and Northern Ireland, while Nationalists (predominantly Catholic) endeavoured a united Ireland.¹¹ British rule in Northern Ireland was punctuated by state activities provoking litigation under the European Convention on Human Rights (ECHR), with the practice of imprisoning persons without trial (“internment”) as a prominent example.¹² There were also considerable socio-economic problems in Northern Ireland, with poverty and destitution particularly pronounced among the Catholic population.¹³

Today, a dubious human rights record would prevent any accession to the EU under Articles 6, 48 and 49 of the Treaty on European Union (TEU),¹⁴ and border disputes presently halt accession of Bosnia-Herzegovina and Serbia.¹⁵ However, in 1972, the EEC was just developing human rights protection,¹⁶ and territorial disputes between applicant countries were not discussed at all.

Since the EEC was, as the EU is today, a peace project based on the equality and cooperation of its Member States, the conflict had to be overcome, however. One can only assume in hindsight that the optimism for the effectiveness of the European integration project outweighed any concern that the EEC had just acquired two potentially warring Member States.

2.2. IMPACT OF EEC MEMBERSHIP IN IRELAND AND THE UK AND NORTHERN IRELAND

Common EEC membership benefitted both Ireland and the UK through offering a larger market and triggering expansion and efficiency gains, while both countries became net recipients through the EEC structural funds. Both countries profited from free

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- 11 Terminology is fraught with ideology here. The term conflict competes with the term ‘Troubles’ (with and without capital ‘T’), while some classified the conflict as civil war, and claimed that any prisoners were prisoners of war under the UN’s Geneva Convention. See, for an extensive explication, Brice Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (Oxford University Press 2010) 5–6. The conflict is not fundamentally religious, and reference to Protestants and Catholics does not include adherents of those religions who came to Northern Ireland from countries other than the UK and Ireland. On the erroneous classification of the so-called sectarian conflict as neither ethnic nor racial, see Chris Gilligan, *Northern Ireland and the Crisis of Anti-Racism* (Manchester University Press 2017) in particular 23–44. Nowadays, when Islamophobia becomes an accepted and EU-funded field of study (see, for example, Ian Law, Amina Easat-Daas and Salman Sayyid, *Dominant Counter-narratives to Islamophobia: Comparative Report* (CIK Working Paper, University of Leeds 2018); there is a whole new dimension in which analysis of Northern Ireland could once again become leading in antidiscrimination law.
- 12 For a thorough discussion of the only partially successful challenges under the ECHR, see Dickson (n 11); Onder Bakircioglu and Brice Dickson, ‘The European Convention in Conflicted Societies: The Experience of Northern Ireland and Turkey’ (2017) 66 *International and Comparative Law Quarterly* 263–94.
- 13 John Coakely, ‘The British–Irish Relationship in the Twenty-First Century’ (2018) 17 *Ethnopolitics* 306–24, 315.
- 14 See on the example of Serbia Beata Huszka, ‘Human Rights on the Losing End of EU Enlargement: The Case of Serbia’ (2018) 56 *Journal of Common Market Studies* 352–67.
- 15 While the absence of border conflicts is not formally an accession criterion, the recent dispute between Croatia and Slovenia over their common border, a heritage of the dissolution of Yugoslavia, before the Court of Justice (case number C-457/18) has motivated the EU Commission to insist on any other border issues to be resolved before accession of other former Yugoslavian sub-states (see answer of Mr Hahn for the Commission to a question in the European Parliament of 6 May 2018 <www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2018-001063&language=EN>).
- 16 On the relation of the EU to human rights, see Marton Varju, *European Union Human Rights Law: The Dynamics of Interpretation and Context* (Edward Elgar 2014).

movement of workers initially by being able to 'export' their work-force, often through temporary works agencies. Irish workers moving between Ireland and the UK saw their rights underpinned by EU law and its predecessors, which had enormous practical consequences in particular for cross-border workers, a category most relevant on the island of Ireland.

For Ireland, modernisation meant moving from a mainly agricultural country towards an industrialised and high-tech one with a significant financial sector.¹⁷ Ireland managed its industrial modernisation through a social partnership policy, among others, while also introducing social benefits for the first time.¹⁸ It achieved a remarkable degree of trade diversification, reducing the UK-share of its exports from over 55 per cent in 1973 to a mere 18 per cent in 2004.¹⁹

In the case of the UK, the access to the Common Market offset the decline of its industrial base. In most EU Member States, state social policy (in most cases underpinned by rights) softened the negative impact of the restructuring of industries on citizens' livelihoods, by instruments such as expensive redundancy plans by employers and employment agencies, which increasingly also had retraining programmes. In the UK, there was no such cushioning, and from 1979 the Conservative Prime Minister Margaret Thatcher ran roughshod over any remaining social consciousness with her explicit disdain for society at large.²⁰

Socio-economic developments on the island of Ireland were contradictory, though. While the Ireland of the 26 counties transformed through modernisation beyond industrialisation, the establishment of an effective service and financial sector, and a differentiation of trade to reduce dependency from the UK, Northern Ireland suffered from economic decline. The former industrial strength of the six counties, depending on shipyards and other heavy industry, became a victim of the fundamental shifts in the global economy. Further, the continuing conflict, with paramilitary violence and an extensive presence of British troops, caused widespread destruction and impacted on the economy as a whole, while business retreated from the province and left behind mainly the agricultural and the public sectors, the latter with a certain emphasis on security. Thus, upon entering the EEC, the socio-economic discrepancy between Ireland and Northern Ireland diminished, while at the same time economic exchange became formally easier. In spite of those frictions, overall concurrent Common Market access emerged as instrumental to deepen the economic integration on the island of Ireland.

At the same time, regular meetings of Irish and UK government representatives in the monthly meetings of the Council of Ministers offered ample opportunities for diplomatic rapprochement, facilitating negotiations resulting in improving the governance of

17 The 26 counties, prior to joining the EU, were even referred to as an 'agricultural backwater', while the six counties were the most industrialised and advanced until the early 1960s, which came with a certain regional price: Collins (n 3) 14.

18 Laffan and O'Mahoney (n 4).

19 Central Statistical Office Ireland, *Ireland and the EU 1973–2003 Economic and Social Change* (2004), table 8.

20 The impact of some of the Conservative government's social policy on the result of the UK's EU referendum is debated in a special issue of the *Journal of Social Security Law*; see Charlotte O'Brien, 'Brexit, Social Security and EU Nationals in the UK: A Recent History of Welfare Segregation, and an Administrative Storm Brewing' (2018) 25 *Journal of Social Security Law* 1–3.

Northern Ireland.²¹ Incrementally, specific negotiations between the UK and Ireland succeeded, for example, enabling common transport and energy sectors in the island of Ireland. They relied on the legal framework provided by the EEC and later the EU.

2.3 RELEVANCE OF THE LEGAL FRAMEWORK AND ITS SUPRANATIONAL QUALITY

The relevance or the specific character of Community law is difficult to quantify, but it certainly constituted a factor in the success of all this. It rendered the EEC and renders the EU much more than a negotiation space.

In 1972, the supranational character of the then EEC was not just a slogan used in its initial negotiation. Instead the Court of Justice had developed the doctrine of direct effect and supremacy of Community law, starting with the pivotal judgments in *Van Gend en Loes* and *Costa v ENEL*.²² The effects of EU law comprise direct effects – i.e. the ability of citizens to rely on the relevant provisions before national courts – and supremacy – i.e. the capacity of overruling national law. Direct effect, while only explicitly demanded for regulations and decisions (Article 288 TFEU) also encompasses Treaty provisions and Directives if these are phrased in such a way as to be applicable by judges without legislative implementation, though for Directives only in relations between citizens and the state or its emanations. Supremacy comprises indirect and incident effects of all EU law, also such which has no direct effect through the principles of interpretation of national law in line with EU law and of non-applicability of provisions breaching EU law. As a last resort, the citizen can also claim damages from the Member State which did not implement an EU Directive or any other source of EU law correctly. This is relevant, because both states have a dualist disposition towards international law generally. Nevertheless, Irish²³ and UK²⁴ courts generally accepted the EU law doctrine of supranationality, and also engaged in extensive judicial dialogue with the Court of Justice. Without these supranational elements, the EEC Treaty would not have had the capacity to become a legally binding and practically reliable basis for cross-border cooperation.

This legal regime had multiple effects on the relations between Ireland and the UK on the island of Ireland. One important example is the EEC's programme to legislate in order to obfuscate physical borders in the Community. While the Treaty created directly effective and supreme provisions guaranteeing free movement of goods, services, persons

21 For an early example, see John McGarry and Brendan O'Leary, *Explaining Northern Ireland* (Blackwell 1996) 279–82, 302–6; see also Elizabeth Meehan, "'Britain's Irish Question: Britain's European Question?' British–Irish Relations in the Context of European Union and the Belfast Agreement' (2000) 26 *Review of International Studies* 83–97.

22 ECJ 5 February 1963 *Van Gend & Loes* Case 26/62 ECLI:EU:C:1963:1; ECJ 15 June 1964 *Costa v ENEL* Case 6/64 ECLI:EU:C:1964:66; for standard textbook coverage on this see Paul Craig and Grainne de Búrca, *European Union Law* (6th edn, Oxford University Press 2015) 185–315.

23 This even held for the disputed austerity measures, see Peter Charleton and Angelina Cox, 'Accepting the Judgements of the Court of Justice of the EU as Authoritative: The Supreme Court of Ireland, the European Stability Mechanism and the Importance of Legal Certainty' (2016) 23 *Maastricht Journal of Comparative and European Law* 204–15.

24 Paul Craig, 'Britain in the European Union' in by J Jowell, D Oliver and Colm O'Cinneide (eds), *The Changing Constitution* (Oxford University Press 2015) ch 4; Anthony Arnall, 'Keeping their Heads Above Water? European Law in the House of Lords' in James Lee (ed), *From House of Lords to the Supreme Court* (Oxford University Press 2011) 129–48. The UK Supreme Court ruling in *Miller* (on which see below text to n 42), though contestable in relation to the Good Friday Agreement, is a model case demonstrating how the Supreme Court follows the doctrine of supremacy and direct effect of EU law.

and capital by the end of the transitional period in 1965,²⁵ the existence of different national systems for VAT and the absence of a uniform pre-declaration of customs consignments meant that border controls remained necessary in the Community, and also on the island of Ireland. The first ever Treaty Reform, the Single European Act of 1987, facilitated adoption of legislation realising Commission President Jacques Delors' ambitious Internal Market programme, which contained the Community Customs Code, adopted in 1992.²⁶ It was this code that eliminated the necessity for controlling goods crossing the borders within the Internal Market, since all levies as well as VAT could be administered after the border crossing. Together with the Schengen Agreement on free movement of persons without passport controls, this code removed the necessity of border posts in the EU. While the UK rejected the relaxation of person borders through the Schengen agreement, and Ireland followed this policy, the Common Travel Area (CTA) in practice replaced this instrument – with the related weaknesses resulting from its informality and complete lack of legal enforceability.²⁷ Taken together, the Customs Code and CTA, which was expressly acknowledged as compatible with Community law in a Treaty Protocol, made border controls superfluous. Any further checks on the Irish border were purely motivated by security concerns.²⁸

2.4 EU MEMBERSHIP AND THE GOOD FRIDAY AGREEMENT

These decisive contributions of EEC membership for normalisation of the situation on the island of Ireland are not usually considered.²⁹ Instead, the Good Friday Agreement³⁰ is often viewed as the high point and provisional culmination of a 'peace process', in which the contribution of the EU is recognised, though not viewed as decisive.³¹ Accordingly, when the EU Commission's negotiation mandate on 'Brexit' as issued by the European Council (Article 50 TEU) included a commitment to upholding the Good Friday

25 Dating the Internal Market's substantive creation to 1993 (e.g. C McCall, 'Brexit, Bordering and Bodies on the Island of Ireland' (2018) *Ethnopolitics* 17(3), 292–305) is factually wrong.

26 Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, OJ L 302/1–50 of 19 October 1992, and Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, OJ L 253/1 of 11 October 1993, 1. This framework has now been replaced by the Union Customs Code (Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, 2013), which entered into force in two stages in 2013 (to enable daughter regulations) and in 2016 (for application at national levels). The new code aims at completely modernising customs procedures for importing into and exporting from the EU, and is still progressively implemented (see for an official explainer <<https://publications.europa.eu/en/publication-detail/-/publication/807e82ea-52ab-11e8-be1d-01aa75ed71a1/language-en/format-PDF/source-search>>).

27 See also John Doyle and Eileen Connolly, 'Brexit and the Northern Ireland Question' in Federico Fabbrini (ed), *The Law and Politics of Brexit* (Oxford University Press 2017) 145–7; on the CTA's insufficiency as legal frame, see Bernhard Ryan, *The Implications of UK Withdrawal for Immigration Policy and Nationality Law: Irish Aspects* (Immigration Law Practitioners Association 2016).

28 See on these and the symbolic relevance of the border, Mary Daly, *Brexit and the Irish Border: Historical Context* (Royal Irish Academy and British Academy 2017); on internal constitutional determinants, see Gordon Anthony, *Brexit and the Irish Border: Legal and Political Questions* (Royal Irish Academy 2017).

29 For exceptions, see Meehan (n 21); Mary Murphy, *Northern Ireland and the European Union* (Manchester University Press 2014), though from a political science and not from a socio-legal perspective.

30 Terminology around this Agreement is ideologically loaded. While those in Northern Ireland referred to as Nationalists or Catholics usually use Good Friday Agreement, those referred to as Unionists or Protestant often prefer 'Belfast Agreement': Guelke (n 7). The EU Commission has opted for '1998 Agreement', while the European Council, in its negotiation mandate for this same Commission (below n 41), uses Good Friday Agreement. This notion shall be used in the remainder of the article.

31 Guelke (n 7) 46; Katy Hayward and Mary Murphy, 'The EU's Influence on the Peace Process and Agreement in Northern Ireland in the Light of Brexit' (2018) 17 *Ethnopolitics* 276–92, 278.

Agreement,³² some noted their surprise on this development.³³ However, common EEC membership had been stressed by the UK government as a reason to ensure new arrangements for Northern Ireland consensually with Ireland as early as 1972, and the first framework document for negotiating the Good Friday Agreement of 1994 again stressed that EU-related matters should be discussed in the North–South bodies. Subsequently, because of opposition of the Unionist parties to a strong role of common bodies of Ireland and the UK in governing Northern Ireland, the EU aspect was given less prominence.³⁴ In order to gauge how the EU should react to the Northern Ireland conflict and its remainder in dealing with the UK's withdrawal, it is vital to recognise how EU membership underpins the Good Friday Agreement at every corner.

2.4.1 Short overview of the Good Friday Agreement

The Good Friday Agreement³⁵ mainly establishes an institutional framework to manage the fallout from the contestation of Northern Ireland as a territory within its society, attempting to induce peace through governance. The Agreement provides three levels of institutions for governing Northern Ireland: the Northern Irish level (consisting of Legislative Assembly and Executive – Strand One), the North–South level (consisting of the North South Ministerial Council (NSMC) – Strand Two) and the East–West dimension (consisting of the British Irish Council (BIC) and the British Irish Intergovernmental Conference (BIIC)³⁶ – Strand Three).³⁷ Strand One is characterised by the requirement to share power between Unionists and Nationalists, referring to the two communities at

32 Para 11 of the negotiation guidelines of April 2017, which remain unchanged: EUCO XT 20004/17 <www.consilium.europa.eu/media/21763/29-euco-art50-guidelinesen.pdf>. See also n 94 below.

33 Colin Harvey, 'Brexit, Human Rights and the Constitutional Future on These Islands' (2018) *European Human Rights Law Review* 10–12, 10.

34 Guelke (n 7).

35 For introductory coverage with further references, there are ample recent publications by political scientists Guelke (n 7); Hayward and Murphy (n 31) 6; David Phinnemore and Katy Hayward, *UK Withdrawal ('Brexit') and the Good Friday Agreement* (European Parliament 2017); and some by legal experts as well, see Brice Dickson, *Law in Northern Ireland* (3rd edn, Hart 2018) 1.27–37; Richard Humphreys, *Beyond the Border. The Good Friday Agreement and Irish Unity after Brexit* (Merrion Press 2018). The Agreement text can be found on the web pages of the Irish and UK governments <www.dfa.ie/media/dfa/alldfawebsitesmedia/ourrolesandpolicies/northernireland/good-friday-agreement.pdf> and <www.gov.co.uk/governmentpublications/the-belfast-agreement> as well as on the UN peacemaker webpage, where some editing has removed duplicate headings contained in the signed version <<https://peacemaker.un.org/uk-ireland-good-friday98>>.

36 In contrast to the BIC (see n 41 below) the BIIC was established by a specific Treaty between Ireland and the UK <www.dfa.ie/media/dfa/alldfawebsitesmedia/treatyseries/uploads/documents/treaties/docs/200027.pdf>. This very short Treaty reaffirms the commitment of both governments to the Multiparty Agreement (Good Friday Agreement). When common EU membership of Ireland and the UK ceases, the BIIC remains as the only forum where 'in recognition of the Irish Government's special interest in Northern Ireland and of the extent to which issues of mutual concern arise in relation to Northern Ireland, there will be regular and frequent meetings of the Conference concerned with non-devolved Northern Ireland matters, on which the Irish government may put forward views and proposals' (BIIC, No 5).

37 The Three Strand Architecture and the power-sharing principles between the two communities and 'neutrals' were not an entirely new invention: in 1973 the British government had introduced these same principles, and these were later confirmed in the Sunningdale Agreement based on cross-community negotiations under participation of the Irish and British governments. At the time, they were opposed by Unionists, who called a general strike (which was enforced by paramilitaries) and intensified paramilitary activity. See Gordon Gillespie, 'Northern Ireland 1963–1998' <www.qub.ac.uk/sites/irishhistorylive/IrishHistoryResources/Articlesandlecturesbyourteachingstaff/NorthernIreland1963-1998/#d.en.189201>; Paul Dixon, 'Why the Good Friday Agreement in Northern Ireland Is not Consociational' (2005) 76 *The Political Quarterly* 357–67; Siobhán Fenton, *The Good Friday Agreement* (Biteback Publishing 2018) 500–52.

several places in the Agreement. It also establishes the principle that some powers are ‘devolved’ to the Northern Irish institutions. These three strands are framed by a chapter on Constitutional Questions (see below) and chapter 6 on ‘Rights, Safeguards and Equality of Opportunity’ (also see below), as well as chapters 7 to 10 on decommissioning, security, policing and justice, prisoners and validation implementation and review. The governance arrangements are not discussed here, with the exception of the principle to govern Northern Ireland under the tenet of cross-community consent; nor are chapters 7 to 10 considered. This reductionist view is justified by the focus on those provisions for which common EU membership of Ireland and the UK is formally relevant.

2.4.2 Explicit reference to common EU membership in the Good Friday Agreement

Despite some efforts to downplay its relevance in the negotiations, common EU membership of the UK and Ireland was prominently underlined in the Good Friday Agreement, and even more so in the International Agreement between the governments of the UK and Ireland to which it is annexed. While the former agreement is frequently characterised as merely political,³⁸ the latter is an agreement under international law³⁹ and as such registered with the United Nations.⁴⁰ It should thus be of some significance that the British and Irish governments concluded this agreement ‘wishing to develop still further the unique relationship between their peoples and the close co-operation between their countries as friendly neighbours and as partners in the European Union’. The Good Friday Agreement itself refers to the EU in the three strands dedicated to the institutions governing Northern Ireland. For Strand One, which establishes the democratic institutions in Northern Ireland, paragraph 31 demands that Assembly representatives and the UK government will agree terms ensuring effective coordination and policy input including on EU issues. The NSMC (to be established under Strand Two) shall ‘consider the European Union dimension of relevant matters’, while arrangements are made to ensure that its views are represented at the relevant EU meetings (paragraph 17). An annex to Strand Two identifies relevant EU programmes as one of the areas covered by the NSMC. The British Irish Council (BIC), to be established under a new British Irish Agreement under Strand Three,⁴¹ should discuss ‘approaches to EU issues’ (paragraph 5).

2.4.3 Brexit and the Good Friday Agreement: the UK constitutional law perspective

Despite this prominence of the EU in the International Agreement between the UK and Ireland and the Good Friday Agreement itself, the UK Supreme Court in its *Miller* judgement⁴² rejected the argument that the UK’s withdrawal of Northern Ireland from the EU constitutes a ‘change in the status of Northern Ireland’. Such a change would legally require the consent of the majority of the people of Northern Ireland under Article I(iii) of the UK–Ireland International Agreement.⁴³ The UK government has

38 Humphreys (n 35) 21–3, 229.

39 Ibid. See also Colin Murray, Aoife O’Donoghue and Ben Warwick, *Policy Paper: The Place of Northern Ireland within UK Human Rights Reform* (Durham University/Newcastle University 2015) 16–22.

40 As ‘Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes). Belfast, 10 April 1998’, 2114 UNTS 473.

41 The British–Irish International Agreement, to which the Good Friday Agreement is annexed, is deemed to be the basis for the BIC from the point in time when it entered into force. The BIC establishes a forum for cooperation between all parts of the British Islands, except for England, which has neither the status of a region with devolved powers nor of a Crown Dependency (as the Isle of Man and the Channel Islands).

42 *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61.

43 According to that provision the ‘two Governments . . . acknowledge that . . . it would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people’.

consistently stressed that in leaving the EU it would not respect the regional referendum result in Northern Ireland, which returned a 55.5 per cent majority for remain. Instead, the UK should leave the EU as one.⁴⁴ This position would seem to be violating the Agreement's provision just cited. The Supreme Court ruling constitutes a contestable⁴⁵ reflection of the UK constitutional approach, which – as mentioned – includes a dualist position to international agreements, rendering their legal effects within the UK wholly dependent on the decision of the UK institutions. This municipal legal perspective is beyond the scope of this article, except for illustrating the superiority of common EU membership or the endurance of supranational law on another basis to any other international agreement between the UK and Ireland.

2.4.4 EU membership and substantive aspects of the Good Friday Agreement

Beyond the explicit references to common EU membership of the UK and Ireland, the EU was and is decisive for the effectiveness of two themes central to the Good Friday Agreement: the hybrid status of Northern Ireland and its citizens, and the Agreement's mission to promote socio-economic prosperity in Northern Ireland, as well as the role of all-island socio-economic processes for achieving and underpinning both.

2.4.4.1 Hybridity of territories and citizenship

The endeavour to establish a hybrid identity for Northern Ireland is expressed in chapter 2 of the Good Friday Agreement. Article 2 of the legally binding agreement between the UK and Ireland confirms this by committing the 'British and Irish Governments' to accepting as legitimate any choice by the majority of the people of Northern Ireland between supporting the Union with Great Britain and a sovereign united Ireland. The fifth paragraph of the chapter ensures that any sovereign government with jurisdiction over Northern Ireland will govern with rigorous impartiality and respect for equality of civil, political, social and cultural rights, as well as freedom of discrimination for all citizens. In addition, there is a specific obligation to govern with parity of esteem for identity, ethos and aspirations of both communities, defined by their wish to either retain the Union with Great Britain or aspire to a sovereign united Ireland. This is followed by the commitment to recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as British or Irish or both, which includes the right to either or dual citizenship, irrespective of any future change of Northern Ireland's status. The Good Friday Agreement under the heading 'Constitutional Issues' asserts that the participants of the negotiations endorse the governments' commitments and also pledge that they will recognise any free choice by the peoples of Northern Ireland and Ireland as to whether Northern Ireland remains a part of the UK or joins Ireland, while also supporting the principle of governing the province with rigorous impartiality.

Strand Three of the Good Friday Agreement further underlines this hybridity in paragraph 5 under 'British–Irish Intergovernmental Conference' (BIIC), according to

44 The UK position on EU withdrawal and the Good Friday Agreement is summarised in a 16-page paper of August 2017 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/638135/6.3703_DEXEU_Northern_Ireland_and_Ireland_INTERACTIVE.pdf>, on which see <<http://qpol.qub.ac.uk/position-paper-uk-government>>, as well as in some remarks in the White Paper on the Future Relationship with the EU: HM Government (UK), *The Future Relationship between the United Kingdom and the European Union* (HM Government 2018) 9.

45 Christopher McCrudden and Daniel Halberstam, 'Miller and Northern Ireland: A Critical Constitutional Response', in Daniel Clarry (ed), *The UK Supreme Court Yearbook* (Appellate Press 2018) 299–344.

which the 'Irish Government's special interest in Northern Ireland' is recognised and regular and frequent meetings of the BIIC are demanded on non-devolved Northern Ireland matters, on which the Irish government may put forward views and proposals. The BIIC may also 'contribute as appropriate' to 'any review of the overall political agreement arising from the multi-party negotiations', without any power to 'override the democratic arrangements set up by (it)', namely the rules on Strand One. Since anything coming close to joint government of the UK and Ireland over Northern Ireland is rejected by the Democratic Unionist Party (DUP), the BIIC has not met since 2007, when the Strand One institutions were restored after a 10-year lapse under the joint leadership of the DUP (Ian Paisley sr) and Sinn Fein (Martin McGuinness). It resumed its activities in July 2018, following the relapse of the Strand One institutions in early 2017, stressing explicitly that the 'bilateral co-operation' enabled by the conference 'needed to be maintained and, where possible, strengthened following the departure of the United Kingdom from the European Union'.⁴⁶

Though not explicitly referred to, common EU membership arguably constitutes a precondition of the hybrid status of regions as well as of persons. Hybridity of regions is facilitated by the possibility of establishing common administrative units and processes by the states for regions which, although formally divided by a state border, constitute a natural and/or socio-economic unit. Such regions are officially referred to as 'border regions', and subject to extensive EU research and funding.⁴⁷ This funding is based on the opportunities provided by common EU membership. These include the option of pooling resources in order to establish transport systems, educational or health services or upgrade the e-communication infrastructure for regions.

Hybridity of people's allegiances (to avoid the contested term identity) is at the core of the EU's socio-economic project, which relies on cooperation of people and businesses even more than on state cooperation. The process of European integration was designed to stabilise transnational interaction between socio-economic actors in order to engender solidarity between the peoples of Europe and thus perpetuate peace between their states.⁴⁸ Early integration theory defined European integration as the changing of socio-economic and civic actors' allegiances from merely resting with the nation states to encompassing European-level activities,⁴⁹ relying on the idea that transactions between individuals would foster identification of citizens with the wider project.⁵⁰ Today's revival of transactionalist approaches to European integration⁵¹ offers

46 <www.gov.uk/government/news/joint-communiqué-of-the-british-irish-intergovernmental-conference-25-july-2018>

47 See European Commission, *Boosting Growth and Cohesion in EU Border Regions* COM (2017) 534 (European Union 2017).

48 Robert Schuman, 'CVCE.eu' <www.cvce.eu/en/obj/declaration_by_robert_schuman_paris_9_may_1950-en-fa872cf5-67fa-4848-ae00-fbc4d4715e96.html> (Jean Monnet Memoires, Fayard, 1976) 323.

49 Ernest B Haas, *The Uniting of Europe: Political, Social and Economic Forces 1950–1957* (2nd edn, University of Notre Dame Press 1968 [1958]), known as neofunctionalism originally, and today also informing theories of federalism and social constructivism.

50 These are known as transactionalist approaches, founded in the 1950s: Karl Deutsch, 'The Growth of Nations: Some Recurrent Patterns of Political and Social Integration' (1953) 5 *World Politics* 168–95; Karl W Deutsch et al, *Political Community and the North Atlantic Area. International Organization in the Light of Historical Experience* (1st edn, Princeton University Press 1957).

51 Sabine Israel et al, 'Connected Europe(ans): Does Economic Integration Foster Social Interaction?' (2016) 26 *Journal of Contemporary European Studies* 1–19; Theresa Kuhn, *Experiencing European Identity: Transnational Lives and European Identity* (Oxford University Press 2014); Steffen Mau and Jan Mewes, 'Horizontal Europeanisation in Contextual Perspective: What Drives Cross Border Activities within the European Union?' (2012) 14 *European Societies* 7–34.

empirical evidence of whether and in how far these assumptions can be confirmed. As the EU is constituted as a Community of Law, these aspirations are pursued by guaranteeing judicially enforceable rights. Primary EU law, established by the Treaties, provides rights of economic actors related to free movement of goods, services, persons (as workers and entrepreneurs) and capital, alongside some rights conventionally classified as social rights (free movement for EU citizens irrespective of their economic status under Article 21 of the Treaty on the Functioning of the European Union (TFEU), employees' rights to equal pay irrespective of sex under Article 157 TFEU). Rights to free movement of natural persons (Articles 45 and 49 TFEU) also have a social dimension in that they entail rights to equal treatment in the host country, which provides equal employment rights and secures access to social institutions such as healthcare, education, social services and social benefits. Secondary EU law creates the frameworks for utilising these rights, including, but not limited to their social dimensions.

It is worth noting that in enabling hybrid citizenship, the rights to free movement of persons as self-employed entrepreneurs, employees, service providers and recipients, and in a civic capacity are possibly more relevant than the right to trade across borders. While it is cross-border trade which triggers immediate control needs through border posts in the absence of the EU Customs Code, transnational identities are – if at all – encouraged by the option of cross-border lives (i.e. the right to work, shop, convene and stroll across borders). EU law underpins these activities by rights which are – by contrast to the Good Friday Agreement – enforceable in UK and Irish courts, with the European Court of Justice as an arbitrator. In a region where human rights abuses were a daily occurrence, this is not negligible. Further, the regulatory service of the EU, in areas such as social security coordination, access to healthcare, education and social benefits for frontier workers and EU citizens in general, is invaluable in a region with a largely dysfunctional Parliament which is mostly served by orders, rather than dedicated legislation issued by the central Parliament.

2.4.4.2 Socio-economic improvement in Northern Ireland

Chapter 6 of the multiparty agreement contains a number of substantive guarantees, under two identical (repeated) headings 'Rights, Safeguards and Equality of Opportunity'.⁵² The first paragraphs are focused on governing Northern Ireland, and demand that this government actively protects human rights, in particular: the right of free political thought, freedom and expression of religion; the right to pursue democratically national and political aspirations; the right to seek constitutional change by peaceful and legitimate means; the right to freely choose one's place of residence; the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity; the right to freedom from sectarian harassment; and the right of women to full political participation.

The second section, with the subheading 'Economic, Social and Cultural Issues', requires for the UK government to promote 'sustained economic growth and stability' in Northern Ireland, as well as promoting social inclusion 'including in particular community development and the advancement of women in public life'. This is underlined by specific political commitments to devise a regional development strategy for Northern Ireland, which addresses the 'divided society', alongside strengthening the physical infrastructure of the region, an obligation to adopt measures guaranteeing employment equality, including through antidiscrimination legislation, as well as measures to combat unemployment with

⁵² The repeated headings appear in the officially signed versions lodged with the UK and Irish governments, while the version published on the UN peacemaker webpage is redacted to omit the repetition, see n 35 above.

specific attention to eliminating the difference in unemployment rates between ‘the two communities’. The UK and Ireland are both required to support linguistic diversity, consisting of the Irish language, Ulster Scots and languages of the various ethnic communities, with an emphasis on promoting the Irish language and the signing of the Council of Europe Charter for Regional or Minority Rights.

These guarantees are only partly paralleled by hard guarantees under EU law. These parallels are strongest in relation to two complexes: first, the right to freely choose one’s place of residence is underpinned by EU Treaty rights – the four economic freedoms proscribe any detriments deriving from working (as employee or self-employed) in another EU Member States or across a formal state border in the EU; and EU citizenship rights partly extend this to those who are still in education, retired or not working for other reasons. Second, socio-economic equal opportunity regardless of religion and belief, disability, gender and ethnic or racial origin is the aim of EU antidiscrimination law and policy, based on today’s Articles 19 and 157(3) TFEU⁵³ and incorporating Articles 21–26 of the Charter of Fundamental Rights of the European Union.

Beyond any explicit parallelism of rights, there is also a more general common thread running through the Good Friday Agreement and the EU Treaties. All aim to engender integrated societies: the former across the ethno-political-cultural divide, as well as across a border; the latter through making national borders permeable and superfluous, as well as through creating European-level socio-economic institutions. The conviction that social change can and must be driven through rights-based socio-economic integration underpins both the EU and the Good Friday Agreement.⁵⁴

Bradley⁵⁵ recalls that, while the Good Friday Agreement was being negotiated, little attention was dedicated to the socio-economic conditions of ensuring prosperity and thus securing peace in Northern Ireland, criticising in particular the limited scope of the socio-economic authority of the Strand One institutions, as well as the ill thought-through list of matters to which the BIIC should direct its attention (transport, agriculture, education, health, the environment and tourism). However, one could argue that the lack of more extensive deliberation on socio-economic policies during the negotiations was due to the recognition that common EU membership would alleviate the problems related to the necessity of including Northern Ireland in an all-island economy: the Common Market would support such an economy regardless of the exact terms of the Good Friday Agreement.

2.4.5 Relevance of common EU membership for Ireland, the UK and Northern Ireland

Overall, common EU membership is not only explicitly specified as informing the bilateral International Agreement to which the Good Friday Agreement is annexed, but also referred to in each of the three institutional strands of the Good Friday Agreement as such. The Good Friday Agreement’s substantive provisions presuppose common EU membership in so far as the ‘Constitutional Issues’ establish Northern Ireland as a hybrid territory and its citizens as hybrid citizens, and the section ‘Rights, Safeguards and

53 Which, in 1998, had just been created in Articles 13 and 141, para 3 of the EC Treaty (version of the Treaty of Amsterdam).

54 See on this already Dagmar Schiek, ‘Hard Brexit: How to Address the New Conundrum for the Island of Ireland’ <<http://dx.doi.org/10.2139/ssrn.2949264>>; see also Phinnemore and Hayward (n 35).

55 John Bradley, ‘The Irish–Northern Irish Economic Relationship: The Belfast Agreement, UK Devolution and the EU’ (2018) 17 *Ethnopolitics* 263–75.

Equality and Opportunity' demands the improvement of the socio-economic situation in Northern Ireland, as well as creating conditions of equal treatment irrespective of race, ethnicity and religion within society.

Rights and political processes established as legally binding concepts by the UK's and Ireland's common EU membership enable the realisation of socio-economic and civic projects to be extended into the whole of both regions though artificially separated by state borders. Guaranteed rights of free movement and equal treatment irrespective of nationality presently bolster the socio-economic position of Irish citizens in Northern Ireland, as they would have bolstered the socio-economic position of UK citizens after a future choice of Northern Ireland to become part of Ireland had the UK not decided to withdraw. The rights basis of more diverse and modern societies, as epitomised by Ireland perhaps more than by Northern Ireland, are also served by EU law, in particular in its legislation requiring Member States to adopt antidiscrimination legislation in employment and beyond.

Accordingly, the UK's withdrawal from the EU fundamentally challenges the functionality of the Good Friday Agreement, amounting to a change of the basis of Northern Ireland as a socio-economic and political entity. The preamble of the International Agreement seems even to suggest that the UK should have consulted Ireland before lodging its application for withdrawal from the EU. All this would lead us to expect that the question of how the functionality of the Good Friday Agreement can be maintained even though the UK plans to withdraw from the EU would be addressed in the negotiations of the withdrawal agreement. Moreover, because the EU's fundamental ethos is mirrored in the rights-based construction of the Good Friday Agreement, the centrality of maintaining its functionality in the withdrawal negotiations is not surprising at all. The next section analyses how far these expectations are met by the debate about the withdrawal process and its implementation.

3 The challenge of Brexit for the island of Ireland

If EU membership resulted in socio-economic improvement on the island of Ireland, providing the preconditions for the Good Friday Agreement and for socio-economic integration across the island, as well as between Britain and Northern Ireland, how will Brexit factually affect this?

3.1 IDENTIFYING THE CHALLENGE: ACADEMIC WRITING AND THINK-TANKS

3.1.1 Socio-economic risks

From 2015, well before the referendum closed, there have been stark warnings on the specific consequences for Ireland,⁵⁶ which have been confirmed by studies in 2018.⁵⁷

One cluster of problems arises from the island's geographic position on the Western outskirts of the Union: it will be cut off from the rest of the EU by the UK as a third country. This poses logistical problems for the trade in goods with the rest of the EU. The EU's initiatives aimed at alleviating this problem include providing funding for

⁵⁶ Alan Barrett et al, *Scoping the Possible Economic Implications of Brexit on Ireland* (Economic and Social Research Institute 2015).

⁵⁷ Copenhagen Economics, *Ireland and the Impact of Brexit. Strategic Implications for Ireland Arising from Changing EU UK Trade Relations – Study Prepared for the Department of Business, Enterprise and Innovation, for the Government of Ireland* (Copenhagen Economics 2018); International Monetary Fund, *Ireland Country Report* (International Monetary Fund Publication Services 2018).

increased sea transport from Ireland directly to other EU countries⁵⁸ and to agree to the control-free transport of sealed containers with goods.⁵⁹

The economic consequences of Brexit for the island also result from the pertaining orientation of trade to the UK (or Britain in the case of Northern Ireland).⁶⁰ While those studies are sometimes quoted to support the argument that trade with Britain is more important than trade across the inner-Irish border, such a conclusion disregards the existence of all-island supply chains, which would be interrupted by eliminating the legal framework of the Internal Market.⁶¹ Maintaining supply chains in the absence of the Internal Market requires additional bureaucracy and thus time-lags and costs impeding competitiveness. These economic issues are amplified for Northern Ireland through the economic detriment of its small size, which renders a close relationship towards if not actual reunification with Ireland an economically valuable option.⁶²

Even positive impacts of Brexit, such as the enhanced traction of Ireland as a base for financial and legal service providers in the light of so-called passporting rights into the EU,⁶³ entail economic risk due to an already stretched housing market⁶⁴ and challenges for recruiting qualified and low-skilled workers.⁶⁵ For Northern Ireland, the latter risk is particularly austere, since its economy may lose access to the EU labour market.⁶⁶ Accordingly, to enable socio-economic prosperity in the far-eastern corner of Ireland, an integration with an all-island economy, as well as an outward-looking orientation beyond the UK are all viewed as necessary,⁶⁷ alongside overcoming persistent infrastructure deficiencies and counteracting outward movement of young and qualified populations.⁶⁸ An additional risk emerges from the fact that EU funding, relating to agricultural policy and regional and social funds, has favoured Northern Ireland more starkly than the other areas of the UK, due to differing policy preferences of the EU and the UK respectively.

58 The present plans unfortunately are based on current freight routes, which of course cross through the UK. It is to be hoped that direct routes to France and Spain receive more priority. See <www.politico.eu/article/commission-frances-exclusion-from-brexit-trade-route-reflects-traffic-flows-shipping-ireland>.

59 Lisa O'Carroll, 'Ireland Seeking Brexit Side-deal with EU to Avoid Border checks' *The Guardian* (London, 6 September 2018) <www.theguardian.com/politics/2018/sep/06/ireland-hopes-side-deal-with-eu-could-allow-it-friction-free-trade-across-border>.

60 See for an overview Copenhagen Economics, *Brexit and the Impact on Ireland* (Dublin 2017) (study commissioned by the Irish government); Adele Berginab et al, *Modelling the Medium to Long Term Potential Macroeconomic* (ESRI 2016).

61 Department of Finance (Ireland), *Analysis of Import Exposures in an EU Context* (Dublin, March 2018).

62 Paul Gosling, *The Economic Impact of an All-island economy: A Draft Report for Consultation* (Dublin, Self-published 2018); Gunther Thumann and Mark Daly, *Northern Ireland's Income and Expenditure in a Reunification Scenario* (Joint Committee on the Implementation of the Good Friday Agreement 2018).

63 Michael Randall, 'Brexit and Financial Services: What Comes Next?' (2018) 22 *Edinburgh Law Review* 149–55.

64 International Monetary Fund, *Ireland Country Report* (n57).

65 Barrett et al (n 56).

66 Paul Macflynn, *The Economic Implications of BREXIT for Northern Ireland* (Nevin Economic Research Institute 2016).

67 Bradley (n 55) 271–3.

68 The infrastructure problems, which consist of a total lack of motorways and railways in the three western counties, have been highlighted by business for decades, see for example <www.ibec.ie/IBEC/Press/PressPublicationsdoclib3.nsf/vPages/Newsroom~ibec-cbi-set-out-ambitious-plan-for-all-island-economy-24-07-2016?OpenDocument?OpenDocument>.

While it is recognised that economic aspects are not the sole factor to be considered here, these aspects alone support the argument for Northern Ireland to remain part of the EU if possible,⁶⁹ or at least in the European Economic Area (EEA).⁷⁰ They further would justify enhanced state aid for the island of Ireland, and possibly even a specific status aligned to outermost territories, in order to perpetuate a specific state-aid regime.⁷¹

3.1.2 Mainly a border problem?

While these challenges are undisputable, current academic and think-tank reflection⁷² tends to focus on the 'border issue'. This is related to the characterisation of the Good Friday Agreement's main achievement as the resolution of a border conflict,⁷³ which results in defining socio-economic measures, such as maintaining free movement of goods and persons into Northern Ireland, as border issues only.⁷⁴ Similarly, a Europeanisation perspective on the inner-Irish border may identify the achievements of the EU as a mere restructuring of the border, culminating in the warning that free movement of workers contributes to the UK's preoccupation with border security.⁷⁵ Such contributions provoke the legal critique that the Good Friday Agreement does not formally require the elimination of an inner-Irish border, while it establishes institutions to manage cross-border cooperation.⁷⁶ Such thinking can be complemented by elaborate proposals for smart border technology to make border crossings run more smoothly.⁷⁷ However, even high-tech border posts are expected to bring back traumatising memories of the past abuse of the border for intimidating those crossing it,⁷⁸ to re-enforce the border in the mind,⁷⁹ and potentially provoke a re-emergence of tensions between Unionists and Nationalists, which some believe have been overcome.⁸⁰ Legal scholars⁸¹ may also differentiate the border into different subject areas, such as a goods border, a person border and a non-physical border, emerging from withdrawing mutual residency rights of UK citizens in Ireland and vice versa post-Brexit.

69 Nikos Skoutaris, 'Territorial Differentiation in EU Law: Can Scotland and Northern Ireland Remain in the EU and/or the Single Market?' (2017) 19 *Cambridge Yearbook of European Legal Studies* 1–24; Schiek (n 54).

70 B Doherty et al, *Northern Ireland and Brexit: The European Economic Area Option* (European Policy Centre 2017).

71 Schiek (n 54).

72 While there is a rich literature on the relation of Ireland to the EU (Central Statistical Office Ireland (n 19); Laffan and O'Mahoney (n 4); Murphy (n 29)), in discussing Brexit focus on the last three years is certainly justified.

73 Phinnemore and Hayward (n 35) 24, drawing on Hayward's longstanding research on Northern Ireland and the EU from the perspective of bordering; see Katy Hayward, *Defusing the Conflict in Northern Ireland: Pathways of Influence* (European Union. Working Paper Series, EU Border Conflict Studies 2004).

74 See also Katy Hayward, 'The Pivotal Position of the Irish Border in the UK's Withdrawal from the European Union' (2018) *Space and Policy* <www.tandfonline.com/doi/abs/10.1080/13562576.2018.1505491>.

75 McCall (n 25).

76 Victoria Hewson and Austen Morgan, 'A Hard Question? Managing the Irish Border Through Brexit' (2017) *Irish Journal of European Law* 38–52, 51.

77 Lars Karlsson, *Smart Border 2.0: Avoiding a Hard Border on the Island of Ireland for Customs Control and the Free Movement of Persons* (European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs 2017).

78 Daly (n 28).

79 Cathy Gormley-Heenan and Arthuer Aughey, 'Northern Ireland and Brexit: Three Effects on the Border in the Mind' (2017) 19 *British Journal of Politics and International Relations* 497–511.

80 Tim Durrant and Alex Stojanovic, *The Irish Border after Brexit* (Institute for Governance 2018).

81 Michael Dougan, 'The "Brexit" Threat to the Northern Irish Border: Clarifying the Constitutional Framework' in Michael Dougan (ed), *The UK after Brexit: Legal and Policy Challenges* (Intersentia 2017) 53–72.

3.1.3 Human rights, equality and 'rights'

The human rights dimension of Brexit in a Northern Irish context is another focus of literature, including studies by and for Irish and Northern Irish human rights organisations. Gordon Anthony goes as far as arguing that the threat to withdraw from the ECHR is more fatal for the Good Friday Agreement than Brexit;⁸² and Donoghue and Warwick have discussed how the idea to withdraw from the ECHR as a complement to EU withdrawal constitutes a violation of international law in this very journal long before the referendum.⁸³ The focus on human rights and equality is not surprising, as the related guarantees differentiate the Good Friday Agreement from power-sharing arrangements in the 1970s. Convincingly, the authors referred to so far recognise that human rights protection as required by the Good Friday Agreement is not necessarily impacted upon negatively by Brexit. A number of authors stress the fact that the motives which resulted in the overall UK majority for withdrawing from the EU may well be indicative of a heightened need for protection of human rights, in particular from ethnic and racist discrimination and human rights violation in the context of immigration policy. In this regard, Harvey, and Smith, McWilliams and Yarnell agree that Brexit may have the advantage of rejuvenating discussions on a human rights Bill for Northern Ireland, which had already been envisaged in the Good Friday Agreement. They admit that this is not required by EU law, and thus not directly impacted upon by Brexit.⁸⁴

As already mentioned, there is some overlap of general human rights policies and rights guaranteed under EU law, as well as some rights to which the parties underwriting the Good Friday Agreement are committed. On this basis, the Joint Committee of the Irish Human Rights Commission and the Northern Ireland Human Rights Commission have raised far-reaching concerns on the potential 'diminution of rights', encompassing the scope of antidiscrimination law, data protection rights, the emerging inequality of those citizens of Northern Ireland who, as Irish citizens, remain EU citizens and those who do not wish to claim an Irish passport for that reason, as well as a range of EU-derived rights for cross-border workers. Based on an academic report,⁸⁵ the Joint Committee takes the view that citizens in practice rely on rights derived from multiple sources to support and protect their lives on the island of Ireland. They also define as their remit the protection of citizens, irrespective of whether they are British, Irish, other EU citizens or indeed non-EU citizens. Under this logic would fall EU Treaty rights and secondary instruments, such as Directives underpinning the antidiscrimination acquis, Treaty rights, regulations and Directives protecting frontier workers, as well as the EU Services Directive, which can be used as a basis for parents living in Northern Ireland and working in Ireland to use tax credits received in the UK for funding childcare in Ireland. The Joint Committee thus raises the point that EU-guaranteed rights, even if they are not human rights *strictu sensu*, are useful to challenge administrative hurdles and even national

82 Gordon Anthony, 'Britain Alone! A View from Northern Ireland' in Patrick Birkinshaw and Andrea Biondi (eds), *Britain Alone! The Implications and Consequences of United Kingdom Exit from the EU* (Wolters Kluwer 2016) 82–102.

83 Aoife O'Donoghue and Ben Warwick, 'Constitutionally Questioned: UK Debates, International Law and Northern Ireland' (2015) 66 *Northern Ireland Legal Quarterly* 93–104.

84 Harvey (n 33); A Smith, M McWilliams and P Yarnell, 'Does Every Cloud Have a Silver Lining: Brexit, Repeal of the Human Rights Act and the Northern Ireland Bill of Human Rights' (2016) 40(1) *Fordham International Law Journal* 76–129.

85 Colin Murray, Aoife O'Donoghue and Ben Warwick, *Discussion Paper on Brexit* (Irish Human Rights Commission 2018).

legislation due to their supranational character.⁸⁶ The EU economic freedoms and citizenship rights, though not an element of human rights, thus emerge as functionally equivalent to constitutional rights in the UK without a formal constitution, while they complement the Irish Constitution where it does not guarantee those rights. A similar point is made by McCrudden⁸⁷ and the Northern Irish Human Rights Consortium.⁸⁸

3.2 IRELAND/NORTHERN IRELAND IN THE WITHDRAWAL NEGOTIATIONS

3.2.1 August 2016: an early positioning of the Northern Ireland executive

While the institutional arrangements of the Good Friday Agreement and its national implementation have not been sufficient to establish a government in Northern Ireland for a period of more than a year now, it is worthwhile pointing out that the former First Minister, Arlene Foster, and the late Deputy First Minister, Martin McGuinness, did communicate a common position to the UK Prime Minister by a letter of 10 August 2016.⁸⁹ The letter opened with a demand that the border must not impede free movement of persons, goods and services, thus stressing its socio-economic relevance. Next, it stated the necessity of avoiding a situation in which the border could develop into a focal point for criminal activity, or a complication in the lives of citizens. The next paragraphs address Northern Ireland's economy: business in Northern Ireland (whether indigenous or based on foreign direct investment) should not lose the ease of trade with nor access to labour from the EU, both skilled and unskilled, emphasising that the public sector too is dependent on the ability to employ EU citizens and non-EU citizens on the terms generated by EU law. The letter also highlighted that the common electricity sector and the all-island agri-food industry required a reliable legal framework, and stressed the relevance of agricultural funds for Northern Ireland (10% of the EU agricultural funds for the UK being allocated to farmers in Northern Ireland), pointing out that agricultural products are predominantly exported to the EU and non-EU countries, which meant that partaking in inner EU trade as well as profiting from EU trade agreements with third countries were of utter relevance. Given the fact that policy-making in Northern Ireland should be based on cross-community consent, there are very good reasons under the Good Friday Agreement to take this positioning as a starting point for identifying the position of Northern Ireland towards the EU after the UK withdraws from the Union.

3.2.2 UK and Irish position

The UK government has focused on avoiding physical infrastructures at the border between Ireland and Northern Ireland,⁹⁰ the continuation of the CTA as well as the Common Electricity Market and payments of 'Peace Money' (programmed to expire in 2020) to Northern Ireland. It has launched its position paper on Northern Ireland, later

86 See above text surrounding footnotes 22–24.

87 Christopher McCrudden, *The Good Friday Agreement, Brexit and Rights* (Royal Irish Academy and British Academy 2017).

88 Human Rights Consortium, *Rights at Risk: Brexit, Human Rights and Northern Ireland* (Human Rights Consortium 2018).

89 The Executive Office of Northern Ireland – letter of 10 August 2016, retrievable from <www.executiveoffice-ni.gov.uk/sites/default/files/publications/execoffice/Letter%20to%20PM%20from%20FM%20%26%20dFM.pdf> (21 November 2017).

90 HM Government Northern Ireland and Ireland Position Paper, London 16 August 2017 <www.gov.uk/government/publications/northern-ireland-and-ireland-a-position-paper>.

complemented by the White Paper on the Future Relationship to the European Union.⁹¹ The White Paper on the future relationship repeats the principles established around February 2017: the UK will leave the EU Customs Union and its Internal Market (referred to as the Single Market), and no longer be subject to the jurisdiction of the Court of Justice. In particular, there will be no free movement of persons into the UK, and any EU citizens accepted will have no claim to equal treatment with UK citizens. This position has been branded as making a hard border inevitable, at the very least for goods crossing a border. As regards movement of persons and services, it will require controls within the UK (and Northern Ireland) which will disrupt economic and civic activity not only if and when borders are actually crossed, but in Northern Ireland generally.

The Irish government has undertaken intensive consultation within Ireland on the position of the island post-Brexit, and early on positioned itself with the aim of maintaining the option of uniting Ireland without the need to undergo an accession process for the whole or part of the country, as well as to avoid a so-called hard border on the island of Ireland. In this context the current Taoiseach has promised that ‘no government will ever again leave North behind’.⁹² It chimes with the adoption of a cross-party motion in the Dail calling on the government to pursue a special designated status for Northern Ireland in the EU in February 2017, and the overarching focus on addressing socio-economic risks emerging from Brexit by the government, as well as key interest organisations in Ireland.⁹³ Nevertheless, the Irish policy is not wholly focused on Northern Ireland. The government also aims at avoiding any restrictions on trade between Britain and Ireland. That position has more in common with the UK government’s than one would think, as the rhetoric is focused on trade in goods and services, but not on free movement of workers without a border. The Irish government is also seriously concerned that violence might resurge in Northern Ireland.

3.2.3 EU Council negotiation mandate

The EU perspective on the Irish problem was first evidenced by the European Council (Article 50) statement to the minutes of its meeting on 29 April 2017, relating to Article I(i), (ii) and (iv) of the UK–Ireland International Agreement, which taken together confirm the option of the people of Northern Ireland to opt for a ‘sovereign united Ireland’. The Council:

. . . acknowledges that the Good Friday Agreement expressly provides for an agreed mechanism whereby a united Ireland may be brought about . . . and . . . that, in accordance with international law, the entire territory of such a united Ireland would thus be part of the European Union.^{93a}

The prominence of the ‘Irish question’ is further mirrored in the negotiation guidelines for the EU Commission regarding the agreement on the UK’s withdrawal from the EU. In paragraph 11, it states:

91 HM Government, *The Future Relationship Between the United Kingdom and the European Union* (July 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf>.

92 As reported widely in the media, for example, in the *Irish Times* in December 2017, alongside a further promise that this would not focus only on Irish citizens in Northern Ireland <www.irishtimes.com/news/politics/oireachtas/varadkar-clarifies-offensive-remark-on-northern-ireland-1.3325231>.

93 Brigid Laffan, ‘Negotiating Brexit: Irish Approaches and Dynamics’ in *Negotiating Brexit: What Do the UK’s Negotiation Partners Want?* (University of East Anglia/University of Surrey 2018) 20-5, 23-5.

93a European Council (Article 50), Minutes, 29 April 2017 EUCO XT 20010/17 <<http://data.consilium.europa.eu/doc/document/XT-20010-2017-INIT/en/pdf>>.

The Union has consistently supported the goal of peace and reconciliation enshrined in the Good Friday Agreement in all its parts, and continuing to support and protect the achievements, benefits and commitments of the Peace Process will remain of paramount importance. In view of the unique circumstances on the island of Ireland, flexible and imaginative solutions will be required, including with the aim of avoiding a hard border, while respecting the integrity of the Union legal order. In this context, the Union should also recognise existing bilateral agreements and arrangements between the United Kingdom and Ireland which are compatible with EU law.⁹⁴

The ‘Irish question’ was among those to be resolved in the agreement on the UK’s withdrawal from the EU under Article 50 TFEU. The staged process proscribed by Article 50 TFEU means that the future relationship between the EU and a former Member State is not fully addressed in the Draft Withdrawal Agreement, though the withdrawal agreement has to be negotiated in view of the future relationship. Maintaining this distinction is important from legal perspectives, *inter alia* because the withdrawal agreement has the same quality as EU law, and arguably also falls under the jurisdiction of the Court of Justice of the EU.⁹⁵

3.2.4 Joint declaration of negotiating parties of December 2017

On 15 December, the European Council, sitting without the UK in accordance with Article 50 TEU, was satisfied that the negotiations between the EU Commission and the UK⁹⁶ had reached a stage where the negotiations could proceed to consider the outlines of the future relationship between the UK and the EU. In the preceding negotiations, the EU Commission has stressed that the solution of the Irish problem was a precondition for that progress. However, now the Commission recognised the provisional character of the 15 paragraphs addressing the unique circumstances of the island of Ireland,⁹⁷ demanding continuation of negotiations on the ‘Irish question’ in a specific strand of discussions.

The ‘December compromise’ reconfirmed the EU and UK’s commitment to honour the Good Friday or Belfast Agreement (‘1998 Agreement’, paras 42–44), defining the ‘hard border’ – which is to be avoided – as ‘including any physical infrastructure or related checks and controls’ (para 43). Also, the right of people of Northern Ireland to identify as British, Irish or both was mentioned, alongside the commitment to EU antidiscrimination law, maintaining the CTA without affecting Ireland’s obligations under EU law and free movement of all EU citizens (para 52–54), and a promise to honour the current PEACE and INTERREG programme, while any future funding beyond 2020 is subject to negotiation (para 55). Both parties specifically committed to recognise the constitutional status of Northern Ireland and the principle of consent (para 44). In addition, the UK pledged to respect Ireland’s place within the EU’s Single Market while

94 European Council (Article 50) on Brexit Negotiations (Special Meeting) Guidelines, 29 April 2017, EUCO XT 20004/17 <www.consilium.europa.eu/media/21763/29-euco-art50-guidelinesen.pdf>.

95 Collins (n 3).

96 Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom’s orderly withdrawal from the European Union TF50 (2017) 19 – Commission to EU27 <https://ec.europa.eu/commission/publications/joint-report-negotiators-european-union-and-united-kingdom-government-progress-during-phase-1-negotiations-under-article-50-teu-united-kingdoms-orderly-withdrawal-european-union_en>.

97 COM (2017) 784 final <https://ec.europa.eu/commission/sites/beta-political/files/1_en_act_communication.pdf>.

it leaves the EU. The UK also unilaterally committed to ‘preserving the integrity of its internal market and Northern Ireland’s place within it’ (para 45).

The agreement that safeguarding Ireland/Northern Ireland will not be contingent on the EU–UK future relationship (para 46) was elaborated by paragraphs 49 and 50, whose convoluted language bears witness to late-night negotiations. These offer the UK the concession that a ‘hard border’ on the island of Ireland may be avoided through its future relationship to the EU. Failing that, there are three fall-back options: first, ‘specific solutions to address the unique circumstances on the island of Ireland’ to be proposed by the UK; failing that, the UK committed unilaterally to maintain ‘full alignment’ with aspects of the Internal Market and the Customs Union supporting North–South cooperation, an all-island economy and the Good Friday Agreement, while also ensuring that ‘no new regulatory barriers’ between Northern Ireland and Ireland develop, unless the Northern Ireland Executive and Assembly agree such new barriers, respecting the principle of consensus. Irrespective of such consensus, the UK ensured access for Northern Ireland’s business to the UK internal market.

Finally, there was recognition that Ireland’s unique geographic situation requires more than maintaining the Good Friday Agreement in relation to transit of goods to and from Ireland via the UK is concerned.

3.3 DRAFT PROTOCOL ON IRELAND/NORTHERN IRELAND (EU WITHDRAWAL AGREEMENT)

While the debate continues, the Draft Protocol on Ireland/Northern Ireland in the Draft Withdrawal Agreement’s version of 19 March 2018 constitutes the last specified point of reference.⁹⁸ Its analysis reveals that the focus on the border, which is shared by a large portion of the academic discussion and the UK government’s position, has acquired exceptional prominence, while the demand to avoid diminution of rights is also addressed. Socio-economic concerns beyond avoiding hard border posts are delegated to a subsection of the Joint Committee to be established under the withdrawal agreement, without any attention to representation of Northern Ireland on this committee, nor consideration of the power-sharing principles.

3.3.1 Content summary

The Draft Protocol consists of five chapters with varying scope. Chapter I, headed ‘rights of individuals’, commits the UK to ensuring that ‘rights, safeguards and equality of opportunity as set out in that part of the 1998 Agreement’ are not diminished as a result of its withdrawal from the EU. It also puts the UK under an obligation to facilitate the work of institutions and bodies set up under the Good Friday Agreement, including those dedicated to the protection of human rights and equality. Paragraph 1 either commits the UK to something it cannot achieve, or is void of legal content: the ambitions of the Good Friday Agreement’s two sections headed ‘Rights, Safeguards and Equality of Opportunity’ contain commitments to uphold rights that go beyond the realm of the EU.

98 European Commission, *TF50 (2018) 33: Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community* (European Union 2018): this version highlights those provisions which are agreed (Articles 2, 8 and 10 out of 15 Articles of the Draft Protocol on Ireland/Northern Ireland) or partly agreed (Articles 1, 6, 9 and 13 out of 15 Articles of that same Protocol). For first commentaries see Sylvia de Mars et al, *Commentary on the Protocol on Ireland/Northern Ireland in the Draft Withdrawal Agreement* (Durham University/University of Birmingham/Newcastle University 2018); House of Commons Library, *Brexit: The Draft Withdrawal Agreement* (Parliament 2018) 67–80; Dagmar Schiek, ‘The Island of Ireland and “Brexit”: A Legal-political Critique of the Draft Withdrawal Agreement’ (1 April 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3150394>.

Those rights that are within the EU's ambit are partly of such a nature that the UK is unable to uphold them on its own. For example, the right to choose a place to live is partly underpinned by the EU economic freedoms, as any national legislation placing an EU citizen under a detriment on the basis of his or her place of residence while exercising one of those freedoms is in breach of EU law.⁹⁹ These rights are, however, are reciprocal. Since the UK is unable to guarantee that EU Member States maintain rights to free movement for EU citizens, this obligation is overbearing. The provision may still have legal content in relation to EU antidiscrimination law, which is mainly secondary law. The UK can commit to maintaining the implementing legislation.

Chapter II's sole Article 2 states that the UK and Ireland may continue the CTA as long as it respects citizens' rights under EU law, and also obliges the UK to ensure that the CTA and associated rights can continue to operate without compromising Ireland's obligations under EU law. This has been read to prevent the UK from requiring Ireland to operate UK immigration control of EU citizens at the Irish border.¹⁰⁰ Again this provision is hardly of major importance.

Chapter III introduces a Common Regulatory Area, which has been interpreted in the media as including Northern Ireland in the Internal Market.¹⁰¹ However, the Common Regulatory Area only maintains free movement of goods – including electricity and agricultural products – for Northern Ireland, as well as extending the frontiers of the EU Customs Union to include Northern Ireland.¹⁰² This has been smugly identified as contrasting with the indivisibility of the Internal Market, which the EU insists on upholding as a principle¹⁰³ – but for Northern Ireland. In a rather illogical fashion, the Protocol also proposes to subject the Northern Irish economy to the EU's state-aid regime, while not mentioning the other provisions of the Treaty chapter on competition law (Article 9). This is most probably triggered by the 2015 legislation on enabling the Northern Irish institutions to reduce corporate tax, which is viewed as potentially violating state-aid rules.¹⁰⁴ However, as this inclusion would also apply to companies providing services and thus remaining excluded from the EU Internal Market with all the accompanying risks, this could be viewed as an unfair allocation of burdens. Chapter III Article 8 demands that the conditions for North–South cooperation in the areas specified in the Good Friday Agreement¹⁰⁵ must be maintained in the course of implementing the Protocol and empowers the Joint Committee with its specialised Committee on Ireland/Northern Ireland (Article 157, 158 of the Draft Withdrawal Agreement's main body) to make appropriate recommendation to the EU and the UK in this respect. Those areas include fields belonging to the service sector, such as healthcare,

99 For example, free movement of workers is interpreted as preventing a Member State to withhold a tax credit for acquiring a family home from a frontier worker on the basis of her place of residence (ECJ 16 October 2008 C-527/06 *Renneberg* ECLI:EU:C:2008:566).

100 de Mars et al (n 98).

101 See, for example, Pat Leahy in the *Irish Times* of 28 August 2018 <www.irishtimes.com/news/politics/brexit-progress-on-future-relationship-key-to-backstop-says-coveney-1.3609400>.

102 On the exact legal technique to achieve that, see Schiek (n 98) 6–7.

103 Anand Menon, *The Guardian* (London 28 February 2018) <www.theguardian.com/commentisfree/2018/feb/28/brexit-eu-draft-agreement-britain>.

104 See with extensive references also to the EU Commission's position, Anthony Seeley, *Corporation Tax in Northern Ireland* (House of Commons Library 2018); from a comparative perspective see Alberto Vega, 'The Impact of European Union Law on Regional Autonomy in Corporate and Value Added Taxation' (2016) 24 REAF 11–45 <www.raco.cat/index.php/REAF/article/download/314595/405125>. It should be noted that the interpretation is not necessarily the only one possible, and that no attempt has been made to explore options of justifying state aid on the grounds of Northern Ireland's extremely weak socio-economic position.

105 See above text around n 55.

telecommunications and tourism, as well as areas where an all-island economy depends on freedom of establishment (justice, if comprising the services of solicitors). Further, employers and trade unions in those very sectors have pointed out that they depend on continuation of free movement of workers. Thus, one wonders whether, through implementing the Protocol, the Joint Committee is empowered to extend the coverage of Chapter III to encompass freedom to provide services and freedom of establishment, as well as free movement of workers.¹⁰⁶

Chapter IV provides two different routes to enforcing the Protocol: under Article 10, the Specialised Committee for Ireland/Northern Ireland should cooperate with the NSMC established under the Good Friday Agreement, but not with the Northern Ireland institutions or the BIC. Article 11 ensures that the EU institutions execute their powers in relation to Chapter III as under EU law, and that any acts adopted in this regard will have the same effect in the UK as EU law. Thus, the part-inclusion of Northern Ireland in the Internal Market encompasses retaining a supranational legal order thus far.

Chapter V includes those provisions of the Draft Withdrawal Agreement's main body which relate to the role of the Court of Justice, though extending the authority of the Court of Justice case law beyond the point in time when the UK leaves the EU (Article 12(2) and (3)). This allows for the 'backstop' to continue functioning until the future relationship between the EU and the UK makes its continued existence superfluous. Article 12 also enables representatives of the UK to participate in the EU's comitology procedures if necessary in relation to the Ireland/Northern Ireland Protocol (Article 12 (4)), and extends EU data protection law and the Treaty reservation in favour of national security (Article 346 and 347) to the UK in respect of Northern Ireland. All this is complemented by more traditional international law-type safeguards, allowing the UK to take rebalancing measures.

3.3.2 Avoiding a hard border and 'diminishing of rights'

While the draft explicitly focuses on the issues defined as material during the academic and policy advice debate, it is actually doubtful whether it addresses the related problems adequately.

The inclusion of Northern Ireland in the EU Customs Union and the Internal Market for goods, including agricultural goods and electricity, will go a long way to eliminate the necessity to control movements of goods across the island of Ireland. Thus, for this purpose border posts will not be needed. However, the movement of persons is fully entrusted to the CTA and its continued operation, which is totally reliant on national law and not based on any formal agreement between Ireland and the UK. As a consequence, even the immigration status of Irish citizens in the UK is not addressed properly. Further, the CTA only extends to UK and Irish citizens. In the era of free movement of persons, and some openness of the EU to immigration from beyond its borders, there is a considerable proportion of EU citizens from other Member States and of non-EU citizens on both parts of the island. Certainly, these populations are also targeted as tourists and business visitors post-Brexit. Thus, the question arises how free movement of EU citizens into Ireland will be secured after Brexit, without compromising the immigration targets of the UK. Article 2 of the Protocol lays the burden on the UK to achieve this: there can be no requirement to limit movement into Ireland in order to assert UK immigration targets. All these controls must be established by the UK, either at its own shores or in Northern Ireland. There is no barrier in the Draft Withdrawal Agreement to this.

¹⁰⁶ See with further references Schiek (n 98) 7.

In so far as ‘diminishing of rights’ is addressed, the Protocol operates a high degree of trust towards the UK. Article 1 does not refer to concepts of Union law, and thus is not encompassed by the jurisdiction of the European Court of Justice under Article 12(2). While the UK remains bound to maintain all EU law protections during the transition phase, there is no protection for the time thereafter at all. In so far as the rights addressed by the Good Friday Agreement go beyond the EU’s limited remit in the field of human rights, this limitation is justified. However, the extensive human rights protection required by the 1998 Agreement continues to demand specific measures by the UK and Irish governments irrespective of EU law.¹⁰⁷

However, antidiscrimination law constitutes a policy field in which the Good Friday Agreement’s demands reflect EU legislation: in 1998, the Treaty of Amsterdam had just been adopted, and with it the explicit competence for the EU to legislate in the field of antidiscrimination law (today Articles 19 and 159(3) TFEU). The institutions were already discussing drafts of the relevant Directives protecting from discrimination other than sex discrimination, building on their extensive experience in this field.¹⁰⁸ Interestingly, the UK insisted on inserting an exception for the discrimination on grounds of religion for Northern Ireland because, on a conservative reading of the EU Directives, positive action would constitute a violation. This exception would arguably not cover the most widespread discrimination in Northern Ireland, which is based on ethno-political allegiance rather than religion. However, UK legislation has implemented the principles of ‘Fair Employment’ into Northern Ireland with reference to religion and political opinion independently from EU pressures. Both the Fair Employment legislation and the antidiscrimination Directives were implemented in Northern Ireland by order, namely without the consent of the Northern Ireland Assembly. These pieces of legislation are retained by the EU Withdrawal Act for the time being, while not excluding future change. Further, the authority of the Court of Justice on their interpretation ends, alongside the option to make references to the Court for national courts. As the supranational character of EU law ends as well, there will be no remedy (such as interpretation in conformity, limited horizontal effect or damage claims against state authorities) in case of incomplete implementation or inadequate interpretation of implementing law. This constitutes a diminishing of rights in this area, which is so important for Northern Ireland and correspondingly spelled out in the Good Friday Agreement. The Draft Withdrawal Agreement would not require any change whatsoever. Such change could easily be achieved by replacing the words ‘As regards Chapter III’ in Article 11 by ‘As regards Chapters I, II and III’. As the draft stands, it does not meet the expectations raised in the academic discourse on the protection of rights so far.

3.3.3 Hybridity of Northern Ireland: territory and citizenship

There is considerable doubt whether the Draft Withdrawal Agreement and Protocol sufficiently safeguard hybridity of identities and territories underlying the Good Friday

¹⁰⁷ See Harvey (n 33); and Smith et al (n 84).

¹⁰⁸ It is safe to assume that the as yet unspecified annex will refer to a set of EU Directives obliging Member States to outlaw discrimination on grounds of sex, ethnic or racial origin, religion and belief, age and sexual orientation in occupation and employment, for sex and ethnic origin also in some other sectors. The main Directives are Directive 2000/43/EC on equal treatment irrespective of racial and ethnic origin in employment and occupation, education, health care and access to goods and services, Directive 2000/78/EC on equal treatment irrespective of religion and belief, sexual orientation, disability and age in employment and occupation, Directive 2004/113/EC on equal treatment between men and women in the access to and provision of goods and services and Directive 2006/54 on equal opportunities and equal treatment of women and men in employment and occupation (recasting Directives first originating in 1975 and 1976)

Agreement in the same way as EU law. While EU citizenship of Irish citizens in Northern Ireland is protected in principle, UK citizens will lose their EU citizenship. The fact that those who fall into the category of ‘citizen of Northern Ireland’ are entitled to claim Irish citizenship does not fully alleviate this concern: under the Good Friday Agreement there should be no nudging into an identity not aspired to by the citizens of Northern Ireland.

More importantly, the hybridity of identities relies on the full ambit of EU citizenship rights, comprising economic citizenship and its civic aspects. Economic citizenship comprises the right to move for work and consumption, as well as providing services across borders. Presently, the draft agreements do not allow the continuation of cross-border services, or for service providers to maintain or create establishments in Ireland and Northern Ireland. While the latter is encompassed by the CTA, the legal reliability of this instrument is dubious. Civic citizenship encompasses the right to move to and stay in other countries for purposes other than economic ones, for example, participating in charitable activity, political association or for educational purposes. As far as the CTA protects some of the related rights for Irish and UK citizens, it lacks legal enforceability. Further, those citizens who have moved to Northern Ireland and Ireland from elsewhere would not have the legally protected right to engage in those activities, and thus civil society would be thrown back on a narrow definition of the citizenry, depending on where a person was born (only those born in Northern Ireland are citizens of Northern Ireland)¹⁰⁹ and the residence status of their parents.

The Good Friday Agreement also safeguards hybridity of identities and territories through the principle of consent, in particular between Unionists and Nationalists. This is established through the requirement of consensual government in Northern Ireland and the role of both Ireland and the UK in the NSMC and the British–Irish institutions. The Draft Withdrawal Agreement creates new competences of the UK in relation to Northern Ireland without ensuring that the people of Northern Ireland are represented in accordance with these principles. Thus, there is no requirement on the UK to ensure that the members of the Northern Ireland/Ireland subcommittee of the Joint Committee are appointed in such ways that Northern Ireland is represented in accordance with the two communities. Similarly, where the UK participates in EU comitology institutions for Northern Ireland, there is no guarantee that this participation is actually by representatives for Northern Ireland. The institutional elements of the Good Friday Agreement have only ever functioned for limited periods of time, and are presently dysfunctional. If the Draft Protocol was factually committed to power-sharing, it should have established its own modalities to ensure that Northern Ireland representation for the purposes of implementing the Protocol is not actually UK representation without reflecting this principle.

3.3.4 Socio-economic improvement

The sectorial access of Northern Ireland to the Internal Market (reduced to goods, including agricultural goods, and electricity) is also problematic with regards to the commitment to develop the Northern Irish economy to approximate a mature developed economy. The all-island economy, mentioned in the joint negotiator report in December 2017, is actually characterised by significant divergence between the Irish and Northern Irish economies.¹¹⁰ The Northern Irish economy has not yet compensated for the loss of

109 This is not part of the Good Friday Agreement, but instead established by an agreed interpretation annexed to the British–Irish International Agreement (see above nn 38–40).

110 Gosling (n 62).

traditional industrial sectors, such as shipbuilding and shirt-making, by developing a service economy. Instead, replacement industrial sectors could be stimulated while the agricultural and public sectors provide additional employment and growth. While in recent years some progress in expanding the service economy has been made,¹¹¹ being excluded from the integrated EU market in services is likely to have an additional stymying effect, not only on growth in this important sector, but also on the desired rebalancing of the Northern Ireland economy and the creation of employment opportunities in a more inclusive way than possible by growing public sector, manufacturing and agricultural employment. Depriving Northern Ireland of access to the EU service sector (which also requires freedom of establishment and free movement of labour) will continue to limit its adequate economic development.

4 Betraying the EU's mission?

The Draft Protocol constitutes an even more problematic inroad into the EU's resolve to safeguard the integrity of its legal order, and in particular of the Internal Market. This is duly mirrored in the European Council's (Article 50) negotiation mandate for the EU Commission, which states:

Preserving the integrity of the Single Market excludes participation based on a sector-by-sector-approach. A non-member of the Union, that does not live up to the same obligations as a member, cannot have the same rights and enjoy the same benefits as a member. In this context, the European Council welcomes the recognition by the British Government that the four freedoms of the Single Market are indivisible and that there can be no 'cherry picking'.¹¹²

The Draft Northern Ireland/Ireland Protocol betrays this particular commitment by offering to Northern Ireland the approach which is chastised as cherry-picking if applied to the whole of the UK.

The indivisibility of the Internal Market is increasingly questioned by UK-based EU lawyers. Remarkably, even those who have dedicated their academic lives so far to free movement of persons in the EU partly demand a diminution of individual rights, conjuring the spectre of fair movement as superior to free movement.¹¹³ Catherine Barnard, for example, carefully exposes how the first drafts for the EEC Treaty did not fully realise free movement of labour. Instead, the Spaak Report, of 21 April 1956,¹¹⁴ did envisage an incremental increase in the number of workers allowed into the Member States, which indicated that labour markets were still perceived as being under state control. Barnard's question of how the gap between this approach and the guarantee of free movement of workers under the condition of equal treatment at their destination was closed can be answered, though: the conference of Messina was accompanied by dialogue of management and labour, at the location of Val Duchesse.¹¹⁵ The recently

111 Eoin Murphy, Michael Scholes and Aidan Stennet, *The Executive's Forthcoming Revised Economic Strategy for Northern Ireland: Preliminary Considerations* (Northern Ireland Assembly 2016).

112 European Council (n 94).

113 Catherine Barnard, 'Free Movement vs Fair Movement: Brexit and Managed Migration' (2018) 55 *Common Market Law Review* 203–26.

114 The full text of 169 pages is only available in French: for example, from <<https://web.archive.org/web/20080227172535/http://www.unizar.es/euroconstitucion/library/historic%20documents/Rome/preparation/Spaak%20report%20fr.pdf>>. A 20-page summary of the most important points in English is also available <<http://aei.pitt.edu/995>>.

115 See the historical documents available at <www.cvce.eu>, under <www.cvce.eu/en/recherche/unit-content/-/unit/02bb76df-d066-4c08-a58a-d4686a3e68ff/24cea7ea-2551-4a63-bbe5-92ab407bf809>.

documented openness of post-war Western-European social democracy for international trade¹¹⁶ did not go as far as supporting a common market for capitalists only, as a contemporary caricature summarised it.¹¹⁷ This was the reason why the Common Market already entailed factor mobility, notably committing the founding states to free movement of workers by the end of the transition period (1965), while free movement of capital was conceptually postponed.

Barnard is correct in highlighting that each accession round saw the Member States waver in their resolve to maintain the indivisibility of the Internal Market: free movement of workers was curtailed by extensive transition periods in 1985/1987 (accession of Greece, Portugal and Spain) and 2004, 2007 and 2013 ('Eastern Enlargement', lastly with the accession of Croatia). However, this should not be a reason to support the factually incorrect media narrative that the UK has been subjected to higher rates of mobility by EU citizens than other Member States.¹¹⁸ A number of Member States, including Ireland, host a higher share of EU citizens in relation to the size of their populations.

The present Treaties uphold the principle of economic free movement rights as indivisible, while allocating slightly less generous rights to EU citizens moving for purposes other than participating in the Internal Market.¹¹⁹ Nevertheless, this prominent critique highlights the necessity to analyse the normative justification for the Internal Market's indivisibility. The creation of the Common Market, and later the Internal Market, constituted an alternative model to traditional liberal free-trade expansion: instead of only offering free trade to producers of goods and services, those whose labour is contracted in producing those goods were granted equal liberty, alongside individual entrepreneurs who wished to move to other states. As evidenced by the amount of initial EU social legislation, this infused the Common Market with social policy elements from the start. The principle of equal treatment of free movers (whether employed or self-employed) in their country of destination constitutes a measure to protect those already labouring in that country of destination from exposure to exploitative competition and a downgrading of their livelihoods. Demanding to give up on equal treatment may be in line with the increasingly conservative, and even right-wing, inclination of the EU's electorates. However, it is not appropriate to alleviate the concerns of those 'feeling threatened' by free movement at any substantive level.¹²⁰

The EU Commission itself has given up the indivisibility in its proposal for or against Northern Ireland. One could conclude that an EU Commission and Irish government, both dominated by conservative parties, pursue the same agenda as the Conservative Party of the UK: to truncate free movement of workers, and eliminate equal treatment rights of those who seek better pastures.

116 Brian Shaev, 'Liberalising Regional Trade: Socialists and European Economic Integration' (2018) 27 *Contemporary European History* 258–79.

117 <www.cvce.eu/en/recherche/unit-content/-/unit/02bb76df-d066-4c08-a58a-d4686a3e68ff/24cea7ea-2551-4a63-bbe5-92ab407bf809/Resources#eae300d8-362b-464e-8ebe-fd40668c4284_en&overlay>

118 For an illustration, see Dagmar Schiek et al, *EU Social and Labour Rights and EU Internal Market Law*, Directorate General for Internal Politics, Policy Department A: Economic and Scientific Policy European Parliament (eds) (European Union, 2015) 104–6, with data up to 2014, i.e. the start of the UK Conservative Party's campaign for leaving the EU.

119 See the extensive analysis by Niamh Nic Shuibhne, 'Reconnecting Free Movement of Workers and Equal Treatment in an Unequal Europe' (2018) 43 *European Law Review* 477–510.

120 For a more elaborate discussion with further references see Dagmar Schiek et al (n 118) 21–4, 49–52.

5 Conclusion: is there any way forward?

It is difficult to conclude in any constructive way on the eve of yet another round of negotiations, previous iterations of which did not bring substantive progress. It seems highly unlikely that the UK will be able to address the 'Irish question' with any ingenuity. The present government's dependence on a sectarian Unionist party from Northern Ireland defies the imagination that a balanced proposal on this difficult project will be received in time for any compromise before November 2018. Thus, any solution will have to come from the EU. The EU will have to consider the specific positioning of the UK with regard to the support and supply agreement between the DUP and the Conservative government. This very situation makes it advisable to not offer anything to Northern Ireland which is not available for the 'Union' (between Britain and Northern Ireland) as a whole. This strategic consideration alone should have deterred the Commission from drafting a partial inclusion of Northern Ireland within the Internal Market.

As has been argued above, limiting Northern Ireland's Internal Market access to free movement of goods does not even satisfy the minimum necessary for its socio-economic recovery. It arguably also falls short of protecting those elements of the Good Friday Agreement which originally relied on and were underpinned by common EEC membership of the UK and Ireland. The EU Commission should thus revise the Draft Protocol to include the full ambit of the Internal Market, maintaining its commitment to its indivisibility as required by the negotiation mandate. The UK could then still request that its whole territory is encompassed by what is offered to Northern Ireland alone, and the EU could accept this request. This would also have the advantage of providing a model of maintaining UK Internal Market membership without distortion of the EEA by the inclusion of a new member much larger than the current EFTA states. Even if it is unlikely that the present UK government would commit to this strategy, a change in direction would inflict less harm on the EU's Internal Market project in itself.

Thus, the Draft Withdrawal Agreement should add free movement of persons, services and capital to the common regulatory area (Article 3). This would require inserting additional Articles into Chapter III, as well as the expansion of the suggested Annex by all the legislation in this area, in particular the legislation on mutual recognition of professional qualifications, on free movement of workers including the coordination of social security and those partitions of Directive 2004/48 relating to economically active citizens, as well as the Services Directive and Directives in the area of financial and online services.

As mentioned above, the Good Friday Agreement's functionality is further threatened by eliminating the institution of EU citizenship from Northern Ireland. Presently, Irish citizens will remain protected if they already use their free movement rights, but the protection of those who do not in their future lives in the UK (including Northern Ireland) relies on a legally non-binding CTA. In order to address this, Chapter II of the Draft Protocol could be enhanced by establishing that the people of Northern Ireland, as well as EU citizens who wish to move to Northern Ireland, continue to enjoy EU citizenship rights, in particular under Directive 2004/38, by an addition to Article 2. This would relieve the UK from undergoing a commitment which is impossible to fulfil, namely to magically ensure that no diminution of rights results from withdrawing EU citizenship rights from a part of Northern Ireland's population.

Further, as regards the first chapter, an additional sub-paragraph to Article 1 should state that EU Treaty provisions and secondary law guaranteeing equal treatment on the grounds of sex, ethnic and racial origin, religion and belief, disability, sexual orientation and age continues to apply in Northern Ireland.

In order to ensure that the additional rights and protections partake in the specific quality of EU law, the jurisdiction of the European Court of Justice should be extended to these chapters. This could be achieved by deleting the words 'As regards Chapter III' in Article 11, in addition to some editorial revisions in Article 2.

Finally, the lack of representation of the people of Northern Ireland in the administration and also adjudication of the Protocol should be safeguarded. The Protocol or the main text of the Draft Withdrawal Agreement should specify that UK members of the subcommittee on Northern Ireland of the Joint Committee must be recruited from the institutions established by Strand One of the Good Friday Agreement, and during times of their dysfunctionality by citizens of Northern Ireland elected in accordance with the principle of community consent. Since the Court of Justice of the EU would acquire a permanent role in Northern Ireland, measures to ensure a corresponding input should be taken. For example, a permanent Advocate General from the island of Ireland could be installed, with the proviso that he or she always advises the Court in matters pertaining to Northern Ireland. For the General Court, a similar provision could be made. All this would require revising Articles 8 and 12 of the Draft Protocol and Article 158 of the main part of the Draft Withdrawal Agreement.

All these issues would of course only be a 'back-stop', as already specified in Article 15 of the Draft Protocol. However, that Article should specify that the safeguards for the functioning of the Good Friday Agreement and socio-economic prosperity in the Draft Protocol must be in place before the Protocol becomes inapplicable.

The EU should also not forget the interests of the larger part of the island of Ireland in approaching Brexit. The commitment of the Joint Declaration of the negotiation parties to alleviate the socio-economic threat of Brexit for the island of Ireland needs to be addressed.

