

Discussion paper on the common travel area

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Citation for published version (Harvard):

Murray, C, O'Donoghue, A, de Mars, S & Warwick, BTC 2018, *Discussion paper on the common travel area*. Northern Ireland Human Rights Commission, Belfast. <<http://nihrc.org/publication/detail/discussion-paper-on-the-common-travel-area>>

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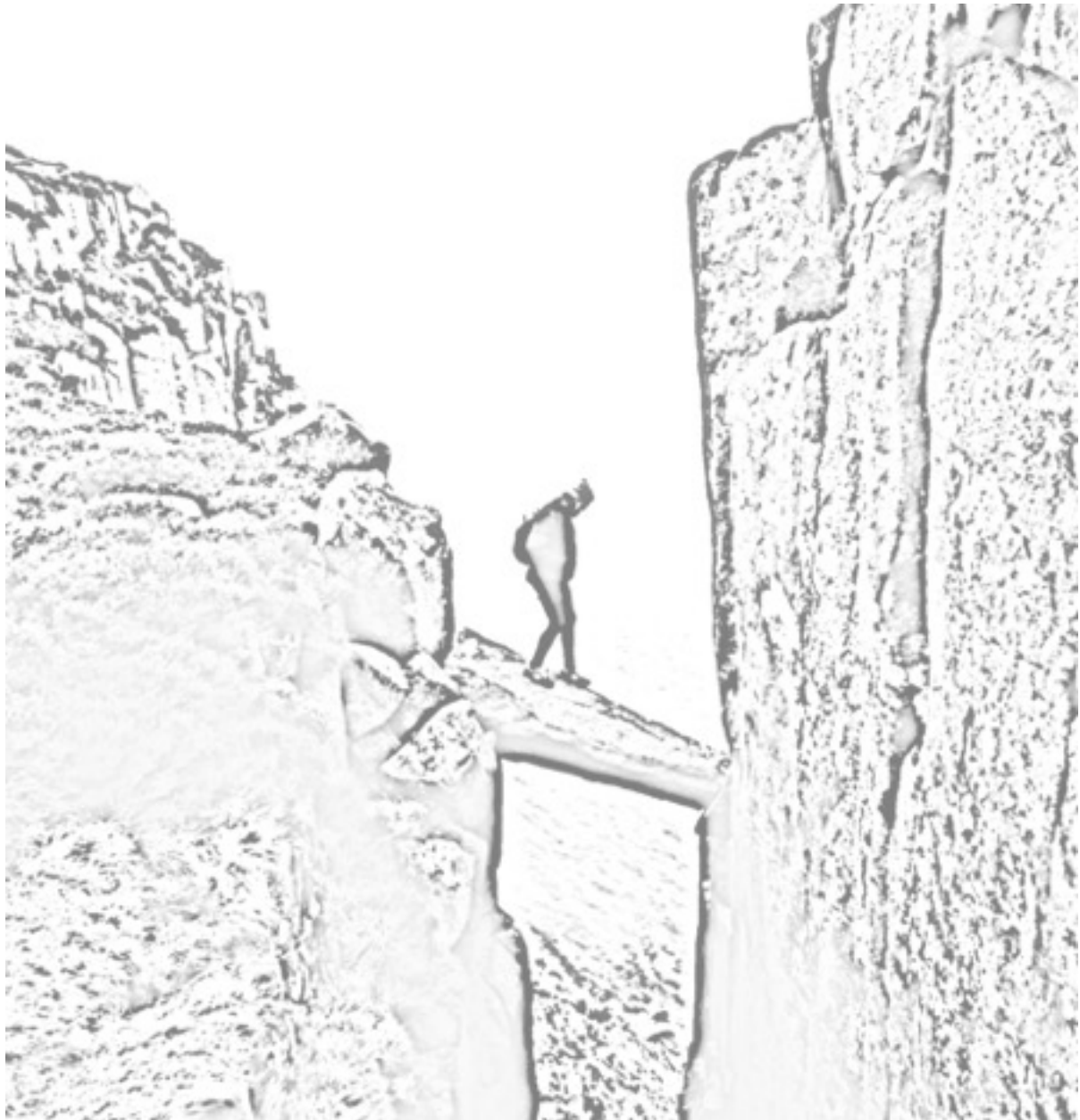
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Discussion Paper on the Common Travel Area

Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick

This paper was written by Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick for the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission. Dr Sylvia de Mars is a Senior Lecturer at Newcastle Law School, Newcastle University; Mr Colin Murray is a Reader at Newcastle Law School, Newcastle University; Professor Aoife O'Donoghue is a Professor at Durham Law School, Durham University; and Dr Ben Warwick is a Lecturer at Birmingham Law School, University of Birmingham. The views expressed within this paper do not necessarily represent the views of the Northern Ireland Human Rights Commission or the Irish Human Rights and Equality Commission, nor the employers of the authors. Paper finalised on 29th October 2018.

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The authors' overarching research on Brexit and Northern Ireland is conducted under the auspices of the *Constitutional Conundrums* project, supported by ESRC Grant ES/S006214/1.

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Abbreviations

CAWT	Co-Operation and Working Together
CTA	Common Travel Area
EEA	European Economic Area
EEC	European Economic Community
EHIC	European Health Insurance Card
EU	European Union
GB	Great Britain
GFA	Good Friday/Belfast Agreement
MoU	Memorandum of Understanding
NHS	National Health Service
NI	Northern Ireland
PSNI	Police Service of Northern Ireland
SLA	Service Level Agreements
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom of Great Britain and Northern Ireland

Executive Summary

A Common Travel Area (CTA) between Ireland and the UK has existed for most of the near-century since Ireland became independent. These arrangements came into being to lessen the disruptive impact of partition upon life on the island of Ireland and to maintain labour flows across the Atlantic Isles. Since the vote in favour of the UK leaving the EU in the June 2016 referendum, political debate about the post-Brexit relationship between the UK and Ireland has frequently invoked the remedial potential of the CTA.

The Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission commissioned this research paper to explore the nature of the CTA and to examine its legal impact within Ireland and the UK. Our research combined archival studies into the history of the CTA, legal research into the UK, Irish and EU legislation and case-law related to the CTA, and interviews and informal discussions with a range of stakeholders across government, public bodies and civil society in Ireland and the UK.

The Territory covered by the Common Travel Area



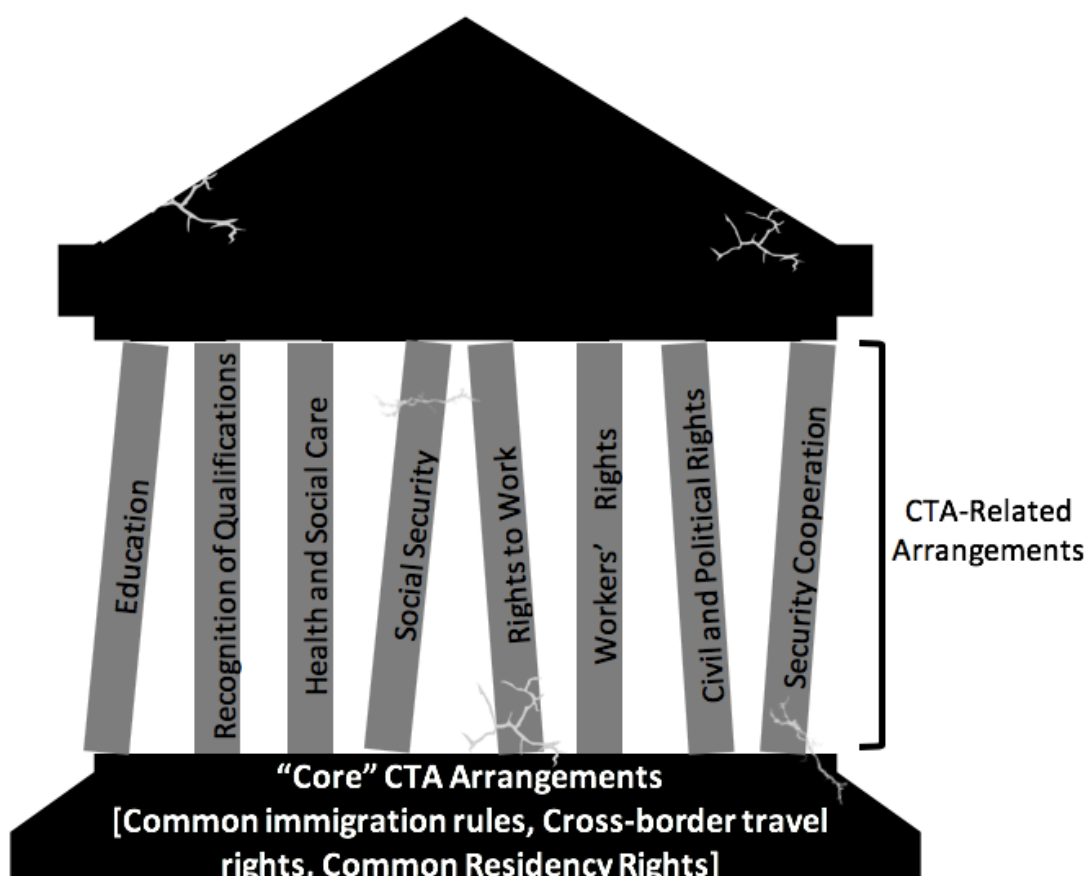
The resultant research paper covers both the ‘core’ terms of the CTA and what the December 2017 Joint Report on the UK-EU Withdrawal Negotiations referred to as ‘related’ arrangements.¹ The paper frequently invokes this distinction between the ‘core’ of the CTA and CTA-related arrangements. This is to highlight the important difference between the more solid and more agreed aspects of the CTA, and those areas which are premised upon the CTA but which are matters of practice, custom and dialogue rather than specific agreement.

In its current incarnation, the CTA was created in 1952, on the basis of an informal agreement between the UK, Ireland, the Isle of Man and the Channel Islands to maintain common

¹ Joint Report: Negotiators of the EU and UK Government, *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 EU (2017)*, para 54.

external immigration rules. This arrangement enables the CTA members to keep checks on travel between these countries (across the CTA’s internal borders) to a minimum. The CTA negates the need for visas, passports or entry cards for citizens of the CTA’s members moving around within the Area (for example, travel by an Irish citizen from Ireland into the UK), and permits open-ended residence for immigration purposes (for example, someone from the Isle of Man moving to live in Ireland). Foreign nationals can still be required to obtain separate visas for each CTA country they enter (although some joint visa schemes exist). The CTA does not, however, impose international legal obligations on its members. Even these core elements of the CTA can be restricted; historical examples exist of movement across the CTA’s internal borders being restricted for security reasons. Chapter 1 details the current extent of the CTA and Chapter 2 examines how these terms emerged over time.

The Core Common Travel Area and Related Issues



Beyond the CTA’s core terms, a range of measures could be described as ‘CTA-related’, because they are linked to the freedom of movement and residency that the CTA provides. The CTA, for example, does not directly cover the movement of capital, the cross-border provision of services, moving across the internal CTA borders purely for work purposes, or transporting goods across borders. Nor does the CTA secure access to medical care or education for citizens of one member of the CTA who has travelled to another on the same terms as ‘home’ citizens. The CTA imposes no obligation upon members to extend a full range of civil and political rights to each other’s nationals. The CTA, moreover, does not mandate any form of police and security cooperation nor does it afford any particular rights in education and health. If these rights and obligations are extended by one CTA member to the

citizens of another on an equivalent basis to their own citizens, this is in almost always a function of domestic legislation and/or policy or a result of obligations arising under EU law. We examine these CTA-related arrangements in Chapter 3 (Health), Chapter 4 (Work), Chapter 5 (Social Security), Chapter 6 (Education) and Chapter 7 (Policing, Justice and Security).

Some of these 'CTA-related' measures are in practice underpinned by EU law. These CTA-related arrangements have always existed at the will of domestic legislatures, but EU law has both facilitated such cooperation and reciprocity, and in some cases required it. After Brexit, it is possible that the UK will not have access to the useful facilitating aspects of EU law, nor might it be bound to continue cooperation with Ireland in these areas. Ireland will have many fewer EU law duties to UK nationals and could be prevented from using EU data sharing and regulatory systems to facilitate pan-CTA cooperation with the UK.

There is not a single legal agreement establishing the CTA. The core arrangements for travel and residence between the CTA's members can be altered by any one of them without breaking international law and the rights and obligations which are so often linked to it can be altered by domestic legislation by any CTA member. One exception is rights covered by the Good Friday/Belfast Agreement (GFA), which we address throughout the text. In short, the CTA is written in sand, and its terms are much more limited than is often believed to be the case.

Therefore, in Chapter 8, we outline possible solutions to the uncertainty which Brexit causes for people and organisations reliant upon the promises of the CTA. The Gold Option, providing the most effective way to address these issues in terms of legal certainty would be for a bilateral agreement between Ireland and the UK² incorporating the full extent of CTA arrangements and explaining the relationship between these commitments and the terms of any UK-EU Withdrawal Agreement. The Silver Option would be to clarify and codify the core CTA arrangements in a binding bilateral treaty between the UK and Ireland, and to reach bilateral agreements on as many of the prominent CTA-related issues as possible (Health/Work/Social Security/Education/Policing, Justice and Security). The Bronze Option would be to continue to operate the CTA as a non-binding arrangement, but to agree and publish a memorandum of understanding setting out its terms (and additional 'related-issues' memorandums as they can be agreed). If reliance is placed upon such informal arrangements, rather than obligations under international law, both the UK and Ireland should commit to wide-ranging public consultations and public information campaigns before unilaterally altering related domestic law.

² This Agreement would also cover the Channel Islands and Isle of Man, if the consent of the Crown dependencies was given to the UK to include them within the treaty.

The Common Travel Area: Myths, Reality and Basis

	UK	Ireland	EU-Level
Claims about the CTA	Rights for Irish nationals to enter and remain, work, study and vote, access to social welfare benefits and health services.	Rights for UK nationals to move freely and reside in either jurisdiction and enjoy associated rights and entitlements including access to employment, healthcare, education, social security benefits, and the right to vote in certain elections.	CTA protected by EU treaty and Draft Withdrawal Agreement.
Core CTA Terms	Right to enter and remain protected in UK domestic law. (Based on an informal agreement in 1952 covering CTA member nations).	Right to enter and remain protected in Irish domestic law. (Based on an informal agreement in 1952 covering CTA member nations).	The United Kingdom and Ireland <i>may</i> continue the CTA (in TFEU Protocol 20, art 2, and draft Withdrawal Agreement, Protocol on Ireland/Ni, art 2).
CTA-Related Arrangements	<p>Access to NHS for residents (Based on different legislation in NI, Scotland, and England and Wales)</p> <p>Reciprocal health care arrangements such as cross-border treatment. (Based on informal Service Level Agreements and Memoranda of Understanding)</p> <p>Right to work. (Based on exemption from Immigration restrictions in the Immigration Act 1971).</p> <p>Rights in Work. (Based on exemption from immigration restrictions in the Immigration Act 1971).</p> <p>Family and other benefits for legal, habitual residents in the CTA with plans in the UK part of future intentions. (Based on The Social Security (Persons From Abroad) Amendment Regulations 2006).</p> <p>Access to education at primary and secondary level. (Based on admissions policies formulated pursuant to the Education (Northern Ireland) Order 1997).</p> <p>Cross-border cooperation in terms of transfer of suspected criminals is provided for under the Extradition Act 2003, which brings the EU's European Arrest Warrant into operation.</p>	<p>Access to public health services for residents. (Based on Health Act 1970).</p> <p>Reciprocal health care arrangements such as cross-border treatment. (Based on informal Service Level Agreements and Memoranda of Understanding).</p> <p>Right to work. (Based on exemption from immigration restrictions in Aliens (Exemption) Order 1999).</p> <p>Rights in Work (Based on exemption from immigration restrictions in Aliens (Exemption) Order 1999 and on EU Charter of Fundamental Rights).</p> <p>Family Benefits for legal, habitual residents in the CTA with Ireland as the main centre of interest. (Based on the Social Welfare Consolidation Act 2005).</p> <p>Access to education at primary and secondary level. (Based on admissions policies formulated pursuant to the Education Act 1998, and the Education (Admissions to Schools) Act 2018).</p> <p>Cross-border cooperation in terms of transfer of suspected criminals is provided for under the European Arrest Warrant Act 2003, which brings the EU's European Arrest Warrant into operation.</p>	<p>EU law currently facilitates of many CTA-related arrangements, but these protections relate directly to EU concepts (such as freedom of movement) and not to the CTA. Many of these measures stand to be altered or fall away after Brexit (depending on the terms of the deal).</p> <p>Under EU law the UK will have to continue to ensure the CTA associated rights and privileges do not affect Ireland's EU obligations. (In TFEU Protocol 20, art 2, and draft Withdrawal Agreement, Protocol on Ireland/Ni, art 2).</p>

Recommendations

Key Recommendations

Gold Standard: The UK and Irish governments should agree a Common Travel Area treaty encompassing common immigration rules, travel rights, residency rights and related rights to education, social security, work, health, and security and justice.

Silver Standard: Failing this, both governments should pursue a bilateral treaty on the core immigration, travel and residency rights accompanied by a range of sectoral agreements.

Bronze Standard: If neither Gold nor Silver can be achieved, both governments should work together to enhance shared understandings of the CTA and its content, including a memorandum of understanding.

As part of any Gold, Silver or Bronze Agreement: Agree a 'notification requirement' whereby each government and devolved administration would notify the others of changes that would have a bearing on the CTA.

As a consequence of any Gold, Silver or Bronze Agreement: The UK government should update the language of immigration provisions facilitating the CTA to clarify the place of Irish nationals within the UK's modern immigration system.

Overarching Recommendations (relevant even without formalisation of CTA)

1. The Irish and UK governments should develop and fund a public information campaign, providing jargon-free information about the practical rights for individuals in the CTA
2. The Irish government should clarify its position on the Schengen Area due to the border challenges that would result from Irish membership of the bloc.
3. The UK and Irish governments should ensure early cooperation with and consultation of the administrations of Guernsey, Jersey and the Isle of Man.
4. The Irish and UK governments should clarify their understandings of the acceptable frequency and scope of checks of individuals traversing the CTA.
5. The UK and Irish governments should commit to ensuring that 'spot checks' on individuals within the CTA are neither directly nor indirectly discriminatory (for example, on the basis of apparent ethnic origin).
6. The Irish and UK governments should consider the position within the CTA of those who are neither UK nor Irish nationals, having especial regard to those who would not enjoy citizens' rights.
7. The UK and Irish governments should work together to ensure funding for pilot projects relating to cross-border healthcare is available following Brexit.

8. The UK government should ensure that the UK Shared Prosperity Fund adequately replaces the cross-border health-care related funding of the INTERREG programme.
9. The Irish and UK governments should restate their political and material support for CAWT (Cooperation and Working Together) initiatives, and commit to continued working through the North-South Ministerial Council.
10. The UK government, cooperating with the Irish government, should establish a taskforce to catalogue the EU regulatory regimes that underpin health cooperation across the CTA, and make recommendations as to their replacement.
11. The Irish and the UK governments should work together to establish a shared understanding of post-Brexit in-work conditions within the CTA.
12. The UK government, cooperating with the Irish government, should establish a taskforce to catalogue and monitor the practical impediments to cross-border work, including for cross-border businesses, for individual workers, for part-time workers, and for the self-employed.
13. The UK and Irish governments should ensure mutual recognition of qualifications continues.
14. The Irish and UK governments should establish a taskforce to catalogue and monitor the practical impediments to claiming social security across the CTA, with especial attention to cross-border living.
15. The UK and Irish governments, in consultation with the relevant sub-national authorities and Universities, should commit to a funding regime that protects access to first, second and third level education for non-national students (including for non-residents).
16. The Irish and UK governments should work within the EU to ensure the continuation of PEACE funding or a full replacement, with particular attention to provision of funding for shared education.
17. The UK and Irish governments should work together to ensure Northern Irish Universities are not isolated from all-island opportunities following Brexit.
18. The UK government should prioritise an agreement that would ensure continued inclusion in EU justice cooperation arrangements.
19. The PSNI and Gardaí should work on contingency plans for justice cooperation in the absence of EU structures (including without the current EU-wide ability to share information).
20. The Irish and UK governments should restate their political and material support for the British-Irish Intergovernmental Conference and Joint Task Force.

Chapter 1: The Core CTA

Introduction

The Brexit referendum campaign saw frequent warnings that cross border co-operation on the island of Ireland would be jeopardised by the UK leaving the EU.³ Prominent Leave campaigners, including the then-Northern Ireland Secretary Theresa Villiers, responded that maintaining the CTA would address such concerns:

*We've run an effective common travel area for many decades with the Republic of Ireland and there's every reason to suggest that that would continue whether we leave the EU or we don't.*⁴

The CTA, the UK's voters were assured, would secure cross-border 'business-as-usual' on the island of Ireland after Brexit. Following the referendum, the UK Government adopted this rhetoric into its negotiating position. In the Brexit negotiations to date Theresa May's administration has prioritised the 'maintenance of the CTA'⁵ as the fixed feature of its solution to the challenge of maintaining an open land border. It once sought to combine the CTA with unspecified 'technology-based solutions'⁶ to customs and regulatory requirements, but currently proposes to pair it with a customs arrangement covering goods, thereby negating the need for customs checks.⁷ For its part, the Irish Government has maintained its position that the CTA will be unaffected by the Brexit process; 'nothing in any withdrawal agreement or withdrawal treaty will undermine the capacity for Britain and Ireland on a bilateral basis to maintain a common travel area'.⁸

Communities within Northern Ireland have reported frustrations at a lack of clarity despite widespread – if not universal – understandings that negative impacts could result from changes to the CTA and associated arrangements. Technical language has hampered understanding and there appears to be a degree of confusion about what the CTA actually is or provides for; 'People consider the Common Travel Area, the area we commonly travel. I'm not sure there is a comprehensive understanding...'.⁹

In December 2017, upon concluding the end of Phase 1 of the negotiations 'Joint Report', the UK and the EU agreed to commit to the following:

Both Parties recognise that the United Kingdom and Ireland may continue to make arrangements between themselves relating to the movement of persons between their territories (Common Travel Area), while fully respecting the rights of natural persons conferred by Union law. The United Kingdom confirms and accepts that the

³ For a summary, see S. de Mars, C. Murray, A. O'Donoghue and B. Warwick, *Policy Paper: Brexit, Northern Ireland and Ireland* (SSRN, 2016) pp4-8.

⁴ Irish Times Editorial, 'Brexit: Sealing the Border' *Irish Times* (18 April 2016).

⁵ HM Government, *White Paper: The United Kingdom's Exit from and New Partnership with the EU* (2017) Cm. 9417, para 4.8.

⁶ HM Government, *Northern Ireland and Ireland: Position Paper* (2017) para 46.

⁷ HM Government, *The future relationship between the United Kingdom and the European Union* (2018) Cmnd.9593, p8.

⁸ S. Coveney, TD (Tánaiste), Dáil debates, vol. 970, speech 2 (27 June 2018).

⁹ In conversation with Louise Coyle, Policy Officer at Northern Ireland Rural Women's Network, reporting on a range of research and community events organised by the Network (September 2018).

Common Travel Area and associated rights and privileges can continue to operate without affecting Ireland's obligations under Union law, in particular with respect to free movement for EU citizens.¹⁰

The Commission, in March 2018, drafted a proposal for embedding this commitment into the Withdrawal Agreement that is to be concluded between the UK and the EU. The draft Withdrawal Agreement contains an agreed provision on the CTA in Article 2 of the Protocol on Ireland and Northern Ireland:

Article 2 Common Travel Area

1. The United Kingdom and Ireland may continue to make arrangements between themselves relating to the movement of persons between their territories (the "Common Travel Area"), while fully respecting the rights of natural persons conferred by Union law.

2. The United Kingdom shall ensure that the Common Travel Area and associated rights and privileges can continue to operate without affecting the obligations of Ireland under Union law, in particular with respect to free movement for Union citizens and their family members, irrespective of their nationality, to, from and within Ireland.¹¹

The CTA will therefore underpin fundamental aspects of the UK's post-Brexit relationship with Ireland. Its importance, however, belies the fact that its specific requirements remain, at best, indistinct, and has no status in international law. This report, as a whole, unpacks the CTA's requirements and the domestic legislation which has come to be associated with it, in an effort to explain the rights and obligations which exist under these arrangements. This section outlines the CTA's core requirements.

We say outlined, because there is no legally binding international agreement which comprehensively establishes the terms of CTA. Instead, in unbroken practice stretching back to 1952, the CTA has operated through a combination of informal administrative understandings and latterly more formal 'sectoral agreements' between its members (the UK, Ireland, the Channel Islands and the Isle of Man).¹² Each party then takes steps to ensure that these arrangements are reflected in their domestic law and administrative practices.¹³

The July 2018 Brexit White Paper sketches the UK Government's current proposed terms for withdrawing from the EU, and their relevance for the CTA:

These proposals are without prejudice to the Common Travel Area (CTA) arrangements between the UK and Ireland, and the Crown Dependencies. The CTA

¹⁰ Joint Report: Negotiators of the EU and UK Government (n 1) para 54.

¹¹ Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union, Protocol on Ireland/Northern Ireland. Available at: https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf (19 March 2018) p110.

¹² S. Coveney, TD (Tánaiste), Dáil debates, vol. 970, speech 4 (27 June 2018).

¹³ B. Ryan, 'The Common Travel Area between Britain and Ireland' (2001) 64 MLR 855, p858.

*means that Irish citizens will continue to enjoy a special status in the UK, provided for by domestic legislation, distinct from the status of other EU nationals.*¹⁴

This statement illustrates that the CTA exists in law insofar as it is 'provided for by domestic legislation'. This 'hotch-potch' of laws provides for a generally aligned immigration system and more-or-less reciprocal special status for each other's citizens, entitling them to equivalent social and political rights to 'home' citizens.¹⁵ In the remainder of this section we explain the most significant legislative provisions which apply to these elements of the CTA in turn, before examining the relationship between the CTA and the GFA.

The CTA: Aligned Immigration Rules

The CTA began as a set of coordinated immigration controls, with other elements developed over time. This coordination covers the treatment of individuals who are not UK or Irish citizens, providing the CTA's external face to the rest of the world. The existence of these aligned outer controls allows the parts of the CTA to minimise controls on movement and residence within the CTA (the internal aspect of the CTA's operation). The degree of coordination on such vital national interests, however, has often been controversial as it appears to constitute an abridgement of national sovereignty. Both the UK and Ireland have, at different times, emphasised that the arrangements are not a function of binding international law, but a policy both countries enter into on the basis of national self-interest.¹⁶

Since 1952 Ireland and the UK have coordinated third-country visa requirements, ensuring their domestic laws roughly align, and that information is shared about particular individuals excluded from either country.¹⁷ Relations in this regard are not always equal; the importance of the CTA to Ireland has often seen the Irish Government to take steps to swiftly align with new UK policies.¹⁸ Ireland's courts have upheld the refusal of a visa on basis that an individual is seeking to use Ireland to access the UK, affirming the public policy importance of protecting the CTA against abuse.¹⁹ Whereas Ireland maintains rules to refuse such individuals a visa,²⁰ the UK does not currently maintain a law which explicitly provides for the enforcement of Irish rules.²¹ The external face provided by this law does not, however, prevent immigration controls being imposed on third country nationals as they move between Ireland and the UK.

¹⁴ HM Government, *The future relationship between the United Kingdom and the European Union* (2018) Cmd 9593, p33.

¹⁵ See I. Maher, 'Common Travel Area: More Than Just Travel' (RIA, 2017) p3.

¹⁶ E. Meehan, *Free Movement between Ireland and the UK. From the 'Common Travel Area' to the Common Travel Area* (Policy Institute, 2000) p22.

¹⁷ Rough alignment does not equate to full harmonisation. For example, Ireland and the UK both impose visa requirements on 103 states (illustrating a considerable degree of alignment), but the UK requires visas for citizens of six states where Ireland does not, and Ireland requires visas for citizens of seven states where the UK does not; HM Government, *Northern Ireland and Ireland: Position Paper* (2017) para 22.

¹⁸ The introduction of 'direct provision' for asylum seekers in Ireland was explicitly justified on the basis that if Ireland operated a less restrictive policy than the UK, asylum seekers would be enticed to move through the UK to Ireland using the CTA; see Ryan (n 13) p873.

¹⁹ *Kweder v Minister for Justice* [1996] 1 IR 381, 387 (Geoghegan J).

²⁰ Aliens (Amendment) (No. 2) Order 1999 (SI 24/1999) (Ireland), article 5.

²¹ See Ryan (n 13) p865. Ryan notes that the UK's immigration authorities could nonetheless be using more general powers to protect the CTA against abuse.

As such, visa requirements generally apply to non-EU/EEA/Swiss foreign nationals travelling between the UK and Ireland and *vice versa*.²²

Having established the CTA's external face under this legislation the Immigration Act 1971 provides the current legislative basis for travel from Ireland, the Channel Islands, and Isle of Man into the UK under UK law:

*Arrival in and departure from the United Kingdom on a local journey from or to any of the islands (that is to say the Channel Islands, and Isle of Man) or the Republic of Ireland, shall not be subject to control under this Act, nor shall a person require leave to enter the United Kingdom on so arriving, except in so far as any of those places is for any purpose excluded from this subsection under the powers conferred by this Act; and in this Act the United Kingdom, and those places, or such of them are not so excluded, are collectively referred to as "the common travel area".*²³

This legislation permits refusal of entry for specific reasons, including for reasons of national security.²⁴ It also includes a break clause, allowing the Home Secretary to impose general restrictions on immigration from Ireland by statutory instrument.²⁵ As a result movement from Ireland into the UK can, as a matter of UK domestic law, be subject to rapid restriction.

The UK does not currently require, as a matter of immigration law, that Irish or UK citizens present identification documents at UK ports and airports when travelling from the CTA. Legal powers exist to institute identity checks on travellers between Great Britain and Northern Ireland, but have not been brought into force in light of vociferous opposition from Northern Ireland politicians.²⁶ Again, the CTA does not completely align practice between Ireland and the UK, because Ireland has since 1997 maintained an immigration requirement that travellers arriving by air from the other parts of the CTA present a passport.²⁷ As one Irish judge has observed, the requirement that a passport be carried to demonstrate that the individual in question need not be subject to immigration control, is something of a Catch-22 situation.²⁸

Road and rail crossings of the land border are also treated differently in Ireland and the UK. In Ireland, Gardaí have powers to institute spot checks on the immigration status of the occupants of vehicles crossing the border and on passengers on board cross-border rail services.²⁹ Cross border buses are subject to regular checks using these powers. In Northern Ireland, by contrast, police powers have hitherto focused on onward travel to the UK via ports and airports. The Counter-Terrorism and Border Security Bill currently before the UK

²² See A. Shatter and D. Green, 'Ireland-UK Accord to Further Secure the Common Travel Area' (2011). Note that a joint visa scheme applies to Indian and Chinese citizens, and Ireland operates a visa waiver programme for some other holders of UK short-stay visas; Immigration Act 2004 (Visas) Order 2012 (SI 417/2012) (Ireland), schedule 1.

²³ Immigration Act 1971 (UK), s1(3).

²⁴ Immigration Act 1971 (UK), s9(4).

²⁵ Immigration Act 1971 (UK), s9(6).

²⁶ Police and Justice Act 2006 (UK), s14. This provision was intended to counter the limited powers of UK Border Force to impose checks on individuals making 'in-country' journeys under *Singh v Hammond* [1987] 1 All ER 829.

²⁷ Aliens (Amendment) (No. 3) Order 1997 (SI 277/1997) (Ireland), Article 3. See also the Immigration Act 2004 (Ireland), s4.

²⁸ *Pachero v Minister for Justice* [2011] 4 IR 698, [18] (Hogan J); 'Whatever about anyone else, Joseph Heller certainly would have approved'. See Graham Butler, 'Not a "Real" Common Travel Area: *Pachero v Minister for Justice and Equality*' (2015) 54 Irish Jurist 155.

²⁹ Immigration Act 2004 (Ireland), s7.

Parliament changes this dynamic. The Bill proposes a “border area” within Northern Ireland of up to one mile from the Northern Ireland/Ireland border or at the first rail stop on cross border journeys).³⁰ Within this area the PSNI/immigration officers will gain the powers to stop, question and detain (for up to six hours) individuals in order to ascertain whether they are there to cross the border.³¹

While so much political attention is focused on Brexit, this Bill amasses powers which could change life along the border. The UK authorities could contend that the proposed powers roughly mirror those currently available to Gardaí. The legislation, however, is drafted with few safeguards (police or immigration officers need show no basis of suspicion of wrongdoing to carry out checks). If the proposed powers are employed in full, the UK authorities could foreseeably establish ‘a kind of militarised zone along the Border, where roving patrols can stop and question any person, resident or traveller, without any kind of justification’.³² These measures could turn the clock back, reinvigorating a version of the vehicle checkpoints which became ubiquitous during the Northern Ireland conflict (see chapter 2).³³ Travellers who are Irish or UK citizens will be able to demonstrate their entitlement to cross the border by producing documents such as their passport, but it could start to feel like an obligation to carry such identification documents.

The CTA: Reciprocal Individual Rights and Obligations

The UK Government has emphasised its ongoing commitment to the CTA after the 2016 Brexit referendum, identifying the following reciprocal rights for Irish Citizens in the UK and UK Citizens in Ireland as being derived from the CTA:

- the right to enter and reside in each others’ state without being subject to a requirement to obtain permission
- the right to work without being subject to a requirement to obtain permission
- the right to access education
- access to social welfare entitlements and benefits
- access to health services
- access to social housing
- the right to vote in local and parliamentary elections.³⁴

The root of these reciprocal arrangements lies in the laws by which Irish citizens in the UK and the UK’s citizens in Ireland are not treated in the same way as other foreign nationals. In Ireland, individuals who are not Irish citizens are classed as ‘non-nationals’,³⁵ whereas they had previously been described as aliens.³⁶ A series of statutory instruments have separated UK citizens out from this status.³⁷ In the UK, the Ireland Act 1949 provides that Irish citizens

³⁰ Counter-Terrorism and Border Security Bill 2018 (UK), Sch. 3, para 57.

³¹ Counter-Terrorism and Border Security Bill 2018 (UK), Sch. 3, para 2-6.

³² CAJ, ‘Briefing on the Counter-Terrorism and Border Security Bill 2018’ (CAJ, 2018) para 21.

³³ George Hamilton, Evidence to the Northern Ireland Affairs Committee (27 June 2018) HC 512, Q51.

³⁴ Department for Exiting the EU, ‘Citizens’ rights - UK and Irish nationals in the Common Travel Area’ (22 December 2017), available at: <https://www.gov.uk/government/publications/citizens-rights-uk-and-irish-nationals-in-the-common-travel-area/citizens-rights-uk-and-irish-nationals-in-the-common-travel-area>.

³⁵ Immigration Act 1999 (Ireland), s1(1).

³⁶ Aliens Act 1935 (Ireland).

³⁷ Aliens (Exemption) Order 1999 (SI 97/1999) (Ireland).

are not treated as 'foreign for domestic law purposes'.³⁸ This language is, however, dated and open to interpretation. Modern UK immigration law details the rights of British citizens by comparison to non-UK citizens. In this context the rights provided by a 'not-foreign' status are uncertain.³⁹

These general provisions are supported by some specific laws. For example, electoral law in both Ireland and the UK makes explicit provision for voting rights for each others' citizens.⁴⁰ Alongside reciprocal provision of rights which are broadly equivalent to home citizens can come reciprocal obligations; Irish citizens resident in the UK for more than five years have a duty to sit on juries.⁴¹ Equivalence also has distinct limits; Irish citizens in the UK are subject to deportation, as the law of deportation applies to any 'person who is not a British citizen'.⁴² In both of these regards reciprocity breaks down. Ireland excludes non-citizens from jury service⁴³ and UK citizens are not 'non-nationals' subject to Ireland's law of deportation.⁴⁴

Neither the UK nor Ireland guarantees that the other's citizens will continue to be treated in a manner which is in most respects equivalent as its own citizens. Instead, both maintain a separate category in nationality law for the other's citizens, who for now are treated in a manner equivalent to home citizens in most regards. The CTA does not mandate this approach as a matter of international law; both Ireland and the UK have adopted these laws as a matter of rough reciprocity.

The CTA and the Good Friday/Belfast Agreement

There is no mention of the CTA in the GFA, but the GFA does mandate the establishment of the British-Irish Intergovernmental Conference, which provides the mechanism by which the CTA is managed.⁴⁵ The GFA also recognises the 'birth-right' of the people of Northern Ireland to self-identify (without disadvantage) as an Irish citizen, a UK citizen or both.⁴⁶ Given that the UK's domestic legislation supporting the CTA provided for almost exact equivalence between UK citizens and Irish citizens, the UK could already maintain that no law reform was necessary in 1998 to fulfil this GFA commitment.

The GFA does not, however, protect the status of all Irish people under UK law; it only provides a safeguard covering those Irish citizens who come from Northern Ireland (and are therefore, under the GFA, part of 'the people of Northern Ireland'). Subtle differences in status already exist under UK law. For example, under the Civil Service Nationality Rules,

³⁸ Ireland Act 1949 (UK), s2(1).

³⁹ See S. Cox, *Brexit and Irish citizens in the UK: How to safeguard the rights of Irish citizens in an uncertain future* (Traveller Movement, 2017) available at: https://travellermovement.org.uk/wp-content/uploads/2018/08/TTM-Brexit_and_Irish_citizens_in_the_UK_web.pdf p10.

⁴⁰ See the Electoral (Amendment) Act 1985 (Ireland) and the Representation of the People Act 1983 (UK). UK law provides for almost exact equivalence between UK citizens and Irish citizens, with the exception that UK citizens resident overseas for less than 15 years retain a vote, whereas Irish citizens do not. UK citizens in Ireland cannot vote in presidential elections or referendums, and cannot stand as candidates for the Dáil.

⁴¹ Juries Act 1974 (UK), s1.

⁴² See the Immigration Act 1971 (UK), s3.

⁴³ Juries Act 1974 (Ireland), s6.

⁴⁴ See the Immigration Act 1999 (Ireland), s3.

⁴⁵ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes) ('Good Friday Agreement') 1998 (2114 UNTS 473), Article 2. The Intergovernmental Conference was carried over from the Anglo-Irish Agreement. Prior to that, CTA issues were dealt with by bilateral meetings.

⁴⁶ GFA (n45), section 2, para 1(vi).

certain UK public sector jobs carry with them a citizenship requirement.⁴⁷ The rules which exclude Irish citizens from the Republic of Ireland from reserved posts have been upheld by the Northern Ireland courts.⁴⁸ They could not, however, operate to exclude one of the people of Northern Ireland who self identifies as an Irish citizen without breaching the GFA. There have been proposals to extend this divide. In 2008 Lord Goldsmith prepared a report for the then UK Labour Government, proposing that political rights (to vote and stand in parliamentary elections) be the sole preserve of UK citizens. Reciprocity under the CTA provided no legal barrier to this proposal, but this proposal did acknowledge the need for special provision for Irish citizens from Northern Ireland in light of the UK's GFA commitments.⁴⁹

Looking to the post-Brexit era, the GFA will continue to be relevant to the operation of the CTA. The requirement of the Agreement that there is rights 'equivalence' between North and South will support arguments for the CTA's continued operation. In addition to the GFA's protections, the Brexit negotiations have led to further pledges that support the CTA's operation (even if they do not, of themselves, form part of the CTA). The first is an assurance in the Joint Report that Irish citizens who are part of the 'people of Northern Ireland' will be entitled to continue to enjoy their rights as EU citizens even if they reside in Northern Ireland.⁵⁰ Claiming these rights does, however, require that such a person claims Irish citizenship (and the EU citizenship which goes along with it). The second important element of the negotiations to date has been the 'non-diminution' guarantee in the Joint Report⁵¹ and the EU's draft Withdrawal Agreement.⁵² This covers all of Northern Ireland and prevents the UK from reducing rights as a result of Brexit. This is a broad guarantee that requires the UK to continue with the high levels of human rights protections that currently derive from EU law.

Conclusion

Myths about the CTA abound. Gavin Robinson MP recently told Parliament that '[t]he common travel area does not allow for a person to be stopped and checked for citizenship or to be asked about their right to travel'.⁵³ But as this section has demonstrated, the Irish Government maintains such checks with no accusations from the UK that they are incompatible with the CTA; indeed, the UK looks set to follow suit under the Counter-Terrorism and Border Security Bill 2018.

This overview brings into focus two serious shortcomings in the CTA arrangements. The first of these problems is the dated language of some of the legislation, over half a century old, which operationalises the CTA. References to aliens and foreigners are out of step with contemporary nationality and immigration law in Ireland and the UK, which could undermine future efforts to enforce CTA related rights by litigation. The second shortcoming is that there

⁴⁷ Civil Service Nationality Rules (2007) (UK), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/536134/civil_service-nationality_rules_20_june_2016.pdf para 1.16.

⁴⁸ See *Re O'Boyle's Application* (2000) 4 Eur. L. Rep. 637.

⁴⁹ P. Goldsmith, *Citizenship: Our Common Bond* (HMSO, 2008), available at: <http://image.guardian.co.uk/sys-files/Politics/documents/2008/03/11/citizenship-report-full.pdf> p76.

⁵⁰ Joint Report: Negotiators of the EU and UK Government (n1) para 52

⁵¹ Joint Report: Negotiators of the EU and UK Government (n1) para 53.

⁵² Draft Withdrawal Agreement (n11), Protocol on Ireland/ Northern Ireland, art 1.

⁵³ G. Robinson, MP, HC Deb., vol.642, col.660 (11 June 2018).

is no agreement, binding in international law, which establishes the terms of the CTA. Instead the arrangements rest on roughly reciprocal legislation in the UK and Ireland.

The mutual interest in maintaining these arrangements in terms of reduced administrative burdens and improved population flows across the Atlantic Islands have sustained them, more or less, for a century. It is a relationship built on trust. There is, however, no recourse to law if trust breaks down, or slowly erodes. It is notable that the Counter Terrorism and Border Security Bill came onto the table after PSNI Chief Constable George Hamilton complained to the UK Parliament about Ireland's record of immigration enforcement at the CTA's outer border as an explanation for the spike in immigration offences in Northern Ireland.⁵⁴ The failure to ground the CTA in a binding international agreement will also hamper any future efforts by courts in Ireland and the UK to interpret domestic legislation in light of the CTA's overarching objectives, which could contribute to the gradual erosion of the protections.

⁵⁴ G. Hamilton, Evidence to Northern Ireland Affairs Committee (13 December 2016) HC 700, Q165.

Summary

<p style="text-align: center;">In the CTA</p>	<p><u>Travel</u>: The CTA theoretically permits unrestricted travel between the UK and Ireland for UK and Irish citizens. Various immigration controls have nonetheless been instituted in both the UK and Ireland that mean that, in practice, many travellers are obliged to carry documentation or do so to facilitate travel.</p> <p><u>Residence</u>: The CTA permits Irish citizens the right of residence in the UK and UK citizens the right of residence in Ireland without special conditions. This means that UK citizens can live in Ireland and Irish citizens can live in the UK on a basis broadly equivalent to ‘home’ citizens.</p>
<p style="text-align: center;">In domestic legislation</p>	<p><u>Key UK law</u>: Irish citizens are not treated as ‘foreign’ in the UK; Ireland Act 1949. Irish and UK citizens travelling from another part of the CTA into the UK are not subject to UK immigration controls; Immigration Act 1971.</p> <p><u>Key Irish law</u>: UK citizens are not treated as ‘non-nationals’ in Ireland; Aliens Act 1935; Immigration Act 1999; Aliens (Exemption) Order 1999 (SI 97/1999). Irish and UK citizens travelling from another part of the CTA into Ireland are expected to show documentation demonstrating their status at airports (and spot checks can take place at ports and on land routes); Immigration Act 2004.</p>
<p style="text-align: center;">In EU Law</p>	<p><u>Freedom of Movement</u>: In terms of travel and residence, EU freedom of movement law works in parallel to the CTA for travel between the UK and Ireland and will continue to do so until the UK leaves the EU (covering UK and Irish citizens as EU citizens). EU freedom of movement law permits EU/EEA/Swiss citizens to travel between the UK and Ireland without visas and to reside for up to three months without additional personal obligations (longer if these individuals in work or are self-supporting); TFEU, Articles 45-48.</p>
<p style="text-align: center;">In policy</p>	<p>These <i>core</i> elements of the CTA are augmented by related arrangements. Associated policies and legislation are covered in Chapters 3-7.</p>

Chapter 2: The Development of the CTA

Introduction

The CTA has existed in various forms, notwithstanding an extended hiatus in the 1940s and 1950s, for almost exactly a century. That travel restrictions were imposed only in time of global conflict (even if they lingered on long after the end of the Second World War) creates the impression that only cataclysmic circumstances would threaten the CTA's operation. This section provides a closer review of the CTA's operation, illustrating both how the CTA has been subject to repeated threats to its operation, and how the mutual rights provided for under the arrangement have varied over time.

Partition

In the aftermath of the First World War the UK Government sought to reorganise the entry and exit controls which had been in place during the conflict. As part of this activity, it established administrative understandings with the authorities in the Isle of Man and Channel Islands facilitating travel between these Crown Dependencies and the UK. At the same time the Irish War of Independence was reaching its peak. The Anglo-Irish Treaty signed in 1921 did not include arrangements for cross-border travel after the Irish Free State's independence from the UK, but it did specify that Ireland remained part of the British Empire. This allowed Irish and UK officials to use the blue print provided by the Crown Dependencies arrangements. They reached a similar administrative understanding in 1922. These arrangements provided the genesis of the present CTA.

The 1922 arrangements did not amount to binding international law. Instead, they were pledges by both the UK and Ireland to operate common rules for third-country nationals entering their territory (creating the external face of the CTA), and to not impose restrictions on travel between the two countries. Both countries subsequently legislated to exclude each other's nationals from immigration requirements and to coordinate their approach to third-country nationals.⁵⁵ This legislation, in theory, allowed the border between Northern Ireland and Ireland to be traversed with little or no documentation, even for third-country nationals. Once across the border the common framework of the British Empire meant Irish nationals in the UK or UK nationals in Ireland faced few other administrative restrictions on work or access to the limited social support then available.

These arrangements were, in some respects, a creation of convenience. Neither the UK nor the Irish Government wanted the expense of policing the land border and both saw advantages in allowing flows of labour to continue unimpeded between Great Britain and Ireland.⁵⁶ This arrangement suited the two Governments, even after the blood-letting of the War of Independence. It is worth noting that at the same time borders were being redrawn across Europe and countries which had been united, particularly in former Austro-Hungarian

⁵⁵ Aliens Order 1925 (SI 2/1925) (Ireland), Aliens Order 1923 (SI 326/1923) (UK) and Aliens Order 1925 (760/1925) (UK).

⁵⁶ Ryan (n 13) pp869-871.

Empire, were now split. These new divisions imposed severe disruptions upon life in new border regions across Europe.⁵⁷

These arrangements were not, however, a panacea for all of the dislocations imposed by partition. Physical manifestations of the border were slow to emerge, especially as the Civil War was ongoing and officials were reluctant to construct them ahead of the report of the Boundary Commission. But gradually the border came into effect. In April 1923 the UK introduced customs controls on the land border.⁵⁸ Thereafter the archived files on the border are replete with stories of petty officialdom, such as the fine imposed on a traveller for failing to declare 4oz of tobacco, or the school teacher refused permission to use a motorbike on the most direct route between his home and his school across the border.⁵⁹ Ireland established its own customs controls,⁶⁰ and in the 1930s instituted administrative restrictions on travellers resident in Great Britain or Northern Ireland to register with the Gardaí following arrival in Ireland and obtain permissions for stays of over one month.⁶¹

In short, the arrangements created in the 1920s allowed someone to walk across the Irish border without papers. But driving a motor car or motorcycle, or moving livestock or goods, could only legally take place during the day on twenty authorised routes across the border, and required those engaged in this activity to obtain the necessary permits and pay the necessary duties.⁶²

The Second World War and its Aftermath

The outbreak of the Second World War saw a flurry of legislation from Dublin, Belfast and Westminster restricting travel.⁶³ The need for Irish labour in UK industry and agriculture in light of wartime conscription ensured that considerable flows of workers continued in spite of these new regulations, with travel only being severely curtailed between March and August 1944.⁶⁴ Conditions upon travel were also introduced between Northern Ireland and the remainder of the UK.⁶⁵

These restrictions did not fall away with the end of hostilities. Ireland and the UK were now following separate immigration policies and the preconditions for common travel therefore no longer existed. Ireland removed many of its restrictions on travel from the UK in 1946, but the UK Government did not follow suit, and even retained the restrictions upon travel to Great Britain from Northern Ireland. These restrictions were repeatedly questioned in Parliament, with one UK Government minister responding that controls would either have to

⁵⁷ P. Leary, *Unapproved Routes: Histories of the Irish Border 1922-1972* (OUP, 2016) p11.

⁵⁸ Customs (Land Boundary) Regulations 1924 (SI 631/1924) (UK).

⁵⁹ See Files CUST 49/881 and HO 267/49 (UK National Archives).

⁶⁰ Customs (Land Frontier) Regulations 1923 (SI 11/1923) (Ireland). See C. Nash, L. Dennis and B. Graham, 'Putting the border in place: Customs regulation in the making of the Irish border, 1921-1945' (2010) 36 *Journal of Historical Geography* 421, p421.

⁶¹ Aliens (Exemption) Order 1935 (Ireland) (SI 80/1935).

⁶² See G. Denton and T. Fahey, *The Northern Ireland Land Boundary 1923-1992* (Universities Press, 1993) p 21.

⁶³ See Ryan (n 13) p857.

⁶⁴ See File LAB 8/974 (UK National Archives).

⁶⁵ See File HO 213/1304 (UK National Archives).

happen at Great Britain's ports or the land border. He further noted that the Atlee's Government was exploring 'the possibilities of control on the border'.⁶⁶

The superficial openness of the Northern Ireland land border in the middle of the twentieth century was also deceptive. The devolved administration in Northern Ireland maintained an employment permit system which restricted the ability of those not ordinarily resident in Northern Ireland (including individuals from Ireland and even the rest of the UK) to come into Northern Ireland to work.⁶⁷ Although phrased neutrally, this legislation was a 'nasty piece of work', with the primary effect of excluding workers from Ireland from seeking employment in Northern Ireland.⁶⁸ These restrictions persisted in full force well into the 1970s, defended by the UK Government as being necessary 'to ensure that available work there should be reserved in the first instance for residents of Northern Ireland'.⁶⁹

For as long as Ireland remained in the Commonwealth, administrative burdens such as checks on travellers at ports notwithstanding, Irish nationals enjoyed the rights accorded to any subject of the British Empire to live and work in Great Britain.⁷⁰ This backstop, however, fell away with declaration of that Ireland was a Republic and would leave the Commonwealth in 1949.⁷¹ This makes 1949 a pivotal moment for the arrangements for the movement of people between the UK and Ireland. Had Ireland remained within the Commonwealth there might well have been the same gradual imposition of immigration controls as imposed on nationals of other Commonwealth countries in the succeeding decades.⁷² The declaration of the Republic, however, obliged the UK Government to consider the position of Irish citizens as a special case. In response, it introduced new legislation into Parliament, with a firm eye towards the administrative burdens of not doing so:

It would be an extremely difficult thing to decide in every case from day to day as to what the exact status was of a person with an Irish name, and if we had to attempt to make all citizens of Eire aliens, it would have involved a great expenditure of men and money and a great extension of control of aliens. We had in particular also to remember the difficulties caused because of the fact of the land frontier between Northern Ireland, which is part of the United Kingdom and the Commonwealth, and Eire.⁷³

The Ireland Act 1949 has long been recognised as having particular constitutional importance, insofar as this is possible under the UK's uncodified constitution.⁷⁴ As the UK Government continues to assert, this legislation provides the root of the 'special status afforded to Irish

⁶⁶ G. de Freitas, MP (Under-Secretary of State for the Home Department), HC Debs, vol. 478, col. 847 (28 July 1950).

⁶⁷ Safeguarding of Employment (Northern Ireland) Act 1947 (UK).

⁶⁸ See Dr P. Hillery, TD (Minister for Foreign Affairs), Dáil debates, vol. 255, speech 59 (27 July 1971).

⁶⁹ G. Howe, MP (Solicitor General), HC Debs, vol. 835, col. 1476 (25 April 1972).

⁷⁰ British Nationality Act 1948 (UK), s 2.

⁷¹ Republic of Ireland Act 1948 (Ireland), s 2.

⁷² Starting with the Commonwealth Immigrants Act 1962 (UK); see R. Hansen, *Citizenship and Immigration in Postwar Britain* (OUP, 2000) pp100-126.

⁷³ C. Atlee, MP (Prime Minister), HC Debs, vol. 464, col. 1855 (11 May 1949).

⁷⁴ Ireland Act 1949 (UK). H. Calvert, *Constitutional Law in Northern Ireland: A study in Regional Government* (Stevens & Sons, 1968) pp23-24

citizens within the UK'.⁷⁵ In some respects, the changes in Ireland's status in 1949 posed similar problems for UK law makers as Brexit. Laws across the statute book depended on Ireland's being part of the Empire, and thereafter, the Commonwealth. As a legislative 'quick fix' not dissimilar from the retaining of large sections of EU law in the European Union (Withdrawal) Act 2018, the 1949 Act provides that Ireland is generally not treated as a 'foreign country' under UK law.⁷⁶

The legislation of the late 1940s transformed the status of Irish citizens in UK law.⁷⁷ They went from being one sub-category of UK citizen,⁷⁸ to being part of a distinct category in UK nationality law; they were neither UK citizens nor foreigners.⁷⁹ This special status allowed UK law makers to treat Irish citizens in a manner analogous to UK citizens, setting up the basis for reciprocal rights and obligations under the CTA. In terms of domestic law, however, the rights and obligations within this third category can be altered so as to diverge from those of UK citizens.

Forging and Sustaining the Modern CTA

The Ireland Act 1949 did not restore coordinated immigration arrangements. In 1950, a year after the Act entered force, the UK Labour Government placed the blame for entry controls to Great Britain from Ireland and Northern Ireland squarely at the door of the Irish Government; '[i]f the Irish Republic would once again join with us in working a common system for the control of aliens, then we would for this purpose become a single unit, and these annoying travel cards could be abolished'.⁸⁰

The 1949 Act did, however, create the conditions in which travel arrangements could be restored. Post-war labour shortages in the UK and emigration pressures in Ireland increased the pressure for a deal, and in 1952 the modern CTA was established. Neither the terms nor even the existence of the agreement was made public at this point. Given that control of immigration arrangements was perceived as intrinsically linked to a state's independence, the Irish Government was concerned that public cooperation with the UK on these issues would be regarded as subservience.⁸¹ The arrangements were quietly built into UK and Irish law by statutory instrument.⁸² It would, nonetheless, take until the 1960s for Ireland to repeal the last legislation which formally imposed administrative duties on travellers from Great Britain and Northern Ireland.⁸³ As we discussed in the last chapter, in the UK these arrangements

⁷⁵ HM Government, *White Paper: The United Kingdom's Exit from and New Partnership with the EU* (2017) Cm. 9417, para 4.6, available at: <https://www.gov.uk/government/publications/theunited-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper>.

⁷⁶ Ireland Act 1949 (UK), s2(1).

⁷⁷ See Ryan (n 13) pp859-860.

⁷⁸ See *Murray v Parkes* [1942] 2 KB 123, 131 (Lord Caldecote).

⁷⁹ See *Re O'Boyle's Application* (2000) 4 Eur. L. Rep. 637, 658 (Lord Carswell).

⁸⁰ G. de Freitas, MP (Under-Secretary of State for the Home Department), HC Debs, vol. 478, col. 848 (28 July 1950). Much to the annoyance of the Northern Ireland authorities, a carnet permit system would continue to apply to travelling from Northern Ireland to Great Britain with a car into the 1960s; see File CUST 49/5669 (UK National Archives).

⁸¹ Meehan (n 16) p29.

⁸² Aliens (No 2) Order 1952 (SI 636/1952) (Ireland) and Aliens Order 1953 (SI 1671/1953) (UK).

⁸³ Aliens (Exemption) Order, 1935 (Revocation) Order 1962 (SI 113/1962) (Ireland).

were incorporated into the Immigration Act 1971, which explicitly connects the CTA to the issues of an individual's entry into, and entitlement to remain within, the UK.⁸⁴

Many restrictions upon travel across the land border continued in force into the later years of the twentieth century. Quite apart from security arrangements, the number of approved routes for customs and excise purposes remained limited to twenty. Off these routes motor vehicles could not travel across the border without permits. Up until the 1960s these permits were ordinarily restricted to clergy, doctors and veterinarians, requiring lengthy detours for groups like parishioners crossing the border by vehicle to attend church services. Even after a relaxation of the issue of permits in the mid-1960s, many border communities continued to regard the system as an unwanted official intrusion into their lives.⁸⁵

The Northern Ireland conflict saw fresh restrictions on movement between the Atlantic Isles. Indeed, the UK Government came close to employing the break clause in 1974, after the Birmingham and Guildford bombings.⁸⁶ Although identification was not, prior to those attacks, required for immigration purposes from Ireland to the UK, and *vice versa*, the CTA did not prevent the UK from instituting identity checks at the border, ports and airports⁸⁷ and establishing border checkpoints to conduct mandatory vehicle searches on security grounds, with the result that travel documents continued to be carried by cross-border travellers as a matter of course.⁸⁸ Internal restrictions on travel within the UK were also introduced, enabling the UK authorities to prevent individuals suspected of involvement in terrorism from travelling from Northern Ireland to the Britain.⁸⁹

Notwithstanding the CTA, entry into the UK via Ireland by non-EEA third-country nationals (and *vice versa*) remained, and remains, controlled.⁹⁰ Archival records indicate how little these rules were understood by travellers and even officials in the 1970s and 1980s, given that the land border could be crossed without checks. A Chinese table tennis team, for example, was unfortunate enough to find itself with only Irish visas in the course of a tour of Ireland and Northern Ireland.⁹¹ That said, because travellers are unlikely to encounter a border guard when travelling from Ireland to the UK, the UK operates a system of 'deemed leave' for third-country nationals, provided their stay in the UK is not for work purposes and not longer than three months.⁹² In recent years Ireland and the UK have sought to limit the application of these controls by agreeing joint visas to operate alongside the CTA. Such arrangements, the British Irish Visa Scheme, are in place to cover Indian and Chinese

⁸⁴ Immigration Act 1971 (UK), s1(3).

⁸⁵ See File CJ 4/639 (UK National Archives).

⁸⁶ See File FCO 50/549 (UK National Archives).

⁸⁷ Prevention of Terrorism (Temporary Provisions) Act 1974 (UK), s8(1).

⁸⁸ Northern Ireland Emergency Provisions Act 1978 (UK), s20(1)(b).

⁸⁹ Prevention of Terrorism (Temporary Provisions) Act 1974 (UK), s3(1). See B. Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (OUP, 2010) pp82-92.

⁹⁰ Immigration (Control of Entry through Ireland) Order 1972 (SI 1972/1385) (UK).

⁹¹ See File FCO 50/920 (UK National Archives).

⁹² Immigration (Control of Entry through Ireland) Order 1972 (SI 1972/1385) (UK), Article 4. See Home Office, *Common Travel Area* (13 July 2018) p34, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727577/common-travel-area-v1.0.PDF.

travellers.⁹³ Prior to Brexit, proposals were on the table to extend these joint arrangements to travellers from other countries.⁹⁴

The European Dimension

The UK and Ireland both joined the European Economic Community (EEC) in 1973. EU law facilitated movement of people across the EEC and subsequently the EU, ultimately providing that '[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member States'.⁹⁵ The rights associated with freedom of movement under EU law apply to the nationals of all of the EU Member States, the European Economic Area (EEA) states of Iceland, Liechtenstein and Norway, and also Switzerland, and their immediate families. EU Citizenship rights include visa-free travel, residence without conditions for up to 90 days and without time limit for those in work, studying, or who are self-sufficient and possessing comprehensive health insurance (residence rights also cover immediate family members, even if they are non-EU citizens).⁹⁶ EU states can restrict movement and residence under EU law if these conditions are not met, or on limited grounds of public policy, public security or public health.⁹⁷

EEC membership dramatically reduced labour market protectionism in Northern Ireland and Ireland. EU law's requirements for free movement of workers permit only a narrow range of citizenship restrictions upon employment 'in the public service'.⁹⁸ The permit system imposed on non-Northern Ireland residents seeking employment under Safeguarding of Employment (Northern Ireland) Act 1947 was incompatible with these rules, and was therefore gradually phased out after the UK joined the EEC. Under the transitional arrangements put in place during the UK's membership negotiations, the last elements of this regime would not be repealed until 1981.⁹⁹ Ireland, it should be noted, also excluded non-citizens from various categories of employment beyond those permitted under EU law prior to it joining the EEC, and also phased these restrictions out during a transitional period in the 1970s.¹⁰⁰

The CTA and EU law currently exist in parallel, even if some of the benefits which they provide to individuals moving between the Atlantic Isles overlap. Some of the reciprocal rights derived from the CTA are more extensive than those which are facets of European citizenship.¹⁰¹ For example, EU law does not provide European citizens a right to vote in parliamentary elections if they reside in an EU country which is not their country of nationality, whereas both the UK and Ireland extend the right to vote in parliamentary elections to each other's nationals. The

⁹³ Home Office, *Common Travel Area* (n 92) pp19-20.

⁹⁴ See P. Hosford, 'It's going to be easier for tourists to come to Ireland and the UK from today' *Journal.ie* (6 October 2014) available at: <http://www.thejournal.ie/visa-waiver-programme-uk-and-ireland-1708178-Oct2014/>.

⁹⁵ TFEU, Article 21(1).

⁹⁶ European Parliament and Council Directive 2004/38/EC (29 April 2004). See also the Immigration (European Economic Area) Regulations 2016 (SI 1052/2016) (UK) and the European Communities (Free Movement of Persons) Regulations 2015 (SI 548/2015) (Ireland).

⁹⁷ European Parliament and Council Directive 2004/38/EC (29 April 2004), Articles 27-33.

⁹⁸ TFEU, Article 45(4). See Case 149/79 *Commission v Belgium* [1980] ECR 3881, para 12.

⁹⁹ See M. Daly, 'Brexit and the Irish Border: Historical Context' (RIA, 2017) p4, available at: https://www.britac.ac.uk/sites/default/files/BrexitandtheIrishBorderHistoricalContext_0.pdf.

¹⁰⁰ See E. Meehan, 'Freedom of Movement: the Common Travel Area between Ireland and Britain and the Treaty of Amsterdam' in S. Ghatak and A. Showstack Sassoon, *Migration and Mobility: The European Context* (Palgrave Macmillan, 2001) pp124-145.

¹⁰¹ The Nordic Passport Union also operates alongside EU law for many of its member states, and in some respects provides for deeper rights for nationals of its member states than EU law.

CTA, however, does not provide comparable rights to EU law for immediate family members who are not citizens of one of its parties.

The distinct nature of these overarching regimes is important when it comes to the enforcement of rights. The CTA amounts to a network of bilateral arrangements; if they 'go wrong' (if reciprocity breaks down on a particular issue), the basis for a legal challenge is rarely clear. The UK's Ireland Act 1949 has, for example, very rarely been invoked in litigation to protect the legal interests of Irish citizens resident in the UK.¹⁰² As a result, the rights and obligations provided under the CTA can sometimes be threatened by proposals which take little account of the special CTA circumstances.¹⁰³ EU law, by contrast, provides an effective legal framework through which individuals can protect movement and associated rights when a Member State fails to fulfil its EU obligations. Provisions in Northern Ireland welfare law which disadvantaged cross-border workers persisted into the 1990s. They were not resolved through intergovernmental action under the CTA. They were litigated under EU law.¹⁰⁴

In the 1980s some EU countries developed their own open border arrangements, which culminated in the Schengen Convention.¹⁰⁵ Schengen is open to association by non-EU Member States, but the Schengen *acquis* was incorporated into EU law in the Treaty of Amsterdam.¹⁰⁶ Ireland and the UK remained separate from the Schengen *acquis*, however, in order to protect their own shared immigration arrangements under the CTA. Given that this placed Ireland and the UK out of step with the developing EU law on open borders, both countries pursued and gained an acknowledgement in the Treaty of Amsterdam which recognised that the continuing operation of the CTA would not conflict with EU law.¹⁰⁷ After Brexit, Ireland will be the only EU state not part of Schengen or moving towards being so; all new EU Member States are obliged to join Schengen.

Brexit

After Brexit the CTA can, in theory, continue to cover Ireland as an EU Member State and the UK as a non-Member State. The UK's leaving the EU does not, of itself, collapse the CTA.¹⁰⁸ The Joint Report on the UK-EU withdrawal negotiations, concluded in December 2017, agreed that the arrangements between the UK and Ireland relating to the movement of persons under the CTA can continue.¹⁰⁹ The Report did, however, stipulate that any continuing CTA must respect the rights of natural persons as conferred by EU law.

The Joint Report asserted that the UK-EU Withdrawal Agreement will provide for the continuation of EU-law rights for EU citizens resident in the UK ahead of Brexit.¹¹⁰ There are,

¹⁰² See, for example, *Re O'Connor's Application* [2005] NIQB 11.

¹⁰³ The Goldsmith Report commissioned by Gordon Brown's Labour Government, for example, advocated removing Irish citizens from the UK parliamentary franchise; P. Goldsmith, *Citizenship: Our Common Bond* (HMSO, 2008) pp75-76, available at: <http://image.guardian.co.uk/sys-files/Politics/documents/2008/03/11/citizenship-report-full.pdf>.

¹⁰⁴ See Case C-119-91 *McMenamin v Adjudication Officer* [1992] ECR I-6393.

¹⁰⁵ Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders OJ L 239 (22 September 2000).

¹⁰⁶ TFEU, Articles 26 and 77. See also Council Decision 435/1999/EC and Council Decision 436/1999/EC.

¹⁰⁷ TFEU, Protocols 19-21.

¹⁰⁸ The Isle of Man and Channel Islands, which make up the other parts of the CTA, are not parts of the EU.

¹⁰⁹ Joint Report: Negotiators of the EU and UK Government (n1) para 54.

¹¹⁰ Joint Report: Negotiators of the EU and UK Government (n1) para 31.

however, caveats within the UK's approach to this commitment which create divisions in how Irish citizens will be treated in the UK post-Brexit. Irish passport holders from the ROI will be able to register for "settled status" as EU citizens under the new Home Office system.¹¹¹ The UK Government maintain that this scheme is *optional* for Irish citizens, because of the rights they retain as a result of the CTA's operation.¹¹² It suffices to note that given the lack of certainty around the CTA's terms and how the arrangements might change in the future, this scheme for locking in EU rights will provide an important safeguard.

Irish passport holders from Northern Ireland will not be able to avail of this settled status scheme, a restriction justified on the basis that such individuals have not engaged in the cross-border movement necessary to trigger EU free movement law. The ongoing *de Souza* litigation, which tests the legal status of the GFA's commitment to the people of Northern Ireland being able to choose whether to identify as a UK or Irish citizen without disadvantage, may impact on this restriction.¹¹³ As for UK citizens resident in Ireland, those from Great Britain will have to rely on the terms of the Withdrawal Agreement, whereas those from Northern Ireland are able to assert their right to Irish citizenship.

The UK also confirmed, in agreeing to the Report, that the continuation of the CTA will not impact on Ireland's obligations under EU law, including the free movement of persons. If the UK seeks to impose restrictions on movement of non-Irish EU citizens after Brexit, the Report amounts to an acknowledgement that Ireland would not be able to match those restrictions in its immigration controls. In order to restrict freedom of movement by EU nationals through Ireland into the UK, the UK Government will likely move to institute port and airport immigration identity checks on travellers from Ireland to Great Britain.

The UK Government has mooted 'deep' checks on individuals' immigration status when a range of public or private services are accessed (for example, banks, landlords, employers, social security offices or NHS access points) as a means of negating the need for checks at the land border in Northern Ireland.¹¹⁴ 'Hostile-environment' checks have in some respects been scaled back since the Windrush scandal (particularly checks on bank accounts), but many private interactions remain covered by immigration checks. The requirements that a prospective employee or tenant demonstrate citizenship status to their prospective employer or landlord remain in full effect.¹¹⁵ The Joint Report therefore clarifies the parameters within which the CTA can continue to operate, but does nothing to systematise its terms or to enumerate the rights and obligations enjoyed by individuals who move across its borders. The flexibility and informality of the CTA means that associated or dependent rights for individuals are vulnerable to modification through domestic legislation.

Conclusion

The CTA which emerges from this brief history rests on backroom political agreements which have frequently been under strain. In its Brexit publications the UK Government speaks only

¹¹¹ UK Home Office, *EU Settlement Scheme - EU Citizens and their Family Members* (28 Aug 2018).

¹¹² UK Home Office, *EU Settlement Scheme: Statement of Intent* (21 Jun 2018) para 2.6.

¹¹³ See L. O'Carroll, 'Derry woman's US-born husband free to live in UK, court rules' *The Guardian* (12 Feb 2018).

¹¹⁴ HM Government, *Northern Ireland and Ireland: Position Paper* (2017) para 33, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/638135/6.3703_DEX_EU_Northern_Ireland_and_Ireland_INTERACTIVE.pdf.

¹¹⁵ Immigration, Asylum and Nationality Act 2006 (UK), s17 (employment); Immigration Act 2014 (UK), s21 (tenancy).

of ‘a short period during the Second World War’ in which there was a hiatus in the CTA arrangements.¹¹⁶ This downplays the volatility in the CTA arrangements and significant breaks in the reciprocal provision of rights and obligations for each other’s citizens in the laws of the UK and Ireland.

The roots of the CTA in the 1920s demonstrate a deep reluctance in the century-old history of Ireland and the UK as independent states to impose a hard border on the island of Ireland. The respective governments might have balked at the costs of establishing such a border, but at a time when new borders were causing extreme dislocation across Europe, the creation of the CTA provided a seedbed in which cooperative cross-border activity could develop. It is, however, little more than a facilitating factor in such cooperation. As we shall explain in the subsequent chapters, the development of areas of cross-border cooperation in recent decades cannot be directly attributed to the CTA’s slender terms.

Summary

Core CTA	The core CTA covers inter-CTA travel and residency for the citizens of all of the CTA’s constituent parts. In these regards citizens of other parts of the CTA have been treated as equivalent to ‘home’ citizens in Ireland and the UK since the modern CTA came into being in 1952.
Related Arrangements	Beyond the travel and residence elements, other elements of the rights and obligations of citizens of other parts of the CTA resident in Ireland and the UK have changed over time, and have not always been equivalent, or close to equivalent, to ‘home’ citizen rights. Access to work, social security, health care and education (covered in detail in Chapters 3-6) for individuals from other parts of the CTA (and their families) have not systematically been treated as facets of the CTA arrangements since 1952.

¹¹⁶ HM Government, *White Paper: The United Kingdom’s Exit from and New Partnership with the EU (2017)* Cm. 9417, p22, available at: <https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper>.

Chapter 3: The CTA and Cross-border Health and Social Care Provision

Introduction

In the area of health and social care, the broad term ‘CTA and associated rights’ as used in the Joint Report agreed between the UK and the EU in December 2017¹¹⁷, appears to refer to, first of all, cooperation between UK and Irish administrations now taking place under Strand 2 of the GFA¹¹⁸; second, unilateral domestic law provisions that affect cross-border health and social care provision and access in both Ireland and the UK; and, finally, EU laws that enable and manage the operation of cross-border health and social care provision. None of these arrangements are directly organized under the legal concept of the CTA; as discussed in Part 1 of this report, with the only *legal* reference to the CTA found in UK immigration law.

Determining how the Withdrawal Agreement (and Brexit more generally) is going to impact on cross-border health and social care provision thus first of all requires unpicking which of these three regimes—cooperation; unilateral domestic law arrangements; and EU law—a given current practice falls under. The next section offers a sketch of the landscape of cross-border health and social care regulation.

A significant portion of cross-border health and social care cooperation between Ireland and Northern Ireland takes place outside of any formal legal strictures, and is instead organised via service level agreements (SLAs) or memorandums of understanding (MoUs) between health organisations in Ireland and Northern Ireland.¹¹⁹ A lot of the work on cross-border health care in particular has taken place under the ambit of Co-Operation and Working Together (CAWT), a body established in 1992 to liaise between health boards in the Republic of Ireland and Northern Ireland, with a particular focus on the ‘border corridor’ population.¹²⁰

A variety of CAWT’s initiatives have benefitted from EU funding, while others have been (whether originally or following an EU-funded pilot) funded by the Irish or UK/Northern Irish governments. As explained by a study conducted in 2000 by the Centre for Cross Border Studies:

The Co-operation and Working Together (CAWT) organisation was initiated in 1992 when the North East Health Board (NEHB) and North West Health Board (NWHB) from the Republic of Ireland and the Western Health and Social Services Board (WHSSB) and Southern Health and Social Services Board (SHSSB) from Northern Ireland signed the Ballyconnell Agreement committing them to co-operation to improve the health and social well-being of their resident populations. The four CAWT Boards embrace the whole of the land boundary between the Republic of Ireland and

¹¹⁷ Joint Report: Negotiators of the EU and UK Government (n1) para 54.

¹¹⁸ GFA (n45).

¹¹⁹ Lords EU Committee, *Brexit: Reciprocal Healthcare* (HL 2017-2019, 107) Q86.

¹²⁰ *Ibid*, Q85.

*Northern Ireland, serve a population of over one million people and account for 25% of the total land area of the island of Ireland.*¹²¹

While pre-dating the GFA, CAWT's activities fall within the north-south co-operation efforts that found a legal basis in that agreement. Cross-border health and social care now operate under the oversight of the North-South Ministerial Council, with CAWT's activities running independently of the Council but having an audience there so as to facilitate cross-border initiatives.¹²²

As an example of its activities, evidence provided to the Lords EU Committee proves helpful. CAWT has facilitated the creation of cross-border provision in health care in fields as wide-ranging as ambulance care, ENT out-patient treatment, cardiac care, cancer treatment, mental health provision, and treatment for eating disorders.¹²³ The evidence provided by CAWT highlights two facets of cross-border health and social care cooperation in practice in particular:

- Provision of such cooperative services is significantly, though not exclusively, dependent on EU regional/structural funding.
- While none of the cooperation activities themselves have a legal basis in EU law, what makes both the delivery of and access to cross-border health care services possible at this time *is* heavily dependent on the EU regulatory regime on mutual recognition of qualifications and freedom of movement (of services, goods and persons).¹²⁴

Domestic Rules affecting Cross-Border Health and Social Care Access/Provision

The legal rules that make it possible for Irish nationals to access health and social care in Northern Ireland, and for UK nationals to access health and social care in Ireland, come from two distinct but overlapping sources of law.

The first of these sources is the domestic arrangements that ensure that Irish nationals are 'not foreign' in the UK, and that UK nationals are not subject to immigration law in Ireland, which form the foundation of the CTA.¹²⁵ While neither set of rules are directly relevant to cross-border health care, what they do is subject Irish nationals in the UK and UK nationals in Ireland to identical rules as nationals of either country while living in that country; as a consequence, Irish nationals *resident* in the UK and UK nationals *resident* in Ireland find

¹²¹ Centre for Cross Border Studies, 'Concept to Realisation – an Evaluation of CAWT' (2000), Executive Summary, available at: http://www.cawt.com/download/doc_library/corporate/ConceptRealisation.pdf.

¹²² *Ibid*, Chapter 2.

¹²³ Lords EU Committee, *Brexit: reciprocal healthcare* (HL 2017-2019, 107), Q85-Q93.

¹²⁴ See also Lords EU Committee, *Brexit: reciprocal healthcare* (HL 2017-2019, 107), para 100: 'Professor Martin McKee noted that 'many of the [reciprocal healthcare arrangements between the UK and the Republic of Ireland] take place on a purely bilateral basis, although they are underpinned, ultimately, by European Union law'.

¹²⁵ See Chapter 1 and 2, covering the Ireland Act 1949 (UK), s2; British Nationality Act 1981 (UK), s50(1); and the Immigration Act 1971 (UK), s 1(3). Question marks remain over whether these domestic provisions accurately capture the status of Irish nationals in terms used in modern legislation (eg, 'aliens' vs 'foreigners' have become unused terms). See Lords EU Committee *Brexit: UK-Irish Relations* (2016-17) HL 76 written evidence of Professor Bernard Ryan (BUI0008).

themselves accessing healthcare services in either country as if they were nationals of (or ‘not foreigners to’) that country.¹²⁶

The key term is ‘residence’, however, which is the main determinant for free access to both the NHS and the Irish public health services. Rights held by UK and Irish nationals in parts of the CTA in which they are not nationals cannot be described as ‘cross-border’ rights. As such, Brexit will not directly impact on these rights as they stem from CTA related immigration definitions contained in national law on access to healthcare.

Similarly, as discussed below in chapter 4, the CTA immigration regime enables all Irish and UK nationals to ‘work’ in each other’s jurisdictions without specific visa permission. However, this is again a very general entitlement, and of limited help to the medical profession in particular.¹²⁷ The right to ‘work’ is not equivalent to the ‘right to practice medicine’, and the rules that coordinate mutual recognition of qualifications do not, at this time, originate in domestic law but rather in EU law, as will be seen below.¹²⁸

As for accessing healthcare services as an Irish national *visiting* the UK or a UK national *visiting* Ireland, the relevant rules here have once more been occupied to a significant extent by EU law. As the CTA means that persons of either nationality are not under immigration rules in any CTA jurisdiction, this means that they can in principle access a service in that jurisdiction. However, the actual mechanisms by which healthcare services are accessed, and in particular, who determines who *pays* for visitor healthcare, are laid down in EU law, as we will consider below.

As such, what the CTA and related domestic legislation actually guarantee regarding health and social care is *only* that those Irish nationals who are resident in the UK, and those UK nationals who are resident in Ireland, can access the local public health services in the same way that all resident UK and Irish nationals (respectively) can. The relevant rules on immigration do not specify *what* the conditions for access are, which is a purely domestic policy decision in both countries, and can in reality change at any moment in time, should the Irish or UK/Northern Irish legislatures wish it to.

The services provided under the CAWT’s oversight across border corridor operate because of these types of domestic policy decisions. For now, health authorities have agreed that cross-border care will be delivered to those resident in the opposite jurisdiction under specific schemes, but that does not make for a ‘right’ to cross-border healthcare access in the same way that EU law establishes a ‘right’ to a European Health Insurance Card. CAWT’s initiatives are not underpinned by binding bilateral or domestic commitments beyond the general commitment to cooperation under Strand 2 of the GFA, which does not amount to an enforceable ‘right’ to cross-border health or social care.

¹²⁶ See, for example, Citizens’ Information, ‘Residence Rights of UK citizens’, available at: http://www.citizensinformation.ie/en/moving_country/moving_to_ireland/rights_of_residence_in_ireland/residence_rule_s_UK_citizens.html, which specifies that as UK nationals are not subject to the Aliens Act 1935 or any orders made under it (such as the Aliens (Exemption) Order 1999); ‘UK citizens who are resident in Ireland are entitled to health services in the same way as Irish citizens who are resident’.

¹²⁷ Ibid. ‘... a UK citizen does not need a visa, any form of residence permit or employment permit in Ireland’.

¹²⁸ Unlike in education where mutual recognition of qualifications for teachers is directly mentioned in Strand 2 of the GFA, health is restricted to ‘accident and emergency services and other related cross border issues’ as an area for cross-border co-operation and implementation.

EU Regimes affecting Cross-Border Health and Social Care Access/Provision

As already alluded to, many aspects of cross-border (rather than ‘resident’) health and social care access and provision are currently underpinned by EU rules. These can be split into three broad categories:

- Patient Rights
- Provider Rights
- Regulation and Movement of Goods

More generally, cross-border health and social care between Ireland and Northern Ireland are also highly dependent on EU funding streams for the last 20 years.

Patient Rights: Accessing Healthcare Abroad

The EU has legislated since 1958 to ensure that EU nationals who move to a Member State other than their state of nationality have an entitlement to access healthcare in their new Member State of residence, usually at the cost of their ‘home’ healthcare system. Such rights—commonly called ‘reciprocal healthcare rights’—operate in tandem with other EU-level social security regulation. They currently manifest in the following ways:

- Any EU citizen holding a European Health Insurance Card (EHIC) can, while *visiting* another Member State, access emergency health services at no cost there; the cost of healthcare received is refunded by their home Member State via the EHIC system.¹²⁹
- EU citizens who retire in a Member State other than their home Member State have an entitlement to receive healthcare in their state of retirement at the expense of the Member State paying their pension or benefits under the so-called S1 system, set out in Regulations 883/2004 and 987/2009.¹³⁰
- EU citizens who receive approval from their home Member State to pursue medical treatment in a different Member State (so as to shorten waiting times, for instance) can do so at the cost of their home Member State healthcare system under the so-called S2 system.¹³¹ Arrangements covering cross-border care received without pre-approval are now set out in Directive 2011/24.¹³²

¹²⁹ As set up by Decision 2003/751/EC: Decision No 189 of 18 June 2003 aimed at introducing a European health insurance card to replace the forms necessary for the application of Council Regulations (EEC) No 1408/71 and (EEC) No 574/72 as regards access to health care during a temporary stay in a Member State other than the competent State or the State of residence (2003) OJ L276/1 and Decision 2003/752/EC: Decision No 190 of 18 June 2003 concerning the technical specifications of the European health insurance card (2003) OJ L276/4.

¹³⁰ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (2004) OJ L200/1 and Regulation 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation 883/2004 on the coordination of social security systems (2009) OJ L284/1.

¹³¹ Also administered under Regulations 883/2004 and 987/2009.

¹³² Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients’ rights in cross-border healthcare (2011) OJ L88/45.

These reciprocal healthcare systems are coordinated and administered at the EU level.¹³³ Evidence given to the House of Lords makes clear that while the scale of S1 care is difficult to identify in the CTA because the relevant Irish and UK healthcare systems are residency-based and so there is no technical *need* to for those entitled to S1 healthcare to register that entitlement in the country of residence¹³⁴, S2 care does take place in the cross-border context, with an Irish health authority approving treatment in Northern Ireland or vice-versa. However, Damien McCallion, Director-General of CAWT, stresses that ‘there are probably as many people availing themselves of directly agreed services as there are in terms of reciprocal EU rights.’¹³⁵ By directly agreed services, he refers to the cross-border healthcare projects organised by CAWT under MoUs or SLAs. As discussed above, these are concluded between health authorities in Ireland and Northern Ireland without particular reference to the explicit EU reimbursement frameworks set up under the S1, S2, EHC and Patients’ Rights Directive systems.

As such, both EU and domestic law are relevant in assessing current access to healthcare provision. For non-resident access the EU facility is particularly important but also critical is the nature of the funding provided to cover healthcare access.

Provider Rights: Providing Health and Social Care across a Border

The border corridor is composed of many remote areas, where specialist services are uneconomical to provide; but the ability to provide those services across borders makes them sustainable. Bernie McCrory of CAWT gave evidence to the Lords EU Committee that demonstrated that a number of CAWT initiatives are dependent on the ability of medical professionals from one jurisdiction (eg. Ireland) to work in the other jurisdiction (eg. Northern Ireland):

*There was a very robust ENT service in the Southern Trust in Northern Ireland where we had four ENT surgeons working on a rota. [EU funding] allowed us to employ two more ENT surgeons. The surgeons rotated into the south of Ireland, into Monaghan, where they did out-patient and day-case work.*¹³⁶

What makes projects such as the CAWT ENT project feasible is mutual recognition of qualifications. While the Northern Ireland and Ireland health services are distinct in many ways, an overarching EU system of mutual recognition of qualifications enables doctors qualified in one jurisdiction to practice medicine in the other jurisdiction with ease. Directive 2005/36/EC creates an EU-wide automatic recognition of medical professionals’ qualifications from other Member States, as EU law has harmonised the relevant training conditions for those professionals, and so ‘registering’ to practice in a different EU jurisdiction is a matter of simply providing evidence of the original training.¹³⁷ The UK and Ireland could adopt

¹³³ By the Administrative Commission for the Coordination of Social Security, which is composed of a government representative from each EU country and a representative from the European Commission, and established under Articles 71-72 of Regulation 883/2004.

¹³⁴ See Lords EU Committee, *Brexit: reciprocal healthcare* (HL 2017-2019, 107), written evidence of the Department of Health (BRH0021), p25: ‘The UK does not exchange S1 forms with Ireland so these figures do not include UK/Irish insured individuals.’

¹³⁵ Lords EU Committee, *Brexit: reciprocal healthcare* (HL 2017-2019, 107) Q87.

¹³⁶ *Ibid*, Q86.

¹³⁷ For more information, see European Commission, ‘Recognition of professional qualifications in practice’, available at: https://ec.europa.eu/growth/single-market/services/free-movement-professionals/qualifications-recognition_en.

legislation recognizing each other's medical qualifications post-Brexit if necessary, but this is a distinct step that would need to be taken. The CTA and related arrangements as they currently exist would not assist in this area.

Regulation and Movement of Goods

A significant aspect of cross-border health and social care provision relates to the practical matter of ensuring that the health and social care 'products' and related services can actually cross the border. The CTA, as explained, facilitates the movement of Irish and UK national patients in the literal sense, in that they are not subject to immigration rules; but the movement of medical products more broadly is not addressed by the CTA.

Instead, EU law has harmonised many of the laws regulating medicines, medical devices, and even substances of human origin (such as blood and organs for transplant) across the EU; and where these rules are not harmonised, the EU's Single Market is underpinned by a broad mutual recognition system with only scope for limited exceptions.¹³⁸ As a consequence of this combination of harmonised rules and mutually recognized rules, medical goods and related services flow freely across borders in all EU countries.

Funding

EU funding has been described by the Director-General of CAWT as 'invaluable in terms of trying to stimulate and encourage cooperation'.¹³⁹ Others describe significant concerns that economic challenges could lead to reduced support for cross-border activities;

When we were going through the financial crisis... [we saw that] support for cross-border activities was one of the first areas of activity to be struck. It is seen as a luxury. So if Brexit is going to not only result in the loss of common mechanisms, but also a have negative economic impact, cross-border mechanisms will fall away first and foremost. ... if it wasn't for EU structural funds most cross-border stuff would not happen. But there's no consideration of that in the [UK Shared Prosperity Fund proposals]. That's supposed to address regional problems, but only in the UK. Legislation coming out of Westminster does not prioritise cross-border cooperation taking place. Westminster has the tendency to forget about the border.¹⁴⁰

CAWT has particularly benefitted from INTERREG funding. INTERREG is a European Commission-established regional development funding stream that has, since its inception in 1991, supported cross-border cooperation and economic development in Ireland and

¹³⁸ Examples are the forthcoming Medical Devices Directives (as discussed here: https://ec.europa.eu/growth/sectors/medical-devices/regulatory-framework_en); the legal framework governing medicinal products for human use in the EU (as explained in brief here: https://ec.europa.eu/health/human-use/legal-framework_en); and the so-called EU Tissue and Cells Directives (EUTCD) and EU Organ Donation Directives (EUODD) (as discussed here: <https://www.hta.gov.uk/guidance-professionals/hta-legislation>). On the EU's mutual recognition framework, see Regulation 764/2008 of the European Parliament and of the Council of 9 July 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No 3052/95/EC (2008) OJ L218/21, recital 3.

¹³⁹ Lords EU Committee, *Brexit: reciprocal healthcare* (HL 2017-2019, 107) Q90.

¹⁴⁰ Anthony Soares (Centre of Cross-Border Studies), telephone conversation on 31 August 2018.

Northern Ireland. As of INTERREG III, the programme has targeted cross-border healthcare as a 'priority area' for funding.¹⁴¹

An example of an INTERREG III funded project relates to out-of-hours GP access, where CAWT found that 'approximately 70,000 people across the length of the border are closer to 'out-of-hours' GP services in the opposite jurisdiction'.¹⁴² A pilot to examine cross-border access to out-of-hours GPs has since become a permanent feature for these patients.

A larger-scale example of EU funded cross-border healthcare is the INTERREG IV-funded Acute Hospital Services project, which delivered cross-border services in ENT, Urology, Vascular and Ophthalmology specialisms, treating over 17,000 individuals in the border corridor.¹⁴³

A follow-up Acute Hospital Services has been applied for and offered under INTERREG V, covering a further 13,000 patients. CAWT has indicated that approximately 80% of the projects funded by INTERREG IV have since been mainstreamed by Northern Irish and Ireland health services¹⁴⁴, but that the EU funding is 'useful to pump-prime new projects' and that a lack of INTERREG funding would 'certainly inhibit any new planning'.¹⁴⁵

Access to Cross-Border Health and Social Care under the Withdrawal Agreement

As this overview demonstrates, the majority of provision and access to cross-border health and social care is regulated by current EU regimes; and even when organised as 'directly agreed' services between health authorities, cross-border health and social care delivery is underpinned by Single Market rules that make it possible in practical terms.

The draft Withdrawal Agreement, underpinned by the December 2017 Joint Report agreed by the UK and the EU, confirms that it intends to maintain the CTA; maintain cooperation in healthcare across the Northern Ireland and Ireland border, as mandated by the Good Friday Agreement's Strand 2; and will preserve the EU citizenship of Irish nationals resident in Northern Ireland.¹⁴⁶ However, the above analysis reveals that these do not make up the legal regime that actually supports cross-border health and social care between Ireland and Northern Ireland. For different categories of national living and working in Ireland and Northern Ireland, then, Brexit may have different effects on their ability to access or provide cross-border health and social care, even with the intended retention of the CTA, the Good Friday Agreement, and of EU citizenship for Irish nationals in Northern Ireland.

For Irish Nationals in the UK/Northern Ireland, and UK Nationals in Ireland

Preservation of the CTA's 'related arrangements' means that under the domestic law of both the UK and Ireland, Irish nationals resident in the UK can access the UK NHS in the same manner as UK national residents do, and UK nationals resident in Ireland can access the Irish

¹⁴¹ Centre for Cross Border Studies (n 121).

¹⁴² As described in Lords EU Committee, *Brexit: reciprocal healthcare* (HL 2017-2019, 107) written evidence of CAWT (BRH0026).

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Lords EU Committee, *Brexit: UK-Irish Relations* (HL 2016-2017, 76) Q68.

¹⁴⁶ Joint Report: Negotiators of the EU and UK Government (n1).

health service in the same manner as Irish national residents do.¹⁴⁷ This is unchanged by Brexit, though it bears stressing that it is not guaranteed by the Withdrawal Agreement or the GFA.¹⁴⁸

In terms of the ability of either UK or Irish nationals to *access* cross-border health care, there are two separate regimes and both are affected by Brexit. First, there are ‘directly agreed’ healthcare services, organised by health authorities on either side of the border, accessible to those living in catchment areas near the border. The lack of immigration rules within the CTA make it possible for patients from one jurisdiction to access another jurisdiction for treatment in a literal sense. However, how their treatment will be paid for is likely to be affected.

While some cross-border care is currently funded by Irish and UK health authorities alone, a significant portion is made feasible by EU funding programmes. Without that EU funding, new policy choices on funding would need to be made in both Ireland and the UK to continue to fund healthcare for ‘non-residents’ using domestic resources. Without continued EU funding, the services in question may either no longer prove tenable, or may need to be privately paid for by patients instead.

It is possible for Ireland and Northern Ireland to institute specific agreements to permit residents of one jurisdiction to access treatment in another jurisdiction free of charge. Abortion services is one particularly notable area where this could occur; allowing women resident in Northern Ireland to access services in the Republic.¹⁴⁹ Brexit would not affect such agreements, bar the general effect that the possible introduction of a border might have on the feasibility of accessing such services.

Furthermore, the Withdrawal Agreement does not guarantee the continuance of the EU ‘patients’ rights’ systems (EHIC, S1, S2 and the Directive) post-Brexit, meaning that these avenues providing access to and funding for reciprocal healthcare may simply not exist anymore. They will be subject to negotiations following the UK’s exit.

Funding shortages aside, provision of cross-border healthcare services will also be affected by Brexit if mutual recognition of qualifications and a soft border are not guaranteed. While both of these are indicated as priorities for, respectively, the future relationship negotiations and

¹⁴⁷ Entitlement to the NHS (whether in England, Northern Ireland, Wales or Scotland) free of charge is grounded in the concept of ‘ordinary residence’, and under the CTA rules, Irish nationals who are ordinarily resident in any part of the UK will qualify for such free treatment in the relevant part of the UK. See the National Health Service Act 2006 (UK), s 175 for England and Wales; the Health and Personal Social Services (Northern Ireland) Order 1972 (UK), Article 98; National Health Service (Scotland) Act 1978 (UK), s 98. Note that ordinary residence in *one* country of the UK does not necessarily enable free treatment in *another* country in the UK.

¹⁴⁸ Entitlement of UK nationals resident in the Republic of Ireland to the Irish (public) health care system stems from the fact that they are not subject to the Aliens (Exemption) Order 1999 (SI 97/1999) (Ireland); they are consequently subject to Irish law in the same way as Irish nationals who are resident in Ireland are, *while resident in Ireland*. The rules on access to public health care services in Ireland are set out in the Health Act 1970 (Ireland).

¹⁴⁹ Simon Harris TD stated that ‘I intend to ensure women from Northern Ireland can access such services in the Republic, just like they can access other health services here’. (Seanin Graham, ‘Landmark move to allow Northern Ireland women access to abortion services in Republic confirmed’ (The Irish News, 9 August 2018), available at: <https://www.irishnews.com/news/northernirelandnews/2018/08/09/news/landmark-move-to-allow-northern-ireland-women-access-to-abortion-services-in-republic-confirmed-1403217/>). The draft Health (Regulation of Termination of Pregnancy) Bill 2018 (Ireland), s25(d), however suggests that pregnant persons not resident in the Irish State will need to pay to access abortion services.

the Withdrawal Agreement negotiations, they are not guaranteed at this time. Similarly, the UK's ability to potentially diverge from EU-level regulations may make the provision of many healthcare services significantly more complicated. Two examples demonstrate this.

Consider CAWT's establishment of cross-border emergency services. Bernie McCrory explains that prior to a CAWT MoU on ambulance care, in the past 'ambulances would drive up from one side of the border, the ambulance on the other side of the border would meet them, and the patient would transfer.'¹⁵⁰ However, that MoU is dependent on a 'soft' border; a hard border may 'certainly impede lifesaving treatment and perhaps preclude it from happening'.¹⁵¹ Continued free trade (or movement of goods generally) is consequently of overarching importance to cross-border healthcare cooperation in a very broad sense.

Regarding the cross-border movement of medical products, Anthony Soares of the Centre for Cross-Border Studies stresses that of key importance here is 'the avoidance of divergence in terms of relevant policies, regulations and standards.'¹⁵² Evidence provided to the Health and Social Care Committee for its *Brexit: medicines, medical devices and substances of human origin* inquiry makes clear that 'leaving the European Union poses significant risks to the supply of key products to the UK's National Health Services', such as medicines, medical implants and human tissue and organs.¹⁵³ The Committee's findings make clear that it 'heard a consistent and repeated message during [the] inquiry that to minimise the risks to all stages of the development and timely supply of medicines and devices, the Government should seek the closest possible regulatory alignment with the EU'.¹⁵⁴ Such alignment should be long-term: witnesses stressed that even the *potential* of a divergence in standards or protocols regarding medicine, medical products and medical 'processes' in the future is very likely to cause significant problems in terms of supplying health services across the UK, including within Northern Ireland and across the Northern Ireland-Ireland border.¹⁵⁵

A final overarching concern is recruitment of staff, even beyond recognition of qualifications. If the health authorities near the border suffer an EU national recruitment crisis post-Brexit (whether because of future UK immigration rules deterring EU applicants for posts, or them simply no longer qualifying for immigration), this will make the sustainability of cross-border healthcare projects significantly more difficult, just as it will make providing health services within Northern Ireland more difficult.

For non-UK and non-Irish EU Nationals

So-called EU 'frontier' workers of neither UK nor Irish nationalities currently benefit from all cross-border healthcare regulations that originate in EU law, on account of exercising their EU free movement rights. They consequently, on terms identical to Irish or UK workers in comparable positions, are able to exercise EHC/S1/S2/Patients Right's Directive rights to

¹⁵⁰ Lords EU Committee, *Brexit: reciprocal healthcare* (HL 2017-2019, 107) Q86.

¹⁵¹ Lords EU Committee, *Brexit: reciprocal healthcare* (HL 2017-2019, 107) Q90.

¹⁵² *Ibid* Q90.

¹⁵³ Health and Social Care Committee, *Brexit – medicines, medical devices and substances of human origin* (HC 2017-19, 392) written evidence of the Nuffield Trust (BRX0075).

¹⁵⁴ Health and Social Care Committee, *Brexit – medicines, medical devices and substances of human origin* (HC 2017-19, 392), p4.

¹⁵⁵ Health and Social Care Committee, *Brexit – medicines, medical devices and substances of human origin* (HC 2017-19, 392) Q57, Q93.

access healthcare in the opposite jurisdiction. The ‘directly agreed’ arrangements overseen by CAWT are not nationality-restricted in any way: Anthony Soares confirmed that the qualifying criterion at the moment is *residence* in the border corridor for coverage purposes, rather than nationality.¹⁵⁶

The consequences of Brexit on the ability of these EU nationals to access cross-border health care are difficult to predict; they are dependent on what replaces the EU free movement regime that currently binds the UK as a Member State. The CTA does not cover non-Irish EU nationals right to move, work or access services. As it stands, the Withdrawal Agreement, will cover EU nationals’ residence rights in Northern Ireland under its ‘citizens’ rights’ provisions in Part 2. This will preserve their rights *in* Northern Ireland including if they are in receipt of S1-covered health care. Nonetheless it will not per se cover cross-border rights, which will become linked to the exercise of ‘frontier worker’ status at the time the UK leaves the EU.

Whether EU nationals moving to Northern Ireland at any point post-transition would continue to be covered by EHIC/S1/S2 or equivalent, and whether they would be able to continue to provide healthcare services in Northern Ireland, is contingent on the negotiations relating to the future UK-EU relationship or a unilateral decision by the UK to provide cross-border healthcare. Conversely, their ability to access cross-border health and social care services that are directly provided *now* is entirely contingent on domestic policy choices, as it will be in future if they remain resident near the border.

The more general observations regarding movement of goods, absence of funding, staffing problems, and a ‘hard’ border in the event of Brexit, of course, also apply to other EU nationals and will affect their ability to access any cross-border health and social care services, purely in the sense that it will affect the sustainability of those services.

For Third Country Nationals

Third country nationals do not benefit from any of the EU regulations organizing cross-border healthcare entitlement, such as EHIC/S1/S2 and the Patients’ Rights Directive now. This is unaffected by Brexit. As to whether they benefit from directly agreed services, this is again dependent on domestic policy choices, here expressed in the functioning of the MoUs and SLAs agreed between the relevant health authorities. If these continue to operate on a residency basis, non-EU nationals will continue to be able benefit from them provided their immigration status grants them access to healthcare services in either jurisdiction; regardless, Brexit would not make a direct difference to their situation.

The more general observations regarding movement of goods, absence of funding, staffing problems, and a ‘hard’ border in the event of Brexit, of course, also apply to non-EU nationals and will affect their ability to access any cross-border health and social care services, purely in the sense that it will affect the sustainability of those services.

Conclusion

The above analysis suggests that the majority of entitlements relating to access to and provision of cross-border health and social care are not preserved by the commitments made in the Joint Report. Either those rights are underpinned by EU regimes that are not covered

¹⁵⁶ Anthony Soares (Centre of Cross-Border Studies), telephone conversation on 31 August 2018.

by the Protocol on Ireland and Northern Ireland, and would need to be replaced by similar commitments regarding the future UK-EU relationship; or the 'rights' stem from a commitment to cooperation outside of EU law, but which nonetheless requires the EU rules that make up the Single Market *and/or* EU-level funding such as via the INTERREG stream in order to be sustainable.

This is not to say that the current level of cooperation in cross-border health care cannot be maintained; rather, the continuance of the cooperation will become dependent on domestic policy choices, and should ideally be guaranteed through a bilateral framework covering the UK and Ireland specifically, so as to underpin the existing commitments to health care cooperation under the GFA.

Such policy choices will in particular have to be made regarding:

- Reciprocal healthcare for UK and Irish nationals: if healthcare is to remain reciprocal, policy makers must replace the existing EU S1/S2/EHIC schemes and cover an ability to 'reclaim' costs of receiving healthcare in the opposite jurisdiction, or to guarantee payment by the home jurisdiction via a pre-application process; as well as an ability to access emergency care as a 'visitor' while not resident. This requires coordination between the UK and Irish health and social security services, and is thus best pursued through a bilateral agreement if not through a replacement EU framework.
- Mutual recognition of qualifications. This can be done on a unilateral basis via domestic law, or guaranteed via a bilateral agreement if not through a replacement EU framework.
- Free movement of medical products/'soft border' requirements. This could be guaranteed via a unilateral commitment for the UK to 'align' to the EU standards adopted in Ireland; alternatives of 'mutual recognition' of standards have been categorically rejected by the EU to date.
- Funding for cross-border health and social care projects. Without an overarching EU agreement that will continue INTERREG funding, alternative domestic streams to support cross-border health and social care initiatives specifically will be necessary to prevent such initiatives from diminishing in size or frequency. Such funding could be guaranteed via a unilateral commitment made by the UK and Irish governments, but would be more stable if underpinned by a bilateral commitment.

The importance of funding in terms of future policy cannot be overstated. Current governmental proposals (the UK Shared Prosperity Fund¹⁵⁷) to replace EU structural funds are not, as currently formulated, a guarantee to continued cross-border health and social care cooperation.

¹⁵⁷ Local Government Association, *Beyond Brexit: future of funding currently sourced from the EU*, available at: <https://www.local.gov.uk/topics/european-and-international/beyond-brexit-future-funding-currently-sourced-eu>.

Summary

In the CTA	<p><u>Nothing specific</u> relating to health and social care.</p>
In domestic legislation	<p><u>Once resident in Ireland</u>, UK nationals can access Irish public health services in Ireland on the same conditions that Irish nationals resident in Ireland can, via the Health Act 1970.</p> <hr/> <p><u>Once resident in the UK</u>, Irish nationals can access UK public health services (eg the NHS) on the same conditions that UK nationals resident in the UK can, via the domestic laws governing NHS entitlement in Northern Ireland, Scotland and England and Wales.</p>
In EU Law	<p><u>Various reciprocal healthcare arrangements</u>: treatment for UK nationals in Ireland but at the expense of the UK NHS, as well as treatment for Irish nationals in the UK but at the expense of the Irish Health Service Executive, is underpinned by EU mechanisms known as the EHIC (for short-term visitors, via Decision 2003/751/EC) and the S1/S2 schemes (covering pensioners and pre-approved treatment, set out in Regulations 883/2004 and 987/2009 and Regulation 2011/24).</p> <hr/> <p><u>Mutual recognition of qualifications</u>: Directive 2005/36/EC creates an EU-wide automatic recognition of medical professionals' qualifications from other Member States.</p> <hr/> <p><u>Regulations applying to goods, and the movement of (medical) goods across borders</u>: regulations applying to goods have either been harmonised by the EU <i>or</i> require mutual recognition under the principles established by the CJEU. Membership of the Single Market requires adoption of these two strands of rules, which means that goods can pass across borders without checks.</p> <hr/> <p><u>Funding</u>: the EU's INTERREG funding stream in particular underpins a substantial volume of cross-border healthcare initiatives in Northern Ireland and Ireland.</p>
In policy	<p><u>Other reciprocal healthcare arrangements</u>: while EU law covers aspects of reimbursing treatment costs for patients, the actual organisation of cross-border health and social care initiatives between Ireland and Northern Ireland has largely taken place through memorandums of understanding or service-level agreements between health authorities in each jurisdiction. These are not formally rooted in domestic or EU law.</p>

Chapter 4: The CTA and Employment Protections

Introduction

Concerns have been expressed by many about the effects that Brexit might have on their working life, and whether the CTA will afford any protections. There are a range of economic consequences which will depend on the post-Brexit relationship between the UK and EU. These could clearly affect employment opportunities. Put simply, if it is legally possible to work across the border, if jobs are not available then such a possibility is illusory. Below the effects of the CTA on employment protections are discussed. Addressed first is the right to take employment under the CTA and the limitations to that right, before sections on rights while in work are addressed, fall-back protections, and the rights of self-employed and frontier workers.

Basic Rights to Work Under the CTA

The CTA is said by both the UK and Irish governments to include a right to work.¹⁵⁸ However, since EU law has protected the rights of all EU nationals to work within the EU, much of the rules and guidance have relied on these provisions and not maintained a separate CTA right for Irish or UK nationals. As a practical matter, this policy guidance would need updated as a matter of urgency in the aftermath of the UK's exit from the EU. Despite its absence from guidance, the rights to work of UK and Irish citizens are still visible on the statute book.¹⁵⁹

In the UK, Irish nationals are exempted from immigration requirements (though they may still be subjected to checks¹⁶⁰ and some Irish nationals can be excluded from the UK¹⁶¹). This protects the freedom of movement of Irish citizens within the UK and Crown Dependencies. Additional provisions of UK law exempt Irish nationals from the usual (stringent) restrictions on foreign nationals working in the UK.¹⁶² The same law notes unambiguously that the Home Secretary can exclude Ireland from the Common Travel Area using a statutory instrument to the extent that s/he sees necessary.¹⁶³

Irish law accords comparable protections to UK workers in a similar manner (though the Irish provisions are less qualified). Irish immigration law is applied only to 'non-nationals' or 'aliens'¹⁶⁴ and a statutory instrument excludes all UK nationals from these categories.¹⁶⁵ Again, in parallel with the UK, the Irish Government can revoke this categorisation of UK nationals and apply full Irish immigration law to them.

¹⁵⁸ Department of Foreign Affairs and Trade, 'Brexit and You', available at: <https://www.dfa.ie/brexit/faqs/common-travel-area/>; Home Office, 'Travelling within the Common Travel Area' (2018), available at: <https://www.gov.uk/government/publications/travelling-in-the-common-travel-area-if-theres-no-brexit-deal/travelling-within-the-common-travel-area-and-the-associated-rights-of-british-and-irish-citizens-if-there-is-no-brexit-deal>.

¹⁵⁹ For more see Chapter 1.

¹⁶⁰ Immigration Act 1971 (UK), sch. 2, s2 and s4.

¹⁶¹ Immigration Act 1971 (UK), s 9; Immigration (Control of entry through Republic of Ireland) Order 1972 (UK), Article 3.

¹⁶² Immigration Act 1971 (UK), s1(3) read with s24B.

¹⁶³ Immigration Act 1971 (UK), s9(6)

¹⁶⁴ Immigration Act 1971 (UK), s1(1).

¹⁶⁵ Aliens Act 1935 (Ireland), s10; Aliens (Exemption) Order 1999, S.I. No. 97/1999 (Ireland).

These exemptions from UK and Irish immigration law are only accorded to UK and Irish nationals and not to the nationals of other countries. In the context of EU membership, EU law has separately provided EU nationals with the right to work in the UK and Ireland. This will, of course, continue in Ireland. In the UK, however, rights to work could be more limited. While the draft Withdrawal Agreement provides those EU nationals already in employment at the end of the transition period will continue to have rights in the UK, a change in employment could result in some individuals (but not some longer-term UK-residents) losing their EU law protections. The UK Government has nonetheless pledged to protect the rights of those EU workers already in the UK as a matter of domestic law. None of this, however, is connected to the CTA.

Under UK law, while the CTA entails a degree of travel flexibility for non-UK/Irish citizens, it does not afford any rights to work. On the right to enter and be present in the UK, because the CTA entails a reduced level of checking at its various borders, there are frequently people who enter the UK without being checked by UK border guards. Certain categories of these people are given what is termed 'Deemed Leave', which recognises that they have not had their passport stamped on entry to the UK, but equally are not responsible for this fact as they did not encounter a border guard on their entry to the UK.¹⁶⁶ For example, a US citizen who arrives in Dublin and travels directly to Portadown will be in the UK under 'Deemed Leave'.¹⁶⁷ This person, despite being covered by the CTA, is expressly not permitted to work.¹⁶⁸ 'Deemed Leave' restrictions on people entering the UK via the CTA do not currently apply to Irish citizens, EU nationals, or those entitled to live in the UK.¹⁶⁹

CTA Limitations

It is evident, therefore, that CTA protections for workers are deficient in three main respects. Firstly, they are in the unilateral gift of each government; secondly, that they do not protect all workers in the UK and Ireland; and thirdly, they do not provide practical guarantees of a functioning labour market.

While workers, whether in the UK or Ireland, have recently enjoyed similar rights to one another, this has not always been the case. There is a long history of British and Irish exemptions being applied or being attempted to workers from the other jurisdiction. Meehan tracks favourable provisions applied to 'natural born British subjects' and to 'graduates of British universities', and protectionist moves against those not ordinarily resident in Northern Ireland, discrimination against Irish workers, and the restriction of some jobs to those of a certain nationality or who passed an Irish language test.¹⁷⁰

This history demonstrates that neither countries are immune from or uniformly bound to provide the right to work for each other's nationals without any limitations or qualifications. As seen in the previous section, the revocation or modification of workers' rights can be

¹⁶⁶ Home Office, 'Common Travel Area (Modernised Guidance)' (2018) p34, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727577/common-travel-area-v1.0.PDF.

¹⁶⁷ This usually lasts 3 months; Home Office (n166) p44.

¹⁶⁸ Home Office (n166), p35.

¹⁶⁹ Home Office (n166), p34. See also The Immigration (Control of Entry Through Republic of Ireland) Order 1972 (UK) which details many of these points in law (especially s4) and British Nationality Act 1981 (UK) s50A.

¹⁷⁰ E. Meehan, 'Borders And Employment: Opportunities And Barriers' (Mapping Frontiers, Plotting Pathways Working Paper 15, 2006).

carried out under the domestic law of both jurisdictions through a simple act of a minister. Therefore, while it is a positive that these exemptions in domestic law exist and have a legal basis, these rights are in a somewhat fragile position since they may be easily removed or modified.

The second limitation of workers' rights under the CTA is that they are not available to all. The largest group excluded from these rights are non-UK, non-Irish nationals. This will largely affect non-Irish, EU workers arriving in the UK after the end of the transition period. The ability to, and conditions of, work for this group following the transition period will be subject to negotiations and UK domestic law, such as the long-awaited proposal for a new UK immigration law following Brexit.

Another, more marginal group, can be excluded by the UK from CTA and work entitlements. Those whose exclusion is deemed by the UK Home Secretary to be against the public good can be stopped when they attempt to enter the UK and sent back to Ireland.¹⁷¹ This assessment of the public good is restricted to national security grounds but is also accompanied by another provision of UK law which allows for a more general assessment of the public good and the exclusion of Irish citizens on that ground.¹⁷² It is likely that these individual directions of the Secretary of State will remain rare, but this is in the realm of his/her policy on the matter.

Thirdly, even with the rights associated with the CTA still operational, there is no guarantee that jobs will be available or practically viable. For example, a proposal mooted by the Migration Advisory Committee for more restrictive Canada-style checks on EEA workers, does not properly take into account the practical disincentives to cross-border working that this would create.¹⁷³ Changes (positive or negative) to the labour market which might occur as a result of Brexit could require individuals to re-train; an issue that has not been practically dealt with yet. Practical concerns relating to a hardened border and work have also been articulated, including concerns that any delay at the border could effectively prevent cross-border living;

Even the time factor in all of that, particularly for women in part-time work, is it even feasible? ... The delays and all that...How viable is it if I have children to leave to school and pick up again?¹⁷⁴

Rights in Work

While there is a degree of protection within domestic law for Irish/UK citizens' right to access work, their conditions of work are a different matter. Maternity and paternity rights, rules on redundancy and dismissal, conditions and safety at work (including working time), leave entitlements, and protections for part-time and agency workers have all been influenced and

¹⁷¹ Immigration Act 1971 (UK), s9(4)(a).

¹⁷² Immigration (Control of Entry through Republic of Ireland) Order 1972 (UK), Article 3(1)(b)(iv).

¹⁷³ Migration Advisory Committee, 'Impact of International Students in the UK' (2018), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/739089/Impact_intl_students_report_published_v1.1.pdf.

¹⁷⁴ In conversation with Louise Coyle, Policy Officer at Northern Ireland Rural Women's Network, reporting on a range of research and community events organised by the Network.

developed by EU law provisions, that will no longer bolster CTA or UK domestic law approaches.

Irish Workers in the UK

EU law has provided for many employment protections, and it is unlikely that such EU laws will continue in Northern Ireland/ the UK. While the UK government has indicated it will not start a race to the bottom on employment rights, in the absence of EU membership there is little to prevent one in practice. This would mean that *new* Irish workers would not benefit from EU law protections (though those resident in the UK at the end date of the transition will be protected¹⁷⁵). These new Irish workers would (subject to any agreement concluded by the UK and EU on the matter of the 'future relationship') have their conditions regulated under UK domestic law. The level of employment protection and working conditions in the UK following Brexit is a deeply political contentious one, with fears in some quarters that protections will be reduced to 'maximise regulatory opportunities'.¹⁷⁶

However, if protections were to be reduced this could happen in a number of ways and might not directly impact Irish workers. For example, the UK might choose to reduce protections afforded to new migrant workers. Another route that the UK could take would be to reduce protections for all workers, including UK workers. This would inevitably affect new Irish workers and, absent a specific agreement, not be subject to EU law. An additional political consideration could prevent this latter route being taken in the short or medium term. The draft Withdrawal Agreement commits the UK to Citizens' Rights protections whereby EU nationals already resident in the UK have their existing EU employment rights protected. The UK must also treat this group equally to UK nationals. This means that for the foreseeable future, there will be a group in UK which the government must provide EU-level rights to. For as long as this is a (politically) significant group, it would be difficult for the government to substantially reduce the conditions of UK workers so that they are in a worse position than legacy EU residents. In addition, a future trade deal between the UK and the EU would be likely to include some human rights protections and this could act as a further constraint upon the UK's ability to depart too far from its current arrangements.

If Irish workers continue to enjoy the carve-out that Irish nationals have in UK immigration law, then *substantial* reductions to their employment protections would be difficult. As they are currently treated more like UK nationals than migrant workers, they are likely to continue to enjoy whatever employment protections that UK nationals enjoy. The complexities of the Northern Irish position (i.e. a mix of residents of Irish and UK citizenship) mean that a move to treat UK and Irish workers differently would be fraught with difficulty and numerous administrative checks.

UK Workers in Ireland

UK workers in Ireland will benefit from EU-level protections. Those resident in Ireland at the end of the transition period will be afforded Citizen's Rights protections like those in the UK.

¹⁷⁵ Joint Report: Negotiators of the EU and UK Government (n1) para 31; 'Joint technical note expressing the detailed consensus of the UK and EU positions on Citizens' Rights' (TF50 2017, 20) 8 December 2017, row 19.

¹⁷⁶ B. Kentish, 'Brexit: Official document raises prospect of tampering with workers' rights to boost economy' (2018), available at: <https://www.independent.co.uk/news/uk/politics/brexit-worker-rights-impact-assessment-eu-withdrawal-leaked-theresa-may-a8201176.html>.

New UK workers in Ireland will also be protected by EU law, including the Charter of Fundamental Rights and its employment protections. These protections will be at least ‘equivalent’ (but not necessarily identical) to those of Irish and other EU nationals and to what they currently enjoy.¹⁷⁷ However, negotiations on the EU-UK future relationship might afford a higher level of protection than this.

Workers from the UK with Irish citizenship (take, for example, the large number of Irish nationals in Northern Ireland) would, of course, enjoy the full employment rights of any Irish national, including full and ongoing EU protections.

Other Protections: CTA, EU, and GFA

Many of the entitlements and protections above exist as a matter of domestic law. This section will examine any constraints imposed by non-domestic frameworks that might constrain the actions of the two governments.

As discussed elsewhere¹⁷⁸ there is little legally binding either the UK or Irish governments to the CTA arrangements. As such, the current working understanding between the two governments could be unilaterally changed without legal recourse. If one government was to reduce protection of rights to/in work the other may reciprocate in a similar manner, however this would be as a result of a mere political calculation. Such reciprocity could – if it occurred – serve to damage protections for all UK and Irish workers.

EU Standards

Both governments will be bound by the terms of the draft Withdrawal Agreement which will require EU protections afforded to citizens already resident in the UK or Ireland at the end of the transition period to be continued in perpetuity. In addition, the Irish citizens who are part of the people of Northern Ireland have their rights as EU citizens protected. The non-diminution guarantee also prevents the reduction of rights in Northern Ireland.

The Irish government will continue to be bound to EU standards and is therefore constrained as to the changes it could make to workers’ rights. However, EU law would not prevent Ireland from stopping some or all GB workers entering the country legally.

The UK, meanwhile, is required to prevent any diminution of rights (at least) for the people of Northern Ireland.¹⁷⁹ This ensures that the current level of protection afforded under EU law for this group should be written into the UK’s domestic law and not resiled from. This protection would not necessarily extend beyond Northern Ireland, and the current level of employment protection could therefore be reduced for new Irish (or UK) workers in GB.

Good Friday Agreement

If the full import of the GFA is taken seriously, there are a good number of general protections to avoid the sort of drastic revocations of rights to work contemplated above. Aside from the

¹⁷⁷ EU Charter of Fundamental Rights, article 15(3).

¹⁷⁸ See Chapter 1.

¹⁷⁹ Note limitations of the non-diminution guarantee, however; C. Murray, A. O’Donoghue and B. Warwick, *Discussion Paper on Brexit* (Joint Committee, 2018) pp59-61, available at: <https://www.ihrec.ie/app/uploads/2018/03/Discussion-Paper-on-Brexit.pdf>.

obvious peace-bringing reasons to abide by both the letter and the spirit of the GFA, there is a legal imperative. The GFA is a binding international agreement, indexed at the UN, and therefore the UK and Ireland are bound by its terms under international law. In addition the 'no diminution' guarantee of the December Joint Report and the draft Withdrawal Agreement prevents the UK from reducing rights protections and thereby enables a degree of continuity with current GFA rights.¹⁸⁰

The preamble of the GFA (which is non-binding, but provides important interpretative context¹⁸¹) notes the role of the agreement in developing 'the close co-operation between [the two] countries as friendly neighbours'.¹⁸² The GFA also required the creation of new unitary equality body in Northern Ireland to take over the work of several bodies which had previously dealt with discrimination in employment, and established the Northern Ireland Human Rights Commission.¹⁸³ The creation of both of these bodies are important statements of the Agreement's intention to ensure better and fairer employment conditions within the region. At the pan-UK level, the British government was required to bring in new measures relating to fair employment and to carry out a review of the same.¹⁸⁴ In Ireland, the Irish government was required by the GFA to create a human rights commission and to 'implement enhanced employment equality legislation'.¹⁸⁵ All of these measures sit alongside the context of both States being required by the agreement to implement domestic arrangements relating to the ECHR, which itself protects workers in some respects.

However, despite these measures required of each government separately, the area of employment is not listed in areas for potential cooperation under Strand Two of the agreement.¹⁸⁶

Despite setting a clear agenda of improved employment protections, the GFA entails a broad direction and not a manifesto of concrete standards. This means that ascertaining any breach of the Agreement in this area (apart from the most egregious sort) would be very difficult or impossible. Compounding this is the limited legal routes to resolving the issue. Individuals could not rely on the content of the GFA to ensure their fair employment, nor are there even robust mechanisms for one of the States to challenge the other (apart from the extreme and limited international law methods). The British-Irish Intergovernmental conference provides something of a political forum for hybrid GFA-CTA discussions, but not a firm legal basis for intergovernmental challenge.¹⁸⁷

Other Forms of Employment

Self-employed workers, frontier workers, and cross-border businesses all benefit from a mix of EU law protections and domestic law provisions. There is no explicit CTA provision for these groups beyond the general rights to work described above.

¹⁸⁰ See Chapter 1.

¹⁸¹ C. Murray, A. O'Donoghue and B. Warwick, *Discussion Paper on Brexit* (Joint Committee, 2018) p6, available at: <https://www.ihrec.ie/app/uploads/2018/03/Discussion-Paper-on-Brexit.pdf>.

¹⁸² GFA (n45), Annex.

¹⁸³ GFA (n45) Rights, Safeguards And Equality Of Opportunity, paras 5 and 6.

¹⁸⁴ GFA (n45) Rights, Safeguards And Equality Of Opportunity, para 2(3).

¹⁸⁵ GFA (n45) Rights, Safeguards And Equality Of Opportunity, para 9.

¹⁸⁶ GFA (n45) Strand Two, Annex.

¹⁸⁷ See above at Chapter 1.

Self-Employed Workers

There are two pertinent issues for self-employed workers; first what employment protections they are entitled to from the State (for example, access to paid parental leave), and second whether they will be entitled to form or carry out a business. These are addressed in order.

Like other workers, self-employed workers who are resident in the UK or Ireland at the end of the transition period will be entitled under the draft Withdrawal Agreement to continuing protection of the EU rights they enjoy on that date.

Like other people of Northern Ireland, the guarantee of non-diminution will apply to self-employed workers in Northern Ireland. The UK is therefore required to transpose into its domestic law, the protections that exist under EU law for self-employed workers in Northern Ireland.

Those to whom the Withdrawal Agreement will not apply (essentially, new Irish and EU workers) in the UK will be subject to the UK's domestic legal regime for such workers (this would include UK, new Irish, and new EU self-employed workers).¹⁸⁸ It is likely that this regime will match the EU's in the aftermath of the UK's departure. Changes could be made to any of the standards and protections for such workers in future, but if this is occurred it is likely that Irish nationals would be afforded the same standards (increased or reduced) that UK nationals enjoyed. Nationals of other countries could be similarly categorised or subjected to a weaker system of protections. It remains possible that this position will be bolstered or improved by an agreement between the UK and EU on their future relationship on this issue.

New self-employed UK nationals in Ireland – so long as Ireland continues to exempt UK nationals from immigration controls – will benefit from protections equivalent to those of Irish and other EU workers.

On rights to form a business, the status quo will persist throughout the transition period. Following this, it is highly likely that already established enterprises will be allowed to continue in both the UK and Ireland. Absent an agreement on the matter in the UK-EU 'future relationship' negotiations, GB citizens will not enjoy the EU citizens' right to form a business anywhere in the EU.¹⁸⁹ The people of Northern Ireland should have this right protected under the non-diminution guarantee, but GB citizens will be subject to the Irish rules on non-EU nationals setting up businesses. These rules could, if the Irish state so chose, be relaxed for UK nationals or even for self-employed, micro-enterprises specifically. Without a provision in a UK-EU agreement on the future relationship, the ability for Irish citizens to form a business in the UK will be regulated by UK domestic law.

¹⁸⁸ For EU workers, the UK's forthcoming Immigration Bill will apply, while for new Irish workers the currently applicable standard regimes of UK law will continue to apply (unless the status of Irish migrants to the UK is changed in UK domestic law).

¹⁸⁹ EU Charter of Fundamental Rights, Article 14.

Frontier Workers

Frontier Workers are individuals who live on one side of a border and work on another.¹⁹⁰ Charlie Flanagan (when Irish Foreign Minister) claimed there are around 30,000 cross border workers and a recent study using mobile phone tracking has claimed that there are an average of around 100,000 crossings per day crossings as a result of work.¹⁹¹ Many of these workers are aided in getting between their places of work and home by the liberal immigration arrangements in the UK and Ireland in respect of people travelling between the two countries. However, it is EU protections that have allowed people to work across borders with minimal administrative difficulty or confusion.

Those who are Frontier Workers at the end of the transition period will continue to be protected under the draft Withdrawal Agreement for as long as they continue to be Frontier Workers.¹⁹² New Frontier Workers would be subject a mix of Irish law (which is premised on EU law) on workers who traverse an external EU border, and UK law. Coordinating these two legal frameworks is likely to pose a significant challenge for individuals. This challenge could be ameliorated by either the UK aligning its domestic legal framework with the EU's protections for Frontier Workers, or the position being clarified by the future relationship agreement.

The realistic ability of such workers to continue living and working on opposite sides of the border is contingent upon there being a soft border. With barriers or queues at the border, it would become increasingly difficult to regularly commute between the two States. This would be especially the case for part-time workers (who are predominantly women¹⁹³).

Cross-Border Business

Cross-border business is an area of significance for many in Ireland and Northern Ireland and encompasses haulage, construction, agricultural and retail. The position of such businesses after the transition period will be subject to whatever arrangements are made in an EU-UK agreement on their future relationship. Besides facilitating easy cross-border travel for employees, the CTA arrangements have no bearing on cross-border business. Other domestic law could be introduced – especially in the UK – to reduce the complexities and regulatory hurdles to cross-border business, but this is likely to have a limited impact when compared with the potential of a UK-EU arrangement.

¹⁹⁰ The definition in EU law is 'any person pursuing an activity as an employed or self-employed person in a Member State and who resides in another Member State to which he returns as a rule daily or at least once a week'; European Parliament and Council Directive 2004/38/EC (29 April 2004), Article 1(f).

¹⁹¹ BBC, 'Essential to avoid hard border, says Irish minister Flanagan' (2017) available at: <https://www.bbc.co.uk/news/uk-northern-ireland-39522086>; A. Doherty, 'The movement of people across the Northern Ireland - Republic of Ireland border' (September 2018), available at: <https://www.economy-ni.gov.uk/sites/default/files/publications/economy/Cross-Border-Movements-Research-Article-19-Sep%202018%20FINAL.pdf> The 100, 000 figure is an average of the work-related weekday and weekend crossings. This number is also much lower than the approximate average of 288,000 daily crossings of the border.

¹⁹² C. Murray, A. O'Donoghue and B. Warwick, *Discussion Paper on Brexit* (2018) pp39-40, available at: <https://www.ihrec.ie/app/uploads/2018/03/Discussion-Paper-on-Brexit.pdf>.

¹⁹³ 73% of part-time workers in the UK are women; Office of National Statistics, 'EMP10: Part-time and temporary workers by occupation' (August 2018), available at: <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/datasets/parttimeandtemporaryworkersbyoccupationemp10>.

The ability of cross-border business to effectively continue is dependent upon a soft border continuing to exist.

Mutual Recognition of Qualifications

Whatever the entitlements to take employment in the UK or Ireland, being recognised as qualified to do the job is essential to being employed in a role. The EU has had a large impact on the mutual recognition of qualifications, and EU law (like Directive 2005/36, discussed in Chapter 3) underpins the majority of the cross-recognition of professions between the UK and Ireland.¹⁹⁴ This cross-border recognition of qualifications is essential to a range of workers including medical professionals and teachers. If the UK does not continue within this EU mutual recognition system, there would be a number of consequences for the practical operation of CTA-related rights to work.

Conclusion

It is clear that many of the rights for Irish and UK citizens to take employment rely on their immigration status. Yet this status rests on national law and is not guaranteed by EU, GFA, or CTA agreements. For those workers in Ireland, protections are likely to continue at the pace of EU protections. However, it appears at this stage that workers in the UK will not have the same level of protection. Whether workers' rights are maintained and enhanced currently rests in the political arena. This area of employment and its protections, with its close connection to the success of the peace process and importance to the economic interests of both the UK and Ireland, is something that might be better secured in law, however. An agreement between the two states on access and conditions of work could lock in the current understandings about the treatment of each others' nationals. However, any such reciprocal agreement would still leave non-Irish EU nationals who arrive in the UK after Brexit in a vulnerable position.

¹⁹⁴ Directive of the European Parliament and Council on the Recognition of Professional Qualifications (Directive 2005/36).

Summary

In the CTA	The Common Travel Area allows UK and Irish individuals to travel between the jurisdictions without immigration restrictions. This <u>practically facilitates work-related activities such as cross-border working</u> (e.g. haulage), employment on the other side of the border, and self-employment. The precise rules governing each of these areas is not part of the core CTA however.
In domestic legislation	<p><u>Domestic restrictions</u> on working in the UK and Ireland that are ordinarily applied to non-EU migrants (and even EU migrants in some instances) <u>are not applied to UK or Irish nationals</u>. This currently flows from the Common Travel Area immigration policy.</p> <p>For <u>those not covered by the Citizens' Rights agreement</u> (most significantly, new Irish workers after transition), the rights to work and in work would be covered by UK domestic law. This would include self-employed workers.</p> <p><u>New frontier workers</u> (those not covered by the Citizens' Rights agreement) would have part of their rights by virtue of UK domestic law.</p>
In EU Law	<p><u>Citizens' rights for Irish workers in the UK and UK workers in Ireland</u> at the end of the transition (including self-employed workers) would derive from EU law.</p> <p>The rights afforded to the <u>people of NI who are Irish citizens</u> will derive from EU law.</p> <p><u>New UK Workers</u> (those not covered by the Citizens' Rights agreement) in Ireland would have in-work rights 'equivalent' to EU nationals by virtue of Ireland's EU law obligations.</p> <p><u>New frontier workers</u> (those not covered by the Citizens' Rights agreement) would have part of their rights by virtue of EU law.</p>
In policy	Certain decisions about <u>Irish nationals</u> which the UK wishes to <u>exclude</u> from the CTA rules and from the UK for the public good are made by ministers and are subject to their policy discretion.

Chapter 5: The CTA and Social Security

Introduction

The CTA has been associated with social security by both the UK¹⁹⁵ and Irish¹⁹⁶ governments. However, like many other aspects of the CTA that have been described above, there is no agreement between the two governments on the exact content of social security entitlements, no legal basis on which to secure them in the event of a domestic change in policy in either jurisdiction.

It has been emphasised by both governments that the CTA pre-existed their EU membership and provided benefits before EU law did. However, in the area of social security, the EU has had a significant coordinating role, and laws and policies have responded more to the EU framework than they have with any thought to the CTA. The nature of social security provision has changed substantially in the years since the UK and Ireland joined the EEA and the old CTA-only provision cannot practically now be reverted to. In 2007, the UK and Ireland agreed a range of common definitions that has some utility, but even this was reliant upon EU law and is now largely out of date in this fast moving area.¹⁹⁷ Further, even with the relatively advanced EU approach to coordination of social security, not everything has worked smoothly. Below the CTA related arrangements in UK and Irish domestic law are addressed, before the underpinnings that EU law provides are addressed (including those aspects which could remain after Brexit).

CTA and Domestic Law

As with other areas that are discussed under the CTA umbrella, there is no binding bilateral agreement between the UK and Ireland on social security provision. Instead the CTA coverage of social security is found in a broad collection of national laws in the UK and in Ireland. There is no legal impediment arising from the CTA that would prevent the UK or Ireland unilaterally changing its policy of allowing nationals of the other country to access social security. It is also true, as will be seen below, that the provision of many social security payments is dependent on residency and does not easily facilitate dynamic cross-border living.

UK Provision

The UK's provision of social security benefits is largely divided into those you must be resident to claim and those which can be claimed even if not resident. If living in Ireland, for example, some UK benefits – broadly family related benefits – can still be claimed.

¹⁹⁵ Department for Exiting the EU, 'Citizens' rights - UK and Irish nationals in the Common Travel Area' (22 December 2017), available at: <https://www.gov.uk/government/publications/citizens-rights-uk-and-irish-nationals-in-the-common-travel-area/citizens-rights-uk-and-irish-nationals-in-the-common-travel-area>.

¹⁹⁶ Department of Foreign Affairs and Trade, 'Brexit and You', available at: <https://www.dfa.ie/brexit/faqs/common-travel-area/>.

¹⁹⁷ Convention On Social Security Between The Government Of Ireland And The Government Of The United Kingdom Of Great Britain And Northern Ireland 2007 (Available as a Schedule to Social Welfare (Bilateral Agreement With The United Kingdom On Social Security) Order 2007, S.I. No. 701/2007 (Ireland)).

For residence-based benefits (such as Jobseekers Allowance) the legislative mechanism that the UK has used to allow Irish nationals to access UK social security is tightly defined and has been developed in close dialogue with EU law on social security coordination. EU law defines the State responsible for social security as the State in which a person habitually resides.¹⁹⁸ The major steps in the development (and logic) of the UK law governing those social security benefits that are linked to *residence* in the UK are:

- Well before the EU adopted the habitual residence test, social security was afforded in the UK only to all those ‘habitually resident’ in the CTA to restrict ‘benefit tourism’.¹⁹⁹
- Around the time of the expansion of the EU and in response to the further fears that there were individuals who were resident but shouldn’t be and yet were able to claim social security, the regulations were tightened. As a consequence, only those with a *legal right to reside* in the CTA were to be treated as habitually resident in the CTA. Economically inactive EEA nationals and irregular migrants did not have such a right to reside and were not able to claim benefits even if they were in practice habitually resident in the CTA.²⁰⁰
- In 2004, an EU directive changed rights of residence so that EU nationals enjoyed an unconditional initial 3 months legal right of residence.²⁰¹ This would have broken the UK’s attempt to exclude ‘benefit tourists’ by using a legal residence test, and as such the regulations were amended to exclude EU nationals residing purely on the basis of this new three month right from social security entitlements.²⁰²

This means that the test for income-related benefits is now two-fold; access to these benefits requires a right to reside (which is often correlated to certain forms of nationality), *and* a habitual residency within the CTA. The exact definition of habitually resident is ‘notoriously opaque’²⁰³ and there is no set list of factors applied but it has been suggested that non-exhaustively the following factors are important:

- the length, continuity and general nature of actual residence
- reasons for going to the UK
- future intentions.²⁰⁴

¹⁹⁸ Residence is defined as the place where a person habitually resides (Regulation of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (Regulation 883/2004) Article 1(j)). The elements for determining residence are contained in; Regulation of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation No 883/2004 on the coordination of social security systems (Regulation 987/2009) Article 11.

¹⁹⁹ House of Commons Library, ‘The Habitual Residence Test’ (SN/SP/416, 2011); Explanatory Memorandum To The Social Security (Persons From Abroad) Amendment Regulations 2006, available at: http://www.legislation.gov.uk/ukxi/2006/1026/pdfs/ukxiem_20061026_en.pdf.

²⁰⁰ Explanatory Memorandum (n 199).

²⁰¹ Directive of the European Parliament And Of The Council of 29 April 2004 on the Right of Citizens of the Union and their Family Members to Move And Reside Freely within the Territory of the Member States (Directive 2004/38/EC), Article 6.

²⁰² Permitted by Directive 2004/38/EC (n190) Article 24(2); enacted by The Social Security (Persons From Abroad) Amendment Regulations 2006 No. 1026 (UK), see, for example, s2(2)(a)(4)(c).

²⁰³ N.J. Wikeley and A.I. Ogus, *Wikeley, Ogus and Barendt’s The Law of Social Security* (5th edition, 2002) p282.

²⁰⁴ Letter from Maria Eagle MP to Tim Boswell MP regarding the habitual residence test raised during the first Committee session of the State Pension Credit Bill. (DEP 02/1278, 2002).

This somewhat convoluted approach (which could readily be changed in the future to reflect the new UK-EU relationship) means that Irish nationals are treated distinctly from other EEA nationals and that they benefit significantly from this status. As Irish nationals are afforded a general right of residence²⁰⁵ that is not linked to the three-month period afforded by EU law, they are not caught by these anti- ‘benefit tourism’ regulations of the UK. This was a specific concession won for citizens of Ireland during the passage of the original 1994 legislation in recognition of the historical and ‘continuing close ties between the peoples of the Irish Republic and the UK’.²⁰⁶ Irish citizens are therefore immediately entitled to these social security benefits as long as they have been ‘habitually resident’ in the CTA – a condition which is itself more likely to be satisfied by Irish EU nationals than other EU nationals. Irish nationals who have not been habitually resident anywhere in the CTA (i.e. who are returning to the CTA after a period of residence abroad) must wait between one and three months before they can claim habitual residence and social security benefits in the UK.²⁰⁷

The CTA provides no legal protection, and the rights currently enjoyed by Irish citizens in the UK could be eroded in two ways. First, by changes to the immigration status of Irish nationals which would undercut their right to reside. Such changes could occur without changing social security regulations, and instead would flow from a change in immigration regulations. The second way that Irish nationals could have their eligibility reduced is by reducing the geographical scope of the habitual residence test so that it included only the UK, and not habitual residence in all of the CTA. This would require a change to social security regulations.

Irish Provision

There are two main types of social security payment in Ireland; ones that require habitual residence (such as work-related payments, disability allowances, and non-contributory State pensions), and those which are exempt from the residence test (such as family and child benefits) but which accrue to EU nationals holding employment in Ireland and non-EU nationals who held employment in another EU state and now hold employment in Ireland.²⁰⁸ The categorisation and application of the latter is heavily dependent upon EU law.²⁰⁹ Whether UK nationals (who would in any case have to be employed or self-employed in Ireland to access certain benefits) are to be treated as ‘EU nationals’ or non-EU nationals will be a matter in the first instance for an agreement on the future relationship between the UK and EU, and failing clear categorisation there, for Irish domestic law. There is nothing formal in the CTA that could compel the Irish government to provide such family benefits to UK nationals.

The other part of Irish social security is dependent on habitual residence. This flows from the EU’s use of the habitual residence test and the provision of social security to UK citizens in Ireland follows a very similar model to that used in the UK. Again, for access to Irish social

²⁰⁵ See Chapter 1.

²⁰⁶ Social Security Advisory Committee, *The Income Related Benefits Schemes (Miscellaneous Amendments) (No 3) Regulations 1994* (1994) Cm 2609 p3.

²⁰⁷ Ministry of Housing, Communities and Local Government, ‘Homelessness code of guidance for local authorities: Annex 1 (the Habitual Residence Test)’ (2018), para 14 available at: <https://www.gov.uk/guidance/homelessness-code-of-guidance-for-local-authorities/annex-1-the-habitual-residence-test>.

²⁰⁸ Department of Social Protection, ‘Habitual Residence Condition’ (SW108, 2016), 1, available at: <http://www.welfare.ie/en/downloads/sw108.pdf>.

²⁰⁹ Department of Employment Affairs and Social Protection, ‘Guidance on Family Benefits: Chapter Eight of Regulation 883/04’, available at: <http://www.welfare.ie/en/downloads/part9.pdf>.

security payments, habitual residence anywhere in the CTA is acceptable.²¹⁰ Again, mirroring the UK approach, in addition to the habitual residence test, there must also be a legal right to reside in the CTA/ Ireland.²¹¹

There is also a need to show that Ireland is the country most appropriate to provide social security payments. This involves an assessment of the permanence of individuals' residence in Ireland. There are 'Five Factors' written into Irish law, which map the case law of the European Court of Justice:

1. Length and continuity of residence in Ireland or in any other particular country
2. Length and purpose of any absence from Ireland
3. Nature and pattern of employment
4. Applicant's main centre of interest
5. Future intention of applicant concerned as they appear from all the circumstances.²¹²

These factors mean that social security entitlements – in the CTA context – are strongly tied to residency *in Ireland*.²¹³ Frequent cross-border residence swapping or even complex cross-border living are not naturally accommodated by these factors (or the UK's parallel approach).

Consider the following, relatively straightforward example. Jasmin is a UK national who has lived in the UK (i.e. in the CTA) for 10 years. She moves to Ireland and applies immediately for Jobseeker's Allowance. The main tests applied to her are:

- Is she habitually resident in the CTA? [She clearly meets this test]
- Is she legally resident in the CTA? [Yes, as she is a UK national]
- How do her circumstances weight against the Five Factors? [Here it will be very difficult (but not impossible) for her to show that Ireland is her main centre of interest, and that her future intentions lie in Ireland]

Another more complex example (adapted from the guidance given to Irish officials) shows how the two types of benefit (residency and work-based) interact.²¹⁴ Javid works in the UK and lives in Ireland with his family. Because family benefits primarily follow the country of employment, the UK will be liable to pay items such as child benefit.²¹⁵ However, Ireland will be liable to pay those social security payments which are based on residency such as disability allowances.

²¹⁰ Department of Employment Affairs and Social Protection, 'Guidelines for Deciding Officers on the determination of Habitual Residence', s 6, available at: <http://www.welfare.ie/en/Pages/Habitual-Residence-Condition--Guidelines-for-Deciding-Offic.aspx#7.1>.

²¹¹ Social Welfare Consolidation Act 2005 (Ireland), s246(5)-(10).

²¹² Social Welfare Consolidation Act 2005 (Ireland), s246(4).

²¹³ Citizens' Information, 'Residence Rights of UK Citizens' (2018) available at: http://www.citizensinformation.ie/en/moving_country/moving_to_ireland/rights_of_residence_in_ireland/residence_rule_s_UK_citizens.html.

²¹⁴ Department of Employment Affairs and Social Protection, 'Guidance on Family Benefits: Chapter Eight of Regulation 883/04', example 1, available at: <http://www.welfare.ie/en/downloads/part9.pdf>.

²¹⁵ There is an additional element to this scenario which would require Ireland to top up the UK's provision of family benefits if they are at a higher level in Ireland; Regulation 883/2004 (n 130) Article 68(2).

Current Complexities

Social security payments are currently a complex area, and there are already challenges for those who have residence and work on different sides of the border. EU law has facilitated a degree of consistency between the two jurisdictions, with them both using similar residency tests. EU law has nudged and shaped the UK and Irish approaches to social security, but even pre-Brexit there have been areas where coordination has not been total or successful. Successful coordination partly relies upon the classification of certain social security as falling within the scope of the EU regulations.²¹⁶ This classification process can lead to individuals claiming on both sides of the border and engaging in complex administrative processes. The Universal Credit system, for example, has not been classed as family benefit (partly because it replaces some employment-related benefits) and therefore is not subject to the full range of EU coordination rules. Irish citizens would under current UK law be required to fulfil the habitual residence test outlined above in order to claim Universal Credit payments.²¹⁷ In a similar manner to the Jobseekers Allowance, the CTA is relevant only insofar as CTA-related arrangements loosen the requirements upon Irish nationals to show habitual residence by counting periods of residence in the CTA (though showing plans in the UK is still needed). There are number of policy decisions also to be made by the UK regarding other aspects of eligibility for these benefits. For example, whether non-UK citizens will be entitled to the full sum of Universal Credit payments and what is included by the systems as work seeking activities.

Under EU law designations of benefits by national governments as falling within/ without the scope of EU regulations have been open to challenge whether directly or indirectly. To provide just two examples, in an Upper Tribunal case the meaning of family allowances under EU law was directly contested.²¹⁸ In another example, indirectly, through relying EU rights to provide and receive services across borders, a UK law restricting where childcare payments could be spent was successfully challenged.²¹⁹ Although EU law will retain some relevance in assisting with similar challenges, if the UK develops its social security in a new direction following Brexit, this influence will wane. The CTA currently provides no legal backstop that would help resolve these complexities or provide a basis for challenging barriers to cross-border social security administration.

Post Brexit Connections to EU Law

As discussed above, social security arrangements in the UK and Ireland and their coordination are heavily reliant on the common EU framework. In the immediate aftermath of Brexit, following the (partial) loss of this common set of rules there are likely to be only a few difficulties, while in the medium to long term more significant difficulties will arise.

The immediate difficulties could arise where there is direct coordination and communication between agencies in the UK and those in Ireland, which may be dependent upon data sharing

²¹⁶ Regulation 883/2004 (n 130).

²¹⁷ Department of Work and Pensions, 'Explanatory Memorandum for the Social Security Advisory Committee' (2012), para 15, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/221579/uc-draft-regs-2012-memorandum.pdf.

²¹⁸ EM v HMRC (TC) (Case No. CTC/3179/2009) 2010 UKUT 323 AAC.

²¹⁹ NB v HMRC (TC) (Decision No: C1/14-15(TC)(T)) 2016 NICom 47.

and coordination agreements applicable to the EU. If not properly factored in to withdrawal agreements between the UK and EU this could prevent effective social security administration across the border. The draft Withdrawal Agreement has a range of measures agreed (in green) relating to social security coordination that make these short-term difficulties less likely.²²⁰ This includes a provision to allow the UK access to the ‘Electronic Exchange of Social Security Information’ database. A further annex on social security cooperation is also to be added, indicating that a good deal of attention is being given to this issue.²²¹ These coordination measures will be of large benefit to those living between the UK and Ireland (as they are now), but they are pan-European measures not specifically tailored to the Irish situation or affected by the CTA.

Longer term difficulties could arise if social security systems in the UK and Ireland/EU develop in different directions following Brexit. The CTA provides no legal guarantee of equivalence between the UK and Ireland, but it could – if developed further and made more concrete – act as a starting place for longer term social security cooperation between the two countries. New mechanisms for data sharing between Irish and UK social security agencies will in any event need to be established once the UK is no longer an EU Member State, as following the end of the transition period, the UK will no longer have access to any EU databases or frameworks containing private information. This is a practical consideration that lies outwith the arrangements covered by the CTA.

EU (Withdrawal) Act 2018

The UK’s EU (Withdrawal) Act 2018 ends the direct association of the UK with the EU and sets out a process by which EU regulations can be retained in the domestic law of the UK following Brexit. One of the more important provisions of this Act in the social security context is the prohibition on ministers diminishing cooperation derived from the GFA which requires them to have due regard to the provisions of the December Joint Report between the UK and Ireland.²²² Both of these provisions aid in the maintenance of social security cooperation.

The GFA suggests that areas for North-South cooperation ‘may’ include social security, especially with respect to cross-border movements.²²³ When combined with the EU (Withdrawal) Act this could be read as preventing UK ministers from making changes that would negatively affect cooperation with Ireland. This would act as something of a safeguard, but the UK parliament could still choose to make changes to social security that would harm cooperation, and such legislation would be capable of overriding the GFA-linked protections of the Withdrawal Act (because of basic principles of parliamentary sovereignty).

Similarly, when acting in respect of EU linked laws under the Withdrawal Act, UK ministers must have ‘due regard to’ the Joint Report that resulted from the first phase of the UK-EU negotiations. Although the Joint Report permits the UK and Ireland to continue to make arrangements for travel in the CTA, it is not specific at all about any of the related ‘arrangements’ that are considered part of the CTA, such as social security. The Joint Report also does not *require* the UK or Ireland to continue with CTA arrangements, but rather permits

²²⁰ Draft Agreement on the withdrawal of the United Kingdom (n 11) Articles 29-30.

²²¹ Draft Agreement on the withdrawal of the United Kingdom (n 11), Annex [y+5] ‘Social Security Coordination’.

²²² European Union (Withdrawal) Act 2018 (UK) s10.

²²³ GFA (n45), Strand Two North/South Ministerial Council, Annex.

their continuation (in general terms).²²⁴ The follow-through effect of this is that there would not be a requirement for UK ministers to further develop the CTA as a result of the EU (Withdrawal) Act. More useful, perhaps, are the social security coordination measures mentioned in the Joint Report which ministers would be required to pay due regard to when considering legislative changes under the Withdrawal Act.²²⁵

Irish Citizens in Northern Ireland

On paper, the additional rights that the Brexit negotiations afford to Irish citizens who are part of the people of Northern Ireland appear to pave the way for a continuation of the current approach to claiming social security in the UK. These rights are agreed in the UK-EU Joint Report where it is written that, 'the people of Northern Ireland who are Irish citizens will continue to enjoy rights as EU citizens'.²²⁶ The UK has also agreed to continue social security coordination for EU citizens resident in the UK at the end of the transition period. After this, however, the practical capacities of the UK and Irish authorities to coordinate social security are dependent upon an agreement being struck that encompasses these issues. Without such an agreement, the CTA would only provide individuals with the ability to move cross-border and CTA-related domestic legislation could allow greater flexibility in terms of residency tests. However, claims would be snarled in administrative difficulties as authorities in the UK and Ireland would have to develop new processes for checking that people were not claiming identical benefits in both jurisdictions and to ascertain periods of work or insurance in other jurisdictions.

Conclusion

To maintain the current approaches to social security a new legislative basis for *coordination* of the systems will be required. This currently resides in EU law. Cross-border social security will be particularly difficult to maintain as it is already poorly arranged and more complex as two different administrative systems must work closely to configure amalgamation of rights/benefits.

Guarantees made so far in the Brexit negotiations add some detail to how this might function following the UK's departure from the EU. There is some commitment to coordination of the systems and information sharing, but more permanent arrangements will be needed. There are also guarantees of non-diminution of rights and the provision of continuing EU citizenship for Irish citizens who are part of the people of Northern Ireland (even when they are resident in Northern Ireland). It could prove difficult to claim a diminution of rights or a violation of EU citizenship as a result of some more minor changes to social security or even in respect of administrative challenges. However, a key touchstone should be the impact that failures in social security systems have on people's ability to live and work cross-border. If this becomes more difficult, this could certainly be described as a diminution of rights and a violation of Irish nationals' free movement rights.

The content of social security payments will not be so reliant upon new (EU) law to underpin it and has been described as related to the CTA. This gives a degree of political protection to continuing reciprocity between the UK and Ireland in relations to social security payments.

²²⁴ Joint Report: Negotiators of the EU and UK Government (n1) para 54.

²²⁵ Joint Report: Negotiators of the EU and UK Government (n1) paras 28, and 30-31.

²²⁶ Joint Report: Negotiators of the EU and UK Government (n1) para 52.

There is no legal protection, however, and the UK or Ireland could unilaterally change their approach to social security and their domestic law.

Summary

In the CTA	<p><u>Nothing specific</u>. CTA provides ability to move and reside within the Area, which is a necessary pre-condition for many social security payments.</p>
In domestic legislation	<p>Social security provision, with <u>some commonalities</u> between the UK and Irish provision, but no exact reciprocity.</p> <hr/> <p>In UK and Irish law: <u>habitual residence tests</u> which allow residence within the Common Travel Area, but which will require further evidence that the State being claimed from (the UK or Ireland) is the applicant's main centre of interest.</p>
In EU Law	<p><u>Data sharing and other coordination</u> systems essential to the administration of social security between the two jurisdictions.</p> <hr/> <p>Grounds for <u>directly or indirectly challenging</u> poor or unfair coordination practices between the UK and Ireland.</p> <hr/> <p>Requirements for <u>'topping up' social security</u> payments where people live across borders and the level of payment is different between the two countries.</p> <hr/> <p>Guarantees from the Brexit process relating to Irish <u>citizens' EU rights</u>, and <u>non-diminution</u>.</p>
In policy	<p>Some ministerial discretion on setting the parameters and ingredients of <u>habitual residence</u>, for example on how to test applicants' intentions for the future.</p>

Chapter 6: The CTA and Education

Introduction

The CTA does not address education. Currently a combination of EU and domestic law enables access to education across primary, secondary and third level education while work within the education sector is covered by the same workers' rights outlined in Chapter 4. Strand 2 of the GFA provides the only bilateral legal agreement between the UK and Ireland on education but this only stretches to cooperation and implementation on the recognition of teacher qualifications and education exchanges.²²⁷ Other educational rights, for instance to attend primary school across the border, are covered by domestic law such as the Ireland Act 1949,²²⁸ Irish Statutory Instruments on reciprocity²²⁹ and EU law on migrant workers (which is limited to first and second level education).²³⁰ Both governments have stated an intention to maintain existing arrangements however as will become clear below both the content and legal basis of these arrangements post Brexit are not clear.²³¹

Education rights are based on legal residence which the CTA assists an individual in acquiring. Residence requirements have a direct impact on applications to schools, fees requirements and staff mobility for those seeking to cross the border to work or study and the details of each situation is outlined below.

Under EU law all EU nationals are entitled to study in another EU state's primary and secondary education system on the same terms as its own nationals. Fee and support arrangements in place for home students are also applicable to all EU students. As such, under EU law children of EU citizens who are migrant workers are entitled to attend school in any EU country under the same conditions as nationals of their own country.²³² At Third Level, Universities and Further Education Colleges are required to treat home students the same as EU students except regarding access to funding where residency requirements are permitted.²³³

Under the draft Withdrawal Agreement EU citizens (who meet the requirements for registration in the UK) and UK citizens in EU states (if they remain resident in their immediate post-Brexit EU state) – including Ireland – will retain those rights.²³⁴ At present there is no agreement to extend the rights under EU law on education to new EU migrants in the UK or UK migrants in the EU after Brexit.

Currently, the Irish Government states that:

²²⁷ GFA (n45).

²²⁸ Ireland Act 1949 (UK), s2; British Nationality Act 1981 (UK), S50(1); and the Immigration Act 1971 (UK).

²²⁹ Citizens of United Kingdom and Colonies (Irish Citizenship Rights) Order 1949, S.I. No. 1/1949 (Ireland).

²³⁰ Council Directive of 25 July 1977 on the education of the children of migrant workers (77/486/EEC).

²³¹ 'UK and Ireland to keep education access after Brexit', Belfast Telegraph (24 September 2018).

²³² Council Directive of 25 July 1977 on the education of the children of migrant workers (77/486/EEC); European Union, 'Starting school in another EU country' (2018), available at: https://europa.eu/youreurope/citizens/education/school/enrol/index_en.htm.

²³³ TFEU, Article 165; Case C-73/08 Nicolas Bressol and Others v. Gouvernement de la Communaute francaise, para 28.

²³⁴ Draft Withdrawal Agreement (n11) & Joint Report: Negotiators of the EU and UK Government (n1).

*... the CTA ... provides broadly reciprocal rights on the freedom to reside, work and access services, including social security, health and education.*²³⁵

The UK Government states:

Under the CTA, UK and Irish nationals enjoy a range of reciprocal rights - for example:

*...the right to access education*²³⁶

It is reassuring that both States consider that access to education falls within the CTA. However, there is no legal basis for such rights beyond EU law and the GFA. As such, policies to enable access including education that are either contained in legislation or are departmental policy decisions are subject. Access, even as policy, is rather limited, as it does not require access on the same or similar basis, nor is it clear what the terms of access may be beyond residence. It is also important to note that the Irish Government states they are only broadly reciprocal terms therefore granting themselves the possibility of variance between the UK and Ireland. As access is largely based on residency this has a significant impact on those crossing the border for education and work within educational institutions as well as those applying to study at third level in another part of the CTA.

It is also important to state that there is nothing in law to prevent either Government or the devolved administration in Belfast from extending equivalent access rights after Brexit. As the UK will no longer be an EU state, Ireland can extend any rights regarding education it wishes without having to extend those same rights to EU citizens or it can simply mimic the rights that EU citizens receive. Likewise, the UK and the devolved administrations can agree to fund Irish citizens as it does UK students and, as such, treat them differently to other EU nationals. There will also be the residual rights of resident EU and UK citizens in either country. Article 8 of the Protocol to the draft Withdrawal Agreement on Ireland/Northern Ireland states that the protocol will be interpreted so as to maintain the need for continued North/South co-operation including education, though this must be done in the context of Ireland ensuring compliance with its EU obligations.²³⁷ Under the draft Withdrawal Agreement EU citizens already resident in the UK will be entitled to continue exercising their EU rights (see Chapter 2).

As noted above, the GFA states under Strand 2 that education and particularly teacher qualifications and exchanges are areas for North-South co-operation and implementation.²³⁸ The Standing Conference on Teacher Education, North and South (SCoTENS) and Universities Ireland are examples of bodies working on this basis.²³⁹ Education comes under the exegesis of the British-Irish Council as a matter for the exchange of information, discussion, consultation and cooperation in mutual interest.²⁴⁰ These rights do not appear to be individual rights and it is unlikely that they would be enforceable as the GFA establishes a duty

²³⁵ Department of Foreign Affairs and Trade, 'Brexit and You', available at: <https://www.dfa.ie/brexit/faqs/common-travel-area/>.

²³⁶ Department for Exiting the EU, 'Citizens' rights - UK and Irish nationals in the Common Travel Area' (22 December 2017), available at: <https://www.gov.uk/government/publications/citizens-rights-uk-and-irish-nationals-in-the-common-travel-area/citizens-rights-uk-and-irish-nationals-in-the-common-travel-area>.

²³⁷ Draft Agreement on the withdrawal of the United Kingdom (n 11).

²³⁸ GFA (n45).

²³⁹ Standing Conference on Teacher Education, North and South (SCoTENS) <http://scotens.org/>; Universities Ireland <http://universitiesireland.ie/>.

²⁴⁰ GFA (n45) Strand Three.

to co-operate rather than specific rights for individuals that are set out. It could be the basis for a specific policy initiative (See example of Trinity College Dublin below) but is unlikely to be justiciable.

The EU PEACE IV Programme includes a strand on shared education,

*The provision of direct, sustained, curriculum-based contact between pupils and teachers from all backgrounds through collaboration between schools from different sectors in order to promote good relations and enhance children's skills and attitudes to contribute to a cohesive society.*²⁴¹

The continuation of the PEACE funding stream for Northern Ireland after 2020 remains a matter for negotiation.

The Ireland Protocol to the draft Withdrawal Agreement commits the UK to protecting and supporting North-South and East-West cooperation across the full range of political, economic, security, societal and agricultural contexts and support of current and future common policies under the GFA which includes education. However, as just discussed, it is unlikely that this is justiciable. The right to education is also contained within the non-diminution requirements under the GFA. However, it is unlikely that restricting access under residency requirements would constitute a violation of the non-diminution requirements particularly if a right was accessible within the state of residence. For example, a student resident in Northern Ireland who could no longer attend a primary school in the ROI but could access a school in Northern Ireland is unlikely to come within the terms of non-diminution.

Primary Level and Post Primary Schools

As the 'Report on the Movement of People across the Northern Ireland-Ireland Border' states there is a history of pupils and staff travelling across the border to attend schools. The Report states that in 2016/17 267 pupils from Ireland attended post primary schools in Northern Ireland and 103 pupils attended primary school.²⁴² In 2015/16 191 pupils resident in Northern Ireland attended primary and post primary schools in Ireland.²⁴³

Ireland

Under the Education Act 1998 and the Education (Admissions to Schools) Act 2018 schools in Ireland are entitled to develop their own admissions policies if these provide for maximum accessibility and follow equality requirements. There is nothing in these Acts that specifically references residency in the State. Schools are also required to publish their admissions policies. In practice, as the statistics demonstrate, students do cross the border to attend primary and post primary schools. A survey of admissions policies of schools in ROI near the border suggested no school specifically excluded students from Northern Ireland. What may be of concern is whether the Irish Government will continue to fund these student places, however there has been no suggestion that this will be discontinued. A further concern may

²⁴¹ Special EU Programmes Body, 'PEACE IV 2014-2020: Overview' (2018) available at: <https://www.seupb.eu/piv-overview>.

²⁴² Department of Education (Northern Ireland) analysis of Northern Ireland school census, 2017, see <https://www.education-ni.gov.uk/articles/school-enrolments-overview>

²⁴³ NI school Census; Parents Learners Database Section, Department of Education and Skills (ROI) see <https://www.education-ni.gov.uk/publications/school-enrolments-northern-ireland-summary-data>

be the erection of a border which slows travel across the border which may make attendance significantly more difficult. On a legal level, this complicates matters as the entitlement of children to attend a school in Northern Ireland would make it unlikely that there would be a violation of the right to education if crossing the border became difficult.²⁴⁴

For staff members who cross the border to work, the possibility of a hard border may make travel to work particularly difficult and lead to economic hardship if the commute is longer or requires documentation. Under the draft Withdrawal Agreement while they remain in employment they will retain their status as Frontier Workers and the attached rights. However future employees will not be covered by this status (see Chapter 4). The recognition of qualifications comes under the terms of the GFA under strand 2 as an area of co-operation and, as such, is also recognised in the Ireland/Northern Ireland Protocol to the draft Withdrawal Agreement. The UK and Ireland should undertake steps to ensure that this continues. The CTA does not provide any specific employment protection for those crossing the border to work in Ireland as it is mainly operationalised by residency (note, however, that Ireland will continue to enforce all EU employment law).

Northern Ireland

As the statistics demonstrate, a number of students travel from Ireland to Northern Ireland to primary and post primary schools each day. Each school is free to apply its admissions policy to admit students from Ireland (Ireland is in fact not specified and theoretically this would apply to any students not resident in Northern Ireland), but priority must be given to students resident in Northern Ireland.²⁴⁵ According to Northern Ireland's education department this is currently under review.²⁴⁶ Schools are required to publish their admissions policies. A similar policy applies to nurseries.²⁴⁷

Staff mobility may be similarly affected to those who work in Ireland as a hard border may cause delays in travelling to work and potentially economic hardship should the commute be longer or require documentation. Similarly, the draft Withdrawal Agreement will protect those entitled to Frontier Worker status, but not new employees post Brexit. While in Ireland EU law will continue to provide employment protection, it is possible that there will be a divergence with Northern Ireland. However, this would also have to comply with the non-diminution requirements of the GFA. The CTA does not specifically provide protection in this context as residency is required to protect most rights.

A study by the Ulster University on the impact of Brexit on Northern Ireland's Education system stated that it was likely to impact upon diversity at primary and post primary level as Brexit is likely to lead to a sharp reduction in the number of students with diverse languages and cultures coming to Northern Ireland.²⁴⁸ Movement from Ireland under the CTA may alleviate this lack of diversity slightly, but not to an extent that would alter this outcome entirely, particularly as EU citizens seeking to work or study will not have the same ability to

²⁴⁴ See further Chapter 4.

²⁴⁵ Education (Northern Ireland) Order 1997 (UK), s16(4).

²⁴⁶ Department of Education, 'School Admissions Guidance', available at: <https://www.education-ni.gov.uk/articles/school-admissions-guidance>.

²⁴⁷ Education (Northern Ireland) Order 1997 (UK), s16(4).

²⁴⁸ Ulster University, 'Impact of Brexit on education in Northern Ireland', available at: https://www.ulster.ac.uk/_data/assets/pdf_file/0008/179423/Impact-of-Brexit-in-education-in-NI.pdf.

move residence as Irish citizens within the CTA. Further concerns were raised in the Report regarding recruitment of staff at secondary level in key areas of the curriculum where there were currently shortages in Northern Ireland.²⁴⁹

Northern Ireland Schools may lose access to the Erasmus+ Comenius programme, which includes funding for staff and student mobility for and post primary students, unless the UK Government negotiates to remain within that programme.²⁵⁰ The EU Commission has proposed extending Erasmus+ to all states after 2021 but this will require those states to accept that they do not have a 'decisional power' on the programme and agree to a 'fair balance' of contributions.²⁵¹ Ireland and Northern Ireland and/or the entirety of the UK could create a separate bespoke version of the programme and the existence of the CTA would facilitate this as it alleviates any visa requirements that individuals from the rest of the EU may have to comply with. This would also come under the terms of educational co-operation under the GFA.

Further Education and Universities

In its Brexit Report, the Royal Irish Academy – a pan-Ireland body – surveyed academics about Brexit and the relevant concerns around the CTA included:

- Reduced staff and student mobility between Ireland and the UK in the absence of an agreed common travel area or agreement by the UK on free movement of EU nationals;
- The application of international student fee charges by UK HEIs to Irish students;
- Significant capacity issues for Irish HEIs should the 10,000 Irish based students travelling to the UK each year for higher education now need to be accommodated within the Irish system;
- A decline in opportunities for cross-border research and education collaboration and cooperation;
- Isolation of Northern Ireland education institutions from all-island opportunities in contradiction with the objectives of the Good Friday Agreement.²⁵²

The 'Report on the Movement of People across the Northern Ireland-Ireland Border' found that in 2015/16 almost 2,200 students from ROI attended higher education institutions in Northern Ireland (4.0% of the total).²⁵³ Around 1,900 students domiciled from the ROI

²⁴⁹ Ulster University, 'Report on Ulster University Brexit Symposium' (2017), available at: https://www.ulster.ac.uk/data/assets/pdf_file/0005/230666/Report-on-Ulster-University-Brexit-Symposium.pdf.

²⁵⁰ European Commission, 'Erasmus+: Programme Guide Online', available at: https://ec.europa.eu/programmes/erasmus-plus/programme-guide/part-a_en.

²⁵¹ European Commission, 'Commission adopts proposal for the next Erasmus programme 2021-2027' (2018), available at: https://ec.europa.eu/programmes/erasmus-plus/news/commission-adopts-proposal-next-erasmus-programme-2021-2027_en.

²⁵² Royal Irish Academy, 'Research and Higher Education on the Island of Ireland after Brexit' (2017), available at: https://www.ria.ie/sites/default/files/roi_brexit_report- e-version-1_0.pdf.

²⁵³ Department for the Economy (Northern Ireland), 'Enrolments at UK Higher Education Institutions: Northern Ireland analysis 2015/16' (2017) available at: <https://www.economy-ni.gov.uk/publications/enrolments-uk-higher-education-institutions-northern-ireland-analysis-201516>.

attended further education colleges in campuses around the border areas, accounting for almost 6% of students at those colleges.²⁵⁴

Enrolments at Northern Ireland Higher Education Institutions by domicile 2015-2016

	NI	GB	ROI	Other EU	Non EU	Total
Number	47,150	2,930	2,195	375	2,585	55,245
%	85.4%	5.3%	4.0%	0.7%	4.7%	100.0%

Source Background Evidence on the Movement of People across the Northern Ireland – Ireland Border Department for the Economy March 2018 (<https://www.economy-ni.gov.uk/sites/default/files/publications/economy/movement-people-northern-ireland-ireland-border.pdf>)

The Report found that amongst those in further education for 2015/16, 6.0% of students undertaking regulated provision at the three Further Education Colleges which neighbour the border, were from outside Northern Ireland with many of these students coming from ROI quite a number of whom cross the border every day to attend.

Individuals at Further Education Colleges in the border areas of Northern Ireland by Domicile Group 2015/16

	NI	Other UK	ROI	Other EU	Non EU	Total
Number	31,354	60	1,852	55	34	33,361
%	94.0%	0.2%	5.6%	0.2%	0.1%	100.0%

Source: Background Evidence on the Movement of People across the Northern Ireland – Ireland Border Department for the Economy March 2018 (<https://www.economy-ni.gov.uk/sites/default/files/publications/economy/movement-people-northern-ireland-ireland-border.pdf>)

The Report found that in 2015/16 there were 8,050 Irish Domiciled Students studying at higher education institutions in GB. This was a decrease of 6% between 2014/15 and 2015/16 and a 30% decrease compared to 2010/11. In 2015/16 70% of Irish students in GB were studying in England compared to 23% in Scotland and 7% in Wales. While small in terms of UK higher level education, should those students choose to study in Ireland instead there would need to be a significant increase in numbers across courses in Ireland. In 2016 there were 1,007 students from Northern Ireland and 1,805 students from GB studying on a full-time basis at higher education institutions in ROI. Together they accounted for 1.3% of students in ROI.²⁵⁵

The various representative bodies of Universities and Further Education are very clear in their calls for clarity.²⁵⁶ Regarding those studying across the border, for instance, upon signing a Memorandum of Understanding between Letterkenny Institute of Technology, Ulster University, North West Regional College and Donegal ETB they stated that

²⁵⁴ Department for the Economy (Northern Ireland), ‘Northern Ireland Further Education Activity’ (2017) available at: https://www.economy-ni.gov.uk/sites/default/files/publications/economy/FE-Activity-Statistical-Bulletin-1314-to-1617_0.pdf (note this covers regulated activity only).

²⁵⁵ Further statistics are available in the Royal Irish Academy’s Report (n252).

²⁵⁶ Association of Colleges, ‘Brexit’, available at: <https://www.aoc.co.uk/funding-and-corporate-services/brexit>.

*Brexit will pose a significant challenge to our higher and further education institutions. Through our Action Plan for Education, which aims to make Ireland's education system the best in Europe within a decade, we are preparing our education and training providers to respond to this challenge. Talent drives the success of any region and strong hubs will be the engine of regional development. Today's partnership is a very welcome development, which will have a really significant impact on the North West region.*²⁵⁷

Fees and other impediments

There are anxieties and uncertainties expressed within Northern Ireland regarding the status of fees following Brexit. One civil society group expressed concerns that it might transpire that 'we [the people of Northern Ireland] are going to be considered foreign students [and] subject to international charges'.²⁵⁸

The decision on what UK Universities in Northern Ireland, Scotland, England and Wales charge students from Ireland or other parts of the UK is entirely a policy-based decision and will depend on the allocation of funding.²⁵⁹ The representative bodies of UK Universities have all called for clarification from the UK Government particularly around new entrants from the EU from 2020.²⁶⁰ It is possible that an entirely separate fee status will be granted to Irish passport holders applying from Ireland, but this has yet to be determined either at UK or devolved level. This may create a system where going to School across the border may entitle you to different fees depending on how being 'from Ireland' was determined. However, this was the case pre the introduction of EU requirements on fees and, as such, could be resolved.

While students from the rest of the EU will be subject to the new student visa process – or an extension of existing visa processes for international students to EU students - this will not impact upon Irish students if the CTA continues to operate as it currently does.

Post Brexit, while it is probable that EU students not resident in the UK pre-Brexit will be ineligible for loans to cover fees from the Student Loan Company for England and Wales the position of Irish students is less clear. It is uncertain if Irish students will be required to be domiciled in the UK and covered by the Ireland Act 1949 to be eligible for student loans. However, after Brexit, there will be no impediment to the UK at a national level or the devolved bodies charging students from Ireland the same as domestic students or extending funding. There remains no clarity on the issue for 2020 entrants.

In Ireland, the Universities have stated a preference for maintaining EU/domestic fees for all students from the UK. However, the Irish Government has not stated whether it will continue to cover the cost of fees for UK students on the same basis as they currently do for EU students. At present, students coming from Northern Ireland can apply for a Student Contribution Loan from the Northern Ireland administration if they intend to study in Ireland

²⁵⁷ Department of Education and Skills, 'Minister Bruton endorses Cross Border Education Alliance' (2018), available at: <https://www.education.ie/en/Press-Events/Press-Releases/2018-press-releases/PR18-02-23-2.html>.

²⁵⁸ In conversation with Louise Coyle, Policy Officer at Northern Ireland Rural Women's Network, reporting on a range of research and community events organised by the Network (Sept 2018).

²⁵⁹ L. Mayhew 'UK Higher education and Brexit' (2017) 33 Oxford Review of Economic Policy 155.

²⁶⁰ Department for Education, 'Further financial support for UK and EU students' (2018) available at: <https://www.gov.uk/government/news/further-financial-support-for-uk-and-eu-students>.

to cover the cost of the student contribution fee.²⁶¹ There is no indication that this will cease after Brexit but there is also no indication of whether students would become eligible for loans should the Irish Government choose not to cover the fees of students domiciled in Northern Ireland or Britain prior to commencing their courses.

Those Northern Ireland students with an Irish passport will continue to be entitled to EU citizenship and under the draft Withdrawal Agreement should be able to continue to exercise their EU rights. This should mean that they are EU students for the purposes of fees should the draft Agreement go forward as currently written; however, they may have an issue with residency. Irish Universities – as a matter of policy – have EU residency requirements within the EU to qualify for that fee status. As Northern Ireland will already be an exceptional case for those exercising EU rights from outside the EU, potentially it could be argued that this should mean residency in Northern Ireland should count for the purposes of fees. This, however, would require not just Ireland but the whole of the EU recognising Northern Ireland residents with Irish nationality as residents of the EU for the purposes of education (and potentially other rights). Nonetheless, once Brexit occurs, there is no impediment to Irish Universities treating students from Northern Ireland or the UK differently to other ‘international’ students and categorising them as home students or another specific category for the purposes of fees. The CTA does not require this to happen and it is only in the case of residency that similar treatment is generally, though not absolutely, required.

Since 2014 Trinity College Dublin has undertaken a feasibility study to triple the students coming from Northern Ireland to the University following a decline in numbers.²⁶² Trinity sets aside specific places for students from Northern Ireland and gives them exceptions regarding qualifications. Given the place of education under the GFA there is potential to argue that maintaining cross-border co-operation and mobility in education comes within the terms of the Agreement. This could also be argued to be the basis on which Trinity is able to give preferential treatment to students from Northern Ireland but not to other EU citizens, however the legality of this has not been tested.

The CTA does not impact upon fees or the categorisation of students. While students will be able to move between jurisdictions without the need for visas they would have to be resident in the jurisdiction of either state to be able to access the rights under the CTA.

Universities in the UK will lose access to Erasmus+: Erasmus programme, though similarly to the primary and post primary programme there is nothing to prevent Ireland and Northern Ireland and/or the UK creating a bespoke version of the programme.

Staff Mobility

According to the ‘Movement of People across the Northern Ireland Report’ 17% of staff at one FE College close to the border commuted from Ireland to Northern Ireland, this includes

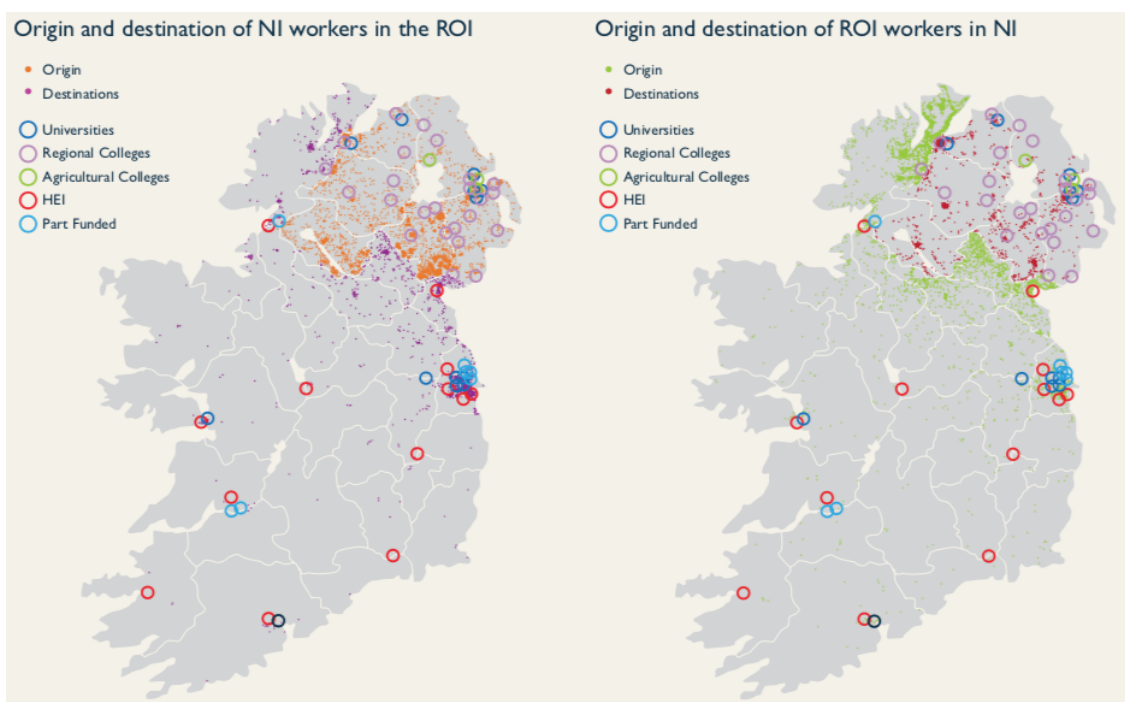
²⁶¹ StudentFinanceNI, ‘Full-time undergraduate, Northern Ireland students’, available at: <https://www.studentfinancenl.co.uk/types-of-finance/undergraduate/full-time/northern-ireland-student/>.

²⁶² Students are admitted with 3 A-Levels rather than 4; Trinity College Dublin, ‘Major New Trinity Initiative to Increase Number of Northern Ireland Students’ (2014), available at: https://www.tcd.ie/news_events/articles/major-new-trinity-initiative-to-increase-number-of-northern-ireland-students/; Trinity College Dublin, ‘Northern Ireland’, available at: <https://www.tcd.ie/study/country/n-ireland/>.

teachers and a wide range of support staff.²⁶³ At the Ulster University in 2018 96 members of staff had addresses in Ireland with 66 of those staff members at the Magee campus.²⁶⁴ In June 2017 the Ulster University held a symposium on Brexit. In its discussions, staff mobility was a serious concern including issues concerning visa requirements, recognition of qualification and accreditations.²⁶⁵

The CTA and the continuance of Frontier Worker status for those staff employed – and who remain in employment - at the time of Brexit- will assist with staff mobility. Staff will be able to take positions without the need to obtain visas. Nonetheless the nature of the commute remains to be answered however as the terms of the border – beyond the backstop in the draft Withdrawal Agreement – have yet to be determined. This may make commuting across the border or travel for shared research projects or attendance at conferences more difficult and may also have economic consequences should commuting become longer or documentation required. As the diagram below demonstrates cross border travel is an all-island issue not simply a border one.

Visualisation of Ireland/Northern Ireland Cross Border Flows



Source: Higher Education and Research in Northern Ireland Post-Brexit, November 2017. (https://www.ria.ie/sites/default/files/ni_brexit_report-e-version-1.pdf)

While staff will be able to travel to conferences across the CTA without the impediment of visa requirements, it is now a regular occurrence to be required to provide evidence of ability to work in the UK when undertaking casual, consultancy or incidental paid work for a

²⁶³ Department for the Economy, 'Movement of People across the Northern Ireland – Ireland Border' (March 2018) available at: <https://www.economy-ni.gov.uk/sites/default/files/publications/economy/movement-people-northern-ireland-ireland-border.pdf>.

²⁶⁴ Information provided on request by Ulster University. On file with Authors.

²⁶⁵ Ulster University, 'Report on Ulster University Brexit Symposium' (2017), available at: https://www.ulster.ac.uk/_data/assets/pdf_file/0005/230666/Report-on-Ulster-University-Brexit-Symposium.pdf.

University other than one's main employer.²⁶⁶ There may also be obstacles to joint collaborations on research and participation in the Erasmus+ programme as participation in EU research funding remains a matter of negotiation.

The Royal Irish Academy Task Force on Brexit has made the following call for cooperation to:

1. Secure commitments as to the rights and entitlements of Irish and UK citizens within the common travel area;
2. Pursue actively the continuance of the current fee status and eligibility for access to the higher education and research system enjoyed by Irish and UK citizens in each other's jurisdictions;
3. Create a bespoke suite of programmes including bilateral funding agreements to support a new Irish-British research area enabling North-South, East-West academic research mobility and partnerships;
4. Encourage enhanced promotion and mobility programmes to bring global student and research talent to Ireland, north and south;
5. Provide support for pan-island bodies such as the Royal Irish Academy and Universities Ireland to enable continued all-island and Ireland UK dialogue.²⁶⁷

At present, beyond the general commitments to the CTA made in the Joint Report, the draft Withdrawal Agreement, the GFA and statements by both Governments, much of the rest of the call remains unanswered as none are presently required by the terms of the CTA.

Conclusion

The CTA assists in key areas of education such as staff mobility without visa restrictions and general access rights in both states where the pupil/student is resident. The GFA's general commitments to co-operation on education and non-diminution of rights also provides for pan-Ireland co-operation and access to education for those residents in the UK and Ireland. Rights based on EU citizenship will no longer apply within the UK post-Brexit; however, it is possible that EU citizens resident in Northern Ireland may be able to access some rights while they remain resident in Northern Ireland.

The CTA does not assist in cross border education access including admissions, fee status and accreditation/qualification recognition. Decisions on fee status are currently policy based and require funding decisions to be made at the national and devolved levels. Access to EU funding for research and collaboration across the CTA is also policy based and a funding decision is yet to be made and will form part of the exit negotiations.

Some decisions are entirely policy or fiscal based or subject to negotiation– such as fees for third level education, access to the ERASMUS programme or continued enrolment at primary or secondary level schools across the border. While the GFA agreement requires co-operation, this is not an individualised right. The GFA's non-diminution requirement means

²⁶⁶ P. Scott, 'How universities were swept into the 'hostile environment' (*The Guardian*, 1st May 2018) available at: <https://www.theguardian.com/education/2018/may/01/how-universities-swept-into-hostile-environment-windrush>.

²⁶⁷ Royal Irish Academy (n252).

that education access cannot be lowered on the island, but this does not provide a right to access education in the other jurisdiction at all or on any particular basis.

Summary

In the CTA	The CTA does not directly cover education.
	The CTA does enable travel across the various CTA borders to access educational services or work where residence is not required.
	Where residency is required, it enables individuals to move to another part of the CTA without visa or other restrictions to establish the length of residency required to access, for instance, a particular fee status. But these access or residency systems are not based within the CTA but within domestic and EU law's regulation of education.
In domestic legislation	Admissions policies for primary, secondary and third level education is based on domestic primary and secondary legislation in both Ireland and Northern Ireland.
	This includes the <i>Ireland Act 1949, S.I. No. 1/1949 - Citizens of United Kingdom and Colonies (Irish Citizenship Rights) Order 1949, Education Act 1998, Education (Admissions to Schools) Act 2018, Education (Northern Ireland) Order 1997.</i>
	As such, these are subject to change in the same manner as other law, albeit Ireland is required to comply with EU law when making any changes and not discriminate against EU nationals.
In EU Law	EU law currently gives basic educational access and frontier worker status.
	Under EU law all EU nationals are entitled to study in each other's primary and secondary and third level systems on the same terms as their own nationals with the only restriction based on access to funding through residency.
	Directly relevant EU law includes Council Directive of 25 July 1977 on the education of the children of migrant workers (77/486/EEC), Article 165 TFEU on third level access.
In policy	At the very local level, each primary and secondary school has its own admissions policies. In Ireland there is no reference in law to allowing or not allowing individuals who cross the border to attend schools while in Northern Ireland the only restriction is that priority must be given to students' resident in Northern Ireland.
	At third level, in Ireland each University decides its own fee structures – albeit they must comply with EU law – but it is the Governments decision as to how it funds university places.
	In Northern Ireland funding decisions are also a devolved and national matter of policy and these will not have to comply with EU law after Brexit.

Chapter 7: The CTA and Policing, Justice and Security

Introduction

Security concerns have long overshadowed the operation of the CTA. As we noted in Chapter 2, following the 1974 Birmingham and Guildford bombings the UK Government seriously contemplated suspending the CTA. There was nothing in the nature of the CTA which prevented such an action; indeed, archival materials indicate that the UK Government only stepped back from such a course because abridging freedom of movement would likely result in legal challenges under EU law.²⁶⁸ With Brexit, these background protections look set to fall away, given that the UK Government refuses to countenance withdrawal terms which provide for freedom of movement.²⁶⁹ This opens up the possibility that the CTA could be undermined on the basis of security concerns, with many commentators warning about the possibility of increased political violence by groups operating in Northern Ireland after Brexit.

Even if this worst-case scenario does not happen, Brexit will likely increase the need for enhanced cooperative justice arrangements. Cross-border crime exploits differences in regulation on either side of a border, and the differences on either side of the land border in Ireland look set to increase after Brexit. Should the legal movement of goods or people across the land border become more difficult after Brexit, then illicit attempts to circumvent these restrictions will become more attractive for criminals.²⁷⁰ Good working relations between law enforcement agencies in Ireland and Northern Ireland are important,²⁷¹ but the current *tools* for cross-border policing and justice are to a large extent found in EU law, and not in bilateral arrangements between the UK and Ireland. It is potentially difficult to establish a bilateral substitute for some of these tools after Brexit, because Ireland will be obliged to resource multiple cooperation platforms. Given the broad range of cooperative measures at issue, and the degree of overlap in the difficulties that Brexit creates, this section of the report focuses on a selection of the most important measures.²⁷²

Policing and Prosecution Cooperation

Operational Cooperation

Enhancing police cooperation between Ireland and the UK has been a major policy goal since the 1980s. Significant parts of the Anglo-Irish Agreement were focused on facilitating transfers of suspects between the jurisdictions and on enhancing high-level police

²⁶⁸ See File FCO 50/549 (UK National Archives).

²⁶⁹ HM Government, *The future relationship between the United Kingdom and the European Union (2018)* Cmnd.9593, p14.

²⁷⁰ See House of Lords European Union Committee, *Brexit: UK-Irish Relations* (2016) HL 76, para 150.

²⁷¹ George Hamilton, Evidence to the Northern Ireland Affairs Committee (27 June 2018) HC 512, Q41.

²⁷² This section of report draws upon and updates the material on security cooperation produced as part of the discussion paper published by the Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission in March 2018; C. Murray, A. O'Donoghue and B. Warwick, *Discussion Paper on Brexit* (2018) pp47-58, available at: <https://www.ihrec.ie/app/uploads/2018/03/Discussion-Paper-on-Brexit.pdf>.

cooperation between the then-Royal Ulster Constabulary and An Garda Síochána.²⁷³ Since then policing cooperation has extended to the operational level; the 2015 Fresh Start Agreement announced the establishment of a Joint Agency Task Force to tackle cross-border crime, consisting of officers from the PSNI, An Garda Síochána, the Revenue Commissioners and HM Revenue and Customs.²⁷⁴

These operational arrangements, supported by the institutional framework of the British-Irish Intergovernmental Conference, will be able to continue after Brexit. Brexit does, however, endanger the cooperation which takes place between Ireland and the UK under the auspices of European Agencies:

- Europol is the EU Agency for Law Enforcement Cooperation.²⁷⁵ Its primary function is to support the law enforcement authorities of EU Member States in their efforts to tackle serious cross-border crime. As such, only EU Member States are entitled to full membership of Europol, although many other states enjoy strategic and operational partnerships with the Agency, and some third-country partners operate bureaux of law enforcement officers alongside those of EU Member States.
- Eurojust is the EU Agency tasked with improving cooperation between prosecutorial/investigatory authorities across EU states.²⁷⁶ Although the real-time cooperation achieved under the auspices of Eurojust has been characterised as ‘essential’ for the UK’s prosecutorial authorities,²⁷⁷ it is also likely to be difficult to sustain full membership after Brexit. Eurojust nonetheless maintains co-operation agreements with third countries, including Norway, Switzerland and the United States of America, which provide for the exchange of liaison prosecutors.

Information Exchange

EU law provides the basis for a range of cross-border information sharing tools for law enforcement authorities. Whatever informal bilateral sharing of information existed in the past is now entirely channelled through these systems because of the restrictions which data protection law now places upon public bodies sharing data they hold about individuals. So ubiquitous has the use of these systems become that PSNI officers to whom the report team have spoken have expressed surprise that the UK is not part of the Schengen Convention, so often do they use tools like the Schengen Information System. The EU’s most important information sharing/data collection mechanisms which the UK could lose access to post-Brexit are summarised as follows:

²⁷³ *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ireland* (1985) Cmnd. 9690, Articles 8 and 9.

²⁷⁴ Northern Ireland Executive, *A Fresh Start: The Stormont Agreement and Implementation Plan* (November 2015) para 3.2, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/479116/A_Fresh_Start_-_The_Stormont_Agreement_and_Implementation_Plan_-_Final_Version_20_Nov_2015_for_PDF.pdf.

²⁷⁵ EU Council Decision 2009/371/JHA (6 April 2009).

²⁷⁶ EU Council Decision 2002/187/JHA (28 February 2002).

²⁷⁷ House of Lords European Union Committee, *Brexit: Future UK-EU Security and Police Cooperation* (2016) HL 77, para 87.

- The Europol Information System (EIS) pools information from EU Member States about criminal actors. Through the UK's membership of Europol its law enforcement agencies can access this information directly to assist in their criminal investigations.
- The European Criminal Records Information System (ECRIS) provides a secure electronic platform for sharing criminal record information between EU Member States.²⁷⁸
- The Prüm Decisions allow the law enforcement agencies of EU Member States to search for biometric and vehicle registration data against other Member States' databases.²⁷⁹
- The Schengen Information System (SIS II) provides alerts about ongoing law enforcement investigations across much of the EU.²⁸⁰ This database was constructed for countries within the Schengen Acquis (Ireland is not currently party to SIS II arrangements), illustrating the extent of current UK integration.
- Passenger Name Records (PNR) are collated by carriers as part of the travel booking process (covering, for example, details of how a booking was made, the name of the traveller, contact details, and travel itinerary). PNR analysis therefore helps to track the movements of serious criminals.²⁸¹

The importance of reaching an agreement for access to these EU law enforcement tools is only emphasised by the scale of the problem posed, at present, by cross border environmental crime (particularly the dumping of waste) on the island of Ireland. The inability of environmental regulation authorities (local government, the Environmental Protection Agency (Ireland) and the Northern Ireland Environment Agency) to share information as readily as their police counterparts has made this problem particularly difficult to tackle.²⁸²

Hot Pursuit

Hot pursuits, where the police are following a suspect and attempting to effect an arrest, present a specific ongoing problem for cross-border policing in Ireland. Neither the PSNI nor An Garda Síochána are permitted to continue pursuit of suspects who cross the border out of their jurisdiction.

In countries covered by the Schengen Agreement, by contrast, cross-border police pursuits of suspects are permissible.²⁸³ As an Oireachtas Joint Committee Report has noted, these provisions provide 'an EU precedent which facilitates the pursuit of criminals over international borders'.²⁸⁴ In the interests of enhancing policing cooperation post-Brexit, the

²⁷⁸ EU Council Framework Decision 2009/315/JHA (26 February 2009).

²⁷⁹ EU Council Decisions 2008/615/JHA and 2008/616/JHA, Framework Decision 2009/905/JHA.

²⁸⁰ EU Council Decision 2007/533/JHA (12 June 2007).

²⁸¹ Directive 2016/681 of the European Parliament and EU Council (27 April 2016).

²⁸² See C. Brennan, 'The Enforcement of Waste Law in Northern Ireland: Deterrence, Dumping and the Dynamics of Devolution' (2016) 28 *Journal of Environmental Law* 471, pp489-490.

²⁸³ The Schengen Acquis - Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders OJ L 239 (22 September 2000) Article 41.

²⁸⁴ Joint Committee on Jobs, Enterprise and Innovation, *Report on the All-Island Economy* (2016) 31 JEI 023, p89.

UK and Ireland could adopt legislation which allows the CTA to mirror these aspects of the Schengen Acquis.

Justice System Cooperation

Bilateral cooperation over the transfer of suspected criminals and prisoners between the UK and Ireland has long been fraught with difficulty, and in some respects EU law has significantly enhanced cooperation in recent years, particularly since the introduction of the European Arrest Warrant (EAW). As the Director of Public Prosecutions for England and Wales informed one parliamentary committee, ‘when we looked at casework, either outside the EU or prior to the EAW, we were talking months and years rather than the days and weeks we currently have’.²⁸⁵

Earlier extradition arrangements, under the auspices of the European Convention on Extradition, are not only slower but contain more significant exceptions than are provided for under the EAW, which can become the subject of prolonged litigation. The Northern Ireland conflict saw frequent extradition battles and even temporary collapses in extradition cooperation between the UK and Ireland.²⁸⁶ A memo from the NI Department of Justice on post-Brexit arrangements, released under a Freedom of Information request, effectively summarised this problem; whereas the ‘EAW has removed the political dimension from extradition’, following Brexit ‘[t]he extradition process could become toxic once again’.²⁸⁷ Brexit could, in short, potentially reverse these gains, with the CTA providing no meaningful fall-back position.

Surrender of Suspected Criminals

The EAW entered force in 2004 as a measure to replace traditional extradition procedures between EU Member States. It was designed to facilitate the transfer between justice systems of individuals facing criminal prosecution or prison sentence.²⁸⁸ The UK makes considerable use of this system, both in terms of suspects transferred into and out of its jurisdiction.²⁸⁹ In the Northern Ireland context, over two thirds of the 154 EAWs sought by the PSNI between 2007 and 2017 involved a request to the Republic of Ireland.²⁹⁰ According to the PSNI Chief Constable, George Hamilton, EAWs ‘are essential in tackling terrorism, organised and volume

²⁸⁵ A. Saunders, Evidence to the Select Committee on the European Union Inquiry *Brexit: Future EU-UK Security and Police Co-operation* (2 November 2016) Q65.

²⁸⁶ For examples, see C. Campbell, ‘Extradition to Northern Ireland: prospects and problems’ (1989) 52 *Modern Law Review* 585.

²⁸⁷ C. Campbell, ‘Extradition “could become toxic” post-Brexit – Stormont officials’ *Irish Times* (23 November 2017).

²⁸⁸ EU Council Framework Decision 2002/584/JHA (13 June 2002), Article 1(1).

²⁸⁹ Statistics indicate that in recent years the UK has transferred roughly 1000 individuals under the EAW and issued over 200 of its own EAWs annually; see National Crime Agency, *Wanted by the UK: European Arrest Warrant Statistics 2009—May 2016 (Calendar Year)* (July 2016) available at: <http://www.nationalcrimeagency.gov.uk/publications/european-arrestwarrant-statistics/wanted-by-the-uk-european-arrest-warrant-statistics/690-wanted-by-the-uk-european-arrest-warrant-statistics-2009-may-2016-calendar-year>; National Crime Agency, *Wanted from the UK: European Arrest Warrant Statistics 2009–2016 (Calendar Year)* (July 2016) available at: <http://www.nationalcrimeagency.gov.uk/publications/european-arrest-warrantstatistics/wanted-from-the-uk-european-arrest-warrant-statistics/691-wanted-from-the-uk-european-arrest-warrant-statistics-2009-may-2016-calendar-year>.

²⁹⁰ C. Campbell, ‘Government fears “essential” extradition powers to combat crime will be lost after Brexit’ *The Detail* (23 November 2017).

crime across the island of Ireland'.²⁹¹ These comments are echoed by senior Gardaí; 'the operation of the European arrest warrant is probably the area of most concern'.²⁹²

The operation of the EAW system is overseen by domestic courts and, since 2009, the CJEU has enjoyed the jurisdiction to hear references from domestic courts regarding the operation of the EAW.²⁹³ The CJEU's interpretation of EU law within a preliminary ruling issued in response to such a reference, is binding upon the domestic courts of Member States. In the course of such rulings the CJEU applies the provisions of the EU Charter of Fundamental Rights, with its construction of fair hearing rights,²⁹⁴ the right to liberty,²⁹⁵ and the rights to private and family life,²⁹⁶ being particularly important in the EAW context. The EAW system allows for rapid transfers in large part because it operates 'on the basis of the principle of mutual recognition'.²⁹⁷ In short, the EAW operates on a presumption that EU Member States maintain equivalent protections for defendants in their criminal justice systems.²⁹⁸

The EAW requires mutual recognition of the fairness of criminal justice systems across the EU.²⁹⁹ Following the triggering of Brexit there have unsurprisingly been legal challenges against the EAWs issued by the UK. Ireland's High Court and Supreme Court both issued preliminary references pending to the CJEU which question whether Brexit undermines the current operation of the EAW system.³⁰⁰ Advocate General Szpunar, in giving an opinion on one of these cases, maintained that the mutual trust on which the EAW is based has not been undermined by the UK's triggering of the Brexit process.³⁰¹ The CJEU backed this analysis; 'substantial grounds' that the affected individual's EU Charter rights were at risk would need to be demonstrated before an EAW would be halted.³⁰² As a result, the Irish courts have moved swiftly with the intention of approving EAW requests.³⁰³ The Framework Decision on which the EAW is based, in short, should continue to operate in full until the UK has formally left the EU.

This opinion requires an analysis of what will follow once any agreed transition period (after March 2019) ends and the UK leaves the EU. The EAW exists as a mechanism between EU states under EU law; once the UK ceases to be an EU Member State these arrangements will cease.³⁰⁴ It could, nonetheless, be possible for the UK and EU to conclude comparable arrangements (and thereby avoid a return to the UK having to rely upon the European Convention on Extradition). For example, although Norway and Iceland are not EU Member States, a 'suspect surrender agreement' has been reached between them and the EU (but has

²⁹¹ G. Hamilton, Evidence to Northern Ireland Affairs Committee (13 December 2016) HC 700, Q162.

²⁹² J. O'Driscoll, Evidence before the Oireachtas Joint Committee on Children and Youth Affairs (25 October 2017), Speech 31, available at: https://www.oireachtas.ie/en/debates/debate/joint_committee_on_children_and_youth_affairs/2017-10-25/2/.

²⁹³ TFEU, Article 267.

²⁹⁴ EU Charter of Fundamental Rights, Articles 47 and 48.

²⁹⁵ EU Charter of Fundamental Rights, Article 6.

²⁹⁶ EU Charter of Fundamental Rights, Articles 7, 9, 33.

²⁹⁷ EU Council Framework Decision 2002/584/JHA (13 June 2002), Article 1(2).

²⁹⁸ See C-399/11 *Melloni v Ministerio Fiscal* [2013] 2 CMLR 43, [54] (Grand Chamber, CJEU).

²⁹⁹ See Cases C-404/15 and C-659/15 *Aranyosi and Căldăraru* (EU:C:2016:198) para 77.

³⁰⁰ Case C-191/18 *KN v Minister for Justice and Equality* and Case C-327/18 *Minister for Justice and Equality v RO*.

³⁰¹ Case C-327/18 *Minister for Justice and Equality v RO* (2018) AG's Opinion, para 53.

³⁰² Case C-327/18 *Minister for Justice and Equality v RO* (2018) EU:C:2018:733, para 62.

³⁰³ See *Minister for Justice and Equality v O'Connor* [2018] IESC 47, para 5.1 (Clarke CJ).

³⁰⁴ The Irish legislation operationalising the EAW, for example, is explicit that the arrangement operates only between EU Member States; European Arrest Warrant Act 2003 (Ireland), s2.

not yet entered force). This agreement will allow them to participate in a system which is in many respects akin to the EAW (although a political offence exception is retained, and parties can refuse to transfer their own citizens).³⁰⁵

This Agreement provides a potential model for the UK to pursue after Brexit, in particular because it does not impose the jurisdiction of the CJEU, with disputes over the operation of the arrangements being referred to a meeting of governmental representatives.³⁰⁶ Nonetheless, these arrangements do presuppose that few disputes will arise, on the basis that the CJEU and the domestic courts in Norway and Iceland will have close regard to developments in each others' jurisprudence.³⁰⁷ Under any equivalent arrangements post-Brexit, the CJEU would likely remain the key interpretive institution influencing the shape of these arrangements and UK courts would have to have some regard to its findings. Furthermore, Norway and Iceland's membership of the Schengen free movement area facilitates this arrangement (but is not determinative, given that the UK has successfully operated the EAW outside the Schengen zone).

Although the negotiation of the Norway/Iceland-EU arrangements began soon after the commencement of the EAW, and they were agreed in 2006, they have yet to enter force (despite common criminal justice standards and a shared commitment to the ECHR rights). A similar gestation period for any agreement between the UK and the EU post-Brexit would therefore necessitate the UK falling back upon the Council of Europe extradition arrangements.³⁰⁸ The UK and other EU Member States retain these treaty arrangements and continue to employ them in cases involving countries including Russia. Any reinvigoration of these arrangements will, however, require legislation in many states. In Ireland the domestic legislation activating these arrangements has changed since the advent of the EAW,³⁰⁹ and new legislation would need to be enacted to restart this system insofar as it applies to the UK.³¹⁰

Prisoner Transfers

Prisoner transfers are another significant area in which EU law provides the basis for enhanced cooperation. Historically, the UK and Ireland signed up to the Council of Europe Transfer of Sentenced Persons.³¹¹ This treaty permits, but does not oblige, state parties to agree to transfer foreign national prisoners to their country of citizenship.³¹² Under the original treaty, such transfers required the consent of the prisoner, but the 1997 Additional Protocol permits the transfer of prisoners without their consent.³¹³ Both the UK and Ireland

³⁰⁵ EU Council Decision 2014/835/EU (27 November 2014) on the conclusion of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway [2014] OJ L343/1; EU Council Decision 2006/697/EC (27 June 2006) on the signing of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway [2006] OJ L292/1, Article 6.

³⁰⁶ EU Council Decision 2006/697/EC (27 June 2006), Article 36.

³⁰⁷ EU Council Decision 2006/697/EC (27 June 2006), Article 37.

³⁰⁸ European Convention on Extradition (13 December 1957).

³⁰⁹ European Arrest Warrant Act 2003 (Ireland), s50 (repealing Extradition Act 1965 (Ireland), Part III).

³¹⁰ See House of Lords European Union Committee, *Brexit: UK-Irish Relations* (2016) HL 76, para 147.

³¹¹ Council of Europe Convention on the Transfer of Sentenced Persons (21 March 1983).

³¹² Council of Europe Convention on the Transfer of Sentenced Persons (21 March 1983), Article 2(2).

³¹³ *Additional Protocol to the Convention on the Transfer of Sentenced Persons* (18 December 1997) Article 3(6).

have ratified the Additional Protocol, but Ireland has declared that it will not accept prisoners who do not consent to an exchange.³¹⁴

Under EU law, cooperative justice arrangements provide for an expedited system of prisoner transfer between EU Member States.³¹⁵ These arrangements supplant earlier Council of Europe treaties on prisoner exchange as they apply between EU Member States.³¹⁶ Compulsory arrangements concluded as part of transfer agreements under the EU Prisoner Transfer Framework Decision potentially allow for transfer of prisoners without their consent.³¹⁷ Ireland, however, has not concluded a compulsory prisoner transfer agreement with the UK under these EU arrangements.³¹⁸ Ireland's prison population currently stands at around 4000 prisoners, and recent statistics indicate over 750 Irish prisoners in UK prisons.³¹⁹ The effect of compulsory transfer of Irish citizens incarcerated in UK prisons upon Ireland's prison infrastructure would therefore be dramatic, and there is therefore little possibility that Ireland's position towards prisoner transfers will change, irrespective of Brexit.

The only significant impact of the CTA on the management of foreign prisoners in the UK is with regard to post-sentence deportation. Under the UK Borders Act 2007, the Home Secretary can order the deportation of any 'foreign criminal' who has been convicted of one of a range of specified criminal offences and sentenced to a term of imprisonment of more than 12 months.³²⁰ This power covers EU citizens and ministerial statements indicate that it is also intended to cover Irish citizens. Nonetheless, in light of the ability of Irish citizens to travel to the UK from Ireland under the CTA without immigration checks, the UK Government has recognised that such deportations would have little practical effect and have given assurances that these powers will only be applied to Irish citizens when a judge had specifically recommended post-sentence deportation or where the Home Secretary identified an overriding public interest in deportation.³²¹

The legislation's specific definition of 'foreign criminal' as someone who is not a British citizen, would on its face appear to override the Ireland Act 1949 insofar as their terms conflict. There is, however, scope for affected Irish individuals to challenge the application of these provisions of the UK Borders Act to them, on the basis that the Ireland Act's guarantee that Irish citizens are not to be treated as foreign within the UK is such a fundamental piece of legislation that its application should have been expressly set aside by Parliament in passing the 2007 Act.³²² Irish law does not provide for comparable arrangements for post-sentence deportation of UK citizens sentenced to imprisonment in Ireland.

³¹⁴ See FCO, *Additional Protocol to the Convention on the Transfer of Sentenced Persons* (2010) Cm 7906.

³¹⁵ EU Council Framework Decision 2008/909/JHA (27 November 2008) Article 1(2).

³¹⁶ EU Council Framework Decision 2008/909/JHA (27 November 2008), Article 26(1).

³¹⁷ EU Council Framework Decision 2008/909/JHA (27 November 2008), Article 6.

³¹⁸ A. Selous, MP, HC Debs, vol. 618, col. 1618 (14 June 2016).

³¹⁹ Home Affairs Select Committee, *The work of the Immigration Directorates (Q4 2015)* (2016) HC 22, para 93.

³²⁰ UK Borders Act 2007 (UK), s32.

³²¹ See L. Byrne, HC Debs, vol. 457, col. 4WS (19 February 2007).

³²² See *Thoburn v Sunderland City Council* [2002] EWHC 195, [60] (Laws LJ). The impact of this decision for the doctrine of implied repeal is addressed in depth in R. Masterman and C. Murray, *Constitutional and Administrative Law* (Pearson, 2018) pp158-160.

Child Protection

The Brussels II arrangements³²³ provide an EU law basis for expedited return in cross-border child abduction cases within the EU. This can be particularly important in cases in which one parent takes a child to a different EU Member State after a divorce, in breach of child custody arrangements. Under the Brussels II rules, the country from which a child is taken can make orders for mandatory return.³²⁴ The judicial authorities in the country to which a child has been taken must reach a decision in response to one of these orders within six weeks.

This process provides for a speedier and arguably more effective means of addressing such cases than non-EU frameworks under international law (the Hague Conventions).³²⁵ Nonetheless, like the EAW, the Brussels II process is predicated upon understandings of fair judicial procedure which exist between EU Member States (except for Denmark) and the common human rights framework that the Charter provides.³²⁶ As a consequence, in the absence of any special UK-EU deal, the Hague Conventions are likely to apply to cases between the UK and the remaining EU Member States post Brexit.

The number of child abduction cases handled between Ireland and the other CTA members annually is not large, but the raw numbers cannot distract from the importance of these measures for affected families. In 2016, the Irish Central Authority for International Child Abduction recorded 4 new incoming cases involving Northern Ireland (child taken from Northern Ireland to Ireland) and 3 new outgoing cases (child taken from Ireland to Northern Ireland). For the whole of the CTA, Ireland recorded 48 new incoming cases that year, and 42 new outgoing cases.

A New Arrangement

The UK Government has long emphasised that it would like to conclude a new arrangement with the EU sustaining the existing policing and justice cooperation arrangements it participates in as an EU Member State.³²⁷ But Michel Barnier emphasised in June 2018 that, given the current state of negotiations and UK red lines ('the sovereign choices made by the UK'), the possibility for such a new arrangement was slim. The best outcome that the UK can hope for as a post-Brexit policing and justice cooperation arrangement is for a new streamlining of the Council of Europe Extradition arrangements. In terms of information sharing, there could be a new bilateral agreement, but not one based 'on access to EU-only or Schengen-only databases'.³²⁸

³²³ EU Council Regulation 2000/1347/EC (1 March 2001) and Council Regulation (EC) No 2201/2003 (27 November 2003).

³²⁴ EU Council Regulation 2003/2201/EC (27 November 2003), Articles 11 and 42.

³²⁵ Council of Europe, Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, CETS No. 105, 1980; Council of Europe, European Convention on the Exercise of Children's Rights, CETS No. 160, 1996.

³²⁶ Question marks remain over whether Brussels II is actually more effective than the Hague Convention Arrangements. See P. Beaumont, L. Walker and J. Holliday, 'Conflicts of EU courts on child abduction: the reality of Article 11(6)-(8) Brussels IIa proceedings across the EU' (2016) 12 *Journal of Private International Law* 211.

³²⁷ T. May, 'The government's negotiating objectives for exiting the EU: PM speech (17 January 2017), Objective 11, available at: <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>.

³²⁸ M. Barnier, *Speech at the European Union Agency for Fundamental Rights* (19 June 2018) available at: http://europa.eu/rapid/press-release_SPEECH-18-4213_en.htm.

A significant development in the UK's July 2018 White paper, however, was the acknowledgement that EU rules would continue to apply to any new policing and justice cooperation arrangement:

*The UK envisages these safeguards would include robust governance arrangements and a dispute resolution mechanism ... supported by comprehensive data protection arrangements. The agreement should also include a mutual commitment to individuals' rights, noting that the UK will remain a party to the ECHR after it has left the EU.*³²⁹

In fleshing out what it meant by a 'dispute resolution mechanism', the UK Government acknowledged that this mechanism would be bound by Court of Justice of the European Union (CJEU) interpretations of EU measures covered by this new international agreement.³³⁰ This marks a significant move away from the UK Government's previous insistence that Brexit will 'bring to an end' the CJEU's jurisdiction with regard to any aspects of UK law makes these issues particularly intractable.³³¹

This shift is of vital importance, because CJEU oversight is an integral feature of cooperation under the auspices of Europol or Eurojust. These concessions therefore provide the basis for the conclusion of a new strategic and operational partnership with Europol and Eurojust. Nonetheless, it must be emphasised that any such third-country arrangement does not substitute for full involvement in the work of these Agencies, and in particular the UK will lose its say in setting these Agencies' priorities.³³² Moreover, any such agreement as a third country partner could take considerable time to conclude (even with the current alignment of the UK with the work of these Agencies) and would be subject to the approval of the European Parliament.³³³

The offer to embed the UK's place within the ECHR in this agreement also buttresses another key element of international human rights oversight, one which the Prime Minister herself had questioned during the EU referendum campaign.³³⁴ It is nonetheless, a commitment that sits uneasily with the UK's legislative removal of the EU Charter of Fundamental Rights from UK law.³³⁵ If the UK refuses to commit to these protections post-Brexit, the EU institutions will likely be resistant to any arrangement which permits continued data sharing. The CJEU is

³²⁹ HM Government, *The future relationship between the United Kingdom and the European Union* (2018) Cmnd.9593, p56, available at:

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.

³³⁰ HM Government, *The future relationship between the United Kingdom and the European Union* (2018) Cmnd.9593, p93, available at:

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.

³³¹ HM Government, *The United Kingdom's exit from and new partnership with the European Union* (2017) Cm 9417, para 2.3, available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf.

³³² L. Campbell, *Beyond Brexit – Beyond Borders Mutual Assistance in Policing and Investigating Organised Crime* (Durham University Centre for Criminal Law and Criminal Justice, 2017) p4.

³³³ TFEU, Article 218.

³³⁴ Theresa May, 'Home Secretary's Speech on the UK, EU and Our Place in the World' (25 April 2016), available at: <https://www.gov.uk/government/speeches/home-secretarys-speech-on-the-uk-eu-and-our-place-in-the-world>.

³³⁵ European Union (Withdrawal) Act 2018 (UK), s5(5).

particularly important, as it oversees data sharing and the operation of the EAW system in line with the requirements of the EU Charter of Fundamental Rights.³³⁶ It is notable in this regard that in the *Schrems* case, the CJEU focused upon the lack of scrutiny of the United States' data protection standards in striking down data-sharing arrangements between the EU and the United States.³³⁷

Much will therefore depend upon the UK's commitments regarding the 'protection of personal data'. If the UK commits to maintaining full alignment with EU data protection rights post Brexit, Michel Barnier has acknowledged that continued access to key EU databases such as Prüm could be possible, and so could 'swift and effective' extradition arrangements.³³⁸ This, nonetheless, will likely occur under the Norway/Iceland model, rather than full participation in the EAW, especially given the UK's legislation removing the EU Charter from its domestic law post Brexit.

Conclusion

If the UK does secure a new binding international agreement sustaining the existing policing and justice cooperation arrangements in which it currently participates as an EU Member State, this will also provide the cooperative tools necessary to manage the CTA. If it is unable to do so, however, the result will be a disaster for policing cooperation on the island of Ireland. The shell of the cooperative institutions, such as the Joint Task Force, will be able to remain in place, but Gardaí working within it will likely find themselves unable to share information without breaking EU rules. Cooperation over the transfer of suspects will slow dramatically.

In the event of no UK-EU deal on policing and justice cooperation, EU law will tie Ireland's hands with regard to elements of any bilateral agreement on these issues that the two states might seek to conclude. The EU would undoubtedly challenge any proposals which would involve sharing EU citizens' information or at providing for expedited transfer of criminal suspects who are EU citizens which do not fully conform to both EU data protection rules and the EU Charter of Fundamental Rights, and which do not allow for CJEU oversight.

³³⁶ See House of Lords European Union Committee, 'Brexit: Judicial oversight of the European Arrest Warrant' (2017) HL 17, para 57.

³³⁷ C-362/14 *Schrems v Data Protection Commissioner* [2016] 2 CMLR 2 (Grand Chamber, CJEU).

³³⁸ M. Barnier, *Press Conference* (26 July 2018) available at: http://europa.eu/rapid/press-release_SPEECH-18-4704_en.htm.

Summary

In the CTA	No specific CTA measures relate to <u>policing, justice and security</u> . Cross border police liaison is provided for through the under the British-Irish Intergovernmental Conference and Joint Task Force on Cross Border crime but the mechanisms for information sharing and for transferring suspects between jurisdictions exist under EU law.
In domestic legislation	<p>Under UK law, the European Arrest warrant is operationalised under the Extradition Act 2003 and deportation of prisoners who are not UK citizens is provided for under the Borders Act 2007.</p> <p>Under Irish law, the European Arrest warrant is operationalised under the European Arrest Warrant Act 2003.</p>
In EU Law	<p><u>EU Law Enforcement (Europol) and Justice (Eurojust) Cooperation Agencies</u>: Co-ordinating police operations and prosecutions with a cross border element; EU Council Decision 2009/371/JHA (6 April 2009) and EU Council Decision 2002/187/JHA (28 February 2002).</p> <p><u>Information Sharing between EU Member State Law Enforcement Agencies</u>: In line with EU data protection rules; EU Council Framework Decision 2009/315/JHA (26 February 2009); EU Council Decisions 2008/615/JHA and 2008/616/JHA, Framework Decision 2009/905/JHA; EU Council Decision 2007/533/JHA (12 June 2007) and Directive 2016/681 of the European Parliament and EU Council (27 April 2016).</p> <p><u>European Arrest Warrant</u>: Rapid surrender of suspects across EU Member State borders; EU Council Framework Decision 2002/584/JHA (13 June 2002).</p> <p><u>Prisoner Transfers</u>: For EU nationals from one EU Member State held in prison in another; EU Council Framework Decision 2008/909/JHA (27 November 2008).</p> <p><u>Cross-Border Child Protection</u>: Facilitating the return of children abducted from one EU Member State to another; EU Council Regulation 2003/2201/EC (27 November 2003).</p>
In policy	<p><u>Other bilateral arrangements</u>: Since the Anglo Irish Agreement 1985 there have been formal arrangements for direct liaison between the RUC/PSNI and An Garda Síochána. An Garda Síochána and the PSNI concluded a MoU enabling the creation of a joint Task Force in 2016.</p>

Chapter 8: Conclusions

What the Common Travel Area does

The core Common Travel Area, in legal terms, encompasses immigration rules that each part of the CTA operates and enforces. There is an informal 1952 agreement from which the modern CTA takes its form, however there is no legally binding document that sets out the terms of the core CTA or the substantive law that each constituent part must possess. The core CTA enables members to keep checks on travel between these countries (across the CTA's internal borders) to a minimum. The CTA means that there are no visa, passports or entry cards requirements for citizens of the CTA's members moving within the Area and from an immigration perspective permits open-ended residence. Nonetheless, foreign nationals can still be required to obtain separate visas for each CTA country they enter (albeit some joint visa schemes exist). Critically, as this Report has outlined, even these core elements of the CTA can be restricted and historically have been. A list of our recommendations can be read above, but what follows is a brief summary of some key points.

What is based in domestic legislation

The legal structures related to the **right to work**, (Chapter 2) on **cross-border health and social-care** (Chapter 3), **social security coverage** (Chapter 5), **education** (Chapter 6), or **policing, justice and security** (Chapter 7) flow from the immigration status afforded by the 'core' CTA, but are based on entirely separate domestic law or policy, and/or are underpinned by EU law. In this Report these are described as 'CTA-related' arrangements as they are dependent upon the basic structures, statuses and definitions that are put in place by the 'core' CTA. While CTA-related, these arrangements are not based on a bilateral binding agreement between the UK and Ireland and are therefore based on varying amounts of legal certainty and are nearly all subject to unilateral change.

While many of the CTA related arrangements discussed in this report are based in unilateral domestic UK and Irish law, others are unilateral policy arrangements. For instance, under **health and social care** (Chapter 3), conditions for accessing public healthcare once resident in the opposite jurisdiction are contained in domestic law. Regarding **employment** (Chapter 4), Ireland will continue to follow EU law on employment conditions and UK nationals can rely on the CTA to move to Ireland and attain residency on the other hand frontier worker status is based on the Withdrawal Agreement. On **social security** (Chapter 5), relevant entitlements are all set out in UK or Ireland's domestic law. Within **education** (Chapter 6), general admissions policies for primary and secondary education are set out in Ireland and Northern Ireland's primary and secondary legislation.

What is based in EU law

Other aspects of CTA related arrangements are facilitated by EU law. For example, on **cross-border health and social care** (Chapter 3), many reciprocal health-care arrangements are underpinned by EU law, including mutual recognition of medical professionals' qualifications and regulations regarding the movement of medical goods across borders. Cross-border health and social care is also significantly dependent on EU funding streams. Regarding **employment** (Chapter 4), all EU nationals covered by the Withdrawal Agreement will have their work-related rights stemming from EU law for the duration that they retain that status.

Frontier workers, resident in Northern Ireland, who are not covered by the Withdrawal Agreement will, when working in Ireland, benefit from some EU law rights. Within **social security** (Chapter 5), the mechanisms for coordinating and accumulating social security are based in EU law. As regards **education** (Chapter 6), EU law sets out basic rights of children of EU national workers to access education in their host Member States. Regarding **policing, justice and security** (Chapter 7) almost all elements of cooperation including the sharing of information and extradition are contained within EU law.

What is policy based

Policy is a key element of the CTA's related arrangements. Within **education**, for instance, the admissions of children to primary schools in Ireland who are resident in Northern Ireland is based on the admissions policy of the School and the Irish Department of Education's policy to fund these students which operate within legislation but are not directly addressed by any legal structures. A further example is **cross-border health and social care**, where memorandums of understanding and service-level agreements underpin many cross-border healthcare initiatives in the border counties. These initiatives benefit from EU law, but do not themselves have a formal legal basis.

The Good Friday Agreement

The GFA does include an impetus for cooperation in areas such as education, health, security and justice. However, these are not individualised rights and cooperation does not include any substantive requirements. Some of these systems of co-operation such as Universities Ireland can continue post Brexit however the legal infrastructures that make such cooperation straightforward, for instance access to EU research funding, may disappear unless negotiated as part of the withdrawal process. Similarly, within healthcare, cooperation can continue, but the EU infrastructure that allows for deep cooperation will no longer be in place unless included in the withdrawal process. Non-diminution, as contained within the GFA, has limited application as cross-border enforcement by individuals would be very difficult and for individuals who have attained residency through the CTA's core immigration process, their access to justice will be based on the status given to them within that jurisdiction.

The Future

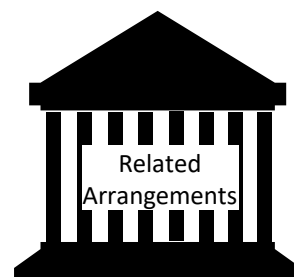
To preserve and guarantee the forms of access that we have outlined after Brexit there are three possible options - though all would have to be cognisant of Ireland's continued EU membership and its obligations therein, around, for instance, immigration, justice, and sharing of data. The three options are also subject to the nature of the Brexit negotiations, as some issues such as security and justice, may be resolved at the EU level. Each of the agreements below would have to involve the administrations of the Channel Isles and the Isle of Man as they are part of the CTA. However, a final agreement would be bilateral one between Ireland and the UK.³³⁹

³³⁹ The UK would need the permission of Jersey, Guernsey and the Isle of Man: 'Framework for developing the international identity of Jersey' (2006) available at: <https://www.gov.ie/SiteCollectionDocuments/Government%20and%20administration/R%20InternationalIdentityFramework>

Gold Standard

A bilateral agreement that covered the core of the CTA, common immigration rules – bearing in mind Ireland’s immigration obligations as an EU member – common cross-border travel rights and common residency rights.

This bilateral agreement would *also* include ‘related’ arrangements. This should include - education, social security, health, workers’ rights, security and justice and should also consider other areas designated by the GFA for cross-border cooperation.

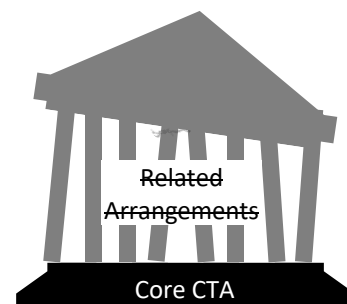


It would also include a notification requirement on all parties – both Governments and the devolved administrations - to inform others should they introduce relevant changes to domestic law or policy.

Silver Standard

A bilateral agreement that covered the core of the CTA, common immigration rules – bearing in mind Ireland’s immigration obligations as an EU member – common cross-border travel rights and common residency rights.

Alongside this core agreement a series of separate sectoral agreements on each element of ‘related’ arrangements could be negotiated on a case by case basis and as desired by the parties.



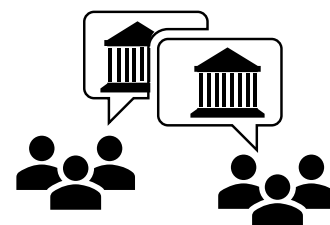
All would include a notification requirement on all parties – both Governments and the devolved administrations - to inform others should they introduce changes to domestic law or policy.

Bronze Standard

This would continue the core CTA as an understanding rather than an agreement, and as such, not binding. However, both the UK and Ireland could publish a joint memorandum of understanding setting out its terms.

Additional ‘related-issues’ sectoral memorandums of understanding would be negotiated and published on a case by case basis.

All would include a notification requirement on all parties to inform others should they introduce changes to domestic law or policy. Should the bronze option be chosen, and reliance is placed on non-binding agreements, both the UK and Ireland and the devolved administrations should commit to wide-ranging public consultations and public information campaigns before unilaterally altering related domestic law.



rk%2020070502.pdf; ‘Framework for developing the international identity of Guernsey’ (2006) available at: <https://www.gov.gg/CHttpHandler.ashx?id=2174&p=0>; ‘Framework for developing the international identity of the Isle of Man’ (2006) available at: <https://www.gov.im/media/622895/iominternationalidentityframework.pdf>.