

Report on a Special Designated Status for Northern Ireland Post-Brexit



**An Independent Opinion Commissioned
by the European United Left / Nordic Green Left (GUE/NGL) Group
of the European Parliament**

Nikos Skoutaris

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Summary*

THE EU-UK JOINT REPORT of December 2017 recognised the possibility for a differentiated Brexit that would allow Northern Ireland to maintain a special relationship with the EU. Such an arrangement could occur if addressing the challenge of the Irish border through the overall future EU-UK relationship proves impossible and if the specific technological solutions the UK proposes are deemed insufficient. Indeed, the Protocol on Ireland/Northern Ireland of the draft UK Withdrawal Treaty the EU published on 28 February 2018 codified such a 'backstop option'.

The present Independent Opinion suggests that the UK Withdrawal Agreement should recognise the unique circumstances of Northern Ireland by providing for a special designated status. Such a status should be understood as a mutually agreed arrangement that will respect and protect

the unique constitutional status of the region as provided by all three Strands of the Good Friday Agreement. In particular, the special designated status should respect the principle of consent and the right of self-determination by providing for a legal route for the reintegration of Northern Ireland into the EU. This status should protect the all-island economy by allowing for the participation of the region in the single market and/or the EU Customs Union (EUCU). This situation should not happen at the expense of weakening 'East-West' institutions, however (i.e. between the Republic of Ireland and the UK); in fact, their strengthening will be necessary in order to manage the tensions that Northern Ireland's remaining in the single market and the EUCU would likely cause to its economic relationship with the rest of the UK.

*. The findings of this Independent Opinion are largely based on two academic publications: 'From Britain and Ireland to Cyprus: Accommodating "Divided Islands" in the EU Political and Legal Order', EUI Working Paper AEL 2016/02; and 'Territorial Differentiation in EU Law: Can Scotland and Northern Ireland Remain in the EU and/or the Single Market?' 19, *Cambridge Yearbook of European Legal Studies* (2017), 287–310.

I

Introduction

ON 23 JUNE 2016, 52 per cent of voters who participated in the Brexit referendum voted to leave the EU. Northern Ireland and Scotland, two of the four UK constituent nations, voted to remain: in Northern Ireland, 55.7 per cent voted against Brexit, while 62 per cent did so in Scotland. Since that time, the Scottish government has forcefully argued in favour of Scotland remaining in the single market, even after Brexit.¹ So far, the UK government has rejected the Scottish proposals.² At the same time, in Northern Ireland the main political parties hold opposing views on Brexit, while the power-sharing arrangement has collapsed since the beginning of 2017. As a result, the devolved institutions of the region have been less active in presenting their views on Brexit.

This situation is particularly important given that Brexit raises unique and complex legal and practical issues, many of which are linked to the 1998 Good Friday Agreement (hereafter GFA).³ These issues include the question of the territorial border; the threat to the island of Ireland as a single economic area; the rights of the Irish passport holders in the North; practical questions that are directly related to the thousands of people who cross the border every day to work and have access to childcare and healthcare, among other activities.

All interested parties have underlined the importance of the ‘Northern Irish question’ in the context of the Brexit negotiations. Former Taoiseach Enda Kenny has described Brexit as ‘arguably the greatest economic challenge for this island in 50 years’.⁴ The current Taoiseach, Leo Varadkar, has noted that ‘every single aspect of life in Northern Ireland could be affected by Brexit’.⁵

The EU has also recognised that ‘the unique circumstances and challenges on the island of Ireland will require flexible and imaginative solutions’.⁶ At the same time, an overwhelming majority of the European Parliament has adopted a resolution urging all parties to remain committed to the peace process and to avoid implementing a hard border.⁷

In her letter to President of the European Council Donald Tusk with which she triggered Article 50 TEU, UK Prime Minister Theresa May expressed her intention ‘to avoid a return to a hard border’ as well.⁸ This position was broadly in line with the post-referendum letter she received from the then First Minister and the Deputy First Minister of Northern Ireland in which the two figures highlighted the need to ensure that the Irish border does not become an impediment to the movement of goods, services and capital.⁹ More recently, the former Secretary of State for Northern Ireland, James Brokenshire, noted that

*we want to ensure that the Belfast or Good Friday Agreement is fully protected ... including the constitutional principles that underpin it, the political institutions it establishes and the citizens’ rights it guarantees.... Within the Northern Ireland-Ireland Dialogue, we have agreed that the Belfast or Good Friday Agreement should be protected in full, including its constitutional arrangements.*¹⁰

If the UK had decided to remain in the single market and the EUCU after Brexit, then the vast majority of the challenges Brexit raises with regard to Northern Ireland would have been avoided. In her Lancaster House speech, however, Prime Minister May has clarified that the UK’s aim is to leave both the single market and the EUCU.¹¹ She repeated

1. See Scottish Government, [Scotland’s Place in Europe](#), 20 December 2016.

2. See for instance the [UK Government Response to Scotland’s Place in Europe](#), 29 March 2017.

3. Available at <https://www.gov.uk/government/publications/the-belfast-agreement>.

4. E. Kenny, ‘[Irish Times Brexit Summit Keynote Address](#)’, 7 November 2016.

5. ‘[L. Varadkar Warns “Clock Is Ticking” on Brexit Talks](#)’, BBC News, 4 August 2017.

6. See para. 14 of the EU Negotiating Directives, 22 May 2017.

7. [European Parliament Resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union](#) (2017/2593 [RSP]).

8. Available at <http://www.independent.co.uk/news/uk/politics/article-50-letter-read-full-brexit-theresa-may-takes-uk-out-of-eu-statement-a7655566.html>.

9. Available at [https://www.executiveoffice-](https://www.executiveoffice-ni.gov.uk/sites/default/files/publications/execoffice/Letter%20to%20PM%20from%20FM%20%26%20dFM.pdf)

[ni.gov.uk/sites/default/files/publications/execoffice/Letter%20to%20PM%20from%20FM%20%26%20dFM.pdf](https://www.executiveoffice-ni.gov.uk/sites/default/files/publications/execoffice/Letter%20to%20PM%20from%20FM%20%26%20dFM.pdf).

10. J. Brokenshire, ‘[Speech to the European Policy Centre](#)’, Brussels, 6 November 2017.

11. Available at <http://www.telegraph.co.uk/news/2017/01/17/theresa-mays-brexit-speech-full/>, London, 17 January 2017.

this message in her Florence speech¹² and her Mansion House speech.¹³ The proposal regarding the Irish border that the UK government released reaffirms this position vis-à-vis Northern Ireland. The proposal clarifies that the region will fall outside the single market and the EUCU.¹⁴ This means that – at a minimum – a customs border will need to be established on the territory of the island, which is one of the main reasons why a number of EU officials have dismissed the initial UK proposal on the Irish border. According to these officials, ‘the UK government has focused on technical fixes around trade and customs’ although ‘border issues are broader than economic questions’.¹⁵

The December Joint Report, however, has provided for a pathway that could lift that gridlock. According to the report,

*the United Kingdom remains committed to protecting North-South cooperation and to its guarantee of avoiding a hard border. Any future arrangements must be compatible with these overarching requirements. The United Kingdom's intention is to achieve these objectives through the overall EU-UK relationship. Should this not be possible, the United Kingdom will propose specific solutions to address the unique circumstances of the island of Ireland. In the absence of agreed solutions, the United Kingdom will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement.*¹⁶

In other words, the overall aim of the negotiations would be to address the challenge of the Irish border through the overall EU-UK relationship. If that proves impossible, then there is the possibility for specific solutions being applied to Northern Ireland. Should there not be an agreement on those specific technological solutions, then Northern Ireland at a minimum (or the UK as a whole) should remain aligned to the single market and the EUCU. Indeed, that third backstop option was legally codified in a Protocol on Ireland/Northern Ireland contained in the draft Withdrawal

Treaty published by the EU on 28 February 2018.¹⁷ Such a concession has opened the possibility either for a differentiated Brexit that would accommodate the special circumstances of Northern Ireland or for a rather ‘soft’ Brexit for the whole UK.¹⁸

The starting point of this Independent Opinion is precisely to understand and describe the special relationship that Northern Ireland should enjoy with the EU should the overall EU-UK relationship and the specific technological solutions fail to effectively address the Irish border. In any case, according to the Joint Report, both the UK and the EU have agreed to continue a ‘distinct strand of the negotiations on the detailed arrangements required’¹⁹ for Northern Ireland. This Independent Opinion argues that the UK Withdrawal Agreement needs to recognise the unique position and special circumstances and to put in place an arrangement which will provide for a special designated status for Northern Ireland, similar to the one described in the draft UK Withdrawal Agreement. Such a status should protect and preserve all three Strands of the GFA (to be discussed in section 2.1 below), which would be in line not only with the EU’s commitment to protecting the GFA and the peace process ‘in all its parts’²⁰ but also with the recognition from the UK government that the GFA is the ‘bedrock of the peace process’²¹, which must be protected and safeguarded throughout the Brexit process. Both parties affirmed these commitments in the December Joint Report.²²

To this effect, the following section discusses the definition of this special designated status. Section 3 analyses how such a status should reflect the principle of consent and the right of self-determination. Section 4 examines how Ireland could remain a single economic area by allowing for the participation of Northern Ireland in the single market and the EUCU. It also discusses how the interests of Northern Ireland could be represented in the EU in the post-Brexit era. Finally, section 5 reflects on how the East-West dimension should be strengthened in order to manage the tensions that Northern Ireland’s remaining in the

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12. Available at <https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu>, Florence, 22 September 2017.
13. Available at <https://www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union>, London, 2 March 2018.
14. UK Government Position Paper, ‘[Northern Ireland and Ireland](#)’, 16 August 2017.
15. T. Connelly, ‘[The Brexit Veto: How and Why Ireland Raised the Stakes](#)’, RTÉ, 18 November 2017.
16. [Joint Report from the negotiators of the EU and the UK Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the EU](#) (hereafter Joint Report), 8 December 2017, para. 49.
17. ‘[Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community](#)’ (hereafter Draft UK Withdrawal Agreement), 19 March 2018, Protocol on Ireland/Northern Ireland.
18. See for example <https://www.theguardian.com/politics/2017/dec/05/david-davis-northern-ireland-plan-apply-whole-uk-brex-it-dup>.
19. Joint Report (see note 16), para. 56.
20. European Council (Art. 50), ‘[Guidelines Following the United Kingdom's Notification under Article 50 TEU](#)’, 29 April 2017, para. 11.
21. UK Government Position Paper (see note 14), para. 6.
22. Joint Report (see note 16), para. 42.

single market and the EUCU would likely cause to its economic relationship with the rest of the UK.

It is important to note that a recent survey suggests that, notwithstanding the challenges such a special designated status would create, the majority of the electorate in

Northern Ireland accepts and approves of such a status.²³ At the end of the day, recognising ‘the diversity that is self-evident in modern UK constitutional law through a unique solution for Northern Ireland is in tune with the evolution of the UK constitution over the last two decades’.²⁴

23. J. Garry and J. Coackley, ‘[Opinion Poll Results: Is There Support for a Border in the Irish Sea?](#)’ *UK in a Changing Europe*, 28 November 2017.

24. C. Harvey, ‘[No, the Northern Ireland Brexit Solution Was Not Going to Break up the United Kingdom](#)’, *UK in a Changing Europe*, 7 December 2017.

II

What Is a Special Designated Status?

2.1 Defining the Special Designated Status

NORTHERN IRELAND is part of the United Kingdom, although it enjoys a special constitutional status underlined by the GFA.²⁵ The GFA regulates three types of interlocking and interdependent relationships, or Strands: relationships within Northern Ireland, relationships between Northern Ireland and the Republic of Ireland (the North-South dimension), and relationships between Britain and the Republic of Ireland (the East-West dimension). As one recent report put it, ‘The institutions [the GFA] established provided frameworks for cooperation between those entities’.²⁶

The special constitutional status of Northern Ireland is further highlighted by the legal significance of the Northern Ireland Act 1998. In *Robinson v Secretary of State for Northern Ireland*, Lord Bingham recognised that the 1998 Act

*was passed to implement the Belfast Agreement, which was itself reached, after much travail, in an attempt to end decades of bloodshed and centuries of antagonism. The solution was seen to lie in participation by the unionist and nationalist communities in shared political institutions, without precluding ... a popular decision at some time in the future on the ultimate political status of Northern Ireland.*²⁷

He described the 1998 Act as ‘in effect a constitution’.²⁸ Lord Hoffmann added that it is ‘a constitution for Northern Ireland framed to create a continuing form of government against the background of the history of the territory and the principles agreed in Belfast’.²⁹

Although the text of the GFA does not include many references to the EU,³⁰ Elizabeth Meehan has explained that EU membership has facilitated the design of the GFA.³¹ ‘The sharing of sovereignty within the EU has spilled over into some sharing of sovereignty over Northern Ireland’.³² In a way, the GFA ‘was premised on the assumption of common policies and interests across a wide range of policy areas’,³³ which the EU membership of both the UK and the Republic of Ireland had secured. In that sense, Brexit puts all three Strands of the GFA at risk of deep fissures.³⁴ It challenges ‘the narrative of a shared and interdependent Northern Ireland’³⁵ and impedes the sharing of sovereignty across the region, since the UK and (by extension) Northern Ireland will no longer be part of the EU. By definition, this situation will change the balance of power in the East-West dimension. At the same time, the EU framework will no longer be providing its much-needed paradigm of power-sharing between the two main communities. One particular danger is that at least part of the segmented post-conflict society of Northern Ireland will not welcome the strengthening of more UK-centric notions of sovereignty that Brexit might lead to.

Finally, the creation of a customs border – at a minimum

25. For an analysis of the GFA, see C. Gallagher and K. O’Byrne, ‘[Report on How Designated Special Status for Northern Ireland within the EU Can Be Delivered](#)’, 16 October 2017, 13–16.

26. *Ibid.*, 13–14.

27. *Robinson v Secretary of State for Northern Ireland*, 2002, UKHL 32, para. 10.

28. *Ibid.*, para. 11.

29. *Ibid.*, para. 33.

30. The text of the GFA has three sets of references to the EU. The first aims to ensure ‘effective coordination and input by Ministers [from the Northern Ireland Executive] to national [UK] policy-making, including on EU issues’ (Strand One, para. 32). A second set relates to the work of the North South Ministerial Council (Strand Two, para. 17; Strand Three, paras. 5 and 31). The third set underlines the need for the Irish and UK governments ‘to develop still further the unique relationship between their peoples and the close co-operation between their countries as friendly neighbours and as partners in the European Union’ (British-Irish Agreement, Preamble).

31. E. Meehan, ‘Britain’s Irish Question: Britain’s European Question? British-Irish Relations in the Context of European Union and the Belfast Agreement’, 26, *Review of International Studies* (2000), 83.

32. S. Douglas-Scott, ‘[A UK Exit from the EU: The End of the United Kingdom or a New Constitutional Dawn?](#)’, 9.

33. D. Phinnemore and K. Hayward, ‘[UK Withdrawal \(“Brexit”\) and the Good Friday Agreement](#)’, *Study for the AFCCO Committee*, 7.

34. The Joint Report (see note 16) recognises that ‘the United Kingdom’s withdrawal from the European Union presents a significant and unique challenge in relation to the island of Ireland’, para. 42.

35. S. Farry and S. Eastwood, ‘[How to Underpin a Special Deal for Northern Ireland](#)’, *UK in a Changing Europe*, 31 October 2017.

– will pose a significant threat to the island of Ireland as a single economic area. In particular, such a development

*would not only require a massive investment by Ireland, as the EU Member State required to enforce the EU external customs border with the UK at this point, but also bring back painful memories of the times of conflict on the island, when the trade border was not only (ab)used for intimidation through its harsh enforcement, but also had a real impact on livelihoods.*³⁶

John Doyle and Eileen Connolly have summed up the threat that Brexit poses to the GFA. According to the authors, the withdrawal process from the EU ‘has the potential to destabilise the idea of incremental progress embodied in the Good Friday Agreement. The potential also exists for increased instability to be deepened by the worsening economic situation for Northern Ireland in a post-Brexit world’.³⁷

For all these reasons, it is critical that the special designated status be designed in such a way as to provide for effective answers to the challenges to all three Strands. For the internal dimension, the special status should take into account the principle of consent and the right of self-determination by providing for a legal route for the reintegration of Northern Ireland into the EU, should the majority of the people on both sides of the Irish border so decide in democratic and legally binding referendums. For the North-South dimension, the special status should allow for the effective membership of Northern Ireland in the single market and the EUCU and the representation of Northern Ireland’s interests within the EU. Finally, the special status should absorb the tensions that remaining in the single market might cause to Northern Ireland’s economic integration with the rest of the UK.

Overall, the special designated status should be understood as a mutually agreed arrangement that will respect and protect the unique constitutional status of Northern Ireland, as designed by the Good Friday Agreement, even after Brexit.

2.2 Political Connotations of the Term

HAVING DEFINED the special designated status, we must admit that, innocuous though the arrangement may sound, a number of unionists perceive it as a political fracturing of the UK and a path to a united Ireland. As such, they reject it out of hand. The events of 4 December 2017 – when the

Democratic Unionist Party (DUP) and its leader, Arlene Foster, essentially vetoed the agreement that Prime Minister May had achieved – provide for an insight into the strong reservations that the unionist community has over a differentiated relationship with the EU. This is a very important point that should not be overlooked.

To this effect, it should be noted that the special designated status would benefit from the flexibility of the EU legal order that has accommodated a number of territorially differentiated arrangements in various areas of the world.³⁸ The sovereignty of the respective metropolitan State over a given area that enjoys such a differentiated arrangement has never been challenged. For example, the fact that EU law does not apply in the same way to the French Overseas Territories as it does to the French mainland does not in any way question France’s sovereignty over those territories. Instead, those arrangements aim to accommodate the specific historical and political conditions present in those regions.

Indeed, the UK itself has made extensive use of this flexibility. Gibraltar, the Channel Islands and a number of other Overseas Territories have different relationships with the EU than the UK. Such differentiated membership with the EU has not undermined those territories’ constitutional relationships with the UK; in the same way, a similar solution for Northern Ireland after Brexit would not threaten the UK’s constitutional integrity. In that sense, the designated status should not be understood as a staging post towards a united Ireland. Instead, it should be viewed as a site-specific solution that will respect the special constitutional status that Northern Ireland already enjoys within the UK constitutional order, largely because of the GFA.

The aim of the special designated status is precisely the protection of the GFA. At the core of the GFA is the principle of consent. In that sense, a special designated status should be understood as an arrangement that would be accepted by all interested parties, including the unionist community. A special designated status would necessitate the consent of the EU, the United Kingdom, the Republic of Ireland and the two main communities involved. Unless all the parties consent to it, this status cannot be achieved.

Having said that, the focus of all the interested parties should not be on the term they will use to describe the arrangement. Instead, they should focus on the content of this arrangement. The aim of the designated special status should be to protect the GFA and to preserve the fragile balance of powers that it has achieved. In order to achieve that balance, all three Strands of the GFA should be taken into account.

36. D. Schiek, ‘[The Island of Ireland and “Brexit” – A Legal-Political Critique of the Draft Withdrawal Agreement](#)’, *TREUP Occasional Paper*, 6.

37. J. Doyle and E. Connolly, ‘[Brexit and the Future of Northern Ireland](#)’, DCU Brexit Research & Policy Institute Working Paper 1/2017.

38. See section 4.1 of this Independent Opinion.

III

The Internal Dimension

3.1 Referendum(s) on Irish Unity

THE BALANCE OF POWER that the GFA has achieved may be found in the compromises the UK and the Republic of Ireland made regarding the self-determination of the people of Northern Ireland.³⁹ The Republic, for its part, accepted the continuation of Northern Ireland's place in the UK. For the UK's part, 'Westminster has formally conceded that Northern Ireland can secede from the United Kingdom to join a united Ireland, if its people, and the people of the Irish Republic, voting separately, agree to this'.⁴⁰ According to the Joint Report, both the EU and the UK 'respect the provisions of the 1998 Agreement regarding the constitutional status of Northern Ireland and the principle of consent'.⁴¹

Section 1 of the Northern Ireland Act 1998 is a rare example of a provision of a constitutional statute explicitly recognising the right of secession of a region.⁴² Unsurprisingly, in the aftermath of the Brexit referendum, Sinn Féin has called for a referendum for the unification of Ireland.⁴³ Politically speaking, however, such a scenario seems less than probable in the immediate future. According to Schedule 1 of the Northern Ireland Act, a referendum for the reunification of Ireland should be organised if 'it appears likely to [the UK Secretary of State] that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland'. Theresa Villiers, the former Northern Ireland Secretary, made clear that there was 'nothing to indicate that there [was] majority support for a poll'.⁴⁴

To this effect, one must also bear in mind that the Northern Irish political parties do not agree about the need to organise such a referendum. But a recent Lucid Talk poll on whether a referendum on Irish unity should be held suggests that 47.1 per cent of voters favour such a referendum being held within five years, a further 14.8 per cent said within ten years and 17.1 per cent said that such a referendum should be held at some point further in the future.⁴⁵

3.2 Reunifying a Member State

NOTWITHSTANDING the political feasibility of a referendum on Irish unity, it should be noted that the GFA was founded on the principle of consent and recognises the right of self-determination of the people of Northern Ireland. The UK Withdrawal Agreement should take into account this fundamental element of the peace process and should provide for a legal avenue for the reintegration of Northern Ireland within the EU constitutional and political order, should the people of Northern Ireland and of the Republic of Ireland decide on the unification of the island in separate, democratic and legally binding referendums.

The secession of Northern Ireland would not mean the creation of a new Member State. Instead, it would trigger the territorial expansion of an EU Member State – the Republic of Ireland – to which EU law already applies, in accordance with Article 52 TEU. In a way, the reunification of Ireland could follow the precedent of the German reunifi-

39. According to the Declaration of Support, the signatories to the Agreement 'recognise that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given ...' (1.ii) and: 'It would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people' (1.iii).

40. J. McGarry, 'Asymmetrical Autonomy in the United Kingdom', in M. Weller and K. Nobbs (Eds.), *Asymmetric Autonomy and the Settlement of Ethnic Conflicts* (University of Pennsylvania Press, 2010), 148, 156.

41. Joint Report (see note 16), para. 44.

42. Other examples of constitutional provisions that provide for a right of secession include Art. 39(1) of the Ethiopian Constitution, according to which 'every nation, nationality or people in Ethiopia shall have the unrestricted right to self-determination up to secession', and Art. 4(2) of the Constitution of the Principality of Liechtenstein, according to which 'individual municipalities shall be entitled to secede from the union. The decision on whether to initiate a secession procedure shall be made by a majority of the Liechtenstein citizens eligible to vote who reside there. Secession shall be regulated by a law or, as the case may be, by an international treaty. If secession is regulated by a treaty, a second vote shall be held in the municipality after the treaty negotiations have been concluded'.

43. See www.businesspost.ie/sinn-fein-seeks-irish-reunification-vote-as-britain-votes-for-brexit/.

44. Available at www.theguardian.com/uk-news/2016/jun/24/arlene-foster-northern-ireland-martin-mcguinness-border-poll-wont-happen.

45. Available at <http://lucidtalk.co.uk/images/News/LTOct17TrackerPoll-GeneralReport.pdf>.

cation,⁴⁶ where the application of EU law was extended to East Germany without an amendment of the primary legislation, as agreed in a special meeting of the European Council in Dublin on 28 April 1990.⁴⁷ According to professor Dagmar Schiek ‘the necessary acts of secondary law were adopted on the basis of delegation of powers to the Commission, in order to avoid that the EU legislative process was overtaken by the speed of historical events’.⁴⁸ The difference is that, in the case of Germany, EU law did not apply at all in East Germany before the reunification, something that is very different from the situation in Northern Ireland.⁴⁹

Former Taoiseach Kenny, however, has asked for a special provision in any Brexit deal to allow Northern Ireland to re-join the EU, should it be united with the Republic.⁵⁰ The question is therefore what such a provision would look like. There are hardly any EU law provisions that regulate the unification or reunification of Member States; the closest example is Article 4 of Protocol no. 10 on Cyprus of the Act of Accession 2003. Protocol no. 10 provides the terms for the application of EU law to Cyprus, given that the island was not unified at the time it joined the EU. In particular, the protocol provides for the suspension of the application of EU law in northern Cyprus – a suspension which will be lifted in the event of a solution to the island’s division being found.⁵¹ If such a solution is found in the future, Article 4 will provide for a simplified procedure that will enable the EU to accommodate the terms of the reunification plan. In

particular, Article 4 allows the EU, by a unanimous Council decision at a future date and in the event of reunification, to alter the terms of Cyprus’s EU accession contained in the Act of Accession 2003. In other words, Article 4 allows the Council to amend ‘primary’ legislation (i.e. Act of Accession 2003) with a unanimous decision.

The amendment of primary legislation by a decision might sound problematic, but the EU Treaties foresee special procedures for such amendments in certain exceptional cases. The best example, for the purposes of this Independent Opinion, is the Council decision on the basis of Article 2(2) of the 1994 Accession Treaty, which adjusted the instruments of accession after Norway’s failure to ratify its EU Accession.⁵² Several articles of this Accession Treaty and of the Act of Accession were amended by a Council decision, while other provisions were declared to have lapsed. Thus, in that case, the Council itself amended primary legislation in a simplified procedure without the need for any ratification by the Member States.

To the extent that the UK Withdrawal Agreement will be considered to be part of primary legislation, a similar provision regulating the reunification of Ireland could be included and could assist in the smooth transitioning of Northern Ireland back to the EU. Of course, the question of the reunification of Ireland – as with many other questions related to Brexit – is first and foremost a political one. It is important to point out, however, that EU law is flexible enough to accommodate any such political developments.

46. For an analysis of the EU law implications of the German reunification, see C. Tomuschat, ‘A United Germany within the European Community’ (1990), 27 *Common Market Law Review*, 415; C. W. A. Timmermans, ‘German Unification and Community Law’ (1990), 27 *Common Market Law Review*, 437.

47. The text is available at http://aei.pitt.edu/1397/1/Dublin_april_1990.pdf.

48. D. Schiek, “‘Hard Brexit’ – How to Address the New Conundrum for the Island of Ireland?” *TREUP Occasional Paper*.

49. The relationship of the DDR (East Germany) with the then European Economic Community (EEC) was clarified in the judgment of the Court of Justice in Case 14/74, EU:C:1974:92. In that decision, the Court held that the relevant rules exonerating West Germany from applying the rules of EEC law to German internal trade would ‘not have the result of making the German Democratic Republic part of the Community, but only that a special system [will apply] to it as a territory which is not part of the Community’.

50. Available at <https://www.theguardian.com/politics/2017/feb/23/irish-leader-enda-kenny-calls-for-united-ireland-provision-in-brexit-deal>. The European Council agreed on the following statement in the minutes to the agreement on the Brexit negotiating guidelines on 29 April 2017: ‘The European Council acknowledges that the Good Friday Agreement expressly provides for an agreed mechanism whereby a united Ireland may be brought about through peaceful and democratic means; and, in this regard, the European Council acknowledges that, in accordance with international law, the entire territory of such a united Ireland would thus be part of the European Union’. European Council, ‘Minutes of Special Meeting of the European Council (Art. 50) Held on 29 April 2017’ (23 June 2017), available at <http://data.consilium.europa.eu/doc/document/xT-20010-2017-INIT/en/pdf>.

51. Art. 1 of Protocol No. 10 on Cyprus of the Act of Accession 2003 (2003) OJ L 236/955.

52. Council Decision 95/1/EC, Euratom, ECSC of the Council of the European Union of 1 January 1995 adjusting the instruments concerning the accession of new Member States to the European Union (1995) OJ L 1/1.

IV

The North-South Dimension

APART FROM PROVIDING for a legal route for Northern Ireland to reintegrate into the EU legal order, the special designated status should also protect the island of Ireland as a single economic area. It should do so by avoiding the existence of a hard territorial border. In her speeches in Lancaster House, Florence and Mansion House, Prime Minister May has clarified that the aim of the UK is to leave both the single market and the EUCU. This means that a territorial customs border could only be avoided if Northern Ireland were to achieve a differentiated relationship with the single market and the EUCU, as the Protocol on Ireland/Northern Ireland in the draft UK Withdrawal Agreement provides.

Although Brexit is an unprecedented phenomenon, it should be noted that in a number of cases, different parts of a Member State have different relationships with the EU. Arguably, those different parts are small territorial exceptions because of certain historical and political circumstances or even insularity. In addition, in all these cases, the metropolitan State fully participates in the political and constitutional life of the EU – something that would not apply to the case of the UK in the future. More importantly, in all those cases, the relevant regions have opted out from areas of EU law, while Northern Ireland would opt in to the EU legal order in case it wants to remain within the EU without seceding from the UK. Still, it is important to revisit these cases in order to understand the legal mechanisms that allow territorial differentiation within EU law and to appreciate the remarkable flexibility of the EU legal order in accommodating such differentiation.

All those cases underline the fact that territorial differentiation is an important characteristic of the EU legal order that respects and accommodates rather than challenges the constitutional relationships of the respective regions with

their metropolitan States. In fact, those differentiated arrangements respond to specific needs that the constitutional status of these areas has created and do not in any way question the sovereignty of the metropolitan State. In that sense, the special designated status should be understood as a pragmatic solution to the specific circumstances of Northern Ireland rather than as a staging post towards a united Ireland. As David Phinnemore and Katy Hayward have put it, ‘to argue therefore that Northern Ireland maintaining regulatory equivalence with the EU would “threaten the economic and constitutional integrity of the United Kingdom” is to needlessly and dramatically overstate the extent of the implications of a differentiated arrangement for Northern Ireland’.⁵³

4.1 The Special Designated Status in a Broader Context

TERRITORIAL/GEOGRAPHICAL exceptions to the application of EU law are more common than conventional wisdom might suggest. Indeed, many Member States have special territories which for either historical, geographical or political reasons have differing relationships with their national governments – and consequently the EU as well – from the rest of the Member State’s territory. Many of these special territories do not participate in all (or any) EU policy areas and programmes. Some have no official relationship with the EU, while others participate in EU programmes, in line with the provisions of EU directives, regulations or protocols attached to EU treaties, and especially the relevant Treaties of Accession.⁵⁴

Eight regions of EU Member States are called outermost

⁵³. Phinnemore and Hayward (see note 33), 46.

⁵⁴. For a comprehensive analysis of the application of EU law to Overseas Countries and Territories (OCTs) and to the Outermost Regions, see D. Kochenov (Ed.), *On Bits of Europe Everywhere: Overseas Possessions of the EU Member States in the Legal-Political Context of European Law* (Kluwer Law International, 2013); D. Kochenov, ‘Substantive and Procedural Issues in the Application of European Law in the Overseas Possessions of European Union Member States’ (2008) 17, *Michigan State International Law Review*, 195; D. Kochenov, ‘The Impact of European Citizenship on the Association of the Overseas Countries and Territories with the European Community’ (2009) 36, *Legal Issues of Economic Integration*, 239; F. Murray, *EU and Member State Territories: The Special Relationship under Community Law* (Sweet & Maxwell, 2004); J. Ziller, ‘Flexibility in the Geographical Scope of EU Law: Diversity and Differentiation in the Application of Substantive Law on Member States’ Territories’, in G. de Búrca and J. Scott (Eds.), *Constitutional Change in the EU: From Uniformity to Flexibility* (Hart Publishing, 2000), 113; J. Ziller, ‘Les collectivités des outre-mer de l’Union européenne’, in J. Y. Faberon (Ed.), *L’Outre-mer Français: La nouvelle donne institutionnelle* (Documentation française, 2004); J. Ziller, ‘L’Union européenne et l’outre-mer’ (2005) 113 *Pouvoirs*, 145; J. Ziller, ‘The European Union and the Territorial Scope of European Territories’ (2007) 38, *Victoria University Wellington Law Review*, 51.

regions,⁵⁵ where the *acquis*, generally speaking, applies by virtue of Article 355(1) TFEU. The Council, however, ‘taking account of the structural social and economic situation’ of these regions and ‘their remoteness, insularity, small size, difficult topography and climate, economic dependence on a few products, the permanence and combination of which severely restrain their development’, has adopted ‘specific measures aimed, in particular, at laying down the conditions of application’ of the Treaties to those regions, including common policies.⁵⁶ In practical terms, while EU law does apply fully in these places, derogations to its application do occur.⁵⁷

Apart from the Outermost Regions, other territories enjoy ad hoc arrangements in their relationships with the EU. In most of these cases, their status is governed by protocols attached to their respective countries’ accession treaties, while the rest owe their status to EU legislative provisions which exclude the territories from the application of the relevant legislation.

According to Article 355(3) TFEU, the EU Treaties apply to ‘the European territories for whose external relations a Member State is responsible’. In practice, Gibraltar is the only territory covered by this clause. Gibraltar, a British overseas territory, is part of the EU, having joined the EEC alongside the UK in 1973. By virtue of Article 28 of the UK Accession Treaty, Gibraltar is outside the EUCU and VAT area and is excluded from the Common Agricultural Policy (CAP).

Pursuant to Article 355(4) TFEU, the EU Treaties also ap-

ply to the Åland Islands, a group of a group of Swedish-speaking Finnish islands located between the coasts of Finland and Sweden, in accordance with Protocol no. 2 of the Finnish Act of Accession 1994. The aforementioned Protocol provides for derogations to the free movement of people and services, the right of establishment and the purchase or holding of real estate in the Åland Islands.⁵⁸

The EU Treaties apply to the Channel Islands and the Isle of Man as well but to the extent necessary to ensure the implementation of the ‘arrangements for those islands set out’ in Protocol no. 3 of the Act of Accession 1972.⁵⁹ This effectively means that these islands are part of the EU only for the purposes of customs and the free movement of goods and in relation to certain aspects of the CAP.

In contrast to the areas mentioned above, the Treaties do not apply in the Faroe Islands, pursuant to Article 355(5)(a) TFEU. Instead, the islands hold the status of a third country that enjoys preferential treatment vis-à-vis the EU regulated by two basic agreements, one concerning fisheries⁶⁰ and the other trade.⁶¹

Another category of differentiated integration concerns the Overseas Countries and Territories (OCTs), each of which has a special relationship with one of the Member States of the EU.⁶² Part four of the Treaty on the Functioning of the EU governs the OCTs’ relationship with the EU. The OCTs were invited to form association agreements with the EU⁶³ and may opt in to EU provisions on the freedom of movement for workers⁶⁴ and freedom of establishment⁶⁵. They are not subject to the EU’s common external

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- 55.** The Outermost Regions include French Guadeloupe, French Guiana, Martinique and Réunion, Saint-Barthélemy, Saint-Martin, the Spanish Canary Islands, and the Portuguese Azores and Madeira. Mayotte became an outermost region of the EU on 1 January 2014, following a 2009 referendum with an overwhelming result in favour of departmental status.
- 56.** Art. 349 TFEU. In June 2001 the Council adopted two sets of regulations based on the priorities identified in the Commission Report on the measures to implement Art. 299(2) TEC: the Outermost Regions of the European Union, COM(2000) 147, 14 March 2000. The first set of regulations (Council Regulations 1447/2001, 1448/2001, 1449/2001, 1450/2001, 1451/2001, [2001] OJ L198/1) aimed to take fuller account of the specific nature of the Outermost Regions under the Structural Funds, as defined in Art. 349 TFEU, while the second set (Council Regulations 1452/2001, 1453/2001, 1454/2001, [2001] OJ L198/11) aimed to amend the Common Agricultural Policy (CAP) in order to take greater account of the specific local conditions of the region.
- 57.** For a comprehensive analysis of the application of the *acquis* in the Outermost Regions, see Kochenov, ‘Procedural Issues in the Application of European Law in the Overseas Possessions of European Union Member States’ (see note 54), 227–244 and 268–286.
- 58.** Act concerning the condition of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (1994) OJ C 241/21.
- 59.** Art. 355(5)(c) TFEU.
- 60.** Council Regulation (EEC) no. 2211/80 of 27 June 1980 on the conclusion of the agreement on fisheries between the European Economic Community and the Government of Denmark and the Home Government of the Faroe Islands (1980) OJ L226/1.
- 61.** Council Decision 97/126/EC of 6 December 1996 concerning the conclusion of an agreement between the European Community, on the one part, and the Government of Denmark and the Home Government of the Faroe Islands, on the other (1997) OJ L53/1.
- 62.** Twelve have such relationships with the UK: Anguilla, the Cayman Islands, the Falkland Islands, South Georgia and the South Sandwich Islands, Montserrat, Pitcairn, Saint Helena and the Dependencies, the British Antarctic Territory, the British Indian Ocean Territory, the Turks and Caicos Islands, the British Virgin Islands, and Bermuda (Bermuda, although formally an OCT listed in Annex II, does not benefit from the EU-OCT Association); five with France: New Caledonia and Dependencies, French Polynesia, French Southern and Antarctic Territories, and the Wallis and Futuna Islands (known collectively as *Territoires d’outre mer*), and Saint Pierre and Miquelon; two with the Netherlands: Aruba and the Netherlands Antilles (Bonaire, Curaçao Saba, Sint Eustatius and Sint Maarten); and one with Denmark (Greenland).
- 63.** Art. 198 TFEU.
- 64.** Art. 202 TFEU.
- 65.** Art. 199(5) TFEU.

tariff⁶⁶ but may claim customs duties on goods imported from the EU on a non-discriminatory basis.⁶⁷ They are not part of the EU, and EU law applies to them only insofar as is necessary to implement the association agreements.⁶⁸ Concerning the EU citizenship status of the inhabitants of the OCTs, although the OCTs fall de jure outside the territorial scope of the EU Treaties, their inhabitants are considered EU citizens.⁶⁹

Finally, for the sake of completeness, we could also refer to the special status of the German enclave town of Büsingen am Hochrhein and the Italian enclaves of Campione d'Italia and Livigno (all of which are fully surrounded by Switzerland) and the Spanish enclaves of Ceuta and Melilla on the Moroccan coast. All these enclaves, and the German island of Heligoland, despite their different locations, are excluded from the EUCU⁷⁰ and the VAT⁷¹ area.

This brief study shows, in the most emphatic way, that the application of EU law has been influenced on many occasions by certain historical, political or even geographical conditions. The width and breadth of the subject matter of those territorial exceptions cannot be overstated. Having said that, only in the case of Greenland was the territorial differentiation a result of the decision of the people to withdraw from the EU in a referendum. More importantly, in all those cases, the metropolitan State has taken full part in the political and constitutional life of the EU. It is important to note for the purposes of this Independent Opinion that the EU legal order allows for the differentiated application of the acquis within different parts of the same member state.

4.2 Remaining in the EU and/or the Single Market without Seceding from the UK

THE ONLY HISTORICAL PRECEDENT of a territory that has voted to withdraw from the EU is Greenland, which is an autonomous territory under Danish sovereignty. In 1982, Greenlanders voted against being subject to the EEC Treaty. After three years of negotiations, the Member States concluded the Greenland Treaty on its new status un-

der EU law. According to this Treaty, Greenland became an associated territory under Article 204 TFEU. As a result, part four of TFEU, on the Association of the Overseas Countries and Territories, applies to Greenland. Nevertheless, Greenlanders are still EU citizens.⁷²

The fact that Greenland represents the only historical precedent of a partial territorial withdrawal from the EU has led a number of experts to discuss whether a 'reverse Greenland' model could be used if Northern Ireland (and Scotland) decide to remain in the EU without seceding from the UK.⁷³ According to this model, the Treaties would be amended to the extent that EU law would apply to Northern Ireland but would not apply to the rest of the UK. Such a scenario would entail that the UK would formally remain a Member State of the EU. Alternatively, the UK and the EU could agree to include (either in the Withdrawal Agreement or in a separate international agreement) an arrangement according to which the territorial application of EU law would be extended to cover Northern Ireland as well.

To a certain extent, such arrangement is what the backstop option included in the Protocol on Ireland/Northern Ireland of the draft UK Withdrawal Agreement tries to achieve. According to this option, a common regulatory area comprising the EU and Northern Ireland would be established, and the region would remain in the EU customs territory.⁷⁴ As Schiek has pointed out, however, the 'access of Northern Ireland to the Internal Market [would be] reduced to goods, including agricultural and electricity', and that

*being excluded from the integrated EU market in services is likely to have an additional stymying effect not only on growth in this important sector, but also on the desired rebalancing of the [Northern Ireland] economy and the creation of employment opportunities in a more inclusive way than possible by growing [the] public sector, manufacturing and agricultural employment.*⁷⁵

Be that as it may, it is important to point out that, contrary to conventional wisdom, a status of this kind that would keep Northern Ireland part of the EUCU would not be unique. The UK government at least seems amenable to the idea that another region with a constitutional relationship with the UK will remain within the EU customs territory: the UK Sovereign Base Areas in Cyprus. Similarly to the sit-

66. Art. 200(1) TFEU.

67. Art. 200(3) and (5) TFEU.

68. Art. 355(2) TFEU.

69. See *Eman and Sevinger v College van Burgemeester en Wethouders van Den Haag*, C-300/04, EU:C:2006:545.

70. Art. 3 of Council Regulation (EEC) no. 2913/92 of 12 October 1992 establishing the Community Customs Code (1992) OJ L302/1.

71. Art. 6 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value-added tax (2006) OJ L 347/1.

72. Treaty amending, with regard to Greenland, the treaties establishing the European Communities (1985) OJ L29/1; F. Weiss, 'Greenland's Withdrawal from the European Communities' (1985) 10, *European Law Review*, 173.

73. See for instance T. Lock, '[A European Future for Scotland?](#)' *Verfassungblog*, 26 June 2016; A. Ramsay, '[A Reverse Greenland: The EU Should Let Scotland Stay](#)', *Open Democracy UK*, 24 June 2016.

74. Draft UK Withdrawal Agreement (see note 17), Protocol on Ireland/Northern Ireland, chap. III.

75. Draft UK Withdrawal Agreement (see note 17), Protocol on Ireland/Northern Ireland, chap. III.

uation in Ireland, if those two base areas follow the UK outside the single market and the EUCU, then a hard border would exist on the island of Cyprus. This is why the UK and Cypriot governments are currently negotiating how they might preserve the special EU status that those regions have enjoyed since Cyprus joined the EU in 2004.⁷⁶ In fact, the Preamble to the Protocol on the Sovereign Base Areas contained in the draft UK Withdrawal Agreement clarifies that the agreed arrangements will aim to keep those areas part of the EU customs territory, although the EU treaties will not apply.

Interestingly, keeping Northern Ireland and the UK Sovereign Base Areas in Cyprus within the EU customs territory even after the UK ceases to be a Member State would not be unprecedented. In the past, regions of a third country were part of the EU customs territory in a few rare cases. For instance, because of their geographical position, the Austrian territories of Jungholz and Mittelberg have been part of the EU customs territory⁷⁷ since its establishment,⁷⁸ long before Austria joined the EU on 1 January 1995.

Alternatively, a number of academics have suggested that Northern Ireland should remain in the European Economic Area (EEA) and thus in the single market.⁷⁹ The Scottish government has put forward a similar proposal with regard to Scotland.⁸⁰ Both proposals envisage two pathways for those regions to achieve EEA membership. The first option entails a UK-sponsored membership, where the UK would opt for membership in the EEA, but England and Wales would have territorial exemptions. The EEA acquis would fully apply only in Scotland and/or in Northern Ireland. The precedent for this situation may also be found in the Arctic, where Norway has secured a territorial exemption for the islands of the archipelago of Svalbard that are not part of the EEA.⁸¹

In the second option, an amendment of the European Free Trade Association (EFTA) Convention and the EEA Agreement could allow for the membership of sub-state entities. To this effect, it should be pointed out that although the Faroe Islands is not an independent state, it is currently exploring the possibility of joining the EFTA.⁸² Having said

that, one has to point out that the EEA countries are not members of the EUCU. This means that, according to Phinnemore and Hayward,

*the EEA option would not ... be a panacea. The question of a hardening of the border would not be resolved. With the UK outside a customs union with the EU, the need for customs controls would remain, although their scope would be reduced if the UK-EU relationship comprised a deep and comprehensive free trade area. The EEA option would also leave open the question of agricultural trade.*⁸³

Theoretically speaking, all the aforementioned options are legally possible,⁸⁴ but those options do come with certain consequences that would have to be dealt with. Were the UK to leave the single market and the EUCU, as Prime Minister May announced in her Lancaster House speech, then there would be a customs frontier in the Irish Sea. And, if the free movement of people applied in Northern Ireland but not to the rest of the UK, the question would need to be asked of how that situation might influence people crossing between the two sides of the internal border, given the existence of the CTA.⁸⁵ Section 5 of this Independent Opinion discusses these consequences.

4.3 Representing the Interests of Northern Ireland

AS STATED in the Joint Report, ‘Cooperation between Ireland and Northern Ireland is a central part of the 1998 Agreement and is essential for achieving reconciliation and the normalisation of relationships on the island of Ireland’.⁸⁶ In that sense, avoiding a hard territorial border on the territory of Ireland is a necessary but insufficient condition in order to protect and preserve the GFA. In the December Joint Report, the EU and the UK both conceded that Brexit has given rise ‘to substantial challenges to the maintenance and development of North-South cooperation’.⁸⁷ A special designated status should thus ensure that North-

76. Protocol no. 3 on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus of the Act of Accession 2003 (2003) OJ L 236/940.

77. Art. 3 of Council Regulation (EEC) no. 2913/92 of 12 October 1992 establishing the Community Customs Code (1992) OJ L302/1.

78. Art. 1 of Regulation (EEC) of the Council of 27 September 1968 on the definition of the customs territory of the Community (1968) OJ L238/1.

79. B. Doherty et al., [‘Northern Ireland and Brexit: The European Economic Area Option’](#), EPC Discussion Paper, 7 April 2017.

80. See note 1.

81. Protocol 40 on Svalbard of the Agreement on the European Economic Area (1994) OJ L1/208.

82. For an analysis of the EU status of the Faroe Islands, see J. Hartmann, [‘The Faroe Islands: Possible Lessons for Scotland in a New Post-Brexit Devolution Settlement’](#).

83. Phinnemore and Hayward (see note 33), 45.

84. For a comprehensive discussion of all possible scenarios, see C. Gallagher and K. O’Byrne, [‘Report on How Designated Special Status for Northern Ireland within the EU Can Be Delivered’](#) (see note 25).

85. The Common Travel Area (CTA) is a special travel zone between the Republic of Ireland and the UK, the Isle of Man and the Channel Islands. The CTA dates back to the establishment of the Irish Free State in 1922. Nationals of CTA countries can travel freely within the CTA without being subject to passport controls.

86. Joint Report (see note 16), para. 47.

South cooperation includes mechanisms that would take into account the views of Northern Ireland with regard to the EU.

A number of paradigms currently exist about how different Member States take the views of their various regions into account when formulating policies at the EU level.⁸⁸ In Germany, for instance, the Bundesrat plays a pivotal role in ensuring that the views of the various Länder can be taken into account in terms of EU affairs.⁸⁹ In Belgium, the Directorate for European Affairs in the Foreign Ministry is responsible for coordinating the Belgian position within the EU. In order to achieve these activities, the Directorate regularly convenes a Coordination Committee on European Affairs. Every decision on the Belgian position is reached in the Directorate General by representatives of the federal prime minister and deputy prime ministers, of the minister-presidents of the different sub-state entities, and of those ministers who are responsible for the specific subjects on the agenda.⁹⁰

In the case of Northern Ireland, the North-South institutions, and in particular the North-South Ministerial Council (NSMC), could be used so that the voice of Northern Ireland could be heard within the EU. In particular, a mechanism could be created according to which the Irish positions in the Council of the EU and the EU Council would be formulated after taking into account the interests of Northern Ireland as expressed in the NSMC.⁹¹ In fact, the GFA stipulates that the NSMC's views should be 'taken into account and represented appropriately at relevant EU meetings'.⁹²

The North-South institutions could be used so that the interests of Northern Ireland would be taken into account in the Council of the EU and in the EU Council in particular. According to the Joint Report, however, 'the people of Northern Ireland who are Irish citizens should continue to enjoy rights as EU citizens, including where they reside in Northern Ireland'.⁹³ One could question whether these rights include their voting rights in European Parliamentary elections.⁹⁴ Interestingly, the case law of the Court of Justice of the European Union (CJEU) does not prohibit an arrangement according to which the residents of Northern

Ireland would continue to vote and stand in European Parliamentary elections, even after Brexit. In *Spain v UK*, the question arose of whether the UK could extend to residents of Gibraltar the rights to vote and stand as candidates in European Parliamentary elections. The CJEU noted that

*in the current state of [EU] law the definition of persons entitled to vote and to stand as a candidate in the EP elections falls within the competence of each Member State in compliance with [EU] law and that [the member states are not precluded] from granting that right to vote and to stand as a candidate to certain persons who have close links to them, other than their own nationals or EU citizens residents in their territory.*⁹⁵

This would mean that EU law would not prohibit the Republic of Ireland from extending voting rights for European Parliamentary elections to the residents of Northern Ireland. At the end of the day, a significant number of these residents will continue to hold Irish passports, even after Brexit. Such an arrangement would respect the birthright of 'all the people of Northern Ireland' to 'identify themselves and accept [that they are] Irish or British, or both'.⁹⁶

The draft UK Withdrawal Agreement recognises the need for the interests of Northern Ireland to be represented in certain EU for a as well. Article 12(4) of the Protocol on Ireland/Northern Ireland provides for the representation of the UK within Commission Implementation procedures and in expert groups where necessary.

Having said that, it should also be noted that in order for Northern Ireland to effectively participate in the single market and the EUCU, a fundamental constitutional amendment to the relevant Devolution Act (or Acts) would need to occur. This amendment would be necessary so that the devolved administration would have the relevant competences to make decisions at the EU/EEA level.

The flexible nature of the idiosyncratic UK constitution suggests that this hurdle will not be insurmountable from a legal point of view. But such an amendment to the devolution arrangement would mark the complete transformation of the UK into one of the most decentralised States in

87. Ibid.

88. For different models of representation at the various institutions, see N. Skoutaris, 'The Role of Sub-State Entities in the EU Decision-Making Processes: A Comparative Constitutional Law Approach', in E. Cloots, G. De Baere and S. Sottiaux (Eds.), *Federalism in the European Union* (Hart Publishing, 2012), 210.

89. Art. 23 (4)-(5) of the German Basic Law.

90. Samenwerkingsakkoord van 8 maart 1994 tussen de Federale Staat, de Gemeenschappen en de Gewesten en het Verenigd College van de Gemeenschappelijke Gemeenschapscommissie, met betrekking tot de vertegenwoordiging van het Koninkrijk België in de ministerraad van de Europese Unie (Belgisch Staatsblad, 17 November 1994).

91. his idea was first developed and argued by Sinn Féin. See '[The Case for the North to Achieve Designated Special Status within the EU](#)', 7.

Other parties have agreed with this Sinn Féin-inspired idea. For instance, the leader of the Social Democratic and Labour Party (SDLP), Colum Eastwood, has noted that 'the North-South structures could come into their own – ensuring that we are not cut off from the broader island economy and the European Union'.

92. Strand Two, para. 17.

93. Joint Report (see note 16), para. 52.

94. Art. 22 TFEU.

95. *Spain v UK* C-145/04 EU:C:2006:543, para. 78.

the world. The UK government would have to at least share its competences with the Northern Ireland Executive, even in the areas of external relations and defence, to the extent that Northern Ireland might want to participate in the Common Foreign and Security Policy and the Common Security and Defence Policy.

At the same time, the UK and the EU would have to 'establish mechanisms to ensure the implementation and oversight of any specific arrangement to safeguard the integrity of the EU Internal Market and the Customs Union', as noted in the Joint Report.⁹⁷ This is rather unsurprising if one takes into account the fact that Member States must ensure the 'proper application of European Union law'.⁹⁸ This statement is a reference to Article 4 TEU, according to which an EU Member State should 'take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the EU Treaties or resulting from the acts of the institutions of the Union'.⁹⁹

In particular, within constitutional orders where a territo-

rial distribution of powers exists, the relevant Member States must establish a mechanism to ensure compliance with EU law in the case of a regional 'blocking' (i.e. the inability of a Member State region to comply with a certain piece of EU legislation). The reason for this is that the CJEU has repeatedly held that a member state may not plead that provisions, practices or circumstances exist in its internal legal system in order to justify a failure to comply with the obligations and time limits laid down in a directive.¹⁰⁰ The problem in the case of Northern Ireland is that the UK and the EU would have to create a mechanism of oversight of implementation for a region that would fall within the territory of a non-EU country. This would be unprecedented. The draft UK Withdrawal Agreement tries to 'square the circle' by entrusting the Joint Committee¹⁰¹ and the Specialised Committee¹⁰² with such a role. More interestingly, Article 11 of the Protocol on Ireland/Northern Ireland provides that supervision and enforcement of the Protocol will rely on the CJEU as well as the EU Commission and other EU agencies.

96. Declaration of Support (1.iv).

97. Joint Report (see note 16), para. 51.

98. Council of the European Union, Seville European Council, 21 and 22 June 2002, Presidency Conclusions (13463/02), para. 24.

99. Art. 4(3) TEU.

100. *Commission v Spain*, C-107/96, EU:C:1997:286; *Commission v Belgium*, C-323/97, EU:C:1998:347.

101. Draft UK Withdrawal Agreement (see note 17), Art. 157.

102. Draft UK Withdrawal Agreement (see note 17), Protocol on Ireland/Northern Ireland, Art. 10.

V

The East-West Dimension

ACCORDING TO STEPHEN FARRY and Sorcha Eastwood, ‘Remaining in the single market and customs union is the most logical conclusion to maintaining [the] integrated all Island economy and safeguarding the Good Friday Agreement’.¹⁰³ Such a decision, however, would lead to tensions in the economic integration of Northern Ireland with the rest of the UK. Northern Ireland would continue to adhere to the four fundamental freedoms, while the rest of the UK would be out of the single market and the EUCU, as Prime Minister May has explicitly stated. This is why East-West institutions should be further strengthened. Both the United Kingdom and the Republic of Ireland should achieve higher levels of coordination in order for a shared and interdependent Northern Ireland to successfully remain in the EU without having to secede from the UK.

5.1 The Irish Sea Border

ARTICLE 21 TFEU provides that every EU citizen has the ‘right to move and reside freely within the territory of the Member States’. One of the declared goals of Brexit is to terminate the application of the free movement of people in the UK. But if Northern Ireland remains in the single market, the relevant Treaty provisions would then apply to part of the territory of the UK. This situation means that a border could exist between one area where free-movement *acquis* applies and the rest of the UK, where it does not.

Northern Ireland would not be a unique case where free-movement *acquis* would apply in part of the territory of a State. For instance, in Cyprus,¹⁰⁴ where the free movement of people is suspended only in part of its territory, the Re-

public of Cyprus conducts checks on everyone who crosses the internal boundary called the Green Line, with the aim of combating the illegal immigration of third-country nationals and to detect and prevent any threats to public security and public policy.¹⁰⁵ Everyone who crosses the Green Line must undergo at least one such check in order to establish his or her identity.¹⁰⁶ If a similar measure were to be applied to the maritime border between Northern Ireland and the rest of the UK, then it would be the Northern Irish authorities who would have to police this new EU border.

Of course, in the case of Northern Ireland, given the existence of the CTA, there is no need for such a hard border, at least for British and Irish citizens. In fact, the December Joint Report accepts 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’.¹⁰⁷ This provision has been repeated verbatim in the agreed Article 2 of the draft Protocol on Ireland/Northern Ireland.

As already mentioned, however, there would be a need for a mechanism to distinguish between British and Irish citizens on the one hand and third-country nationals on the other. A more realistic option that some have suggested would entail that immigration checks be conducted in places other than borders. For instance, Raoul Ruparel has argued that ‘the enforcement of ensuring people do not overstay’ can take place ‘via other mechanisms such as regulating access to social security and the job market’.¹⁰⁸ In fact, ‘through successive reforms of the Immigration Act, the UK government has [already] introduced in-land controls by employers, landlords, banks and educational estab-

¹⁰³. Farry and Eastwood (see note 35).

¹⁰⁴. Cyprus is the only member state where the *acquis* does not apply to a significant part of its territory and a territorial border is in place between the part where the *acquis* applies and where it does not. Of course, the historical and political conditions that led to the suspension of the *acquis* in Cyprus do not bear any resemblance to the post-Brexit political situation in the UK. However, the legal arrangements that were used to accommodate the Cyprus problem could offer some much-needed inspiration if Northern Ireland were to decide to remain in the EU and/or the single market without seceding from the UK.

¹⁰⁵. Art. 2(1) of Council Regulation (EC) no. 866/2004 of 29 April 2004 on a regime under Article 2 of Protocol 10 to the Act of Accession (2004) OJ L 206/51 (hereafter Green Line Regulation).

¹⁰⁶. Art. 2(2) of the Green Line Regulation.

¹⁰⁷. Joint Report (see note 16), para. 54.

¹⁰⁸. T. McGuinness and M. Gower, ‘[The Common Travel Area and the Special Status of Irish Nationals in UK Law](#)’, House of Commons Briefing Paper no. 7661, 18.

ishments for the movement of persons, thus rendering person controls at borders less relevant from their perspective'.¹⁰⁹ In a recent report, however, the Committee on the Administration of Justice expressed its concerns about such a system, in particular its compatibility with human rights standards.¹¹⁰

Undoubtedly, all the aforementioned arrangements sound onerous and cumbersome, but it should be noted that unless a similar arrangement to the one described in this section is achieved with regard to Northern Ireland, the same problems will occur *mutatis mutandis* in the Irish territorial border post-Brexit.¹¹¹ The difference would be that a hard Irish border would pose a significant threat to the stability of the fragile peace process.

Concerning the free movement of persons, the challenges that would arise if Northern Ireland remains in the single market would be identical, whether Northern Ireland participated in the EU or the EEA. With regard to the free movement of goods, however, the choice between the two is significant, the reason being that if an area is not within the EU (including those that are part of the EEA), then it is outside the EUCU and thus has a customs border with the European Union. At the same time, this situation means that the area could negotiate its own free trade and customs unions.

Starting with the scenario in which Northern Ireland remains within the EUCU, a new customs border would exist between the region and the rest of the UK, given that the current administration has clarified that their goal is for the UK to be outside the EUCU. It is interesting to look at how the EU managed to regulate its trade relations with northern Cyprus, which is outside the EUCU and where the free movement of goods does not apply. The UK government has explicitly referred to the internal Cypriot border as one example 'of where the EU has set aside the normal regulations and codes set out in EU law in order to recognise the circumstances of certain border areas'.¹¹²

In agreement with the Republic of Cyprus, the EU authorised a Turkish Cypriot NGO, the Turkish Cypriot Chamber of Commerce,¹¹³ to issue accompanying documents so that goods originating in northern Cyprus may cross the line

and be circulated in southern Cyprus and the EU market. More importantly, those goods are deemed to have originated in Cyprus/the EU and thus are not subject to customs duties or charges having equivalent effect when they are introduced in southern Cyprus.¹¹⁴ Similar agencies could be authorised in the rest of the UK so that traders would not face the EU's common external tariff, even when they 'export' goods to Northern Ireland. Alternatively, the free crossing of goods with tighter checks could be allowed at certain focal points, such as ports and airports. For the flow of goods from Northern Ireland to the rest of the UK, it is important to note that the UK government has pledged that it 'will continue to ensure the same unfettered access for Northern Ireland's businesses to the whole of the United Kingdom internal market', as it has the right to do.¹¹⁵

Of course, if the UK signs a free trade agreement with the EU, then goods that are wholly obtained or have undergone their last, substantial, economically justified processing or working in an undertaking equipped for that purpose in the rest of the UK,¹¹⁶ to use the legal terminology, would not be subject to customs duties or charges of equivalent effect.¹¹⁷ All the other goods, however, would face the EU common external tariff.

This is perhaps why the group of academics¹¹⁸ mentioned earlier (and the Scottish government¹¹⁹) have prioritised that Northern Ireland (and Scotland) should remain in the EEA. Doing so would allow goods originating from those regions to move freely in the EU while remaining outside of the EUCU. In that case, the border between the Republic of Ireland and Northern Ireland would resemble the Swedish/Norwegian customs border, where the use of technology has mitigated the disruptions from having a customs border between one State that is within the EUCU and one that is not.

5.2 East-West Institutions

AS WE MENTIONED BEFORE, having a special status should not be understood as a staging post towards a united

¹⁰⁹ D. Schiek (see note 36), 12.

¹¹⁰ Available at ['Brexit and Northern Ireland: A Briefing on Threats to the Peace Agreement'](#), 5.

¹¹¹ The Scottish government also underlined the analogy between the post-Brexit situation with the Irish border and the territorial border between England and Scotland if the latter remains in the single market. In the 2016 blueprint on 'Scotland's Place in Europe' (see note 1), the government suggested that whatever instruments are used for the Northern Ireland / Republic of Ireland border should also be applied *mutatis mutandis* between Scotland and England.

¹¹² UK government position paper (see note 14), para. 42. For an analysis see N. Skoutaris, ['Footnotes in Ireland'](#), On Secessions, Constitutions and EU Law, 18 August 2017.

¹¹³ Art. 4(5) of the Green Line Regulation; Commission Decision 2004/604/EC of 7 July 2004 on the authorisation of the Turkish Cypriot Chamber of Commerce according to Art. 4(5) of Council Regulation (EC) no. 866/2004 (2004) OJ L 272/12.

¹¹⁴ Art. 4(2) of the Green Line Regulation.

¹¹⁵ Joint Report (see note 16), para. 50.

¹¹⁶ Council Regulation (EEC) no. 2913/92 establishing the Union Customs Code (1992) OJ L 302/1.

¹¹⁷ A similar arrangement applies to goods originating in northern Cyprus: Art. 4(2) of the Green Line Regulation.

¹¹⁸ B. Doherty et al. (see note 79).

¹¹⁹ See note 1.

Ireland. Instead, such a status should be understood as a mutually agreed arrangement that would preserve the fragile balance of powers the GFA has established. It should enhance the notions of shared sovereignty and interdependence that the Northern Irish peace process was founded upon. At the same time, if Northern Ireland were to remain in the single market and/or the EUCU, then that situation would admittedly raise challenges to Northern Ireland's economic integration with the rest of the UK.

Those challenges are not insurmountable, as we have explained earlier in this Independent Opinion, but they would create a special and unique regime. In this scenario, Northern Ireland would remain part of the UK but would achieve a higher level of economic integration with the EU than the

rest of the UK will enjoy. At the same time, the Republic of Ireland would be entrusted with voicing the concerns and the interests of the region within the EU. In that sense, it is of utmost importance that both the UK, as the metropolitan State, and the Republic of Ireland, as the closest ally of the region within the EU, would enhance their mutual cooperation by strengthening East-West institutions. The special designated status of Northern Ireland should be protected and facilitated by the close cooperation of those two States. Such a strengthening would be in accordance with the principle of consent and the notions of shared sovereignty and interdependence. In any case, 'approaches to EU issues' are already among the suitable matters of discussion for the British-Irish Council. ¹²⁰

120. Strand Three, paras. 5 and 31.

VI

Concluding Remarks

THIS INDEPENDENT OPINION suggests that the UK Withdrawal Agreement should recognise the various special and unique circumstances related to Northern Ireland. The agreement should do so by providing for a special designated status. Such a status should be understood as a mutually agreed arrangement that will respect and protect the unique constitutional status of the region, as provided by all three strands of the Good Friday Agreement. In particular, the special status should respect the principle of consent and the right of self-determination by providing for a legal route for the reintegration of Northern Ireland into the EU. The special status should help to protect the all-island economy by allowing for the participation of the region in the single market and/or the EUCU. This should not happen at the expense of weakening East-West institutions; in fact, the strengthening of these institutions will be necessary in order to manage any tensions that Northern Ire-

land's remaining in the single market and the EUCU would likely cause to its economic relationship with the rest of the UK.

Notwithstanding the legal feasibility of this special status, this Independent Opinion admits that the greater challenge in reaching such an arrangement will lie in building a consensus about what would constitute the unique and imaginative solution that will have to be found for Northern Ireland. It is important to stress that the principle of consent that the GFA is founded upon necessitates the agreement of all interested parties in order for Northern Ireland to enjoy such a special status. At the same time, unless such an arrangement is reached, the fragile balance that the GFA has established will be threatened. The very logic of the peace process dictates that Northern Ireland should enjoy a special designated status within the EU by taking into account and strengthening all three strands.

Biographical Note



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His most recent [paper](#) discusses how Scotland and Northern Ireland could remain in the single market even after Brexit while he is the Principal Investigator of the [research project](#) on ‘The De-Europeanisation of Border Conflicts: The Effect of Brexit on Territorial Borders and Boundaries’. His website focuses on [Secessions](#), Constitutions and EU law.

