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The Common Travel Area: Prospects After Brexit

(January 2017)

Summary

Maintaining the Common Travel Area that has existed between the UK, Ireland, the Channel Islands, and the Isle of Man has been set down by the UK Prime Minister as one of her government's 12 key negotiating objectives. In this note, some of the functions of the CTA are described, and the possible threats to it from Brexit are explored. It is concluded that the flexibility and informality of the CTA means that while maintaining it in name is relatively easy, changes to its substance are likely. Close scrutiny of any changes to the reciprocal nature and substantive provisions of the CTA are therefore essential to assessing the success of this aspect of the UK government's negotiations.

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Introduction

Prime Minister Theresa May, in setting out her 12-point plan for exiting the EU, included the maintenance of the Common Travel Area as one of her top priorities.¹ She, and UK Government ministers, have also repeatedly maintained that there will be 'no "hard" border with Ireland'² and that there will be no 'return to the borders of the past'.³

There is no appetite for the return of the fortified border posts which were so emblematic of the Troubles. However, in choosing their words carefully, ministers have sought to reassure the Northern Irish public on the most extreme outcome (the hard border) while neglecting to address the other possible day-to-day impacts which Brexit will have on the island of Ireland.

Changes to the border do not necessarily mean the installation of guard towers and razor wire; it can be characterised by the imposition of administrative processes which curtail trade in goods and services, or investment flows, or which make cross-border travel more difficult for people.

"We cannot forget that, as we leave, the United Kingdom will share a land border with the EU, and maintaining that Common Travel Area with the Republic of Ireland will be an important priority for the UK in the talks ahead. There has been a Common Travel Area between the UK and the Republic of Ireland for many years.

Indeed, it was formed before either of our 2 countries were members of the European Union. And the family ties and bonds of affection that unite our 2 countries mean that there will always be a special relationship between us.

So we will work to deliver a practical solution that allows the maintenance of the Common Travel Area with the Republic, while protecting the integrity of the United Kingdom's immigration system. Nobody wants to return to the borders of the past, so we will make it a priority to deliver a practical solution as soon as we can."

PM Theresa May (17 Jan 2017)

What is the 'Common Travel Area' and Why is it Important?

The Common Travel Area (CTA) is an arrangement that allows easy travel and other benefits between the UK, Ireland, the Channel Islands and the Isle of Man. The openness of travel between the UK and Ireland dates from 1922 when the Free State decided to enforce the same travel restrictions as the UK. Neither country required passports for travel from the other. Following the Second World War, the UK's 1949 Ireland Act formalised the special relationship by declaring that Ireland, while no longer a dominion of the UK, is not a "foreign country".⁴

In 1952, the CTA came into being. The travel area – in addition to the small island nations off the UK coast – covers the two states of Ireland and the UK. Rather than being an international treaty or concrete agreement, the CTA exists as a collection of legal provisions in each of the relevant

¹ Theresa May, 'The government's negotiating objectives for exiting the EU: PM speech' (17 January 2017)

<https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>

² David Davis, 'We don't want hard border post Brexit, Northern Ireland still open for business' *Belfast Telegraph* (1 Sep 2016).

³ Theresa May on NI post-Brexit: "No-one wants return to borders of the past" *BBC News* (25 Jul 2016).

⁴ See Ireland Act 1949, s.2.

jurisdictions. These legal provisions enable UK and Irish nationals to be treated almost identically within both states.

The relative flexibility and informality of the CTA means that it is vulnerable to seemingly technical modifications that might go unnoticed. The UK withdrawal from the EU means that these arrangements now require negotiation. While much will depend on that nature of post Brexit negotiations between the UK and the EU (rather than with Ireland particularly) there is virtually no possibility that the border and the movement of goods, services and individuals will remain as they currently operate. This is particularly true if the UK leaves both the single market and the customs union.

The coverage of the CTA is relatively complex and far reaching. For example, UK citizens in Ireland and Irish citizens in the UK have the right to vote in local, national and European elections. Both sets of citizens enjoy unfettered access to employment, social welfare and healthcare. The few exceptions to this equal treatment are political in nature: though Irish citizens can run for the UK Parliament, UK citizens cannot be elected to the Dáil, nor can they vote in constitutional referenda or Presidential elections.

From the UK's perspective, keeping the CTA after Brexit would provide a significant backdoor to an EU member state. More importantly, it would preserve the cross-border freedoms that many in Northern Ireland see as central to their livelihood, lifestyle, identity, and political outlook. The openness of the border is often seen as one of the contributing factors to, and benefits of, the current period of stability and peace.

Yet, some in the UK would have accept that

keeping the CTA comes with compromise to their desire to completely control migration flows to the UK. The continuation of the CTA would enable EU nationals, all of whom have a right to reside in Ireland, to become Irish citizens and gain legal access to the UK. This would not be a large number, but may be symbolic and become viewed as the last EU-related migration loophole that

The Common Travel Area in a Nutshell		
What does it affect?	Who are the biggest winners?	Will the benefits continue after leaving the single market?
Travel	Border Communities; Tourists	Equivalence between UK and Ireland likely to end. Result likely to be more generous terms for Irish citizens than UK citizens.
Work	Businesses in NI and Ireland; Border Communities	Possibly, but with greater regulation and bureaucracy (especially entering into Ireland). Registration systems and spot-checks likely.
Social Security and Healthcare	People moving home between UK-Ireland	UK likely to continue (but with tighter checks); Ireland may not be permitted by EU law to continue the practice.
Voting	Irish in the UK, and UK citizens in Ireland	UK likely to continue; Ireland may not be permitted by EU law to continue the practice.

needs to be closed. This starting position could be further complicated by the introduction of UK identity cards, and the likelihood of EU controls upon UK citizens wishing to travel into Ireland.

Further, the UK might also be subject to what would become illegal migration across the border. Put simply; any EU citizen will remain entitled to travel to Ireland. Once there, with the CTA in place and loose checks at the border, it will be relatively easy for EU citizens to travel across the border into Northern Ireland. The UK is likely to impose checks at official ports and airports to stop onward travel to the UK mainland. Yet this would leave Northern Ireland with the difficulties of policing and regulating an increased population of illegal migrants. Reports of bilateral negotiations suggest that the UK Government is not concerned about the prospect that the CTA will allow EU nationals to cross the Ireland-Northern Ireland border without specific checks being conducted because onward travel into the remainder of the UK can be controlled at ports and airports. This approach seems to presuppose that Northern Ireland is, and will remain, unattractive to what would become illegal migration by non-Irish EU citizens.⁵

With an open border, Northern Ireland is already subject to whatever immigration and visa policies are enacted by the Irish government. However the reciprocity of the CTA has allowed the UK government to exert a degree of influence and control. In terms of non-EU citizens, Ireland and the UK currently maintain common travel visas for Indian and Chinese travellers and proposals were on the table to extend these joint arrangements to travellers from other countries prior to Brexit.⁶ Bilateral harmonisation of Irish and UK visa arrangements for other non-EU countries might appear to offer a means of closing the “backdoor” to the UK and Northern Ireland without the need for intrusive measures at the land border, but issues remain. First, such arrangements depend upon strong bilateral cooperation between Ireland and the UK. Far from the UK “taking back control” with regard to its borders, an important element of its policy will rely upon the practices of another state. Second, Ireland as an EU state does not control its own visa arrangements with regard to many non-EU countries. Where EU-third country visa waiver schemes are in place, the UK will have to agree to stay in line with EU policy if it is to make an arrangement with Ireland work.

UK withdrawal from the EU raises two sets of critical issues. It will change how the border operates and will affect the lives of both UK and Irish citizens living in each other’s jurisdictions.

How can the EU and Brexit affect the CTA?

The CTA is not, at this time, problematic from the perspective of the EU. This is primarily because most of the important rights available to UK and Irish nationals under the CTA are duplicated in EU free movement/citizenship law. There are minor differences, but on points where there is no EU legislative competence – such as voting in national parliamentary elections. However, as will

⁵ This route to the UK relies on gaining access to Ireland first. It is therefore unlikely that the sort of Calais migration crisis would be repeated in Larne or Belfast, as undocumented migrants and those without the right to travel to Ireland would have to overcome checks at Irish ports and airports.

⁶ See P. Hosford, ‘It’s going to be easier for tourists to come to Ireland and the UK from today’ *Journal.ie* (6 Oct 2014).

be shown below, the overlap of rights that makes the CTA unproblematic under EU law falls away when the UK ceases to be an EU member state.

Duplication

The CTA and the EU treaties both provide a range of similar rights for UK and Irish citizens. For instance, welfare rights stemming from the CTA are virtually identical to those that any EU citizen possesses. Indeed, the UK's welfare setup is focused on the CTA: several UK welfare rights require prior residency in the CTA. This effectively means that those living in Ireland can move to the UK and access social security benefits as if they had been resident in the UK. While all EU nationals living within the CTA for a specific period can access these benefits, the rule was clearly established to benefit Irish and UK nationals moving between the two countries.

The more controls that are imposed by the EU, the weaker the CTA will become. It is possible, especially if Ireland remains outside of Schengen, that it will continue in name. But the reciprocity and current substance of the CTA will have to be modified when the UK leaves the single market.

While much of the 'special relationship' has simply been part and parcel of being an EU Member State, the CTA has remained an important background influence. This is why both Ireland and the UK opted out of the Schengen agreement. Opting out was quite remarkable, as the agreement encompasses all other EU members as well as some non-EU states such as Norway, Switzerland, Iceland and Lichtenstein. The UK did not wish to join, and by all accounts, Ireland subsequently declined joining so as to preserve its 'special relationship' with the UK.⁷

Had Ireland joined Schengen then, and if it now decides to do so, the CTA would face substantial threats. If Ireland is in Schengen it's connection to the rest of the EU becomes stronger and there are fewer checks and barriers between Ireland and the continental EU. Where there are reduced checks on entry into Ireland, there will be increased checks at the Irish border.

If Ireland does not join Schengen, the CTA might survive. However, unless the UK chooses to remain within the European Economic Area (EEA) or another form of customs union, access to the common market would still have to be regulated and restricted. This would mean some form of checks about what and who is flowing between Ireland (and the common market) and the UK. If Ireland is outside Schengen, there would continue to be some checks on entry to Ireland, and therefore checks at the Northern Ireland-Ireland border might be somewhat less onerous.

If the UK fully withdraws from the EU as now seems likely, Ireland faces difficult choices. Whether or not Ireland chooses to join Schengen, and there maybe pressure on it to do so, the EU (and not Ireland) would determine how the Ireland-UK border would operate. The EU will have significant control in determining how UK nationals gain access to Ireland, whether as visitors or residents.

"But I want to be clear. What I am proposing cannot mean membership of the single market."

PM Theresa May (17 Jan 2017)

This is because the border between Ireland and Northern Ireland would become the EU's external border and thus the EU and its member states would

⁷ See B. Ryan, *ILPA EU Referendum Position Papers 8: The implications of UK withdrawal for immigration policy and nationality law: Irish Aspects* (18 May 2016).

have an interest in controlling the movement of goods and services. Indeed, the implementation of such controls would be a necessity in order for the EU common market to function. Ireland would have little ability to resist such controls as they are so central to the EU's purpose.

Separation

At present the EU Treaties make allowance for the operation of the CTA.⁸ But the factors that make operating a CTA between Ireland and the UK unproblematic at present are going to be substantially altered by Brexit. Primarily, the CTA will cover territories of which one is *within* the EU, and the other is *fully external* to the EU.⁹ There is no significant precedent governing this type of situation in the EU's history; the closest comparator is the Faroe Islands, when it did not join the Schengen area, but the remainder of the Nordic Passport Union did. However, the relationship between the UK and Ireland is not going to replicate this, not least of all because neither country is in Schengen, and the traffic that crosses the land border is substantially greater.

The main tenet of the CTA is that UK nationals in Ireland are treated as equivalent to Irish nationals in Ireland in almost all respects, and vice versa. What this means, post Brexit, is that without any changes to the CTA, non-EU nationals (ie UK citizens) are being granted EU-level rights (and indeed further rights, in those areas where the CTA expands on EU citizenship rights) in an EU member state. There is simply no precedent for this. It is hard to imagine that this will sit comfortably with the notion that EU citizenship is the 'fundamental status' of all EU nationals – there is little 'fundamental' about a status that can then also be granted to nationals of a third country. Indeed, while the EU has no automatic competence over third country migration policy in the Member States who are not party to Schengen, and thus technically does not currently fully determine Ireland's third country immigration policy, there is no EU Member State that offers nationals from *outside* of the EU a better status in an EU Member State than EU nationals have.¹⁰ It is not in *principle* prohibited by the EU treaties, but that is a world away from suggesting that there will be *political acceptance* of this kind of relationship among the other 26 EU Member States.

The UK domestic situation is simpler: when it ceases to be an EU Member State, it is perfectly entitled to offer preferential treatment to Irish nationals. However, it is hard to imagine that there is willingness to do this unless such preferential treatment is reciprocal. Consequently, the future of the CTA is more dependent on willingness on the part of the other EU Member States to permit ongoing exceptional treatment than it is on the part of the UK and Ireland to not change it.

What does the UK government intend to do?

It has repeatedly been said by UK ministers that there is no intention to create a 'hard' border across the island of Ireland. Yet, this phrase obfuscates the range of possible outcomes for the border. Similarly, Prime Minister Theresa May has said that one of her 12 negotiating objectives is

⁸ Treaty on the Functioning of the European Union, Protocol 20.

⁹ Theresa May, 'The government's negotiating objectives for exiting the EU: PM speech' (17 January 2017)

<https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>

¹⁰ See C-55/00 *Gottardo v Istituto Nazionale della Previdenza Sociale* [2002] ECR I-413, [34].

to maintain the CTA. However, she has given no indication whether she intends to retain it in its current form.

Hard Borders

While it is highly unlikely that a wall will be built on the border, some (and perhaps especially those living close to the border) might consider other types of border checks to be 'hard'. There might be, for example; spot checks on people travelling across the border, restrictions upon the goods that can be taken across the border, duties to declare goods going across the border, the need for work permits, electronic monitoring of border crossings, the presence of some physical checkpoints.

A combination of these measures will be required to enforce EU customs and immigration laws. Ireland's commitments to the EU, which have been adopted into the Irish Constitution, would take precedent in domestic law over any other treaty-based trade commitment. More light-touch models of customs enforcement (limited spot checks and electronic filing of customs documentation) are practiced on EU borders with EEA countries. However, even in such a scenario Ireland will still have to comply with the requirements of the Union Customs Code and a more onerous arrangement is likely if the border is not an EU-EEA border, but a fully external border.¹¹ Even if a light-touch enforcement model is adopted, many of the costs with administering this system will be passed on to exporters, who will have to apply to the EU for authorised economic operator status to take advantage of such processes.

There are no other 'external' EU borders that do not come with some form of physical border controls. An interesting case study here is the Faroe Islands, which declined joining Schengen when all other members of the Nordic Passport Union did. The consequence of this has been for all Nordic Passport Union countries within Schengen to adopt stringent border controls vis-à-vis the Faroe Islands: those from the Faroe Islands are checked when entering any other Nordic Passport Union states, even though those from other Nordic Passport Union states can still travel without controls to the Faroe Islands. Ireland is not in Schengen at this moment – but even so, the Nordic Passport Union represents the closest analogy to the Common Travel Area that we have, and we can see there that the EU required a protection of the EU's external border regardless of the 'special relationship' between the Faroe Islands and the other Nordic countries. A second example from the region is the border between Norway and Sweden, which as an EU external border. As part of the Nordic Passport Union and Schengen there are not immigration controls between the countries, nonetheless as Norway represents an EU external border Sweden maintains customs checks.

Therefore, while the UK government might argue that it is seeking to avoid a hard border, there is no clarity about the meaning of this. There could still be a range of onerous checks and restrictions put in place, that many would view as 'hard', or at least a significant upset to the established operation of the border.

Maintaining the CTA

¹¹ See T. Walsh, *European Union Customs Code* (Kluwer Law International, 2015).

The UK government's ambiguity on 'maintaining the CTA' might allow it to claim a victory in words, while having faced practical defeat. As noted above, the CTA is not a fixed agreement to be kept or scrapped, but rather a set of shared understandings and legal provisions between the UK, Ireland, the Channel Islands, and the Isle of Man. Those shared understandings could well be hollowed out without the language of the Common Travel Area being abandoned. Indeed, given the Irish government's desire for stability in Northern Ireland it is unlikely that it will signal the formal abandonment of the CTA, no matter how meaningless the term becomes.

To effectively maintain the CTA, there are a number of key features that would have to remain. Primary amongst these is the principle of reciprocity, where the UK and Ireland would continue not to treat each other's citizens as 'aliens'.¹² The benefits flowing from this would also have to be maintained. This means the continued ability of the Irish to travel, live, work, claim healthcare and social security payments, and vote in the UK (and of UK citizens to do the same in Ireland).

Conclusions

The relationship between the EU and the CTA is complex, and has always been. The EU will have to extend considerable leeway to Ireland and the UK's relationship, in light of EU citizenship law, if it is to continue on a reciprocal basis. Now, however the contents of the CTA risk being rapidly unpicked and amidst the conflicting priorities of Brexit negotiations.

As has been outlined here, claims that there will be no 'hard' border or that the CTA will be maintained, should be treated with suspicion. Neither of these are fixed concepts, and detailed scrutiny is needed in order to ascertain in what ways the border will harden and *how much of* the CTA will be maintained.

If the UK leaves the EU and the single market, significant parts of the CTA will necessarily be dismantled and the border will become harder. If Ireland also joins Schengen, the challenges for maintaining the CTA will become more severe.

If, as seems to be the case, the structure of the UK's new relationship with Europe is fixed, then careful attention is needed to the mechanisms put in place at the border and the policies that are to be adopted in the UK and Ireland with respect to each others' nationals. Attachment to the CTA, and the rejection of a 'hard' border are, without clear definition, unhelpful comfort blankets in the context of a changing relationship.

¹² See B. Ryan, 'The Common Travel Area between Britain and Ireland' (2001) 64 MLR 855.