



Jean Monnet Centre of Excellence — Tensions at the Fringes of the EU — regaining the Union's purpose

'Brexit' means 'Brexit', but where is the (un)United Kingdom heading?

With special emphasis on the Northern Ireland question

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Introduction

On 23 June, the UK voted in favour of leaving the European Union by 51.9% to 48.1%. Since then, numerous opinions predicting the direction in which the United Kingdom is heading have been voiced in the printed, broadcast and social media.

Politicians sailing the 'Brexit' boat did not resist giving statements from which the UK Prime Minister quickly distanced herself.¹ There are many questions begging for answers, such as: When will the UK trigger Article 50 TEU? Will constituent parts of the UK be able to attain special EU status in the wake of 'Brexit'? What are the implications of 'Brexit' for the Common Travel Area (CTA) and for the island of Ireland in particular? What are the implications for immigration policy? Will the UK be able to secure a 'Lichtenstein model' for itself, limiting

immigration while benefiting from other achievements of the Single Market? Is the 'Swiss model' a 'Brexit' option in this regard and would the UK unilaterally decide to limit immigration? Alternatively, could the 'Norway model' work for the country?

Without pretending to give answers to all questions surrounding the 'Brexit' and UK's future outside the EU, this policy paper summarises the current stance of the UK; the relations between the UK in general -and Northern Ireland (NI) in particular- with neighbouring Ireland; and alternative models for a future UK/EU relationship. The paper is largely based on an experts' discussion that took place at Queen's University Belfast on 15 September 2016.² It addresses the questions

¹ See, for instance, Theresa May's spokesperson statement in respect to David Davies comment over the UK's possibility to stay in the Single Market, available at: <http://uk.businessinsider.com/brexit-theresa-may-david-davis-single-market-improbable-not-government-policy-2016-9> last accessed 28 September 2016; See also, the most recent

statement of Theresa May's spokesperson in respect to Boris Johnson's 'Brexit' timeline, available at: <https://euobserver.com/uk-referendum/135207> last accessed 28 September 2016.

² A number of experts from all around Europe gathered on 15 September at Queen's University Belfast to discuss UK's post-Brexit future at the

raised above, in addition to providing experts' opinion on each topic.

This paper is divided in two parts. The first part discusses the current stance of the UK and the possible impact of 'Brexit' on the constituent parts of the country. In doing so, its primary focus is on the essential paradigms and post-'Brexit' perspectives for Northern Ireland. In this part, the first experts' comment³ considers the possibility of a future (hard) border between Northern Ireland and the Republic of Ireland, as well as the possible overall 'Brexit' impact on the CTA and the island of Ireland. The second experts' comment⁴ looks at the possibility for a special status of the constituent parts of the UK that voted to stay in the EU, by analysing the experience of Greenland.

The second part of the paper looks at the possible alternative models of post-Brexit UK. The experts' commentaries in this part hinge on three different models as possible solutions for the uncertain future UK/EU relationship: a) the 'Liechtenstein model' as a possible way of limiting immigration while participating in the Single Market;⁵ b) the 'Swiss model' as a possible 'Brexit' solution and the possibility to unilaterally restrict immigration;⁶ and c) the 'Norway model' as an option for the future of UK/EU relationships.⁷

The third and last part of the paper draws conclusions based on the discussions surrounding the questions above as well as the experts' commentaries.

Part I

Brexit: what happens now?

Today, over three months after the referendum, UK's future outside the EU can hardly be predicted. Theresa May, appointed UK's new Prime Minister three weeks after the referendum, made a somewhat decisive statement straight after her appointment: 'Brexit means Brexit and we are going to make

a success of it'.⁸ However, this has brought many uncertainties as to what this means for the future UK/EU relationship. The only thing that is probably clear today is that 'Brexit means Brexit' actually means that the UK will definitely leave the EU, or in the words of the Prime Minister: '[t]hat means there's no second referendum; no attempts to sort of stay in the EU by the back door; that we're

'Northern Ireland at the Edge – what next after "BREXIT"' conference co-organised by the Jean Monnet Centre of Excellence Tensions at the EU Fringes (TREUP) at Queen's University Belfast and the Royal Irish Academy, in cooperation with 'The UK in a Changing Europe'.

³ Trevor Redmond, 'The impact of 'Brexit' on the relationship with Ireland: borders and beyond' (Expert commentary 1).

⁴ Ulrik Pram Gad, 'Reverse Greenland': A possible solution for Northern Ireland?' (Expert commentary 2).

⁵ Sieglinde Gstöhl, 'Can UK hope for a 'Liechtenstein model' (Expert commentary 3).

⁶ Christine Kaddous, 'Switzerland and the free movement of persons: model or a lesson for the UK?' (Expert commentary 4).

⁷ Ulf Sverdrup, 'Experiences from Norway' (Expert commentary 5).

⁸ Theresa May's statement is available at <<http://www.standard.co.uk/news/politics/theresa-may-brexit-means-brexit-and-were-going-to-make-a-success-of-it-a3293311.html>> last accessed 28 September 2016.

actually going to deliver on this'.⁹ What is less clear, however, and what the Prime Minister has not revealed so far, is how the UK is 'going to make a success of it'.

This is certainly a cause for great concern not only for interested citizens or scholars working on this issue, but also for the constituent parts of the UK who voted to remain within the EU, namely Scotland and Northern Ireland.¹⁰ Both provinces have a genuine concern not only over the future UK/EU relationship but also over their role in the 'Brexit' negotiations and post-Brexit status. As the Scottish First Minister, Nicola Sturgeon, has recently emphasised, Theresa May must clarify a number of questions regarding what 'Brexit' actually means, as these are fundamental both to the Scottish economy and to people of Scotland. Three important questions that need an answer, according to her, are the following: a) Is the UK's objective to remain in the Single Market? b) Will UK citizens need visa to travel to Europe? c) Will workers' rights be guaranteed?¹¹

Scottish concerns increased after certain indications that the UK might be heading for a 'hard Brexit', i.e. the intention to merely negotiate trade deals with the EU rather than continuing access to the Single Market through membership of the European Economic Area (EEA).¹² Moreover, the possibility of a 'hard Brexit' strengthens the fears of imposing a

hard border between Northern Ireland and the Republic of Ireland, although such possibility seemed to be excluded by the key 'Brexit' player, Prime Minister May.¹³ Yet, the question of borders might not be one decided entirely by the UK and Irish governments, as discussed below.

Another uncertainty is related to the question of if, and when, Article 50 TEU will be invoked. While there are many speculations and even public statements by politicians as to when this may happen, Prime Minister May remains somewhat reticent on that particular question. However, what is clear is her intention to invoke Article 50 without a vote in Parliament, although this has been challenged by 'People's Challenge' - a group of 'concerned British citizens' who has won right to publish the Government Defence in the case.¹⁴ The main argument of Government lawyers is that the UK Executive has a royal prerogative to trigger Article 50 without prior Parliamentary vote. As noted by Government's lawyers:

The giving of notification under Article 50(2) of the UK's decision to withdraw from the EU is and act within the treaty prerogative of the Crown which takes place and has effect only on the international law plane. The appropriate point at which to issue the notification under Article 50 is a matter of high, if not the highest policy; a polycentric decision based upon a multitude of domestic and foreign policy and

⁹ Theresa May informing her cabinet, statement available at: <<http://www.telegraph.co.uk/news/2016/08/31/theresa-may-should-not-negotiate-the-unnegotiable-and-get-britain/>> last accessed 29 September.

¹⁰ While England (53.4%) and Wales (52.5%) voted to leave the EU, Scotland (62%) and Northern Ireland (55.8%) backed strongly staying in the EU. Gibraltar also voted to remain within the EU (96%).

¹¹ See, in more detail, <<http://www.dailyrecord.co.uk/news/politics/nicola-sturgeon-demands-theresa-comes-8901050>> last accessed 28 September 2016.

¹² David Davies' comment (n 1) was the first announcement of such possibility, from which the Prime Minister initially distanced itself. However, the concerns in this respect have now grown. See,

for instance, the warning of the Scotland's external affairs minister, Fiona Hyslop, available at: <<http://www.reuters.com/article/us-britain-eu-scotland-idUSKCN11W1BS>> last accessed 28 September 2016.

¹³ See, for instance, Theresa May's statement in this respect:

<<http://www.standard.co.uk/news/uk/theresa-may-agrees-to-no-hard-border-between-northern-ireland-and-the-republic-postbrexit-a3305131.html>> last accessed 28 September 2016.

¹⁴ The complete legal defence and detailed legal submissions of 'People's Challenge' is available at: <<https://www.bindmans.com/news/peoples-challenge-group-win-right-to-publish-secret-government-defence-in-b>> last accessed 28 September 2016.

*political concerns for which the expertise of Ministers and their officials are particularly well suited and the Courts ill-suited.*¹⁵

Opinions of scholars and practitioners as to whether or not the Government can trigger Article 50 without a Parliamentary vote are divided.¹⁶ Should the Court decide that the referendum vote must be approved by

Northern Ireland after Brexit

It has been said that Northern Ireland is 'different from the rest of the United Kingdom not just because of its geographical detachment from Britain, but also because of its historical and contemporary systems of devolved [G]overnment'. Gordon Anthony has analysed a number of implications of Brexit for the governance of Northern Ireland, with regards both to its relations with the Republic of Ireland and to equality and human rights law. In his view, the latter is particularly worrying since this legislative framework, which has been central to the peace process, may lose effect as a result of a repeal of the Human Rights Act 1998 and its substitution for a British Bill of Rights, as pledged by the Conservative party in the context of Eurosceptics' criticisms of the ECHR.¹⁷

On the other hand, the impact of 'Brexit' on the Common Travel Area (CTA), which allows for free movement of UK and Irish citizens, is yet

Parliament before Article 50 is invoked, 'Brexit' may be substantially postponed, or may indeed, never happen. On the other hand, if the outcome of the case is that the Government can invoke Article 50 as an act of royal prerogative, this article provides for two years of negotiations. Moreover, this period may be extended by unanimous decision of the European Council, in agreement with the Member State concerned.



unknown amid political promises that this will be unaffected. Opinions over the CTA and future relations with neighbouring Ireland are divided. Thus, while Martin McGuinness cannot see how the CTA can survive 'Brexit' negotiations, others think that 'Brexit' may not affect the CTA.¹⁸

¹⁵ Detailed grounds of resistance on behalf of the Secretary of State, pt 15, available at: <<https://www.bindmans.com/news/peoples-challenge-group-win-right-to-publish-secret-government-defence-in-b>> last accessed 29 September 2016.

¹⁶ See the House of Lords Select Committee on the Constitution 4th Report of Session 2016–17, 'The invoking of Article 50', available at: <<http://www.publications.parliament.uk/pa/ld201617/ldselect/ldconst/44/44.pdf>> last accessed 29 September 2016.

¹⁷ Gordon Anthony, "'Britain Alone': A View from Northern Ireland" in Patrick J. Birkinshaw and Andrea Biondi (eds), *Britain Alone! The Implications and Consequences of United Kingdom Exit from the EU* (Kluwer Law Alphen aan den Rijn) 57.

¹⁸ See, for instance, Bernard Ryan, 'The implications of UK withdrawal for immigration policy and nationality law: Irish aspects' (ILPA, 2016), available at: <<http://www.ilpa.org.uk/resource/32154/eu-referendum-position-paper-8-the-implications-of-uk-withdrawal-for-immigration-policy-and-national>>. See, also, Melanie Gower, 'The Common

However, as noted by David Phinnemore and Lee McGowan:

*If a post-Brexit UK opts out of the free movement of people then the Irish border becomes the external border of the EU. This poses serious questions for the sustainability of the CTA with all the economic, political and social consequences that may entail.*¹⁹

There is always a possibility of establishing bilateral agreements between the Republic of Ireland and the UK giving special status to Irish citizens. However, as Prof. Dagmar Shiek remarks, these agreements will require to be seconded not just by the Republic of Ireland but by the EU as a whole.²⁰



Expert commentary 1:

The impact of 'Brexit' on the relationship with Ireland: borders and beyond

Prior to the referendum, the Irish Government made known its concerns as regards the potential implications of a withdrawal from the EU for Northern Ireland, and for the peace process in particular. Emphasising the Irish government's role as co-guarantor of the [Good Friday Agreement](#), at a [speech to the University of Ulster](#) Taoiseach Enda Kenny confirmed that the Government's top priority was to ensure the continued success of the peace process.

Early on the 24th June, as the referendum result was confirmed, he again made clear that the implications of the vote for Northern Ireland, and for relations between North and South, would be a particular priority for the Irish Government. New doubts have been cast over fragile questions of identity, while an important context in which the [Good Friday Agreement](#) was arrived at has been altered. The rights of the people of Northern Ireland to exercise their right of self-determination, or to identify themselves as British or Irish or both, will now entail a relationship between an EU Member State and a non-EU country. Legal questions arise as to how the possibility of a change in status might be accommodated in a future architecture. Similarly, unique issues will arise from the fact that, notwithstanding withdrawal, the people of Northern Ireland maintain a right to EU citizenship through Irish nationality.

Travel Area, and the special status of Irish nationals in UK law' (House of Commons Library, Briefing Paper No. 7661 of 15 July 2016).

¹⁹ David Phinnemore and Lee McGowan, 'After the EU Referendum: Establishing the Best Outcome for Northern Ireland' *EU DEBATE NI*, available at:

<<http://democracyandpeace.org/wp-content/uploads/2016/09/Establishing-the-Best-Outcome-for-Northern-Ireland.pdf>> last accessed 29 September 2016.

²⁰ House of Commons, "Northern Ireland and the EU Referendum", HC 48, May 2016.

Accordingly, when it comes to Northern Ireland, unique features arising from being outside of the EU but retaining important connections with a Member State, will need to be reconciled. Whilst it is often said that the border will become an external frontier of the EU, what can this mean in practice when faced with such a unique context?

a) The particular importance of the open north-south border

As well as the overall issue of the [Common Travel Area](#) (CTA), the specific question of the open border with Northern Ireland is complex and multi-faceted. It is not just a legal entity, its openness is also a state of mind and in its current form a powerful symbol of progress and reconciliation. It is also a vitally important driver of economic and social co-operation. People, goods and services move in their tens of thousands each day. Vehicles and trains carry workers, tourists and indeed livestock back and forth across the 500km-long border. Maintaining the absence of a hard border is a key priority for the Irish Government, which has also more widely [committed](#) to do its 'utmost in upcoming discussions to maintain the Common Travel Area and minimise any possible disruptions to the flow of people, goods and services between these islands'.

Reflecting the fact that the entire Brexit process is an EU-wide one, the Government has already engaged extensively with EU partners over the summer, with Minister Flanagan having spoken to each of his 27 counterparts, and the Taoiseach having met with Prime Minister May, Chancellor Merkel, President Hollande and others. These exchanges have confirmed the appreciation our partners have for the unique situation to which the border gives rise. In parallel with these contacts, ongoing meetings with the UK Government and the NI Executive continue. The Minister for Foreign Affairs and Trade, Charlie Flanagan T.D., met with David Davis (Secretary of State for Exiting the EU) on 8 September and met with James Brokenshire (Secretary of State for Northern Ireland) on 13 September.

a) Common Travel Area

Whilst, as mentioned above, references to the [CTA](#) may often encompass both trade and the movement of persons, the focus here will be on the latter.

Although the idea of the [CTA](#) is straightforward in principle, its history and parallel legal basis in Irish and British law and practice is highly complex, and more convoluted than might first be thought. While it is often noted that the [CTA](#) between the UK and Ireland pre-dates the joint entry of the two countries into the EEC in 1973, it is equally true that the [CTA](#) is entering a distinctly new phase in which one of its members will be within the EU, albeit not in Schengen, while the other is outside it.

[Writing in the Belfast Telegraph on 1 September](#), the UK Secretary of State for Exiting the European Union, David Davis, said: 'We are clear we do not want a hard border - no return to the past - and no unnecessary barriers to trade. What we will do is deliver a practical solution that will work in everyone's interests'. [Speaking on 6 September in the House of Commons](#), SoS Davis also commented that keeping the border between Ireland and Northern Ireland open 'will actually be one of the more difficult elements of the negotiation'. The task of maintaining an open border would, he suggested, 'primarily require an agreement between London, Belfast and Dublin. Brussels will have a say in some respects, but it is down to us', with solutions possibly combining a mixture of the technological and the political.

The extent to which keeping the border open is ‘down to us’ is clearly an important matter that will require careful examination over the coming months. [Addressing the British-Irish Association in Oxford on 9 September](#), the Taoiseach noted the EU-wide dimension to the entire Brexit process and committed to representing Ireland’s national interests to the full:

...we must remember that when it comes to the Brexit negotiations – whether it be on trade, on access to the Single Market, on free movement of people, or on the many other issues that we face - Ireland will be one of 27 Member States who are negotiating with the UK. I will be firm at the European Council, and in all of the negotiations to come, in representing Ireland’s national interests, as a full and committed member of the European Union.

[Professor Schiek has questioned](#) the extent to which the UK and Ireland will be free to reach a bilateral agreement, arguing that Ireland’s continuing duty of loyal cooperation implies that maintenance of the [CTA](#) will have to be renegotiated after the EU has settled its future relationship with the UK as a third country. [Professor Imelda Maher has suggested](#) that regard has to be given to a three-way dynamic: the relationship between Ireland and the EU, the relationship between Ireland and the UK and the relationship between the UK and the EU.

b) The wider immigration issue and the CTA dimension

There is also the central challenge for the new UK Government in terms of agreeing its level of ambition regarding restricting immigration into a post-Brexit UK. A House of Commons [Research paper](#) prepared before the referendum noted that if the UK were no longer part of the EU or EEA, it could impose its own controls on which EU/EEA citizens were admitted to the UK assuming that it did not negotiate a future agreement with the EU (or certain Member States) which required the continued application of free movement law. On whether the UK would be able to apply different visa requirements to different EU/EEA nationalities, the paper recalled that ‘[s]ome experts have noted that the EU’s strong preference is for its third- country partners to apply the same visa conditions to all EU Member States. That makes a ‘pick and mix’ approach potentially difficult to achieve’. A footnote, however, claimed that Irish nationals may be affected differently to other EU/EEA nationals, as they enjoy free movement rights under the [CTA](#) and have a special status in British immigration and nationality law which pre-dates British and Irish membership of the EU. The [CTA](#) also, of course, has a status in EU law by virtue of Protocol No.20 to the TEU and TFEU, as considered by the UK Supreme Court in [Patmalniece v Secretary of State for Work and Pensions](#). The impact, if any, of withdrawal on the [CTA](#) is also, as [Professor Siobhán Mullally of University College Cork has observed](#), likely to be closely intertwined with the nature of the overall withdrawal and future relationship agreements, particularly as regards the free movement of persons. It is sometimes suggested that the [CTA](#) in its current form would prevent the UK from imposing immigration controls on EU nationals, as they could transit to the UK via Ireland. The extent to which this is an issue, however, clearly depends on the future entitlements of EU citizens to live and work in the UK. [Professor Bernard Ryan, for instance, has suggested](#) that a visa regime whereby EU citizens were able to enter the UK without visas for up to three months, could mean that there would be no need to change the [CTA](#). In a similar vein, [Professor Derek Wyatt considers](#) it possible that the existing controls under Operation Gull may continue to compensate for lack of passport controls, and that it may only be in the event of significant changes in migration patterns that consideration would need to be given to introducing additional controls.

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Experiences from ‘Greenland’: A way to keep Scotland and Northern Ireland in the EU?

Greenland exited the EEC in 1985, after three years of negotiations following the referendum held in 1983. Today, it is associated to the EU under the Overseas Association Decision and receives funding from the EU’s general budget through the EU-Greenland Partnership. With a population of a merely 56,7000, it makes a poor comparison with the UK. However, Greenland set a precedent for different countries within the same State to have varying relationships with the EU. A ‘reversed Greenland’ option has thus emerged as one of the models being considered in the public debate around Brexit. This model would see Scotland and other parts of the UK who voted to remain - such as Northern Ireland and Gibraltar- stay in the EU

while the other parts of the UK would leave.²¹ The issue is that, in this instance, it would be the seat of the central government the leaving part. Nonetheless, some see it as a feasible and pragmatic Brexit option. According to Professor of EU law Sionaidh Douglas-Scott²² the difficulties presented by an exit following the ‘Reversed Greenland’ model are not insurmountable:

The EU has a history of flexible and variegated participation that does not always involve single states in homogenous EU memberships

With a reversed Greenland model, the UK would still be an EU member, provided that these territories remain part of the UK.

Expert commentary 2: ‘Reverse Greenland’: A possible solution for Northern Ireland?

Greenland’s exit from the EEC in 1985 is generally a poor precedent for Brexit. Both in terms of process, substance, and the size of the problem. Nevertheless, there might be lessons to learn concerning the importance of constitutional pragmatism and willingness on all sides to play games with sovereignty.

a) How Greenland left the EEC?

When Greenland left the EEC, there was no Article 50 in the European treaties. Nor would such an article have been relevant, since what was taking place was not the exit of a Member State. Rather what happened was that parts of the territory of a Member State were exempted from membership. This was not a unilateral decision; it was formalised in a protocol to the treaties, known as ‘[The Greenland Treaty](#)’, signed by all Member States. As part of the negotiations, Greenland had to agree to special conditions (a fisheries agreement, selling stocks for cash) to receive the preferential status as an associated ‘Overseas Country or Territory’. Initially, negotiations between the EEC and Greenland were handled by Denmark, with mandates cleared with Greenlandic authorities in Nuuk. But increasingly over the years, both the substantial preparations of negotiations and the communication has been taken over by Nuuk. This forms part of a general tendency of devolution within the Kingdom of Denmark. Notably, devolution also involves elements of foreign relations formally core to state sovereignty.

²¹ <https://www.opendemocracy.net/uk/adam-ramsay/reverse-greenland-letting-scotland-stay>.

²² <https://www.opendemocracy.net/uk/adam-ramsay/reverse-greenland-letting-scotland-stay>.

When the Arctic Council was formed in 1996, the Greenlandic Home Rule prime minister signed the founding documents on behalf of Denmark. In 2005, Denmark circulated a [diplomatic note](#) to inform that Greenland and the Faroes could sign bilateral agreements with foreign states (involving only devolved matters. If one looks beyond Denmark, it is not uncommon for states to mandate lawyers, private citizens, NGO representatives – sometimes foreign nationals – to represent them. This was essentially how the history of diplomatic practice began. What matters is that all parties acknowledge the credentials of the representative. In 2013, the Danish authorities even agreed to launch an appeal at the WTO Board of Disputes on behalf of the Faroe Islands against the EU over a fisheries dispute. Formally, Denmark was preparing to launch a case against itself.

b) A Greenland style ‘territorial exemption’ for England and Wales?

Activating Article 50 on the basis of Brexit majorities in England and Wales, would involve the risk of Scottish secession, renewed troubles in Northern Ireland, and severe isolation in Gibraltar. Instead, negotiations could aim at a territorial exemption of England and Wales from UK membership.

The UK would still be a Member State – voting rights reasonably reduced to match the population of Scotland and Northern Ireland. The question of who would represent this Member State, on what mandate, and following what procedures of coordination would have to be solved within the UK. Conceivably, ministers and bureaucrats from Northern Ireland and Scotland would have central roles.

Such a ‘reverse Greenland’ arrangement would leave another, central problem on the table: namely the relationship England and Wales would have with the EU and the Single Market. The solution to this problem would determine the future character of the borders inside the UK.

While the EU might appear to be a rigid legal community, the political processes that generate EU agreements are based chiefly on pragmatism. Greenland’s experience illustrates that it is possible to play games with a state’s sovereignty – and that it can be necessary in order to formally uphold it. Copenhagen has learned that lesson – now the question is whether London will too.

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Part II

Alternative model for the UK

The numerous uncertainties surrounding UK’s vote to leave the EU pose the question of what might be the possible outcome not only for the country but also for its constituent parts from the UK/EU negotiations. Various models have been analysed in this respect. These are, among others, the ‘Swiss model’, the ‘Norway model’, the ‘Liechtenstein model’ and the ‘Reverse Greenland model’, although there is also the possibility of a so-called “hard Brexit”, which would see the UK continuing trade with

European countries only as member of the WTO.

The analysis of these models is certainly helpful amid all the ‘Brexit’ uncertainty, showing not only what other non-EU countries have secured upon their negotiations with the EU but illustrating also in which direction the EU is ready to negotiate.

That being stated, it must be emphasised that the restriction of immigration was a driving

force behind the success of the 'Leave' campaign. Unsurprisingly, Theresa May has insisted that restricting immigration would be at the heart of any future deal between the UK and the EU.²³ However, restriction of immigration would put an end to UK's membership of the Single Market, since access requires acceptance of the four freedoms. Indeed, this is not a 'baloney' as suggested,²⁴ the four freedoms are indivisible. While it is true that certain exceptions to this rule apply in specific circumstances -as testified by the 'Liechtenstein model' described below- such circumstances must be provided for by law. On the other hand, if the UK decided to go for a "hard" Brexit (WTO only model), it would no longer be required to maintain free movement for EU and EEA nationals, yet similar restrictions on movement will likely apply to citizens travelling to, and living in, other Member States.²⁵

It must be emphasised that each of these models will have different impacts on Northern Ireland and on the future relations with the Republic of Ireland. Thus, under a "reversed Greenland Model", Northern Ireland would remain inside the EU. But were Northern Ireland to exit the EU with the rest of the UK, the impact will vary according to the arrangements adopted. That is, the impact of adopting a "Norway model" (UK becoming an EEA/EFTA State) will be softer than going for bilateral agreements ("Swiss model") since those agreements would not give NI the same level of access to the EU than as a member of the Single Market. Furthermore, under the "Swiss model", the UK and Ireland will not be

in a position to agree a bilateral agreement with each other as these are agreed with by all EU members.²⁶ Yet, of all the possible scenarios, a WTO-only model will have the hardest impact on NI and its relations with the Republic of Ireland, since movement across the border might be severely restricted.

Despite the uncertainty surrounding the future of the UK in Europe, what has been revealed so far is that the UK will be heading for a unique deal, i.e. a relationship different from existing models of European states and based on the economic strength of the country. As noted by Theresa May's spokesperson:

*Several cabinet members made it clear that we are leaving the EU but not leaving Europe, with a decisive view that the model we are seeking is one unique to the United Kingdom and not an off-the-shelf solution. This must mean controls on the numbers of people who come to Britain from Europe but also a positive outcome for those who wish to trade goods and services.*²⁷

Prime Minister May and the Secretary of State for International Trade and President of the Board of Trade, Liam Fox, suggested that EU would be interested in such unique deal. As noted by May:

*The 27 will sign up to a deal with us. We will be negotiating with them and we will be ambitious in what we want to see for the United Kingdom.*²⁸

²³ As reported by *The Guardian*, available at: <<https://www.theguardian.com/politics/2016/aug/31/restricting-immigration-will-be-at-heart-of-brexit-deal-theresa-may-says>> last accessed 30 September 2016.

²⁴ As reported by *The Guardian*, available at: <<https://www.theguardian.com/politics/2016/sep/23/france-and-germany-brush-off-johnsons-eu-baloney-jibe>> last accessed 30 September 2016.

²⁵ See Government report on alternatives to membership (Alternatives to Membership: possible models for the United Kingdom outside the European Union) available at: <https://www.gov.uk/government/uploads/system>

/uploads/attachment_data/file/504661/Alternatives_to_membership_possible_models_for_the_UK_outside_the_EU_Accessible.pdf

²⁶ See <https://assets.kpmg.com/content/dam/kpmg/pdf/2016/06/ie-brexit-a-northern-ireland-perspective.pdf>

²⁷ As reported by *The Guardian* (n 27).

²⁸ As reported by *The Telegraph*, available at: <<http://www.telegraph.co.uk/news/2016/09/19/theresa-may-rounds-on-eu-leaders-who-criticise-brexit-telling-th/>> last accessed 30 September 2016.

As noted by the Fox:

To all those who have doubts about Britain's ability to achieve economic success outside the European Union let me just give you two facts. First, if we take the top 10 markets where the UK has a trade surplus only one of them, Ireland, is in the EU. And if we look at the 10 markets with which the UK has a trade deficit, seven out of the 10 are in the EU. It is, therefore, very much in the interests of other EU states that Britain and they makes a success of Brexit and our new relationship.²⁹

Experiences from Liechtenstein: a suitable model for the UK?

Liechtenstein is a fully-fledged EEA member state, but has restrictions on the free movement of people. Immigration is the first concern of the UK Government and a driving force behind the 'leave' vote at the referendum, so the 'Liechtenstein model' might be attractive for the UK Government. Indeed, a number of European countries have been allowed to put in place tougher immigration measures than the UK, while retaining access to the Single Market. In an interview with Vicky Ford³¹, Conservative MEP and Chair of the EP's Committee on the Internal Market

If you look at a country like Liechtenstein, in the EEA, they have access to free movement of goods within the single market [but they] have an absolute cap on the number of people given residency a year – and it is only 90 people.

Whether such model is realistic in the case of the UK is a rather different matter. While the case of Liechtenstein sets a precedent, European leaders have already stated that, if restrictions to free movement are imposed, the UK will not have full access to the Single

Indeed the importance of UK's economy must not be underestimated as a factor which may be taken into account during the negotiation process. And it remains to be seen to what extent the EU is ready to give up its main achievements embodied in the four freedoms and the principle of their indivisibility in order to achieve what is said to be an economically justified deal with the UK. Put it differently, it is questionable whether EU's principles are up for sale, and at what price. What might be clearer, however, is that UK citizens might accept 'hard Brexit' only if it comes for free.³⁰

Market.³² Furthermore, as EU leaders will want to prevent other countries to follow the UK's lead, they are likely to maintain a tough stance at the negotiating table.



²⁹ Ibid.

³⁰ See Eric Kaufmann's survey in this respect at <<http://blogs.lse.ac.uk/politicsandpolicy/hard-brexit-only-if-its-free/>> last accessed 30 September 2016.

³¹ <https://www.theguardian.com/politics/2016/oct/09/liechtenstein-solution-key-to-softer-brexit-tory-mep>.

³² Ibid

**Expert commentary 3:
'Can UK hope for a "Liechtenstein model"?'**

[The Agreement on the European Economic Area](#) (EEA) has since 1 January 1994 extended the internal market's four freedoms as well as horizontal and flanking policies to the members of the European Free Trade Association (EFTA), except for Switzerland. Excluded are the common agricultural and fisheries policies, budget contributions, regional policy, taxation, economic and monetary policy as well as the EU's external relations. All EFTA countries have also concluded bilateral agreements with the EU, for instance governing participation in Schengen.

Liechtenstein joined the EEA on 1 May 1995 after two positive national referenda in 1992 and 1995. The principality became a full member of EFTA (to which it was indirectly associated since 1960) and of the World Trade Organisation only in 1991 after the bilateral customs treaty with neighbouring Switzerland was adapted to allow for the parallel membership of both countries. This treaty revision became necessary because trade negotiations started to go beyond trade in goods for which Liechtenstein had since 1924 delegated treaty-making power to Switzerland. In December 1992 Switzerland rejected EEA membership by a narrow margin, whereas the citizens of Liechtenstein approved it one week later. Maintaining the much appreciated customs union and open border with Switzerland while joining the EEA – a far-reaching free trade area – required innovative adaptations of several bilateral Swiss-Liechtenstein agreements.

This 'squaring of the circle' was rendered possible by to the political will on all sides in view of the democratic votes, the tiny territory of the principality and the fact that Art. 121(b) [EEA Agreement](#) had already recognised the regional union. Part of the solution was the introduction of 'parallel marketability' of goods in Liechtenstein (that is, both EEA and Swiss rules apply at the same time) and the creation of a national market surveillance and control system.

The [regular assessments](#) of Liechtenstein's EEA membership in the past two decades have overall been positive. Despite limited human resources and administrative capacities, the principality heavily invested in its public administration and found efficient solutions to comply with its international obligations, such as strategic prioritisation, outsourcing or so-called 'modular decrees' implementing EEA law.

The EEA's 'quasi-supranational' institutional set-up and the dynamic incorporation of around 300 new EU acts every year certainly pose a challenge for a small country and might be interpreted as a democratic deficit. However, Liechtenstein enjoys [more participation](#) in the EEA's so-called 'decision-shaping phase' than it does in its regional union with Switzerland. Moreover, it is directly and equally represented in the relevant EFTA and EEA bodies, a status often denied in international organisations. Finally, the principality has by far the highest number of 'opt-outs', although most of them are of a technical nature and may, for instance, simply result from a lack of regulatory need. The most prominent and politically most sensitive opt-out is the 'special solution' which allows a quantitative restriction on the number of new residents.

a) [The special arrangement for free movement of persons](#)

The 'special solution' was the outcome of a longer process. The [EEA Agreement](#) contained in [Protocol 15](#) a standard transitional period (until the end of 1997) and a review clause which foresaw to jointly review the transitional measures 'duly taking into account the specific geographic situation of Liechtenstein'. In the context of the negotiations adapting the EEA Agreement to the revised Liechtenstein-Swiss regional union, the Liechtenstein Government obtained in 1995 an

additional joint declaration with the EEA Council ([Decision 1/95](#)). This declaration recognised Liechtenstein as a very small area of rural character with an unusually high percentage of non-national residents and employees. It also acknowledged the principality's vital interest in maintaining its own national identity.

In view of the expiry of the transitional period as of 1998 and the failure to negotiate a solution on time, the Liechtenstein Government invoked the safeguard clause of the [EEA Agreement](#) (Art. 112) which allows a contracting party to take unilateral measures 'if serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persist are arising'. In 1999 the EEA Joint Committee agreed in [Decision 191/1999](#) – under Liechtenstein's chairmanship and without the need for ratification by the contracting parties – to extend the transitional period until the end of 2006 because the principality's situation still justified the maintenance of special conditions.

Before the expiry of that second transitional period, the EU had to enter negotiations with the EEA EFTA countries on the enlargement of the EEA to the ten new EU Member States (Art. 128 [EEA Agreement](#)). On this occasion, the special solution for Liechtenstein was in 2004 incorporated as a 'sectoral adaptation' to Annexes V (free movement of workers) and VIII (right of establishment) of the [EEA Agreement](#). It thus no longer expires automatically but became a 'quasi-permanent' exception, subject to a review every five years. The later EEA enlargement agreements (Bulgaria and Romania, Croatia) followed this example.

As a result, the free movement of persons applies to Liechtenstein, but EEA citizens wishing to live in the country have to obtain a residence permit. The number of permits is limited, with a yearly net increase. There are no restrictions preventing family members of holders of a residence permit from joining and they also have the right to take up an economic activity.

The authorities shall grant the new permits (minimum of 56 permits for economically active and 16 for economically inactive people) in a way that is not discriminatory and does not distort competition. In order to guarantee equal chances, half of them are granted by a ballot procedure. The number of applications for residence permits exceeds the allocable quota by multiple times. Yet, obtaining a residence permit is not a requirement to work in Liechtenstein, and many people commute on a daily basis from neighbouring countries.

b) Liechtenstein as a model for the UK?

The special solution applying to Liechtenstein is closely linked to its tiny territory (160 km²) and high number of foreigners in its resident population of 37.000 people (about one third and two thirds of the workforce). No EU or EEA EFTA state has so far contested Liechtenstein's limited absorption capacity. This arrangement is not likely to constitute a model for the UK or for other countries with a comprehensive access to the EU's internal market, with the possible exception of Andorra, San Marino and Monaco. Unlike Liechtenstein, these three small-sized countries are part of the EU's customs union and have concluded bilateral monetary agreements which allow them to use the Euro. They are since March 2015 negotiating a multilateral (or several bilateral) framework association agreement(s) with the EU which envisage(s) improved market access, special consultation arrangements and an independent monitoring and enforcement of the *acquis*, possibly by the EU institutions. This is in line with the [declaration on Article 8 TEU](#), introduced by the Lisbon Treaty, in which the EU promises to 'take into account the particular situation of small-sized countries which maintain specific relations of proximity with it'.

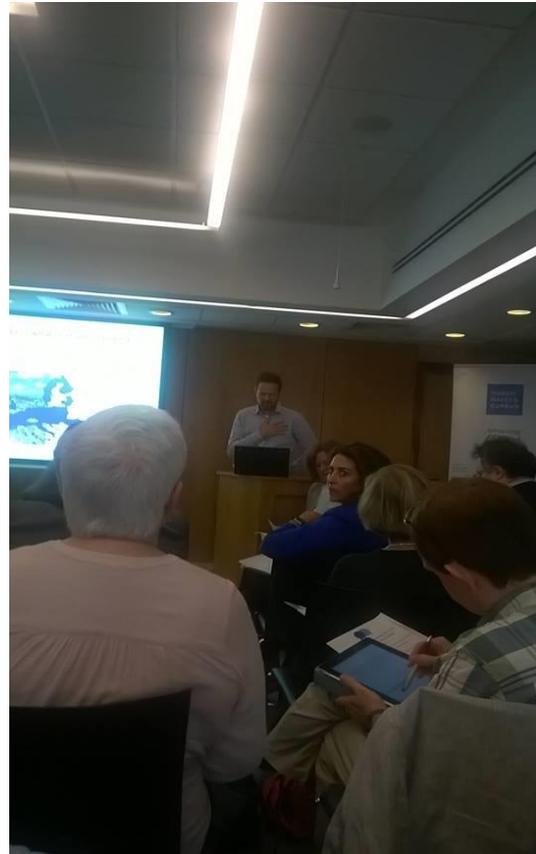
Sieglinde Gstöhl,

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'Swiss model' for the UK?

Switzerland is not a member of the EU, nor of the EEA (Swiss voters rejected the agreement on the EEA in 1992). However, there are about 120 bilateral agreements that provide Switzerland access to EU markets, while their implementation obliges to take over relevant Community legislation in the covered sectors.

Switzerland was able to gain selective access to the Single Market only on condition of accepting the EU principle of free movement of persons. However, in February 2014 the Swiss voted narrowly for quotas on EU immigration, in direct contradiction with that principle.³³ This could put an end to the bilateral relations between the EU and Switzerland - so far, the EU has not agreed to re-negotiate the terms of the agreement³⁴. It is not clear how a Swiss model could be workable for post-Brexit UK and whether EU leaders will be cooperative in this respect, especially given that the EU and Switzerland bilateral relations are becoming more cumbersome over time.



³³ <https://www.ft.com/content/e4c7f5a0-4288-11e6-b22f-79eb4891c97d>

³⁴ <http://ukandeu.ac.uk/is-the-swiss-model-a-brexit-solution/>

Expert Commentary 4:

Switzerland and the free movement of persons: A model or a lesson for the UK?

The Swiss Confederation, located in the very heart of the European continent, is not a member of the EU, nor indeed of the EEA. Even so, Switzerland's relations with the EU are dense and intense and in constant evolution. They have been developed in an *ad hoc* way and are founded on specific institutional mechanisms. Some twenty five agreements of primary importance together with more than one hundred and twenty or thirty secondary agreements are linking Switzerland with the EU today.

a) The Free Movement of Persons agreement

The 1999 [Free Movement of Persons \(FMP\) agreement](#) confers upon the citizens of Switzerland and of the EU Member States the right to freely choose their place of employment and residence within the national territories of the contracting parties. This is conditional, however, on possession by the individuals concerned of a valid employment contract, being self-employed, or in the case of their not being in gainful employment, proof of financial independence and full health insurance coverage. The [FMP Agreement](#) provides for a phased introduction of the ground rules for the free movement of persons between Switzerland and the EU. It lays down transitional periods during which immigration can be restricted. National 'accompanying measures' have also been adopted in order to protect employees, by ensuring compliance by the employers of the pay and working conditions in Switzerland.

[The Agreement](#) is applicable today to all the EU Member States, except Croatia. Difficulties did appear in relation to this last extension due to the vote on the initiative against mass immigration which took place in February 2014. The Swiss people and the cantons adopted a [popular initiative](#) aiming at stopping mass immigration (50.3 per cent of the population voted in favour of the initiative, this made a difference of 19'526 votes). They thereby expressed their support for a change of system in [Switzerland's immigration policy](#). The constitutional text – [Article 121 a](#) - requires the introduction of a new admissions system for foreign nationals within three years that allows Switzerland to control and limit immigration while maintaining its general economic interests. The free movement of persons between the EU and Switzerland will continue to apply until legislation implementing the constitutional provision comes into force.

The new article is not compatible with the FMP Agreement, which has to be renegotiated within three years since the vote. The Swiss Government adopted a mandate for negotiations with the EU, the aim of which is to allow a better control of migration and the safeguard of the bilateral agreements. The Swiss Government started consultations with the EU: seeking a mutually acceptable solution with the EU. However, as the Government is bound by a deadline of three years from the vote, it launched in parallel the drafting of a [unilateral safeguard clause](#). This clause would enable to allow the independent control of immigration by imposing temporary and targeted restrictions on permits for persons from EU Member States. The question that arises is how to draft such a clause without being contrary to the FMP agreement. This is the difficulty of the Swiss situation as to the free movement of persons.

b) Model or lesson for the UK?

If the UK is **thinking** of a participation to the internal market freedoms without the free movement

of persons, it may find itself in the same kind of situation as Switzerland that has been told that: *The principle of non-discrimination, including equal treatment of all EU Member States, the right to exercise an economic activity and reside on the territory of the other party and the standstill clause constitute the essential basis of the consent of the EU to be bound by the agreement. Renegotiating these principles with the objective of introducing quantitative limits and quotas, combined with a preference for Swiss nationals would be in fundamental contradiction to the objective of the Agreement on the free movement of persons* ([EU letter, July 2014](#)).

‘Norway model’ for the UK?

The ‘Norway option’ is very often brought to the public debate on the future of the UK after Brexit. Under this arrangement, the UK would have access to the Single Market through membership of both the EEA and EFTA and would have to comply with EU legislation, including the core principle of free movement of persons, goods and services. In the words of Sir Stephen Wall³⁵:

The sovereignty taken back with Brexit would be more theoretical than real. Anyone who believes that Britain’s former partners would allow us the benefits of the single market with none of the shared responsibility of reciprocity, including on the free movement of people, would, I am convinced, quickly be proved wrong.

Nonetheless, as a member of EEA/EFTA State, the UK would have an input in the shaping of EU legislation through its participation in a myriad of committees, and would be consulted on draft EU measures.³⁶ One question that is not clear is whether EFTA members will be willing to expand by welcoming back the UK as a returning partner. Yet, in an article analysing possible futures of the UK post-Brexit, Burke, Hannesson and Bangsund³⁷ do not foresee any problems with joining EFTA, contending that EFTA governments “are likely to be happy about procuring a far-reaching free trade agreement with the UK, as well as the added influence which UK membership would garner for EFTA”.

Expert commentary 5: Experiences from Norway

In the [Nordic countries free movement and passport free travel](#) was introduced very early – in the 50s and 60s of the previous century. When Sweden joined the EU in 1994, this was maintained. Borders only became problematic for Norway with the amendments on border controls introduced by the [Amsterdam treaty](#). Some of the arising questions included the border of Sweden as EU’s external border possibly undermining trade with Norway, and other close ties.

³⁵ Wall, Sir Stephen, ‘Leaving the EU?’ European Public Law 22, no. 1 (2016): 66

³⁶ For more details, see <http://www.efta.int/eea/eea-agreement/eea-basic-features#16>

³⁷ Burke, Ciaran; Hannesson, Olafur Isberg & Bangsund Kristin. ‘Life on the Edge: EFTA and EEA as a Future of the UK in Europe’. European Public Law 22, no. 1 (2016): 77

Hence, Norway decided to apply to Schengen, and this was accepted. Norway took on the responsibility to police EU's external border. The domestic selling argument was that Schengen was needed to maintain Nordic cooperation and Nordic travel freedom. Schengen moved Norway closer to the EU.

It opened a new chapter, later on Dublin, Europol and intelligence cooperation as well. This cooperation has been practical and beneficial for Norway. But also noteworthy is that the institutional mechanism is different than the EEA, making it possible for Norway to sit on Council meetings, able to discuss, but not vote.

The Schengen agreement is perhaps something that the UK would like to look closer into.

a) On Norway's relationship to the EU

The overall spirit dominating Norway's relationship to the EU can be described as a constructive participant or a partner in the process of European integration. As such, Norway has been now and then pushed by the EU to further integration, but most often any expansion and new agreements are signed on request of Norway (as for instance, in the fields of climate, energy, justice, security, defense etc.). Norway is not a member of the EU but a member of the EEA. The key element of the EEA is the inclusion of EU legislation in all policy areas of the Single Market, i.e. the four freedoms, state aid, competition rules, public procurement, in addition to following numerous other policies. Roughly speaking, Norway has taken on close to three quarters of EU law. The four main principles of the Norwegian model and the EEA can be summarized as follows:

- **Dynamic:** always updated never updated
- **Uniformity:** legal certainty, court, similar interpretations and implementation
- **None or very limited representation:** integration without representation
- **Financial contribution:** not to the EU budget, but a separate grant mechanism

The above model has worked for Norway and the EU is happy with it, but unhappy with alternative modes of association. However, such model requires lots of technical and legal tweeking, although as long as there is a will, there is a way. That being said, acting as a lobbyist from the outside is difficult and demanding. Particularly when interests are not the same or when they are in conflict. The lesson learnt is that the country can get out of representation, but this a difficult path, and probably not in its interest to get away from integration, some form or the other. It is evident, that all Western European non-members are deeply integrated in the EU, even if they said 'no' to EU membership. What needs to be understood is that in some sense European integration is a deep social, technological, and economic process. It even happened before the EU, but the EU has increased the pace. Therefore, everyone is feeling this gravitational push. Norway has been orbiting the same centre, but just with a little bit more of a distance.

b) Are Norwegian lessons of any value for the UK?

There are many differences between Norway and the UK in terms of size, geography, history, identity, political orientation, and preferences. There are also different optics and perspectives on the problem given that the EEA has been designed as a model to promote integration – initially to prepare for membership. The situation in the UK is different as the main question there is the organization of withdrawal. So there are different commitments, views and sentiments. This creates a fundamental different dynamic. That being said, some lessons can be still learnt from the Norwegian case. To sum these up:

- **There is no escape from integration:** although the UK can also prosper on the outside, this will require hard work and lots of creativity

- **You can't have it all:** the UK will also have to understand that there is a world outside its country – inside the EU – that will like to have a say and that they also have legitimate interests to defend
- **UK's model will probably be messy:** the 'UK model' will be something that few would love, but hopefully many can accept it

The 'UK model' has to be based on a solid dose of pragmatism - and it has to be anchored in a realistic and well-grounded domestic compromise on the direction and the general orientation, not only of the mode of association to the EU, but what kind of society the UK would like to be.

What is clear is that it would be difficult to fit everyone's interests. The EU will certainly be in favour of cooperation, but they are not ready to give much unless one plays by their principles. One thing is for sure – the EU can be a tough negotiator! Future agreement between the UK and the EU will therefore require compromises and pragmatism. The UK will need to know its preferences, and be able to rank their importance, and be ready to give up on quite a few of them. What needs to be kept in mind is that this will not be a nice and stream lined model. It will be a compromise – a domestic compromise between the 'Yes' and 'No' voters, between labour and conservatives, between trade unions and employers. Most compromises stink! Most of them have just a few friends! It is a second best solution! It is more like a patchwork than a nice elegant model!

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Conclusion

This briefing paper has highlighted key issues in relation to the current debate on the future of UK/EU relationship. Drawing on experts' views presented and discussed at a seminar at Queen's University Belfast, the paper described four post-Brexit options including the challenges and opportunities posed by each one of them. Placing a special focus on the situation in Northern Ireland, it examined the impact of 'Brexit' not only on the devolved territory but also on its future relations with the Republic of Ireland, the rest of the UK and the EU. Key questions arising in the context of this discussion concern the future of the North-South border and the CTA.

The foregoing discussion clearly shows that the UK situation is far from simple and hardly resembles those of other European countries

outside the EU to which this policy paper testifies. The long EU membership, the specific ties and possible future borders with a neighbouring EU Member State, the gaps between the UK's and EU's expectations as to the future agreements, the possibility of securing 'special status' for Northern Ireland (but also for Scotland) and the nature of future relations between the EU and the UK are only some of the worries which will dominate UK's politics in the following years. The fact that Article 50 TEU has been only introduced with the Lisbon Treaty in 2009 and never invoked so far adds up to the procedural uncertainties of the whole process. UK's intention to secure 'the best from both worlds' does not make it any easier. So far, there is no example as to how access to the Single Market with restricted immigration can be simultaneously achieved.