

Written Evidence submitted by Professor Dagmar Schiek for the Northern Ireland Affairs Committee's inquiry into Northern Ireland and the EU Referendum

Introduction

This evidence is presented in response to the House of Common's Northern Ireland Affairs Committees call on 18 January 2016 and complements the oral evidence I gave in front of the Committee on 3 February 2016.

I am Professor of Law in the School of Law at Queen's University Belfast, Director of the Centre of European and Transnational Legal Studies, Principal Investigator of the University's Jean Monnet Centre of Excellence "Tensions at the EU's Fringes" (TREUP) and also hold a Jean Monnet ad personam Chair (currently unfunded). A full account of the grants I have obtained throughout my academic career since 1993 can be obtained from my web page (<http://go.qub.ac.uk/schieknew>). This evidence is not part of any funded activity I undertake, but only given in a personal capacity. I do not represent the school of law or the University in making this submission.

As a new UK citizen since last year, who also holds German citizenship, I have practiced EU free movement rights in relocating to the UK. I am thus not wholly impartial on the question whether the UK should leave the EU or not: should the UK leave the EU, it is not certain that the rights guaranteed by free movement would be retained. For example, I might no longer be able to accumulate social security benefits for which I have paid contributions in different countries. My situation is similar with that of many EU citizens in both parts of Ireland, who are more prone to use their free movement rights as economic actors, or as students, than average UK citizens.

Scope of Evidence

Submitting written evidence at such a late stage has the advantage that much has been said already. Accordingly, it is possible to focus on the legal aspects of the two main clusters of problems likely to arise for Northern Ireland specifically should the UK leave the EU. The first cluster of problems is based on the unique position of Northern Ireland within the UK arising from a shared land border with another EU Member State.¹ The second cluster of problems results from special relations between the UK and the Republic of Ireland established first with the 1998 Belfast Agreement, and ending with the 2014 Stormont House Agreement. These agreements aim to maintain and further the peace process in Northern Ireland and relax cross-border relations between the Republic of Ireland and Northern Ireland.

¹ It was suggested in the Committee on 3 February that Gibraltar is in a similar position. However, Gibraltar is not part of the UK, but a European territory for whose external relations a Member State is responsible (Article 355 (3) TFEU, see also European Court of Justice, Case C-145/04 *Kingdom of Spain v United Kingdom of Great Britain and Northern Ireland* [2006] ECR I-07917, paragraph 15). It seems that the government of Gibraltar first and foremost campaigns for the UK to remain in the EU in order to avoid detriments from losing its status as part of the EU. It might also look for another Member State to take responsibility for its external relations...

Losing an established legal framework for trans-border life

As regards the shared border, EU membership offers an ideal legal framework for frequent trans-border movement, such as for work, business and leisure purposes. In leaving the EU, the UK would give up this accepted and well-known legal framework by which it presently is integrated into a supranational organisation with 27 other Member States. The disentanglement of this framework is a complex endeavour, which will take at least 2 years (Article 50 TEU), most likely much longer. Giving up this framework would cause large scale uncertainties. It is a matter for political assessment whether the remaining EU Member States will be prepared to conclude special agreements with the UK, should the UK decide to leave the EU although it achieved major concessions in relation to the EU's fundamental constitutional principles such as equal treatment of people who move to work. Special agreements of the EU with third countries (non-Member States), such as the European Free Trade Agreement (EFTA), demand the guarantee of free movement of persons under conditions of equal treatment in the host state. It would seem that, if the UK leaves the EU, the reluctance to maintain this guarantee will be one of the reasons. This might encumber the achievement of any new settlements with the EU at large from an external position. In the absence of an agreement, the day to day life around a shared border will become very complicated. Issues that would require new agreements around the UK's only shared land border include, but are not limited to

- Border controls (of what will be an external border of the EU)
- Right to work as border worker, and to move to the ROI or NI for work or self-employed activity, equal treatment in the Republic of Ireland of Northern Irish citizens who do not hold dual citizenship, and equal treatment of citizens of the Republic of Ireland as economic actors in Northern Ireland
- Associated social security rights, including but not limited to accrual of pension rights, payment of childcare and disability benefit, and other rights, such as usage of cars, access to housing
- Access to education and higher education across the Irish border, which would then become an external border of the EU.

Other submissions have substantiated these arguments with statistical materials.

The continuing peace process

The peace process in Northern Ireland and around the inner-Irish border is based on a number of agreements between the Republic of Ireland and the United Kingdom. These agreements have been concluded between EU Member States as so-called inter se agreements, with implicit approval by the EU. This approval is mirrored in the existence of a specific EU representation in Northern Ireland and the issuing of specific funding programmes supporting the peace process.

The 1998 Belfast Agreement, in its specific sections, partly makes reference to the shared EU membership of both partners. For example, it establishes an obligation of the North South ministerial council to consider the EU dimension of matters under consideration. This provision is reminiscent of the limitations of agreements between EU Member States, which need to comply with EU obligations. The interconnection between the Belfast Agreement of 1998 and its successors, up to the Stormont House Agreement of 2014 with EU law is also mirrored in UK legislation. In particular the Northern Ireland Act of 1998 requires that any secondary legislation issued by the Legislative Assembly must comply with EU law. As long as this legislation and the underlying international agreements are not changed, pockets of mandatory EU law compliance would remain in place for Northern Ireland, should the UK decide to leave the European Union.

Limits for specific international agreements between the UK as a non-EU Member State and the Republic of Ireland concerning both fields

In both fields, the question arises whether the specific problems arising for Northern Ireland as a consequence of the UK leaving the EU can be addressed adequately by bilateral agreements between the Republic of Ireland and the UK. It is often suggested that there are no limits to regulating daily commuting necessities and the continuation of the peace process bilaterally between the Republic of Ireland as an EU Member State and a non EU Member State such as the UK.² This argument assumes that both states could return to the state of affairs which existed before they both joined the EEC. This is not realistic, since it must be expected that the Republic of Ireland remains an EU Member State.

The legal framework for agreements between EU Member States with the active participation of the EU differs fundamentally from the legal framework for bilateral agreements between an EU Member State and a third country. It is informed by the duty of mutual cooperation of Member States and EU (Article 4 (3) Treaty of Lisbon). The predecessor of this provision has been interpreted extensively in relation to individual Member States' international agreements beyond the Union framework. The relations between the Republic of Ireland and the United Kingdom have been subject to legal proceedings before the European Court of Justice in 2002,³ concerning a dispute between these two EU Member States on Irish Sea pollution by the MOX plant at Sellafield. The Commission initiated proceedings against the Republic of Ireland (RoI), because it had requested from the UK the establishment of an arbitral tribunal under the UN Convention on the Protection of the Marine Environment of the North-East Atlantic. The Court held that this violated what is today Article 344 TFEU in conjunction with the duty of loyalty. That provision specifies the duty of Member States' loyalty in stating that Member States must not submit a conflict between themselves to an arbitration institution other than those provided for in the Treaty. The Court's case law on competences of Member States to enter into relations with non EU Member States suggests that entering into bilateral negotiations while the EU is already negotiating on the same issue violates the duty of cooperation.⁴

These principles would bar the Republic of Ireland to enter into negotiations about bilateral relationships with the UK about border regimes or the overhaul of the Belfast Agreement immediately after the UK has declared its intention of withdrawal under Article 50 TEU. This declaration triggers a negotiation process between the UK and the EU, consisting of the remaining Member States, of a withdrawal agreement (Article 50 paragraph 2 TEU). Accordingly, there would be an ongoing negotiation process concerning the results of the UK's withdrawal. Thus, as Luxembourg was barred from concluding individual international agreements with non EU Member States negotiating their accession with the EU, the ROI would be barred from negotiating with the UK while the withdrawal agreement is negotiated.

The reference to the Common Travel Area will not change this assessment. The Common Travel Area between the Republic of Ireland and the UK has been referred to in Protocol Nr 20 annexed to the Treaty of Lisbon, referring to Article 26 TFEU (area without internal frontiers). The protocol en-

² As the submission by Anthony and McCrudden specifies in more detail, there are immense practical hindrances for continuing the peace process on a bilateral basis. For example, questions in relation to the Special European Programmes Body. A body which administers funding created from the EU budget for the continuing peace process will most certainly lose its practical base in the event of the UK leaving the EU.

³ Case C-459/03 COM v Ireland [2006] ECR I-04635

⁴ Case C-266/03 COM v Luxembourg [2005] ECR 4805

sures that the UK can continue to operate any border control it prefers irrespective of the goals of Article 26 TFEU. The provision mentions the “Common Travel Area” in inverted commas and in brackets. This can hardly be interpreted as conceding any international agreement quality for the CTA. Indeed, the CTA is not a formal agreement under international law. Although it is partly acknowledged by national courts⁵ and referred to in administrative statements by the UK, it does not qualify as an international agreement overriding EU obligations for any Member State. The hypothesis that the bracketed addition to Protocol 20 constitutes an authority of the Member State Ireland to unilaterally grant UK citizens more favourable conditions than those of other Member States after the UK is no longer a Member State is open to challenge. Above all, the duty of loyalty implies that any continuation of bilateral relations between the UK and the ROI, which had been in existence when both were still Member States of the EU, would have to be renegotiated after the EU has settled its future relationship with the UK as 3rd country, taking due regard of the Republic of Ireland’s continuing obligation to loyalty to the EU.

Conclusion

As I said in my oral evidence, it is of course possible to produce numerous drafts for potential withdrawal agreements between the UK and the EU. These could include innovative clauses. Whether the prelude to any potential UK withdrawal has created the political climate to achieve a withdrawal agreement granting the UK all the advantages of EU membership without any of the disadvantages is another question. It is not even evident that the Republic of Ireland will continue to accept conditions desired by the UK, such as not profiting from the advantages of Schengen visa for their tourism industry.⁶ Under EU law, any future relation between the Republic of Ireland and the UK would be subject to agreement not only with the Republic of Ireland, but with the whole of the EU. There is no guarantee for an uninterrupted continuation of the legal frame on which the peace process in Northern Ireland rests presently. Neither is there any guarantee that the remaining EU Member States would accept preferential treatment of Irish citizens by the UK after its withdrawal from the EU without reciprocity for any Member States, should the UK wish to continue participating in some elements of the single market. Even while the UK and Ireland both remain Member States, such preferential treatment had to be safeguarded in a protocol to the Treaty. Notably, this safeguard does not cover preferential treatment in relation to social advantages such as benefits. It merely authorizes relaxation of border control. All this means that the legal frame for continuing peace processes and an area without frontiers on the island of Ireland would be extremely fragile should the UK decide to leave the EU.

⁵ See Butler, Not a real Common Travel Area: Pachero v Minister for Justice and Equality, UCPH 2016 ([http://research.ku.dk/search/?pure=en/publications/not-a-real-common-travel-area-pachero-v-minister-for-justice-and-equality\(d3d62db1-47cd-4309-91f0-7a62bd72e3fe\).html](http://research.ku.dk/search/?pure=en/publications/not-a-real-common-travel-area-pachero-v-minister-for-justice-and-equality(d3d62db1-47cd-4309-91f0-7a62bd72e3fe).html))

⁶ See on the negative impact of the non-Schengen status on Ireland Emerson, *Britain, Ireland and Schengen*, Centre for European Reform, 2011