



The Centre for
Cross Border Studies

EU Referendum Briefing Papers

Briefing Paper 2

The UK Referendum on Membership of the EU:
Potential Constitutional Consequences

Introduction

The forthcoming June 23rd referendum on the United Kingdom's continuing membership of the European Union has the potential to be a watershed moment in the history of these islands. A UK decision to leave the EU would have profound and far-reaching implications for Northern Ireland and the island of Ireland as a whole. While the ultimate impact would depend on the shape and detail of any new relationship negotiated between the UK and the EU, Brexit has the potential to affect nearly all aspects of North-South and East-West relations.

In the run-up to the referendum, the Centre for Cross Border Studies and Co-operation Ireland are publishing a series of briefing papers which aim to inform debate by exploring the potential impacts on Northern Ireland and North-South relations. The first paper in this series provided an overview of the potential consequences of a 'leave' vote for future co-operation and peace building across the island.¹ This current paper focuses in greater depth on possible constitutional and political impacts. In particular, it considers what implications UK departure from the EU would have for key political and legal instruments underlying the Northern Ireland peace settlement, including the Belfast Agreement itself. It concludes by briefly noting potential impacts on the wider UK devolution regime.

The Belfast Agreement and the 1998 Northern Ireland Act

The 1998 Belfast Agreement, and subsequent accords,² provided the overarching framework for ending violent conflict in Northern Ireland. The Agreement involved a carefully calibrated political accommodation between the main political groupings in Northern Ireland and the British and Irish governments. Key components included:³

- A form of consociational power sharing with community safeguards
- Provision of a constitutional mechanism for pursuit of nationalist aspirations for Irish reunification balanced against recognition that such change could only come about with the consent of a majority in Northern Ireland
- Removal of a territorial claim on Northern Ireland from the Irish constitution
- Creation of institutional structures for North-South and East-West co-operation
- Reform of the justice and security systems and a series of equality and human rights measures

While the European Union was not a direct player in the Northern Ireland peace process, it provided significant practical and political support, most notably through the ongoing provision of funding for reconciliation and conflict transformation initiatives under the PEACE Programme. However, over the longer term, the EU facilitated political agreement in Northern Ireland in a number of ways. Firstly, common EU membership contributed greatly to the development of improved British-Irish

¹ The Centre for Cross Border Studies and Co-operation Ireland, 2016. The UK Referendum on Membership of the EU: What does it mean for us? EU Referendum Briefing Paper 1. Available at <http://crossborder.ie/eu-referendum-briefing-paper-series/>

² Revisions to the operation of the Northern Ireland institutions were agreed between the main Northern Ireland political parties and the British and Irish governments at St Andrews in 2006 and at Stormont House in 2014.

³ For an overview of the content of the 1998 Agreement see Ruane and Todd, 'The Belfast Agreement: Context, Content, Consequences' in Ruane, Joseph and Jennifer Todd (eds.), 1999. *After the Good Friday Agreement: Analysing Political Change in Northern Ireland*. Dublin: University College Dublin Press.

relations, with the experience of participating as equals in European institutions helping to build trust and underline shared interests. Secondly, exposure to the theory and practice of European cohesion created greater openness to more nuanced understanding of sovereignty and multi-level governance and provided a template for the creation and operation of the North-South and East-West institutions. Finally, the EU can be seen to have weakened the zero-sum logic of the “Irish question” by providing a common locus of pooled sovereignty and fostering a Europe-wide process of policy convergence and opening up of borders, including in particular through the Single Market. While the point should not be overstated, joint British-Irish membership of the EU has materially reduced the political and practical significance of the continued partition of the island.

In this context, the prospect of the UK leaving the European Union raises questions of varying significance for the Northern Ireland constitutional order and the new structures created for North-South and East-West co-operation.

Legislative Competence of the Northern Ireland Assembly

The 1998 Northern Ireland Act provides the legislative basis for the establishment and operation of the devolved Stormont administration. The legislative powers of the Northern Ireland Assembly are defined, with the enumeration of areas reserved to the Westminster government. A number of additional limitations to the legislative competence of the Assembly are identified in the Act, including, under S.6 (2b), the requirement that all legislation must be compatible with EU law.⁴ Similarly, S.24 (1b) expressly prohibits Executive ministers from introducing any subordinate legislation which is incompatible with EU law.⁵

In the event of UK withdrawal from the European Union it is clear these clauses of the legislation would need to be reviewed and updated. However, it is not apparent that these changes would materially affect the Assembly’s legislative powers.

EU Citizenship Rights in Northern Ireland

A potentially more ambiguous issue relates to the impact of a UK exit from the EU on citizenship entitlements in Northern Ireland. In a distinctive feature, the Belfast Agreement provides for all those born in Northern Ireland to elect for British or Irish citizenship or to hold both simultaneously. Under Article 1 (vi) of the Constitutional Issues section of the Agreement, all parties committed to:⁶

Recognise the birth right of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland

This entitlement would be unaffected by the UK leaving the European Union. However, under the Treaty on the Functioning of the European Union, all holders of the nationality of an EU member

⁴ Northern Ireland Act 1998, S.6 (2b)

⁵ Northern Ireland Act 1998, S.24 (1b)

⁶ The Agreement 1998, Constitutional Issues, Art. 1 (v).

state are also automatically citizens of the European Union. EU citizens enjoy, by virtue of this status, the following rights:⁷

- To non-discrimination on the basis of nationality
- To move and reside freely within the EU
- To vote for and stand as a candidate in European Parliament and municipal elections
- To be protected by the diplomatic and consular authorities of any other EU country
- To petition the European Parliament and complain to the European Ombudsman
- To contact and receive a response from any EU institution in one of the EU's official languages
- To access European Parliament, European Commission and Council documents under certain conditions
- To have equal access to the EU civil service

The implications of Brexit for holders of Irish citizenship resident in Northern Ireland are unclear. Legally, it would appear that they would continue to be entitled to EU citizenship but, if so, what practical arrangements would need to be put in place to enable them to vindicate their rights as EU citizens? In Northern Ireland, the entitlement to EU citizenship could become a valuable commodity, enabling continued access to some of the advantages of EU membership. Would this lead to greater uptake of Irish citizenship among the Protestant Unionist community? Or, would it potentially become a source of contention, with nationalists perceived as having access to advantages which unionists, for reasons of culture and identity, felt unable to avail of? This could become a more significant issue as EU citizenship deepens with the further integration of the Union.

Future of the North-South Implementation Bodies

Strand 2 of the Belfast Agreement created the North South Ministerial Council which brings together members of the Executive and Irish government to:⁸

Develop consultation, co-operation and action within the island of Ireland – including through implementation on an all-island and cross-border basis – on matters of mutual interest within the competence of the Administrations, North and South

The Agreement specifically provides, under Stand 2, Art. 17, for the NSMC to facilitate co-operation and coordination in EU matters:⁹

The Council to consider the European Union dimension of relevant matters, including the implementation of EU policies and programmes and proposals under consideration in the EU framework. Arrangements to be made to ensure that the views of the Council are taken into account and represented appropriately at relevant EU meetings

The NSMC's remit in this area would clearly be altered by a UK decision to leave the European Union. However, rather than become redundant, it may become of greater importance, providing a mechanism to address emerging impacts of the withdrawal process. In addition, provision for the

⁷ For overview of EU citizenship entitlements see http://ec.europa.eu/justice/citizen/index_en.htm

⁸ The Agreement 1998, Strand 2, Art. 1

⁹ The Agreement 1998, Strand 2, Art. 17

views of the NSMC to be represented at relevant EU meetings through Irish Government ministers and officials could provide a continuing platform for the Northern Ireland Executive to raise issues and input to EU policy making.

The Agreement also provided for a minimum of six matters of co-operation and implementation to be taken forward by new bodies operating on an all-island or cross-border level (in addition to six areas of co-operation and implementation to be taken forward by existing bodies in each separate jurisdiction). New agencies were created in the areas of EU funding (SEUPB), cross-border trade (Intertradelreland), food safety (SafeFood), language (An Foras Teanga/Language Body), inland waterways (Waterways Ireland), and aquaculture/marine development in Carlingford Lough and Lough Foyle (Loughs Agency). Tourism Ireland operates as a de facto seventh implementation body.

The future operation and development of these bodies would clearly be challenged if Northern Ireland lay outside the European Union. The presumed ineligibility of Northern Ireland for continued access to EU structural funds would appear to end the current role of the SEUPB, although it could find a continuing role in the delivery of funding schemes for co-operation between EU members and non-EU members. The remit of Intertradelreland to promote cross-border business and trade would also face considerable challenges in the event of the UK having restricted access to the Single Market post-Brexit. In the longer-term, growing policy divergence between the UK and the Republic – which, unless opt-outs were sought/obtained, would continue to adhere to common EU policies – would potentially impact on the work of SafeFood, Waterways Ireland, and the Loughs Agency. Regardless of policy changes, day to day operation of the bodies – which draw staff from both sides of the border - would be complicated by any departure by the UK from EU employment law.

The East-West institutions established under the Belfast Agreement, including the British-Irish Council and the British-Irish Intergovernmental Conference, would face similar challenges in the delivery of their remit in the event of UK withdrawal from the European Union. While they would still continue to function, the costs of co-operation would increase with the likely emergence of new practical and policy impediments to meaningful collaboration.

The 1998 Human Rights Act

In October 2014, the Conservative Party published a strategy paper titled ‘Protecting Human Rights in the UK’. In this document, Chris Grayling in his role as Secretary of State for Justice laid out Conservative proposals for reforming the UK’s human rights laws and specifically the repeal of the Human Rights Act 1998 (HRA) – which was introduced by a Labour government to formally align UK law with the European Convention on Human rights (ECHR).¹⁰ The proposal to scrap the HRA was reaffirmed in the Conservative Party Manifesto 2015, prior to the election victory in May of the same year that provided the Conservative Party with a clear majority in the House of Commons and a mandate to pursue this interest. David Cameron reiterated this intention once more in a Chatham House speech in November 2015, while outlining his EU reform agenda.

The repercussions of ECHR denunciation will be felt not least in Northern Ireland, where human rights safeguards are a prominent feature of the 1998 Belfast/Good Friday Agreement. The HRA and

¹⁰ Conservatives, ‘Protecting Human Rights in the UK: The Conservatives’ proposals for changing Britain’s Human Rights Laws’, (2014), p.6.

the ECHR are sewn into the fabric of Northern Ireland Law and the devolved constitution (particularly that of the Assembly), laid out in the Northern Ireland Act 1998. The ECHR is prominent in the Belfast/Good Friday Agreement to the extent that it is declared that no public bodies in Northern Ireland (such as the Assembly) can infringe upon it.¹¹ One of the fundamental aspects of the constitutional agreement is its emphasis on “equality requirements”, which is frequently expanded upon to clearly cite the ECHR.¹² As a safeguard for the protection of ‘the community’, the declaration of human rights (and the ECHR specifically) demonstrates the extent to which the ECHR is fundamental to the agreement itself.¹³ The repeal of the HRA could therefore require revisions of the 1998 Belfast/Good Friday Agreement and of the 1998 Northern Ireland Act, especially if its proposed replacement – a Bill of Rights – is not recognised as being fully compatible with the ECHR.

However, it is important to bear in mind that neither the Human Rights Act nor the European Convention on Human Rights are related to the European Union. The ECHR is the creation of the Council of Europe, an institution that predates and is unrelated to the EU, while the HRA was established by the UK Parliament. Nevertheless, the possible repeal of the HRA could have implications for Northern Ireland whether the UK votes to leave or remain in the EU.

If the UK were to leave the EU and calls were made to revise the 1998 Agreement and the Northern Ireland Act to reflect its departure, the replacement of the HRA with a Bill of Rights could become an additional complication in the achievement of political consensus on the nature of those revisions. Considerable strain would be placed on Northern Ireland’s political institutions, especially as human rights can be seen as a devolved matter, which would imply that the Northern Ireland Assembly would have to pass a legislative consent motion before the Human Rights Act 1998 could be repealed. As Professors Gordon Anthony and Christopher McCrudden have noted, “it is unlikely that such a motion could be carried as a petition of concern could be used to block it”.¹⁴

In isolation, the repeal of the HRA represents a significant potential threat to political consensus in Northern Ireland. That threat will be compounded if it arises while political representatives here are attempting to reconfigure the 1998 Belfast/Good Friday Agreement and the 1998 Northern Ireland Act in line with a UK withdrawal from the EU.

Devolution and the Future of the UK

Relations between the constituent nations of the United Kingdom remain in flux following the result of the 2014 Scottish independence referendum. Despite the Scottish decision to remain, there are growing pressures to deepen devolution arrangements in the UK and move towards a more federal structure. Scottish demands for greater self-government have not been satiated by the reforms promised by the main unionist parties during the referendum campaign. In turn, concessions to the Scots are fuelling calls – of varying intensity - for reciprocal powers among the other UK nations.

¹¹ *The Agreement 1998*, Section 3.5(b)

¹² *ibid*, Section 3.11

¹³ “The community” refers to the community of Northern Ireland as a whole. This terminology is extracted from the Agreement.

¹⁴ Written Evidence submitted by Professor Gordon Anthony and Professor Christopher McCrudden for the Northern Ireland Affairs Committee’s inquiry into Northern Ireland and the EU Referendum (EUN0003), <http://www.parliament.uk/business/committees/committees-a-z/commons-select/northern-ireland-affairs-committee/inquiries/parliament-2015/eu-referendum/publications/>.

Crucially, this includes the English, with resurgent English national identity and resentment at the asymmetrical devolution settlement leading to support across the political spectrum for some form of English self-government.

Against this backdrop, the result of the forthcoming referendum on continued EU membership will have significant implications for the future of devolution and of the UK itself. If the UK votes to remain in the EU, moves towards deeper federalism are likely to gather pace. The dynamics of this process would play out differently in each region. In Northern Ireland, it is possible – though not inevitable – that moves to extend the competencies of the Assembly would become a source of renewed political disagreement.

Greater decentralisation of power within the UK would also be likely to lead to calls for a review of mechanisms for the devolved administrations to represent their interests at European level and to input into common UK negotiating positions. Currently, a Memorandum of Understanding between the UK government and the Scottish, Welsh, and Northern Irish administrations provides for a Joint Ministerial Committee to consider matters of common interest and resolve disagreements. The JMC meets in several different formats, with JMC (Europe) meeting quarterly to discuss European issues and to allow members to exchange information and consider cross-cutting matters in which there is a devolved administration interest.¹⁵ The MOU also outlines a number of additional channels for coordination of EU policy issues between central government and the devolved administrations, including advance provision of information, inter-departmental dialogue, and, where feasible, participation by devolved administration ministers in EU Council of Ministers meetings. Moves towards greater federalism in the UK would likely lead to demands for these mechanisms to be strengthened and put on a legal footing.

While internal relations between the UK administrations will continue to evolve regardless of the referendum result, a victory for the leave campaign would undoubtedly have by far the greatest potential for a rupture of the current order. There is a strong likelihood that a UK majority for leaving the EU would be determined by English votes, with current polls suggesting considerably greater levels of support for remaining in Scotland, Wales, and Northern Ireland. In this context, it would appear highly likely that Brexit would eventually lead to a second Scottish independence referendum – with increased chances of a Yes vote. In due course, an independent Scotland would seek to re-join the EU. The implications of Scottish secession for Northern Ireland are uncertain but it is clear that the nature and practice of the Union would be significantly altered. The consequences for the long-term strategies of the political parties in Northern Ireland would be unpredictable, but, facing a future in an English-dominated remnant state and cut-off from the rest of the island behind an EU external border, there is strong potential that this scenario would lead to renewed support among nationalists for Irish re-unification.

Conclusion

The upcoming referendum on continued UK membership of the European Union raises significant questions for the Northern Ireland peace settlement and the future development of devolution. It is clear that a decision to leave the EU would require revisions to the Belfast Agreement and

¹⁵ Memorandum of Understanding and Supplementary Agreements, 2013. Available at: <http://www.gov.scot/Resource/0043/00436627.pdf>

associated legislation. While some of these changes appear relatively minor, others have the potential to raise serious political difficulties. In particular, a UK decision to also repeal the 1998 Human Rights Act – as previously pledged by the Conservative Party – would potentially re-open political consensus on key safeguards and protections underlying the agreement. The dangers lie not so much in revisiting the Agreement – provision exists for review of its operation and several supplementary agreements have been concluded over the past decade – but rather that renewed negotiations will be taking place, post-Brexit, against a backdrop of great political uncertainty about future relations between the UK and the EU and between the UK and the Republic of Ireland. In this context, achieving a renewed political consensus in Northern Ireland could prove extremely challenging.

The potential implications of UK withdrawal from the EU for the functioning of the North-South and East-West institutions and for the vindication of EU citizenship rights in Northern Ireland raise more practical considerations. It is conceivable that new mechanisms and structures could be agreed to mitigate the impact of Brexit in these areas. For example, the Joint Oireachtas Committee on EU Affairs has previously called for the Irish and UK governments to negotiate recognition of the ‘special position’ of Northern Ireland with the EU and to establish ‘special arrangements’ to maintain North-South relations and EU citizenship rights for those in Northern Ireland.¹⁶ While there would be goodwill on all sides to address the unique implications of Brexit for the island of Ireland, attempts to resolve these issues would be overshadowed and complicated by wider negotiations on the future of UK-EU relations. In this context, managing the potential fall-out from a ‘leave’ vote in the forthcoming referendum will be a defining test of political statecraft across these islands.

¹⁶ Joint Oireachtas Committee on EU Affairs, 2015. *UK/EU Future Relationship: Implications for Ireland*. Available at: http://www.oireachtas.ie/parliament/media/committees/euaffairs/Agreed-Report-UK-EU-Future-Relations_Updated.pdf