



BRIEFING PAPER

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The Common Travel Area, and the special status of Irish nationals in UK law

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Summary

The Common Travel Area

The Common Travel Area (CTA) is a special travel zone between the Republic of Ireland and the UK, Isle of Man and Channel Islands. It dates back to the establishment of the Irish Free State in 1922.

This briefing focuses on how the CTA operates between the UK and the Republic of Ireland.

Nationals of CTA countries can travel freely within the CTA without being subject to passport controls. The arrangements for non-CTA nationals are more complex. Although there are minimal immigration checks for journeys started within the CTA, non-CTA nationals must have the relevant immigration permission for the country they are seeking to enter. Until the UK exits the EU, citizens of EEA member states have prevailing rights of entry and residence in the UK and Ireland under EU 'free movement' law.

Although both the Republic of Ireland and the UK maintain their own visa and immigration policies, there is a significant degree of practical cooperation and policy coordination in order to ensure the security of the CTA. Controls on the Irish border are also generally regarded as impractical and undesirable.

Irish nationals' special status in UK law

Irish nationals have a special status in UK law which is separate to and pre-dates the rights they have as EU citizens.

In short, the Republic of Ireland is not considered to be a 'foreign country' for the purpose of UK laws, and Irish citizens are not considered to be 'aliens'. Furthermore, Irish citizens are treated as if they have permanent immigration permission to remain in the UK from the date they take up 'ordinary residence' here.

This special status affects Irish nationals' rights across a number of areas, including eligibility for British citizenship, eligibility to vote and stand for election, and eligibility for certain welfare benefits. It is thought that, as a result, Irish nationals have more rights than other EU/ EEA nationals resident in the UK.

The potential implications of Brexit

The future of the CTA post-Brexit is uncertain. The UK and Irish governments remain united in their desire to maintain the CTA and EU negotiating guidelines state that the Union will respect such bilateral agreements. Nevertheless expert evidence received by Parliamentary select committees warned that Brexit poses "a real and substantive threat to the very existence" of the CTA and cautioned that the maintenance of current arrangements should not be taken for granted.

Whilst there is widespread political agreement that there should be no 'hard border' in Ireland, the absence of controls on the Irish border post-Brexit would make it unique amongst the EU's external borders.

Professor Bernard Ryan of Leicester University has questioned the extent to which the rights of Irish nationals in the UK are secured by existing law. He argues that new legislation will be required to protect Irish nationals' status in the UK post-Brexit.

1. The Common Travel Area

1.1 Overview

The Common Travel Area (CTA) is a special travel zone between the Republic of Ireland and the UK, the Isle of Man and the Channel Islands. British and Irish citizens can travel freely within the CTA without being subject to passport controls.

The arrangements for non-CTA nationals are more complex. Although there are minimal immigration checks for journeys started within the CTA, travellers must have the relevant immigration permission for the country they are seeking to enter. EU and EEA¹ nationals still have rights of entry and residence in the UK and Ireland under EU 'free movement' law.

The remainder of this briefing focuses on how the CTA is applied for travel between the UK and Republic of Ireland.

CTA arrangements have existed (in various forms) since the establishment of the Irish Free State in 1922. Both the UK and the Republic of Ireland maintain separate immigration policies but there is a significant degree of practical cooperation and policy coordination in order to ensure the security of the CTA.

Cooperation and policy coordination between the UK and Republic of Ireland helps maintain the operation of the CTA

1.2 How do the arrangements work in practice?

The UK and Republic of Ireland maintain their own visa and immigration policies and have different approaches to conducting controls within the context of the CTA.

Immigration status requirements

UK

As per section 1(3) of the *Immigration Act 1971*, people seeking entry to the UK from the Republic of Ireland are not subject to immigration control. [Paragraph 15](#) of the Immigration Rules and [section 9](#) of the 1971 Act contain further provisions related to the CTA.

In short, people who have already been granted leave to enter elsewhere in the CTA do not normally require leave to enter the UK. However, there are some exceptions, as specified in the *Immigration (Control of Entry through Republic of Ireland) Order 1972*, (as amended).

Article 3 of the 1972 Order specifies which categories of traveller require leave to enter the UK when travelling from the Republic of Ireland. Typically, this applies to:

¹ EEA – European Economic Area (EU Member States plus Norway, Iceland and Liechtenstein). Swiss nationals have similar rights under bilateral agreements with the EU.

- people who merely passed through the Republic of Ireland;
- people requiring visas for the UK;
- people who entered the Republic of Ireland unlawfully;
- people who are subject to directions given by the Secretary of State for their exclusion from the United Kingdom on “conducive to the public good” grounds; and
- people who entered the Republic from the United Kingdom and Islands after entering there unlawfully or overstaying their leave.

Certain categories of people still require leave to enter the UK from the Republic of Ireland

As per Article 4 of the Order, certain other categories of people who do not have the right of abode in the UK are automatically deemed to have three months’ leave to enter the UK without permission to work if they enter the UK from the Republic of Ireland. Notably this applies to ‘non-visa nationals’ (ie nationalities that are not required to apply in advance for permission to enter the UK as a general visitor).

EEA and Swiss nationals, and other people who have rights of entry and residence in the UK under EU law, are exempt from Article 4.

Republic of Ireland

All who are not Irish or British citizens are classed as ‘non-nationals’. Similar to the UK, certain nationalities require a visa in advance of travelling to the Republic of Ireland.

A citizen of a country whose nationals need a visa to enter the Republic may still require a valid visa even if in possession of a valid UK visa or residence permit.² Land arrivals are expected to obtain immigration permission with one month of arrival.³

Again, EEA and Swiss nationals and their family members have prevailing rights of entry under EU free movement law.

The CTA and border checks

As indicated above, there are differences between the UK and Irish authorities’ approaches to conducting immigration checks on travellers arriving by land, air or sea.

In Ireland, immigration controls automatically apply to all non-national arrivals from the UK by air or sea, and may be imposed on those who cross the land border.

The UK’s approach is less systematic. A 2011 inspection report by the then Independent Chief Inspector of the UK Border Agency gave some details:

Operation of the CTA

4.17 The control of movements within the CTA is managed in two ways as mentioned earlier: international journeys from the Republic of Ireland to Great Britain and ‘in-country’ journeys

² Citizensinformation.ie, ‘Common Travel Area between Ireland and the United Kingdom’, 6 May 2015

³ Professor Bernard Ryan, [ILPA EU Referendum Position Papers 8: The implications of UK withdrawal for immigration policy and nationality law: Irish aspects](#), 18 May 2016

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that provide onward transit routes to other parts of the CTA. Examples of these are as follows:

- international journey – a flight from Dublin to London, or a ferry from Dun Laoghaire to Holyhead;
- in-country journey – a flight from Belfast City Airport to Manchester or a ferry from Belfast to Stranraer in Scotland.⁴

The report noted that not all international journeys are subject to border control checks. Decisions on whether to apply formal checks are typically informed by risk assessments of the route and passengers.

The Irish border is often described as a ‘soft’ border, in light of the absence of routine border controls. A recent report by the Northern Ireland Affairs Committee explains:

71. (...). Whilst it is not true to say that the border is completely open—there is number plate-monitoring technology in place—it is the case that individuals can travel across the border by land unimpeded. And commerce can take place across the border without duties being levied, customs checks, or other bureaucracy, even though different currencies are already used.⁵

The lack of routine immigration controls and customs checks means the Irish border is often described as a ‘soft’ border

The potential for deliberate and unconscious breaches of controls

It is recognised that there is potential for the CTA and border arrangements to be abused by people seeking to evade the usual controls on entry to Ireland or the UK.

The 2011 inspection report by the independent Chief inspector of the UK Border Agency gave an illustration of how this could happen:

In-country journeys can be used to connect passengers to road and rail networks for onward travel to other parts of the CTA. For example, flights from Great Britain into Belfast or the City of Derry airport can also be used to connect to the road and rail networks for onward travel to the Republic of Ireland. The reverse of these routes (from Republic of Ireland to Northern Ireland across the Irish land border then using a ferry or flight from Northern Ireland to return to Great Britain), would also constitute an in-country journey between Northern Ireland and Great Britain.⁶

‘Operation Gull’ is a longstanding joint scheme involving officials from the Garda National Immigration Bureau, Home Office,

⁴ Independent Chief Inspector of the UK Border Agency, [Inspection of the UK Border Agency in Scotland and Northern Ireland: Countering abuse of the Common Travel Area](#), 20 May 2011

⁵ Northern Ireland Affairs Committee, [Northern Ireland and the EU referendum](#), 26 May 2016, HC 48 2016-17

⁶ Independent Chief Inspector of the UK Border Agency, [Inspection of the UK Border Agency in Scotland and Northern Ireland: Countering abuse of the Common Travel Area](#), 20 May 2011, para 4.17

Police Scotland and the Police Service of Northern Ireland, which seeks to intercept irregular immigrants travelling to/from Northern Ireland by air and sea. According to a BBC report of July 2015, in 2014/15 468 irregular migrants were intercepted at ports in Northern Ireland trying to reach other parts of the UK, compared to 274 in 2012/13. The Home Office attributed the rise to increases in migration movement patterns and increased enforcement activity.⁷

Operation Gull seeks to intercept migrants illegally attempting to use NI ports as a means of transit across the UK

The British-Irish Parliamentary Assembly reported on concerns that some ports in Ireland might be soft entry points for onward travel to the UK:

20. (...) The co-rapporteurs had heard some anecdotal evidence that the CTA was seen as vulnerable to exploitation by those wishing to enter the UK illegally by travelling via Ireland, for example via the Cherbourg-Rosslare crossing, and then on to either Fishguard or Pembroke Dock, or by travelling by land across the border with Northern Ireland. However, the officials we met at Rosslare were very clear that there was no evidence of the Rosslare crossing to the UK being used in such a way.⁸

The absence of immigration checks at the land border means that there is also potential for non-EEA nationals to unwittingly breach UK or Irish immigration requirements when crossing the border. The Law Centre (NI) highlighted this issue in evidence to the British-Irish Parliamentary Assembly:

Callers to our advice line are often surprised to hear that, while the CTA is a “free movement zone” for CTA and EEA nationals, it is not so for other nationals. This lack of awareness can result in people committing an offence by crossing the land border. In some cases, this can lead to detention and removal. Clearly, this brings with it a high human cost as well as the economic cost of immigration enforcement.

Information about the CTA and immigration requirements is not readily available for passengers purchasing train or coach tickets between both jurisdictions. Therefore, a person could easily board a day-return train at Belfast Central Station or Dublin Connolly without knowing that they need to have their paperwork in place.⁹

The Assembly’s inquiry noted that UK and Irish government officials have recognised that there is scope to simplify the rules and enhance the travelling public’s awareness and understanding of the CTA.

Why might UK and Irish citizens still need a passport to travel?

Although the CTA arrangements mean that Irish and UK citizens are not subject to passport checks when travelling between the two countries, in practice they may still require a passport in order to

⁷ BBC News [online], '[Northern Ireland ports: Rise in illegal immigrants intercepted trying to reach other parts of the UK](#)', 13 July 2015

⁸ British-Irish Parliamentary Assembly, Committee B (European Affairs), [Report on Visas](#), 5 July 2016

⁹ British-Irish Parliamentary Assembly, Committee B (European Affairs), [Report on Visas](#), 5 July 2016, para 13

travel. This is explained on the Irish Government's Citizensinformation.ie website:

The Common Travel Area means that there are no passport controls in operation for Irish and UK citizens travelling between the 2 countries. You do not need to have a passport in order to enter the other country. However, all air and sea carriers require some form of identification and some regard a passport as the only valid identification. Immigration authorities may also require you to have valid official photo-identification which shows your nationality. As you are being asked to prove that you are an Irish or UK citizen who is entitled to avail of the Common Travel Area arrangements, it is advisable to travel with your passport.¹⁰

Passports are still used to establish British or Irish citizenship

1.3 Why was the CTA established?

The adoption of a CTA is linked to the establishment of the Irish Free State in 1922. A commentary on the history of the CTA by Bernard Ryan, professor of law at the University of Leicester, explains:

When the Home Office was faced with the imminent establishment of the Free State, its view was that it 'would not propose to require under the Aliens Order a passport system between this country and Ireland, and could not make any use of such a requirement if they were asked to impose it'. The status quo depended however upon Free State agreement to continue to participate in the British system of immigration control, (...). The Irish officials appear to have accepted the proposal with enthusiasm (...).¹¹

This CTA remained in place until controls were reinstated at the outbreak of the Second World War.

Although some restrictions were relaxed after the end of the war, British immigration controls (including checks on people travelling between Northern Ireland and Britain) remained in place until the Irish Government once again agreed to follow immigration policies and systems of immigration control similar to the UK's, in 1952. As previously, the 1952 CTA arrangements were based on administrative agreement between the two states, and details were not made public.

A [more recent briefing by Professor Ryan](#) points to some reasons for successive UK and Irish governments' continued support for the arrangements:

The primary explanation for the durability of these arrangements has been the assumption of the UK authorities that it is impractical for the Irish border to be an immigration frontier. One result has been support by Northern Irish unionists for the common travel area, in order to avoid immigration control on journeys between Northern Ireland and Great Britain.

The many social and economic connections between the Republic of Ireland and all parts of the UK are a second factor

¹⁰ Citizensinformation.ie, '[Common Travel Area between Ireland and the United Kingdom](#)', 6 May 2015 (accessed 30 June 2016)

¹¹ Bernard Ryan, '[The Common Travel Area between Britain and Ireland](#)' (2001) 64 (6) *Modern Law Review*, page 856

pointing towards relative freedom of movement between the two states. This aspect of the common travel area is generally favoured by the Irish Government. It also appeals to nationalist opinion in Northern Ireland, which supports any lessening of the de facto consequences of the partition of the island of Ireland.

A third factor underlying common travel area arrangements is that these favour the free movement of labour. For most of the period since 1922, that meant movement of Irish workers to Great Britain. With greater economic development in the Republic of Ireland since the mid- 1990s, the pattern has been more varied, with movement in both directions.¹²

1.4 Anglo-Irish cooperation on immigration and border issues

The CTA is underpinned by close and active cooperation between the UK and Irish border and immigration authorities.

Cooperation to ensure the security of the CTA's external borders

The British-Irish Parliamentary Assembly received evidence about the nature of cooperation on border security issues from UK and Irish government officials:

17. On security, the UK Government's evidence noted that while it was committed to maintaining the CTA, this should not be at the "expense of a secure border". It was important that the UK had confidence that other CTA partners' borders were secure and to this end the UK Government was actively working with other CTA partners to ensure their borders were secure, and offering assistance to improve that security where appropriate. For its part, the Irish Government said that it was in ongoing discussions with the UK on the security of borders and the CTA which it was committed to enhancing. In particular officials from the immigration services of both countries met on a fortnightly basis to share information on CTA issues and abuses identified. There was also other regular contact through the UK Home Office's liaison officers at the Garda National Immigration Bureau (GNIB) in Dublin and between immigration officers at Dublin Airport, Dublin Sea Port and the Immigration Unit based in Dundalk.

(...)

19. During the co-rapporteurs' visit to the ports of Rosslare and Fishguard on 2 July 2016, they heard how the British and Irish governments were looking to cooperate on improving border security, in particular to minimise illegal migration to the UK via Ireland and vice versa. (...) There was also good evidence of steps to harmonise the systems underpinning checks and for the sharing of information, with Irish officials noting that they would be introducing improvements related to the collection of biometric data over the next 12 months.¹³

British and Irish immigration enforcement officials meet regularly to discuss issues arising from the CTA

¹² Professor Bernard Ryan, [ILPA EU Referendum Position Papers 8: The implications of UK withdrawal for immigration policy and nationality law: Irish aspects](#), 18 May 2016

¹³ British-Irish Parliamentary Assembly, Committee B (European Affairs), [Report on Visas](#), 5 July 2016

Information sharing

In December 2011 the UK and Irish governments agreed a legally non-binding joint statement - [Regarding Co-operation on Measures to Secure the External Common Travel Area](#) - and an accompanying Memorandum of Understanding on visa data exchange. An accompanying press release gave an indication of the anticipated benefits:

Close co-operation in the run-up to the agreement has already brought significant benefits. A pilot exchange to check data provided in 1,700 Irish visa applications lodged in Nigeria against UK immigration records has identified over 200 persons applying to come to Ireland who have an adverse UK immigration history. A considerable number of these were either deported from the UK or refused entry into the UK.

Additionally, so far this year data swaps have shown that of 1,500 failed asylum claims made in Ireland nearly 500 have been identified as being known to the UK Border Agency - either as asylum shoppers with previous asylum applications to the UK or as visa applicants, and usually in a different name and nationality to that declared in Ireland.

And thanks to joint working an immigration fraudster was caught with a bundle of fake identities after his 'zig zag' route across four countries flagged him to UK Border Agency officers in Belfast. Another Nigerian applicant was refused entry into Ireland after comparison with documents which shown [sic] he had previously been removed from the UK in 2008 and that the passport had been tampered with.¹⁴

The agreement identified some policy priorities and areas for further cooperation. These included data sharing to identify and prevent abuses, plans for electronic border management systems, and seeking to develop a joint Common Travel Area visit visa.

Towards mutual recognition of visas

For some time, the UK and Irish governments have been discussing the potential to introduce mutual visa recognition, and to eventually introduce some joint visa arrangements for non-EEA nationals wishing to travel between CTA states.¹⁵

The only example so far is the [British-Irish visa scheme for Chinese and Indian nationals](#), which was formally launched in October 2014.¹⁶ It enables Chinese and Indian nationals to visit the UK and Ireland using a single visitor visa (ie either issued by the UK or Ireland).

Chinese and Indian visitors require only one visa to visit Ireland and Britain

Ireland launched its own visa recognition initiative in July 2011, in a bid to boost tourism.¹⁷ The [Irish Short Stay Visa Waiver programme](#)

¹⁴ Irish Naturalisation and Immigration Service, ['Ireland-UK accord to further secure the Common Travel Area'](#), 20 December 2011

¹⁵ UKBA news release, ['The UK and Ireland to improve the Common Travel Area'](#), 20 December 2011; PA Consulting Group, [Evaluating the value of the economic relationship between the United Kingdom and Ireland volume 1](#), 18 July 2013, page 57; INIS, [Immigration in Ireland – 2013 in Review](#), 6 January 2014

¹⁶ GOV.UK, News, ['British-Irish visa scheme launches in India'](#), 10 February 2015

¹⁷ Irish Naturalisation and Immigration Service, [press release, 'Alan Shatter TD, Minister for Justice, Equality and Defence announces Ireland's first formal Visa Waiver Programme as an integral part of the Government's Job Initiative'](#) (undated; accessed on 23 December 2013). The scheme was initially launched

allows short-term visitors from certain non-EEA countries who already have permission to visit or live in the UK to visit Ireland from the UK without needing a separate visa.

2. Irish nationals' special status in UK law

Irish nationals have a special status in the UK, which predates and is separate to the rights they have as EU citizens. In short, Ireland is not considered to be a "foreign country" for the purpose of UK laws, and Irish citizens are not considered to be "aliens".

Furthermore, Irish citizens are treated as if they are 'settled' (ie have permanent immigration permission to remain in the UK) from the date they take up "ordinary residence" in the UK.

In spite of the above, and the existence of the CTA arrangements, Irish nationals are not wholly exempt from immigration controls. They are still subject to powers to deport, remove or exclude them from the UK.

The special status of Irish nationals dates back to the establishment of the Republic of Ireland in 1949.

2.1 Legislative background

Before 1949 the Irish Free State was within the Crown's Dominions and people born there were British subjects.

The Republic of Ireland Act 1948 (implemented in the UK by the *Ireland Act 1949*) established the Republic of Ireland and broke its last link with the Commonwealth and Crown's dominions.¹⁸

Section 2 of the *Ireland Act 1949* provides that Ireland is "not a foreign country" for the purpose of "any law in force in any part of the United Kingdom..." and references to "foreigners, aliens, foreign countries ... shall be construed accordingly".

Section 50(1) of the *British Nationality Act 1981* (which reflected similar provisions in the *British Nationality Act 1948*) similarly provides:

"Alien" means a person who is neither a Commonwealth citizen nor a British protected person nor a citizen of the Republic of Ireland.

2.2 Why do Irish citizens have a special status?

The reason for giving the Irish a special position was stated during the second reading of the *Ireland Bill* on 11 May 1949 by Clement Attlee, who said that the alternative would be impractical and undesirable:

¹⁸ In line with the *British Nationality Act 1948* (which came into force in 1949), citizens of the Irish Free State were deemed to have ceased to be British subjects on 1 January 1949 (but were able retain British subject status after this time subject to certain criteria). People born in the Republic of Ireland on or after 1 January 1949 did not acquire British subject status or any other form of British nationality by birth.

As everybody knows, there are in Britain large numbers of people of Irish descent, some born in Eire and some born in this country, and there is a continual passage to and fro of people who come over to work or to study or for pleasure. It would be an extremely difficult thing to decide in every case from day to day as to what the exact status was of a person with an Irish name, and if we had to attempt to make all citizens of Eire aliens, it would have involved a great expenditure of men and money and a great extension of control of aliens. We had in particular also to remember the difficulties caused because of the fact of the land frontier between Northern Ireland, which is part of the United Kingdom and the Commonwealth, and Eire. (...).¹⁹

Attlee noted the practical difficulties and costs of viewing the Irish as aliens

During the committee stage of the *British Nationality Bill*, in 1981, Enoch Powell moved an amendment to remove the Irish exception to the definition of an alien. The Home Office minister, Tim Raison, opposed the amendment and explained the Government's position in similar terms to Mr Attlee's 1949 statement:

On the argument that we have heard this morning, I say first that the Government consider that it would be inappropriate to regard Irish citizens as aliens and the Republic of Ireland as a foreign country for the purpose of this legislation. The relationship between this country and the Republic of Ireland reflects the long historical connection between the United Kingdom and what is now the Republic of Ireland and the close personal ties that exist between the people of the one country and the people of the other. The relationship was expressed in the provisions of the Ireland Act 1949 on which these definitions are based. Whilst much has changed since 1949, the Government are not persuaded that this relationship has altered to such a degree that the arrangements in that Act in this respect should be amended.²⁰

The Conservative Government of the 1980s stressed the long-standing ties between the UK and Ireland

2.3 Practical implications

The special status of Irish nationals in UK law provides rights across a number of areas, including eligibility for British citizenship, eligibility to vote and stand for election, and eligibility for certain welfare benefits. As a result it is thought that the Irish have more rights than other EU citizens resident in Britain. However this has been questioned in recent analysis of the likely impact of the UK's exit from the EU.

¹⁹ HC Deb. 464, c.1855

²⁰ 13 May 1981, SC Deb. (F) c.2002

3. The potential implications of Brexit

In the run-up to the referendum, the UK and Irish governments both expressed uncertainty about the future of the CTA in the event that the UK would leave the EU.²¹

The Government's February 2016 paper on [The process for withdrawing from the European Union](#) stated:

Northern Ireland would be confronted with difficult issues about the relationship with Ireland. Outside the EU's Customs Union, it would be necessary to impose customs checks on the movement of goods across the border. Questions would also need to be answered about the Common Travel Area which covers the movement of people. This could have an impact on cross-border co-operation and trade.²²

Its March 2016 paper on [Alternatives to membership: possible models for the United Kingdom outside the European Union](#) raised similar concerns:

It is not clear that the Common Travel Area could continue to operate with the UK outside the EU, and Ireland inside, in the same way that it did before both countries joined the EU in 1973.²³

The implications of Brexit for the continued operation of the CTA remain to be seen. The UK and Irish governments are united in their desire to maintain the CTA²⁴ and the EU acknowledges the importance of ensuring there is no 'hard border' in Ireland.

3.1 The future of the CTA, and the nature of border controls

Might the EU have an influence over the future of the CTA?

EU law recognises the right of Ireland and the UK to maintain special arrangements, outside of the Schengen Area, on the movement of people.²⁵ Both the UK and Irish governments take the view that there is no fundamental reason why the CTA cannot be preserved. The EU Commission's priorities for the withdrawal negotiations clearly suggest it too envisages the continued operation of the CTA post-Brexit. However select committees have received contrasting evidence on the question of Brexit's impact on the CTA.

²¹ [Written Question 15721](#), answered on 17 November 2015; 'Irish prime minister says border controls could return if Britain exits EU', *the Guardian*, 29 May 2016

²² Cabinet Office, [The process for withdrawing from the European Union](#), Cm 9216, February 2016, page 19

²³ HM Government, [Alternatives to membership: possible models for the United Kingdom outside the European Union](#), March 2016, page 16

²⁴ [Written Question 41433](#), answered on 7 July 2016

²⁵ [Treaty on the Functioning of the European Union](#), Protocol 20

Evidence received by the Northern Ireland Affairs Committee prior to the referendum suggested that the future of the CTA is less assured:

74. (...) The European Union's Brexit Taskforce told us that as the CTA is an agreement between two EU members and protected by EU Protocol (it is currently included in an annex to the Lisbon Treaty), it would no longer apply if the UK was outside the EU. Whilst the CTA predates British and Irish membership of the EU, it is not clear that its status in international law is sufficiently robust for it to bind EU members beyond their mutual obligations to each other in the event of a Brexit. **Outside the EU, the UK would be free to negotiate a special status for Irish citizens: Professor Dagmar Schiek, Jean Monnet Chair of EU Law and Policy at Queens University Belfast, told us that there is some latitude within the EU's rules to allow some bilateral agreement between the Republic of Ireland and the UK over the border. However, she emphasised that it would require the remaining EU members to agree to this: "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".**²⁶

Evidence submitted to the Lords EU Committee inquiry into Brexit's impact on UK-Irish relations cast doubt on predictions that the operation of the CTA will continue unaffected by Brexit:

The Immigration Law Practitioners' Association thought it would be optimistic to assume that the Protocol would not become the subject of Brexit negotiations. The Centre for Cross Border Studies noted that, given the references in EU Treaties, retention of at least some of the benefits of the CTA was dependent on EU agreement". Fianna Fáil agreed that it should not be assumed that the political, economic and social imperative to maintain the Common Travel Area and an open border would supersede European law and procedures. In their view, Brexit posed a "real and substantive threat to the very existence of the Common Travel Area", including the introduction of passport controls to prevent the land border being used as a back door into the UK.²⁷

Witnesses warned that the continued operation of the CTA post-Brexit should not be taken for granted

Giving evidence to the Exiting the EU Committee, David Davis was more optimistic that the CTA can be retained. Asked how it could continue with the Republic of Ireland inside the EU and the UK having left, the Secretary of State replied:

First, in terms of legalistic issues, the common travel area is actually a clause of the Amsterdam treaty, which I negotiated. It is not quite perfect, because it talks in terms of different members of the Union, rather than one in, one out, but it is already recognised in there.

²⁶ Northern Ireland Affairs Committee, [Northern Ireland and the EU referendum](#), 26 May 2016, HC 48 2016-17

²⁷ Lords EU Committee, [Brexit: UK-Irish relations](#), 12 December 2016, HL Paper 76 2016-17, para 110

Secondly, people have said, “Wouldn’t Ireland be a route into Britain?” Well, 50 million people land at British airports every year. It is a very long-winded way to get into the United Kingdom to come via Dublin. If you want to come in, you come as a tourist and stay. That is what happens if people are trying to come in illegally in some way. I also do not foresee a circumstance where we will stop tourists at all. We will have lots of people coming in and out of Britain, so I do not see it as being as big an issue as that question implies. The other thing I would say is that I also went to Dublin. They were equally keen to maintain this and we may well have discussions with them at some point about their own incoming security, so we have at least some watchlist-type thing there. That is for them to decide, not me.²⁸

David Davis played down fears that the Irish border would be a weak-point in UK immigration control

Professor Bernard Ryan agrees that the continuation of CTA arrangements is compatible with EU law. He told the Lords EU Committee:

There is no apparent legal reason why the Republic of Ireland should not retain the benefit of Protocols 19 and 20 after Brexit, so as to permit bilateral co-operation with the United Kingdom outside the Schengen Zone.²⁹

James Brokenshire, Secretary of State for Northern Ireland, reminded the Lords EU Committee that the Crown Dependencies are outside the EU and yet within the CTA.³⁰ Mr Brokenshire also pointed to Ireland’s decision not to become part the Schengen area. This, he felt, was a “fundamental building block” to the continuation of the CTA post-Brexit.³¹ Giving evidence as part of the same enquiry, Ambassador Dan Mulhall told the committee that Ireland is under no pressure from other EU member states to join Schengen, as they understand the unique circumstances of Northern Ireland.³²

The Republic of Ireland’s disinclination to join the Schengen Zone avoids what would be a serious hurdle to continuation of the CTA post-Brexit

Might there be a ‘hard’ land border?

The Northern Ireland Affairs Committee summarised the issue:

73. However, in the event of a Brexit, the border between Northern Ireland and the Republic would become an external border for the EU and so would principally be a matter of negotiation between the UK and EU. The scope of any post-Brexit trade deal would have an influence on the nature of the border. In the event that it did not extend to mutual tariff-free access to each other’s markets, the border might need to include customs checks. Furthermore, if any post-Brexit agreement between the UK and EU did not extend to the free movement of labour with the rest of the EU, there are fears that the border with the Republic would become a “back door” by which UK border controls could be evaded (though measures already in place to restrict the ability of what would be illegal EU

²⁸ Exiting the European Union Committee, *The process for exiting the European Union and the Government’s negotiating objectives*, 14 January 2017, HC 815 2016-17, [Q450](#)

²⁹ Lords EU Committee, *Brexit: UK-Irish relations*, 12 December 2016, HL Paper 76 2016-17, written evidence of Professor Bernard Ryan (BUI0008)

³⁰ Lords EU Committee, *Brexit: UK-Irish relations*, 12 December 2016, HL Paper 76 2016-17, Q13

³¹ Lords EU Committee, *Brexit: UK-Irish relations*, 12 December 2016, HL Paper 76 2016-17, Q28

³² Lords EU Committee, *Brexit: UK-Irish relations*, 12 December 2016, HL Paper 76 2016-17, Q4

migrants to live and work in the UK would reduce its attractiveness).³³

Academics at Durham, Birmingham and Newcastle Universities have stressed that ‘there are no other ‘external’ EU borders that do not come with some form of physical border controls’. In their paper on the [prospects for the CTA after Brexit](#), Sylvia de Mars, Colin Murray, Aoife O’Donoghue and Ben Warwick drew attention to the Faroe Islands’ decision not to join the Schengen zone whilst retaining membership of the Nordic Passport Union:

The consequence of this has been for all Nordic Passport Union countries within Schengen to adopt stringent border controls vis-à-vis the Faroe Islands: those from the Faroe Islands are checked when entering any other Nordic Passport Union states, even though those from other Nordic Passport Union states can still travel without controls to the Faroe Islands. Ireland is not in Schengen at this moment – but even so, the Nordic Passport Union represents the closest analogy to the Common Travel Area that we have, and we can see there that the EU required a protection of the EU’s external border regardless of the ‘special relationship’ between the Faroe Islands and the other Nordic countries.³⁴

The Faroe Island’s place within the Nordic Passport Union and outside the Schengen zone may be the best comparison to the CTA post-Brexit

They also refer to the second example from Scandinavia - the EU external border between Norway and Sweden. The Union’s frontier demands the performance of customs checks, whilst immigration controls between the two counties are unnecessary due to joint membership of the Nordic Passport Union and the Schengen Zone.

Will there be immigration checks?

The Northern Ireland Affairs Committee considered three possible scenarios in the event of a significant change to EU nationals’ free movement rights in the UK:

- **A harder border between the Republic of Ireland and Northern Ireland** – it was noted that this would cause significant disruption to the people who regularly cross the border for work, leisure or study, and that there are doubts over the extent to which the border could be effectively policed, given the number of formal and informal crossing points.³⁵
- **A harder border between the island of Ireland and Great Britain** – it was noted that this would be less disruptive and easier to implement than applying controls at the border with the Republic of Ireland, and appeared to be the UK Government’s preference over applying checks at the land border. Nevertheless, the Committee considered that imposing checks on people travelling between different parts of the UK would be “highly undesirable”.

³³ Northern Ireland Affairs Committee, [Northern Ireland and the EU referendum](#), 26 May 2016, HC 48 2016-17

³⁴ O’Donoghue, Murray, Warwick, de Mars, ‘The Common Travel Area: prospects after Brexit’, Durham University, 7 February 2017, page 7

³⁵ The Committee noted that there are estimates of the number of daily cross-border commuters which vary from 18,000 to 30,000; and that there are nearly 300 formal border crossing points and many informal ones.

- **A harmonised approach between the UK and Ireland to immigration and border controls** – this approach would prevent hard border controls on the Irish border or controls between the islands of Ireland and Britain, and could build on the cooperation that already exists. However, the Republic of Ireland’s continued membership of the EU might constrain the policy options available.

The Committee concluded:

In the event of a Brexit, an arrangement that maintains a soft land border between Northern Ireland and the Republic but which does not see restrictions imposed on travel within the UK would need to be a priority.³⁶

A briefing paper published by Professor Bernard Ryan shortly before the referendum identified some specific elements of the current arrangements which might need to be amended in light of a UK withdrawal from the EU, depending on the nature of the UK’s future relationship with the EU.³⁷

On the other hand, some commentators have suggested that it is a “red herring” to argue that the Irish border would become a weak spot in preventing unlawful immigration to the UK. Raoul Ruparel, co-director of Open Europe, suggested immigration checks could be conducted in places other than borders:

It is very likely that the UK will continue to allow visa-free travel with the EU. Therefore, EU citizens will be free to visit the UK on holiday or to conduct some cross-border business. In reality, the enforcement of ensuring people do not over-stay cannot be at the border but via other mechanisms such as regulating access to social security and the job market. These are the things that would no longer be automatically available to EU citizens if the UK was no longer subject to free movement. But there is no real need for any greater border enforcement (though data collection and tracking of entrants should be improved). Border checks from a purely security perspective are already in place since the UK and Ireland are not in Schengen and it seems likely the UK could continue to trust Ireland to enforce the border of the Common Travel Area from a security perspective. The effectiveness of such checks would depend on bilateral cooperation.³⁸

The UK and Ireland’s position outside the Schengen Zone lessens the need for increased immigration control

Will there be an increase in customs checks?

Again, Open Europe argues that checks at the border “need not necessarily be a major problem”, although it recognises that comparable examples in other countries have a different political context:

³⁶ Northern Ireland Affairs Committee, [Northern Ireland and the EU referendum](#), 26 May 2016, HC 48 2016-17, para 80

³⁷ Professor Bernard Ryan, [ILPA EU Referendum Position Papers 8: The implications of UK withdrawal for immigration policy and nationality law: Irish aspects](#), 18 May 2016

³⁸ Open Europe, [‘How might the effect of Brexit on Ireland & Northern Ireland be managed?’](#), 8 March 2016

A border need not necessarily be a major problem and there are examples of where this situation is made to work elsewhere (albeit with a less difficult political situation). Sweden and Norway have a similar issue – a customs border is needed given that one is in the EU and the other is not, though there is no border for people since both are in the passport-free Schengen zone. This could prove a useful template (i.e. there could be a customs border between the North and the Republic but the UK and Ireland could remain within the same Common Travel Area, as they are now and were before they joined the EU). Customs checks are sporadic along the Norway/Sweden border.³⁹

Open Europe took the view that the Norway/ Sweden border may offer a useful precedent

The Irish Government produced an [initial Contingency Framework](#) in response to the referendum result, and published answers to some [related FAQs](#), which included consideration of the likelihood of changes to customs controls:

Will there be customs posts along the border?

There will be no immediate establishment of customs posts along the border, while negotiations are underway.

It is difficult to imagine a situation where there will be no controls or checks on the movement of goods when the UK leaves the EU. This would inevitably involve additional costs. There might conceivably be British as well as EU measures.

It should be noted that the customs régime between the EU and some other third countries does not, however, involve fixed border posts but a less disruptive mixture of electronic filing and random physical checks.

3.2 Impact on Irish nationals' status and rights in the UK

One of the main issues to be settled in the negotiations over the UK's withdrawal from the EU is the status and rights of EU citizens currently resident in the UK. It is possible that this might prompt a re-evaluation of the special status of Irish nationals in UK law, and the associated rights and privileges which stem from it.

Professor Bernard Ryan suggests these rights and privileges are not as entrenched as many think and that adequate protection will require new legislation:⁴⁰

The 1949 Act was the United Kingdom's response to the Irish state's decision to declare itself a republic that year, which meant its definitive withdrawal from the Commonwealth. The purpose of section 2 was to maintain the status quo in the United Kingdom, by ensuring that the Irish state, and its citizens, retained the same legal position as independent Commonwealth states, and their nationals.

It is not clear that section 2 may now be relied upon to claim specific legal rights. Contemporary legislation is highly unlikely to differentiate between 'aliens' or 'foreigners' on the one hand, and British subjects or Commonwealth citizens on the other. At

³⁹ Open Europe, '[How might the effect of Brexit on Ireland & Northern Ireland be managed?](#)', 8 March 2016

⁴⁰ 'Law may be needed to preserve the rights of Irish in UK after Brexit', *the Guardian*, 19 October 2016

most, section 2 now reflects a political understanding within the United Kingdom, which may make a difference to the content of other legislation.⁴¹

The Lords EU Committee noted that the Secretary of State for Exiting the European Union felt unable, when pressed, to give it a specific guarantee that the existing rights of Irish citizens in the UK would be maintained post-Brexit. Instead David Davis told the Committee that the Government had ‘no reason to suppose that the UK’s exit need affect them’.⁴²

Other witnesses to the Committee suggested the Republic of Ireland’s continued membership of the EU may present a difficulty: whilst the UK will be free to adopt whatever approach it likes to its Irish residents, the Republic may be prevented by the EU from offering British citizens reciprocal preferential treatment. Furthermore, the Immigration Law Practitioners’ Association advised that the other EU member states may seek assurances that entry into the Republic of Ireland from the UK would not become a back door to entry into the EU.⁴³

The Republic of Ireland’s continued membership of the EU may present difficulties in offering British citizens reciprocal preferential rights

The Committee concluded that it will be necessary for both the UK and Irish governments to make the case of the necessity of maintaining the reciprocal rights enjoyed by British and Irish citizens.⁴⁴ It called on the Government to guarantee that the rights of Irish citizens in UK law will be maintained regardless.⁴⁵

⁴¹ Lords EU Committee, *Brexit: UK-Irish relations*, 12 December 2016, HL Paper 76 2016-17, written evidence of Professor Bernard Ryan ([BU10008](#))

⁴² Lords EU Committee, *Brexit: UK-Irish relations*, 12 December 2016, HL Paper 76 2016-17, Q28

⁴³ Lords EU Committee, *Brexit: UK-Irish relations*, 12 December 2016, HL Paper 76 2016-17, para 128

⁴⁴ Lords EU Committee, *Brexit: UK-Irish relations*, 12 December 2016, HL Paper 76 2016-17, para 131

⁴⁵ Lords EU Committee, *Brexit: UK-Irish relations*, 12 December 2016, HL Paper 76 2016-17, para 130

4. The UK/ EU withdrawal negotiations

4.1 The Government's position

In her [Lancaster House speech](#) of 17 January 2017, Theresa May noted that the CTA predates UK and Irish membership of the EU. She described the maintenance of the CTA as an important priority for the UK.

During the passage of the *European Union (Notification of Withdrawal) Act 2017* David Davis told the House of Commons that issues relating to Ireland and the peace process would be at the forefront of his mind during the negotiations with the EU. He said the Government guaranteed, "without any qualification whatever", the retention of the CTA.⁴⁶

David Davis guaranteed the CTA would continue post-Brexit

In its White Paper '[The United Kingdom's exit from and new partnership with the European Union](#)', the Government sought to emphasise the ingrained rights of Irish nationals in the UK.

4.6 The close historic, social and cultural ties between the UK and Ireland predate both countries' membership of the EU and have led to the enjoyment of additional rights beyond those associated with common membership of the EU. The special status afforded to Irish citizens within the UK is rooted in the Ireland Act 1949 and, for the people of Northern Ireland, in the 1998 Belfast Agreement.

In its White Paper the Government chose to emphasise the special status of Irish nationals in the UK

4.7 Both the UK and Irish Governments have set out their desire to protect this reciprocal treatment of each other's nationals once the UK has left the EU. In particular, in recognition of their importance in the Belfast Agreement, the people of Northern Ireland will continue to be able to identify themselves as British or Irish, or both, and to hold citizenship accordingly.

The Government committed itself to striving to maintain the CTA:

4.8 We want to protect the ability to move freely between the UK and Ireland, north-south and east-west, recognising the special importance of this to people in their daily lives. We will work with the Northern Ireland Executive, the Irish Government and the Crown Dependencies to deliver a practical solution that allows for the maintenance of the CTA, while protecting the integrity of the UK's immigration system.

4.2 Stance of the EU Parliament

In its [resolution of 5 April 2017](#), the European Parliament recognised that Irish citizens 'will be particularly affected' by UK exit from the EU and stated its opposition to the return of a 'hard border'. The legally non-binding resolution, which sets out the EU Parliament's key principles and conditions for its approval of a withdrawal agreement

⁴⁶ [HC Deb 31 January 2017 cc823-4](#)

between the UK and the EU, noted the need for any withdrawal agreement to address challenges arising from recent history:

20. [The EU Parliament] Recognises that the unique position of and the special circumstances confronting the island of Ireland must be addressed in the withdrawal agreement; urges that all means and measures consistent with European Union law and the 1998 Good Friday Agreement be used to mitigate the effects of the United Kingdom's withdrawal on the border between Ireland and Northern Ireland; insists in that context on the absolute need to ensure continuity and stability of the Northern Ireland peace process and to do everything possible to avoid a hardening of the border...⁴⁷

4.3 EU Council negotiating guidelines

At its special meeting on 29 April 2017 the European Council agreed guidelines for the negotiations. The issue of the Irish border was one of three matters that Council President Donald Tusk chose to highlight in his statement on the meeting.⁴⁸ The guidelines evidence the Council's wish to avoid a 'hard border' and an acceptance that the EU recognise the CTA:

11. The Union has consistently supported the goal of peace and reconciliation enshrined in the Good Friday Agreement in all its parts, and continuing to support and protect the achievements, benefits and commitments of the Peace Process will remain of paramount importance. In view of the unique circumstances on the island of Ireland, flexible and imaginative solutions will be required, including with the aim of avoiding a hard border, while respecting the integrity of the Union legal order. In this context, the Union should also recognise existing bilateral agreements and arrangements between the United Kingdom and Ireland which are compatible with EU law.⁴⁹

The European Council accepted the EU must recognise 'existing bilateral agreements' between Ireland and the UK

4.4 The EU Commission's negotiating directives

Four days later the EU Commission published its draft negotiating directives, translating the Council's guidelines into a legal mandate for the conducting of the first phase of the negotiations.⁵⁰

The negotiating directives, formally endorsed by the European Council on 22 May 2017, outline the EU's priorities for the negotiations. They make explicit reference to the CTA:

14. In line with the European Council guidelines, the Union is committed to continuing to support peace, stability and reconciliation on the island of Ireland. Nothing in the Agreement should undermine the objectives and commitments set out in

⁴⁷ European Parliament resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union ([2017/2593\(RSP\)](#))

⁴⁸ European Council, [Remarks by President Tusk on the Special European Council \(Art.50\) of 29 April 2017](#)

⁴⁹ European Council, [Guidelines following the United Kingdom's notification under Article 50 TEU](#), 29 April 2017

⁵⁰ European Commission, [Speech by Michel Barnier at the press conference on the adoption of the Commission's recommendation on draft negotiating directives](#), 3 May 2017

the Good Friday Agreement and its related implementing agreements; the unique circumstances and challenges on the island of Ireland will require flexible and imaginative solutions. Negotiations should in particular aim to avoid the creation of a hard border on the island of Ireland, while respecting the integrity of the Union legal order. Full account should be taken of the fact that Irish citizens residing in Northern Ireland will continue to enjoy rights as EU citizens. **Existing bilateral agreements and arrangements between Ireland and the United Kingdom, such as the Common Travel Area, which are in conformity with EU law, should be recognised.** The Agreement should also address issues arising from Ireland's unique geographic situation, including transit of goods (to and from Ireland via the United Kingdom). These issues will be addressed in line with the approach established by the European Council guidelines.⁵¹

The Commission's negotiating directives confirmed the CTA's compliance with EU law

⁵¹ European Commission, [Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union](#), 3 May 2017

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