

**MAKING THE  
CASE FOR**

**IRISH  
UNITY**

**IN THE EU**

**AN INDEPENDENT  
LEGAL AND  
ACADEMIC REPORT**

COMMISSIONED BY  
THE LEFT IN THE  
EUROPEAN PARLIAMENT

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# *MAKING THE CASE FOR IRISH UNITY IN THE EU*



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## **EXECUTIVE SUMMARY**

1. The conclusions in our 2019 report remain applicable. Irish reunification is a fundamental element of the Good Friday Agreement (GFA) and that possibility has been given effect in both UK and Irish constitutional law. The binary choice of partition or unity will be presented to the two electorates on the island in concurrent referendums. Irish reunification, pursuant to the terms of the GFA, offers the only realistic path back to full membership of the EU for the people of Northern Ireland.
2. There has been a further marked acceleration of interest in work on a united Ireland since our last report. A prominent theme in these discussions is the need for planning and preparation. Although the guarantee of automatic return to the EU is featuring in many of these discussions, it remains underexplored. The EU now looks increasingly like an outlier in these evolving constitutional conversations.
3. Should both electorates favour reunification, the jurisdiction of Northern Ireland will transfer to the state of Ireland. This is an example of cession in public international law. In EU law, this would amount to a reshaping of Ireland's borders as occurred with German reunification. This reality was recognised by the European Council in its statement of 29th April 2017.
4. There are no normative restrictions on the EU adopting a policy position of favouring Irish unity over the status quo. This is the case with the partition of Cyprus. The right of self-determination belongs to the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment. This provision does not preclude EU support for one of the two contemplated outcomes. Neither article 1 of the Protocol nor article 4(2) TEU, as a matter of law, prevents the adoption of support for Irish unity
5. Viewed on its merits, there are many good reasons to suppose that Irish reunification is preferable to the status quo. Irish reunification, pursuant to the terms of the GFA, would be consistent with the right to self-determination, potentially secure more effective protection for human rights and equality, including rights attaching to EU citizenship, guarantee the protection of the functioning of the internal market, and provide for a more coherent and democratic system of enforcement of EU law. There is also the prospect of improved political relations with the UK.
6. Support for Irish unity in referendums on the island of Ireland, when they are scheduled in accordance with the terms of the GFA, does not equate to a denial or inappropriate undermining of Northern Ireland's current status as part of the UK. Nor does sensible planning now for such an outcome.
7. The adoption of such a policy, would not, it is submitted, be in any way inconsistent with the GFA itself or the Withdrawal Agreement's promise to respect UK territorial integrity and essential state functions. It does not amount to an external impediment to the principles of consent and self-determination, which form the basis of the GFA itself. When the UK and Ireland have together undertaken to hold such a vote, the outcome of the concurrent referendums will have practical, political, and economic consequences for the EU, so an objective assessment of where its shared interests lie is reasonable



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8. Planning for Irish unity remains the responsibility of the Irish Government but a contribution can be made by the EU in areas of exclusive or shared competence under the Treaties.
9. The legal and economic relationship between the EU and the UK is now principally governed by the WA and the TCA. The GFA features prominently in the Protocol to the former. The GFA, including the right of the people of the island of Ireland to self-determination, has, in some respects, become a part of EU law.
10. The continuing operation of the TCA presupposes effective implementation of the WA. Both parties have undertaken to perform their respective duties in good faith. This principle is the foundation stone of public international law but also attracts special significance in EU law.
11. At the present time, adherence to that promise of good faith implementation by the UK is in serious, if not yet permanent, doubt. The stated justification of the Northern Ireland Protocol Bill of necessity is not credible. Unilateral suspension or amendment of the WA is not permitted and article 168 WA requires that both the UK and the EU only have recourse to the dispute-resolution procedures provided for therein. Breach of obligations under the WA can lead to suspension of the TCA, as provided for by article 172 WA and article 749(4) TCA.
12. A situation in which the UK Government was deliberately frustrating the proper operation of the Protocol and simultaneously refusing to call a vote on Irish unity in circumstances envisaged by the GFA is, unfortunately, no longer inconceivable. The EU should identify and consider what courses of action exist to ensure adherence to obligations voluntarily assumed in public international law
13. Changes in the government of a state, its internal constitutional arrangements, or the extent of its territory, do not, in general, affect the legal personality of the state in international law and EU law. Economic and monetary union, and membership of the single currency, require preparation and planning between the Irish Government and the EU institutions. A united Ireland will remain subject to the same obligations but can expect to benefit from some qualifications.
14. Public international law on succession of states in respect of state property, assets, and debts is not settled. The assertion that a united Ireland would initially assume a UK subvention to Northern Ireland of close to £10bn appears to be mistaken. Instead, the question of UK state debt, assets, and pensions will be the subject of negotiations between Ireland and the UK. Existing evidence, practice and agreements provide an indication of how these discussions are likely to be framed and taken forward.

# MAKING THE CASE FOR IRISH UNITY IN THE EU

Mark Bassett and Colin Harvey<sup>1</sup>

## Section A: Review of 2019 Report “The EU and Irish Unity”

### Overview

1. In 2019, the authors published an independent legal and academic report entitled “The EU and Irish Unity: Planning and Preparing for Constitutional Change in Ireland”.<sup>2</sup> It was written during the sometimes unpredictable Brexit Withdrawal Agreement (WA) negotiations between the UK Government and the EU Commission. It was published on the 4th October 2019. It formed part of a series which considered the implications of UK withdrawal from the European Union (EU).<sup>3</sup> The report was presented at the European Parliament, at Westminster in London, at the Oireachtas in Dublin, and to the Northern Ireland Assembly.<sup>4</sup>
2. Reviewing its contents now, almost three years later and after the conclusion of the WA and the Trade & Co-Operation Agreement (TCA), it is apparent that much of the content remains relevant and applicable in the here and now and the not very distant future.
3. Our first report was intended primarily as an account of *how* and in *what manner* the reunification of Ireland would take effect in EU law. It set out the procedure already established in the constitutional law of both the UK and Ireland and how that was consistent with public international law and would be accommodated in EU law. This report, instead, looks at *why* such an outcome, achieved pursuant to the terms of the Good Friday Agreement (GFA), should be supported and welcomed by the EU. It concludes that there are no normative constraints on the Union adopting such a policy. It includes an assessment of the merits of Irish unity under a European roof. It is intended as a modest first step in articulating the case for Irish unity from Brussels.
4. The task of ensuring that Irish reunification is given due prominence in the work of the EU’s institutions is an important one. However, it is obviously not a substitute for the need to convince a majority of the voting electorates both north and south to support Irish unity in the coming referendums. Support for Irish unity amongst the EU institutions and national governments of the member states will not, by itself, deliver Irish unity. That choice remains for the people of Ireland in concurrent referendums. It will, however, assist in the real objective of making a reunified Ireland

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1 Mark Bassett is a barrister in independent practice at the Northern Ireland Bar since 2010. Colin Harvey is Professor of Human Rights Law and Director of the Human Rights Centre at Queen’s University Belfast. The authors would like to acknowledge the feedback provided on a draft of this report from Martina Anderson, Brian Carty, and Chris MacManus. Any errors in this report are ours alone.

2 Available at <https://left.eu/issues/publications/the-eu-irish-unity/> and QUB Policy Engagement at <http://qpol.qub.ac.uk/the-eu-and-irish-unity/>.

3 Other publications include a report from Caoilfhionn Gallagher QC and Katherine O’Byrne on “Special Status for Northern Ireland” in November 2017; Caoilfhionn Gallagher QC, Angela Patrick and Katherine O’Byrne of Doughty Street Chambers on “Brexit and Human Rights” in March 2018; and Report on a Special Designated Status for Northern Ireland Post-Brexit by Dr. Nikos Skoutaris in May 2018.

4 Presented in Brussels to European Parliament on the 9th October 2019; presented to the Oireachtas Joint Committee of the Good Friday Agreement on 15th February 2021 and 22nd March 2021; and to the Executive Committee of the Northern Ireland Assembly on the 28th April 2021.

a success for the people of Ireland (north and south), for the UK, and for the EU. Equally, the measures identified in this 2022 report are necessary but not sufficient. The primary responsibility for planning and preparing and advocating for Irish unity must, clearly, fall to the Irish Government.

5. The 2019 report contained an explanation of the GFA and its implementation in the constitutional arrangements of the UK and Ireland. The GFA contemplates Irish unity through concurrent referendums on the island of Ireland. The report also noted the statement of the European Council, on the 29th April 2017, that in accordance with international law, the entire territory of a united Ireland would become part of the EU.<sup>5</sup> As expected, Irish reunification would be seen as a reshaping of the state's borders.<sup>6</sup> There would be no need for Treaty amendment, nor would article 49 TEU apply, as it concerns the accession of a new member state. The approval of fellow member states or of any of the institutions of the EU would not be necessary.
6. Following Brexit, Irish reunification, pursuant to the terms of the GFA, offers the only realistic path back to full membership of the EU for the people of Northern Ireland. There is no prospect of an imminent return for the UK. This was evident in 2019, but the case has only strengthened. Those seeking the first available option of return to the EU will find a solution in the GFA. The political atmosphere in Britain in the summer of 2022 is surely more hostile to European integration than at any time in the last 60 years. Both of the two main political parties in Britain have rejected the notion of a return to membership.<sup>7</sup> The current British Government has frequently announced its intention to move away from alignment with EU law as fast and as forcefully, and in as many areas, as possible. It often appears that the differentiation is itself the objective rather than the means of achieving any practical or economic benefit.<sup>8</sup> The consequences of such an approach for Northern Ireland are not always adequately considered.<sup>9</sup> The trajectory of the UK, therefore, seems to be moving further away from the liberal social-market democracy model which predominates in the EU.
7. Notwithstanding the partial mitigation contained in the Ireland/Northern Ireland Protocol, the full range of rights and benefits which are on offer with EU membership simply cannot be replicated from within a third country. The economic benefits of Brexit have to date proven illusory.<sup>10</sup> In Northern Ireland, there is no special status or protocol which is equivalent to membership. The jurisdiction remains within the UK, but cannot ignore the geographical reality of being on the island of Ireland.

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5 The fundamental starting place is the European Council statement of 29th April 2017. It accompanied the European Council's approval of the draft guidelines for negotiation of a Withdrawal Agreement with the UK and was added to the minutes. It provided "... the Good Friday Agreement expressly provides for an agreed mechanism whereby a united Ireland may be brought about through peaceful and democratic means; and in this regard, the European Council acknowledges that, in accordance with international law, the entire territory of such a united Ireland would thus be part of the EU".

6 Article 52 TEU provides that the Treaties apply throughout the territory of the member states as defined in national law. This is to be read together with article 355 TFEU, which identifies a number of jurisdictions which benefit from special provisions. See *Administration des Douanes et Droits Indirects v Léopold Legros and others* (1992) EUECJ C-163/90, (1992) ECR I-4265, [7] for example of this approach taken in context of the free movement of goods.

7 "Labour Will Not Take UK back into EU or Single Market" – *The Herald*, 4th July 2022; "Get Brexit Done" as part of Conservative Party manifesto and available at <https://www.conservatives.com/our-plan/get-brex-it-done-and-unleash-britains-potential>.

8 British PM pledges Brexit Freedoms Bill to cut EU red tape – press release from Prime Minister's Office on 31 January 2022; and more recently "Liz Truss vows to start bonfire of EU to spark UK economic growth" – <https://inews.co.uk/news/politics/liz-truss-vows-to-start-a-bonfire-of-eu-red-tape-to-spark-uk-economic-growth-1758029>; <https://www.theneweuropean.co.uk/sunak-sparks-up-the-trusty-brex-it-bonfire-and-promises-the-undeliverable-again/>.

9 "For Northern Ireland, Brexit means more red tape and subsidies" – *The Economist*, 4th September 2021; <https://www.economist.com/britain/2021/09/04/for-northern-ireland-brex-it-means-red-tape-and-subsidies>

10 Office for Budget Responsibility has maintained its forecast of March 2020 that Brexit would ultimately reduce UK gross domestic product by 4% compared with scenario where UK remained in the European Union. Available at <https://obr.uk/box/the-effect-on-productivity-of-leaving-the-eu/>; "The Deafening Silence over Brexit economic fallout" – *Financial Times* on 20 June 2022. Available at <https://www.ft.com/content/7a209a34-7d95-47aa-91b0-bf02d4214764>. "Brexit Two Years On – So Far, So Bad", *Investment Monitor* on 31 January 2022. Available at <https://www.investmentmonitor.ai/analysis/two-years-brex-it-uk-eu>.

8. Brexit accelerated and altered the debate regarding Irish reunification on the island of Ireland. The majority of voters in Northern Ireland supported “remain” in June 2016.<sup>11</sup> We wrote in 2019 that Irish reunification was in the strategic interest of the EU. That submission remains clear and compelling today. This report suggests that rather than remain as a detached observer and eventual facilitator of such an outcome, the EU, and its institutions, should undertake an assessment of their interests and consider becoming an advocate for Irish reunification. This would be consistent with its position regarding the continuing partition of Cyprus.<sup>12</sup>
9. At a minimum, it requires the EU to provide reliable and honest information regarding the effects and their benefits and costs, in the short, medium and long-term, to the electorates north and south on the island of Ireland. The 2016 Brexit referendum in the UK suffered from a lack of candid and informed assessment of what the actual consequences of withdrawal from the EU meant. That lack of European voices may well have stemmed from the calculation that such intervention would be unhelpful to the remain side. It came at a price however. In future, it is suggested that the greater the quality of information available to the electorates in Ireland so much the better, and the EU has a clear role in ensuring that this is the case.
10. Therefore, the current situation requires the EU, and its institutions, to begin to support the planning and preparation for constitutional change in Ireland. This would be to complement rather than replace the necessary steps that will have to be taken by the Irish Government. The precedent of German reunification in 1990, and the contribution of the (then) European Communities, should serve as a model and inspiration. Imperfect though it may be, from the vantage point of 32 years, the peaceful ending of German partition “under a European roof”<sup>13</sup> may be viewed as swift, consensual, and largely successful. It has, undoubtedly, benefited both Germany and the EU as a whole.

### **The Good Friday Agreement**

11. The debate on Irish unity is framed by the GFA, as a multi-party agreement and, in the form of the British-Irish Agreement, public international law. The core commitments in this document, endorsed in concurrent referendums on the island of Ireland in May 1998, offer the roadmap to peaceful and consensual constitutional change in the status of Northern Ireland. The relevant provisions of the text are well-known but repay careful reading:
  1. The participants endorse the commitment made by the British and Irish Governments that, in a new British-Irish Agreement replacing the Anglo-Irish Agreement, they will:
    - (i) Recognise the legitimacy of whatever choice is freely exercised by a majority of the people in Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland
    - (ii) Recognise that it is for the people of the island of Ireland alone, by agreement between

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11 In Northern Ireland, a total of 789,879 valid votes were cast. The referendum electorate voted in favour of remain by a majority of 55.8% to 44.2%. The electorate in Northern Ireland, consistent with the rest of the UK, consisted of British, Irish, and qualifying commonwealth voters. EU citizens were excluded from the franchise. Available at [https://www.bbc.com/news/politics/eu\\_referendum/results](https://www.bbc.com/news/politics/eu_referendum/results)

12 The position of Cyprus within the EU is addressed in Protocol 10 to the 2003 Accession Treaty. The whole of Cyprus is regarded as EU territory, although the application of the Union *acquis* is suspended in the northern area of the island in which the Cypriot government does not exercise effective control. Council Regulation (EC) No 866/2004 of 29 April 2004 on a regime under Article 2 of Protocol No 10 of the Act of Accession, OJ L 161, 30.4.2004, p. 128–143, Council Regulation (EC) No 389/2006 of 27 February 2006 establishing an instrument of financial support for encouraging the economic development of the Turkish Cypriot community and amending Council Regulation (EC) No 2667/2000 on the European Agency for Reconstruction, OJ L 65, 7.3.2006, p. 5–8 and Council Regulation (EU, Euratom) No 1311/2013 of 2 December 2013 laying down the multiannual financial framework for the years 2014–2020, OJ L 347, 20.12.2013, p. 884–891

13 The European Council held a special session in Dublin on the 28th April 1990. Under the Irish Presidency, and chaired by Taoiseach Charles Haughey, a common approach to German unification was reached. The Community warmly welcomed the prospect of unity and that this process was to be accomplished under a European roof. Available at [https://www.consilium.europa.eu/media/20571/1990\\_april\\_-\\_dublin\\_eng\\_.pdf](https://www.consilium.europa.eu/media/20571/1990_april_-_dublin_eng_.pdf)



the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people in Northern Ireland;

- (iii) Acknowledge that while a substantial section of the people in Northern Ireland share the legitimate wish of a majority of the people of the island of Ireland for a united Ireland, the present wish of a majority of the people of Northern Ireland, freely exercised and legitimate, is to maintain the Union and, accordingly, that Northern Ireland's status as part of the United Kingdom reflects and relies upon that wish; and that it would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people
  - (iv) Affirm that if, in the future, the people of the island of Ireland exercise their right of self-determination on the basis set out in sections (i) and (ii) above to bring about a united Ireland, it will be a binding obligation on both governments to introduce and support in their respective Parliaments legislation to give effect to that wish
  - (v) Affirm that whatever choice is freely exercised by a majority of the people of Northern Ireland, the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social, and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities;
  - (vi) Recognise the birthright 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 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
12. There are a number of points to underline about the above provisions. First, the GFA contains an admirable commitment to rights, and this embraces a distinctive right to self-determination that acknowledges that the constitutional status of Northern Ireland rests on continuing consent. The constitutional question is deliberately open-ended; *it is not a final settlement*. Second, it is a right that inheres in the people of the island of Ireland and will be exercised by free and concurrent consent, north and south; subject to the "agreement and consent" of a majority in Northern Ireland. Third, a vote for unity creates a binding obligation on both governments to proceed with relevant legislation. Fourth, the "sovereign government" has an existing obligation of "rigorous impartiality" that will continue whatever the arrangements (this will pass to the Irish Government in the event of reunification). And finally, there is a right to identify and be accepted as Irish or British or both, and it is stated that this will persist too.
13. In our view, the most faithful interpretation of what was agreed by the two governments and the political parties in the GFA, with respect to the right to Irish self-determination, is that there will be concurrent referendums in each jurisdiction. The processes will be subject to differing traditions, rules, and processes. Some procedural issues remain unclear or are subject to ongoing discussion. These include the franchise in the north, the precise questions posed, whether the concurrent referendums must be simultaneous, and the evidence which would trigger the duty on

the Secretary of State to call the poll.<sup>14</sup> Suggestions of a weighed majority in Northern Ireland or suggestions of repeat or confirmatory votes north and south have not gained widespread support and are generally viewed as contrary to the GFA.<sup>15</sup> There is a need for care here in differentiating credible legal interpretations of the GFA, as a matter of international law, from what would be politically desirable or preferred. It remains difficult, for example, to read the GFA as requiring anything other than referendums, north and south, at the same time and on essentially the same basis (allowing for the constitutional and legal distinctiveness of each jurisdiction).

14. The reasonable expectation of voters in each jurisdiction in Ireland is that the Irish Government, in particular, would provide clarity and certainty about some of the most important practical implications of a vote for unity. It is regrettable that this is yet to be realised.<sup>16</sup> The exact nature of the proposal to be put to the electorates, north and south, has not yet been defined with anything approaching sufficient precision. It is likely that this will be the key focus for many participants in the coming years.
15. In the UK, the principles and mechanisms of Irish self-determination, as set out in the GFA, have been given domestic legal effect in the Northern Ireland Act (1998). Since the publication of the report in 2019, the Northern Ireland Court of Appeal delivered judgment in the case of *Re Raymond McCord: A Border Poll*.<sup>17</sup> The court restated, in forceful terms, not only the breadth of discretion available to the Secretary of State but also the requirement for an honest assessment of prevailing circumstances, with a view to acting with rigorous impartiality, and to give effect to the promise of national self-determination together with the Irish Government.<sup>18</sup>
16. The authors have previously written that the right of self-determination belongs to the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment.<sup>19</sup> That phrase is yet to receive any detailed examination in either the Irish or British law reports.<sup>20</sup> It is hinted at in the Anglo-Irish Agreement of 1985 in comparable terms but was not implemented into the national law of either state.<sup>21</sup> In the Downing Street Declaration of December 1993, in section 4, the two governments reaffirmed “as a binding obligation that they will, for their part, introduce the necessary legislation to give effect to this, or equally to any measure of agreement on future relationships in Ireland which the people living in Ireland may themselves freely so determine without external impediment”<sup>22</sup>.
17. The UCL Working Group on Unification Referendums on the Island of Ireland considered that “external impediment”:

precludes actors external to the people of Ireland from intervention in the referendum process in such a way as to become an ‘impediment’. Most obviously, this constraint applies to the UK

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14 For example, the question of the electorate in Northern Ireland is still uncertain. The GFA speaks of the “people of Northern Ireland”. Paragraph 4(1) of schedule 1 to the Northern Ireland Act (1998) requires that the Secretary of State must specify, by order, the persons entitled to vote. The choice is likely to be between the Westminster franchise or the Northern Ireland Assembly franchise.

15 For example see UCL Working Group on Unification Referendums on the Island of Ireland Final Report (May 2021); sections 11.14-11.20 on Referendum Thresholds. Available at <https://www.ucl.ac.uk/constitution-unit/research-areas/elections-and-referendums/working-group-unification-referendums-island-ireland>

16 Chris Donnelly in Irish News (23 May 2022) “Planning for Irish Unity needs to begin in earnest”; BBC News on 20 February 2022 “Sinn Fein: Time to Plan for a United Ireland says Michelle O’Neill available at <https://www.bbc.co.uk/news/uk-northern-ireland-60449290>;

17 In the Matter of An Application by Raymond McCord for Judicial Review (2020) NICA 23

18 Ibid, McCord, paragraphs 67, 70, 72 and 82

19 Colin Harvey and Mark Bassett, The Future of Our Shared Island: A Paper on the Logistical and Legal Questions Surrounding Referendums on Irish Unity (February 2019) available at [http://puureadmin.qub.ac.uk/ws/portalfiles/portal/165227852/Our\\_Shared\\_Island\\_A\\_Paper\\_on\\_Unity\\_CCG\\_2019.pdf](http://puureadmin.qub.ac.uk/ws/portalfiles/portal/165227852/Our_Shared_Island_A_Paper_on_Unity_CCG_2019.pdf)

20 The leading judgments on “consent” from the Northern Ireland Court of Appeal in *Re McCord* (2021) 23 and *Re Allister* (2022) NICA 15 do not address what is meant by “external impediment” in any real detail.

21 The British and Irish governments, in article 1(c), declare that, if in the future a majority of the people of Northern Ireland clearly wish for and formally consent to the establishment of a united Ireland, they will introduce and support in their respective parliaments legislation to give effect to that wish”.

22 Available at <https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/northernireland/peace-process--joint-declaration-1993.pdf>

government as the only party to the Agreement that is, in terms of the Agreement, external to the people of the island of Ireland. But it also obliges both the Irish government and the UK government (as the parties bound by the Agreement) to ensure that there is no such interference from other external actors. In our view, the phrase ‘without external impediment’ does not, however, legally require either government to prohibit financial campaign contributions from outside the island of Ireland, although there may be good reasons to limit or control financial contributions to referendum campaigns.<sup>23</sup>

18. Read in political and historical context, we suggest, however, that the reference to “external impediment” is primarily addressed to the Westminster Parliament. The right to choose a new constitutional future or to continue in the current arrangements resides again with “the people” of the island, and the northern lock is hardwired in, with recognition that there are two jurisdictions that must consent.<sup>24</sup> For those who support Irish unity, there is no route out of partition other than the mechanism set out in the GFA. Equally, however, the previous assumption of a solid majority in the north in favour of union with Britain is no longer sufficient. Consent will soon have to be demonstrated in a free and fair referendum conducted in accordance with the GFA and national electoral law.
19. We submitted that it was significant for the EU in 2017 to confirm that a reunified Ireland would continue as a member state, thus addressing a potential “external” obstacle to reunification.<sup>25</sup> The right to self-determination belongs to the people of this island without “external impediment”. It is not a gift at the discretion of governments in either London or Dublin or anywhere else. There is, however, no impediment imposed by EU support for Irish reunification by undertaking responsible planning now and in the future.
20. The centrality of the concept of parliamentary supremacy to the British constitutional tradition remains a concern. Added to this is the history of Westminster frustration of votes in favour of Home Rule in the period 1886-1912. The link to the Westminster Parliament was certainly the understanding of the-then Taoiseach Ahern when, in April 1998, he said that the:

British government are effectively out of the question, and neither the British parliament nor people have any legal right under this Agreement to impede the achievement of Irish unity if it had the consent of the people North and South ...<sup>26</sup>

21. The British Government is under a “binding obligation” to take forward and support the outcome of concurrent referendums on this island. But what happens if the Westminster Parliament becomes an impediment? If this were to take place, it would amount to an egregious breach of the Agreement. It would be comparable to the Irish state assuming jurisdiction and control of Northern Ireland without reference to the principle of consent.
22. Within the Republic of Ireland, the provisions concerning reunification are now found in the amended articles 2 and 3 of Bunreacht na hÉireann. Again, they are well known to readers, but the precise terms merit close scrutiny.

#### Article 2

It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish Nation. That is also the entitlement of all persons otherwise

23 Working Group on Unification Referendums on the Island of Ireland: Final Report (May 2021), section 4.47. , Ibid footnote 15

24 Colin Harvey, “Let the People Decide: Reflections on Constitutional Change and Concurrent Consent”, Irish Studies in International Affairs, 2021, Vol. 32, No.2 Analysing and Researching Ireland, North and South (2021), pp. 382-405

25 See Colin Harvey and Mark Bassett, “Further Responses to the Oireachtas Joint Committee on the Implementation of the Good Friday Agreement, 16 February 2021, available at [https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint\\_committee\\_on\\_the\\_implementation\\_of\\_the\\_good\\_friday\\_agreement/submissions/2021/2021-02-16\\_correspondence-professor-colin-harvey-lecturer-school-of-law-queen-s-university-belfast\\_ga.pdf](https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_the_implementation_of_the_good_friday_agreement/submissions/2021/2021-02-16_correspondence-professor-colin-harvey-lecturer-school-of-law-queen-s-university-belfast_ga.pdf).

26 Speaking at Arbour Hill on the 26th April 1998: available at <https://www.irishtimes.com/news/britain-has-been-ruled-out-of-the-equation-on-north-says-ahern-1.146434>.



qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage

### Article 3

1. It is the firm will of the Irish Nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognising that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island. Until then, the laws enacted by the Parliament established by this Constitution shall have the like area and extent of application as the laws enacted by the Parliament that existed immediately before the coming into operation of this Constitution.
  2. Institutions with executive powers and functions that are shared between those jurisdictions may be established by their respective responsible authorities for stated purposes and may exercise powers and functions in respect of all or any part of the island.
23. The manner in which Irish reunification could be brought about is tolerably clear. The outcome will be that Northern Ireland will leave the UK and become part of the state of Ireland, as a member of the EU. A reunified Ireland will not be a new state, in the technical legal sense of this term.
24. It should again be restated that there is nothing threatening or anxiety-inducing about votes to give effect to Irish self-determination in the two jurisdictions on the island. It is a core element of the current constitutional compromise that underpins the peace process. It is the sole legitimate basis upon which Northern Ireland remains part of the UK. That the Unionist viewpoint constituted a majority of voters in the north at the time of the signing of the GFA in April 1998 could not seriously be doubted, but that position is significantly less certain in 2022. Those who cite the GFA's endorsement of Northern Ireland's place within the Union should recognise that it is dependent on persisting consent. The people of the island of Ireland have a right to self-determination as an agreed matter of law, policy, and established practice. That they take this constitutional promise seriously, and may wish to exercise this right, should surprise or upset no one. There is nothing "divisive", "dangerous", or "toxic" about contemplating Irish reunification in the aftermath of Brexit.

## **Consistency of Reunification with EU Law**

25. An adequate understanding of Irish reunification also requires familiarity with public international law and EU law. In particular, two aspects should be considered. Both were fundamental to German reunification in 1990. The first is the right of national self-determination. It has obtained the status of *erga omnes*, which all states have an interest in protecting.<sup>27</sup> It also forms part of the general principles of EU law recognised by the CJEU in the case of *Council v. Front Polisario*.<sup>28</sup> The second principle is transfer of territory by cession.
26. The right to self-determination is a cardinal principle of contemporary international law. It has developed from moral, political, and philosophical arguments to attain formidable legal force. Article 1(2) of the United Charter identifies respect for it as one of the fundamental purposes of the organisation. The adoption of Resolution 1514(XV) and Resolution 2625(XXV) by the UN General Assembly placed this principle at the centre of international relations. It is given further expression in article 1 of the International Covenant on Civil and Political Rights (1966) and article

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27 East Timor (Portugal v. Australia), Judgment, I. C.J. Reports 1995, p. 90 [29]; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports, 2004, p. 136, [88]; Legal Consequences of the Separation of the Chagos

28 Archipelago from Mauritius in 1965, Advisory Opinion, ICJ Reports, 2019, p. 169. Also, the issue is examined in a comprehensive manner by the Canadian Supreme Court in the case of Reference Re Succession of Quebec (1998) 2 SCR 217. Council v. Front Polisario, (2016) EUECJ C-104/16, [88]-[89]



1 of the International Covenant on Economic, Social, and Cultural Rights (1966). It provides that all peoples have the right of self-determination.

27. The specific manner in which Irish self-determination will be given effect is set out in the GFA and was formulated and negotiated primarily by both governments over many years. From an international law perspective, the process by which it will be delivered, and the form it will take, has therefore been agreed between the two relevant states. It will see the jurisdiction of Northern Ireland leave the UK and form part of a “sovereign united Ireland”.
28. The transfer of the territory of Northern Ireland from the UK to Ireland, pursuant to the provisions of the GFA, would be regarded as cession in international law. This is the peaceful and agreed transfer of ownership of territory from one state to another. It has the legal effect of replacing one sovereign with another by agreement of the contracting states. Both states retain their international legal personality. The map of Europe has been altered through peaceful cession on many occasions. This includes occasions where transfer was endorsed by plebiscite.
29. EU law recognises the occurrence of moving borders. Examples include the return of the Saarland to German sovereignty in 1955; the dissolution of the Free Territory of Trieste and transfer of territory to Italy in 1954; the change in the status of St. Pierre-et-Michelon from French overseas territory to overseas department within France; Algerian independence from France; German reunification in 1990; and a revised border between Belgium and the Netherlands in 2018. Member states are free to define their own borders in accordance with national law and the generally accepted principles of international law.<sup>29</sup> Thereafter, the Treaties apply throughout the territory of the member states subject only to express reservations recognised in EU rather than national law.
30. This process of Irish self-determination has been implicitly recognised in the Ireland/Northern Ireland Protocol. Article 1(1) lists as one of the objectives of the Protocol:

This Protocol is without prejudice to the provisions of the 1998 Agreement in respect of the constitutional status of Northern Ireland and the principle of consent, which provides that any change in that status can only be made with the consent of a majority of its people
31. Irish reunification, if and when endorsed by the separate electorates on the island, will be seen as a legitimate democratic demand to be supported by the Irish and British governments and, where appropriate, the institutions of the EU. It is suggested that there are useful lessons from the German experience at the end of the Cold War. That is not to argue it is the only relevant example or matches the Irish experience completely. It does not. But it is a helpful recent illustration of successful reunification occurring in Europe.
32. The first is that all relevant parties recognised German reunification as an exercise in self-determination by the German people. This right was then, and remains now, a fundamental element of the international legal order and had to be respected. In the context of Irish unity, successful referendums held in accordance with the provisions of national law and faithful to the requirements of the GFA, will assume a formidable democratic legitimacy. This too will be seen as an exercise in self-determination, which must be accommodated within the EU’s legal order.
33. The second is that a clear constitutional path in national law is essential. Article 23 of the German constitution is mirrored in practical terms in articles 2 and 3 of Bunreacht na hÉireann. The possibility of East German Lander joining the Federal Republic was explicit, as is the possibility and process for the reunification of Ireland now. The German pathway was endorsed by the institutions and member states in 1990. This also appears to be the case with Irish unity, following the statement of the European Council in April 2017. It could not have been possible without consensus among the 27 member states.

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29 See footnote 5

34. The third is consistency with recognised principles of international law. The GDR acceded to the FRG. The latter state was extinguished as an actor on the international plane and the FRG rights and obligations were altered in line with the principle of moving boundaries. The (then) Community and its member states accepted the legality of such an outcome and this informed subsequent actions. In the context of Irish unity, the model will once again be one of cession. The territorial jurisdiction of Ireland will extend to the whole of the island of Ireland. UK sovereignty will end in the jurisdiction. A reunified Ireland would not amount to the accession of a new member state, and Treaty revision will not be required. Both the United Kingdom and Ireland will retain legal personhood in international law.
35. Fourth, the institutions and member state governments were consistent in their view that German unification could be accommodated alongside existing priorities – at that time, principally, the establishment of the internal market. In the context of Irish unity, the EU will continue to pursue its existing and future priorities. The extent to which the UK has deviated from the rules governing the internal market will be relevant to the need for temporary solutions for Irish obligations. This may be particularly relevant in relation to economic and monetary union.

### **Suggestions for Preparatory Work by EU Institutions**

36. The 2019 report made suggestions regarding preparatory work that could be undertaken by some of the EU institutions that would assist in the event of Irish reunification pursuant to the provisions of the GFA. With respect to the European Parliament, this included: (i) explicit endorsement of the position set out by the European Council; (ii) consideration of the level of representation for a united Ireland in the EP; (iii) consideration of voting rights and free movement rights for British citizens resident in Ireland; (iv) the implications for economic and monetary union, other member states, and supervising institutions; (v) the necessity and scope of transitional arrangements and derogations for Ireland in the immediate aftermath of Irish unity.
37. It was suggested that the EU Commission could: (i) produce a legal opinion on the position of Irish unity under EU law comparable to that which was provided in 1990 concerning German reunification; (ii) produce guidance for the member states and institutions regarding their responsibilities regarding the right to self-determination in Ireland; (iii) consider the best legislative approach to ensuring the free movement and voting rights of British citizens resident in Ireland; (iv) consider establishing a task force on Northern Ireland, which would include promotion of the right to self-determination; (v) explore the implications for economic and monetary union for Ireland; (vi) consider the implications for the Union's legislative processes in the event that further delegated powers are conferred on the Commission.
38. The 2019 report sought to pay particular attention to the implications of Brexit for national identity. It was foreseen that it would result in the creation of a region outside of the EU that is largely inhabited by EU citizens (Irish citizens primarily) who wish to see their EU rights protected where they reside. Those who identify as British only (and who entirely legitimately do not wish to avail of any legal right to Irish and thereby EU citizenship) have been deprived of significant free-movement rights.
39. The report also considered the likely effect that Brexit would inevitably have on the protection of citizens' rights, human rights, and equality in Northern Ireland. As expected, the Withdrawal Agreement, the Protocol, and the Trade and Co-operation Agreement have mitigated some, but not all, of these concerns. There was clear merit in recognising the special position of Northern Ireland and this was achieved in certain areas such as the free movement of goods, no diminution of specific equality and rights guarantees, and the benefits of a common travel area for Irish and British citizens.
40. However, Brexit was then, and is still now, part of a larger project that is inherently hostile to

effective human rights protection within the UK domestic legal order. At the time of writing, the progress of the bills explicitly aimed at undermining human rights in the sphere of access to justice in legacy<sup>30</sup>, and continued access to the EU internal market in goods for Northern Ireland in the protocol<sup>31</sup>, are telling examples of the priorities of the current British government. The decision to pause the Bill of Rights Bill (which intended to repeal the 1998 Human Rights Act) suggests that this agenda is facing resistance.

41. Such ambitions follow the abolition of the Charter in UK law<sup>32</sup>, the extinguishing of the right to compensation for individuals who have suffered loss for state breaches of EU law under the *Francovich* ruling<sup>33</sup>, and the rights and benefits that accompany citizenship of the Union when in the territory of the other member states. The ability for cross-border travel has also been targeted in the Counter-Terrorism and Border Security Act (2019) and the Nationality and Borders Act (2022). The former creates a zone known as “the border area” in which those who are within the vicinity of the border are subject to greater police interference.<sup>34</sup> The latter Act will require visa pre-clearance for EU citizens lawfully present in Ireland to cross the border into Northern Ireland.<sup>35</sup> These measures sit alongside the many years of the creation, expansion, and fortification of an immigration system that was notoriously labelled as the “hostile environment” by its chief proponent. New arrivals to Northern Ireland from the EU must now contend with the full range of measures which aim at discouraging migration. It is a system which has delegated many responsibilities for immigration policing to other state agencies, private companies, and individuals.<sup>36</sup>
42. The authors had warned that the UK could become a “cold house” for rights and equality, with severe consequences for Northern Ireland. This process is already well under way and there is, unfortunately, no reason to suppose a complete change of direction lies on the horizon. Although the picture is complicated, supranational protection of rights and equality, effectively insulated from attack from Westminster, is no longer possible under the current constitutional arrangements. That reality will motivate voters in Ireland but should also, it is submitted, be a matter of concern for the EU.
43. The 2019 report also considered the implications of a united Ireland in the context of economic and monetary union. Economic interdependence and solidarity between member states is now more deeply entrenched than ever before. As is well known, but no less controversial for being so, within the 19 states making up the eurozone, monetary policy is centralised and conducted by the European Central Bank. At the same time, economic and fiscal policy remains with national governments subject to certain agreed limitations. Irish reunification will have significant implications for Ireland, its eurozone partners, and the EU institutions in the system of supervision and peer review.
44. The Treaty on Stability, Co-Ordination and Governance for Economic and Monetary Union of 2012 is an intergovernmental treaty between certain member states of the EU, including Ireland. The rules relating to a balanced budget are a significant aspect of the Treaty. It operates alongside a number of pieces of EU secondary legislation which amount to a system of peer review, with

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30 The Northern Ireland (Legacy & Reconciliation) Bill.

31 The Northern Ireland Protocol Bill.

32 Section 5(4) of the European Union (Withdrawal) Act (2018).

33 Paragraph 4 of Schedule 1 to the European Union (Withdrawal) Act (2018).

34 See schedule 3 of the 2019. It provides extensive powers to stop, question, search, and arrest those who are regarded by examining officers as engaged in “hostile activity” within 1 mile of the border on the northern side.

35 Section 75 of the Nationality and Borders Act (2022) amends the Immigration Act (1971) to require electronic travel authorisations save for those who are British citizens and persons who would be entitled to enter the UK without leave such as Irish citizens.

36 Melanie Griffiths and Colin Yeo “The UK’s Hostile Environment: Deputising Immigration Control” *Journal of Critical Social Policy Journal* (2021) Vol 41. Pg 521-544; Colin Yeo “Welcome to Britain” Biteback Publishing (2020); House of Commons Public Accounts Committee “Immigration Enforcement” 17th Report of Session 2019-2020; Report of House of Commons Home Affairs Committee “Windrush Generation” HCC 990 on 3 July 2018.

both preventative and corrective features.<sup>37</sup> Exceptional circumstances permit derogation from the requirements and have been frequently used and expanded over the years since the financial and sovereign debt crisis.

45. It is anticipated that the currency of a reunified Ireland will be the Euro. This is consistent with the moving-boundaries' principle of international law. Ireland would, therefore, retain existing rights and benefits and continue to be bound by duties already entered into, including those arising under economic and monetary union, including membership of the single currency
46. We suggested that an authoritative assessment of the immediate and medium-term economic impact of Irish reunification on state finances and its implications under EMU would be necessary. While Ireland was, and remains, part of a rules-based fiscal framework, a review of past experience shows that it is not entirely mechanical in its application.<sup>38</sup> The facilitation of Irish unity, pursuant to the provisions of the GFA, would be a priority for the EU. It is not difficult to foresee that the Commission, the Council, supervising institutions, and other national governments would recognise the importance and exceptional nature of reunification and refrain from imposing any sanction. The exercise of political discretion is inevitable in this context. Such an approach would not require reconstruction of the growth and stability measures for the Union but rather flexibility for Ireland within them.

# **Section B: The State of the Post-Brexit Constitutional Conversation on a United Ireland**

## **Introduction**

47. As noted in Section A, in our 2019 report we outlined the state of the conversation about a united Ireland. It is becoming increasingly essential to map once again the scale, depth, and extent of ongoing projects. The EU now looks increasingly like an outlier in these evolving constitutional conversations.
48. The rationale then was to demonstrate the intensification of post-Brexit interest and the questions being considered and addressed. It is vital that this work is outlined. Since then, there has been a further marked acceleration of interest in work on a united Ireland. A prominent theme in these discussions is the need for planning and preparation. The title of our 2019 report has now become the mainstream framing for the overall conversation. It is also apparent that, although the guarantee of automatic return to the EU is featuring prominently in many of these discussions, it remains underexplored.

## **Political Parties and Government**

49. Sinn Féin launched its Commission on the Future of Ireland in July 2022.<sup>39</sup> Sinn Féin Chairperson

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37 Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ L 306, 23.11.2011, p. 12–24; Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ L 306, 23.11.2011, p. 33–40; Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macro-economic imbalances in the euro area, OJ L 306, 23.11.2011, p. 8–11

38 Alicia Hinarejos, 'Economic and Monetary Union' in Catherine Barnard and Steve Peers (eds), *European Union Law*, (OUP 2017)

39 <https://www.sinnfein.ie/contents/64056>.



Declan Kearney stated:

The ‘Commission on the Future of Ireland’, which was officially launched by Mary Lou McDonald last week and which I will chair, is intended to widen democratic participation in the ongoing debate about the future and to serve as a model of grassroots’ consultation.<sup>40</sup>

50. The objective is an 18-month process of consultation leading to the publication of a report.<sup>41</sup> Sinn Féin has also produced a number of papers, including ‘Economic Benefits of a United Ireland’ in November 2020.<sup>42</sup> In this paper, the economic consequences of partition are noted, as well as the opportunities opened up by reunification. What is required in terms of next steps is addressed. Sinn Féin calls for: a Joint Oireachtas Committee; an all-island citizens’ assembly; more resources for the Shared Island Unit and better planning; a White Paper on unity; and the party indicates that the Irish Government should achieve a unity referendum.<sup>43</sup> There is recognition in the paper of the demands of climate justice, with the potential of an all-island green economy highlighted.<sup>44</sup>
51. The SDLP announced plans for its New Ireland Commission in July 2020, a body “that will seek to engage with every community, sector and generation on this island to build new proposals that can generate a consensus on our future constitutional arrangements”<sup>45</sup>. The first panel was announced in May 2021<sup>46</sup>. With 32 members, the suggestion was that this would “bring forward the practical detail that has been lacking from the constitutional debate”.<sup>47</sup> Another panel ‘New Generation, New Citizens, New Rights’ was also noted. The project has an associated Twitter account from March 2021: @NewIrelandComm. This describes the initiative as: “A Commission of civic and political leaders from across Ireland informing the debate about our future.”
52. Individual members of political parties have been involved in making proposals. Two prominent examples are Jim O’Callaghan (Fianna Fáil) and Neale Richmond (Fine Gael). In March 2021, Jim O’Callaghan delivered a paper to a virtual seminar at Sidney Sussex College, University of Cambridge.<sup>48</sup> This paper, among other things, sets out what would need to be clarified in advance of the vote, including:
1. What would a united Ireland look like politically?
  2. What would be the economic consequences of a united Ireland?
  3. What laws would operate in a united Ireland?
  4. How would the British identity of unionists be recognised and respected in a united Ireland?<sup>49</sup>
53. The scale of what is required is examined and the paper is clear that: “A new Ireland requires a new constitution.”<sup>50</sup> Neale Richmond’s paper ‘Towards a New Ireland’ was presented in the same seminar series in April 2021.<sup>51</sup> Once again there is an emphasis on significant advance planning, including a citizens’ assembly and an Oireachtas Committee. As the title of the paper suggests, the focus is on a New Ireland, with statements such as:

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40 <https://www.sinnfein.ie/contents/64056>.

41 Ibid. ‘The Commission will be an opportunity for citizens to have their say on the future of Ireland; our economy, our constitutional arrangements; political and democratic structures and governance; the role of the Irish government; the rights and equality agenda; the protection of minorities; future economic and public policy models and a future all-island public health service.’

42 [https://www.sinnfein.ie/files/2020/Economic\\_Benefits\\_of\\_a\\_United\\_Ireland.pdf](https://www.sinnfein.ie/files/2020/Economic_Benefits_of_a_United_Ireland.pdf)

43 Ibid p 7.

44 Ibid pp 18-19.

45 [https://www.sdlp.ie/new\\_ireland\\_commission](https://www.sdlp.ie/new_ireland_commission)

46 <https://www.belfastlive.co.uk/news/sdlp-launches-first-panel-new-20533335>. See also, <https://www.irishnews.com/news/northernirelandnews/2021/05/06/news/sdlp-launches-new-ireland-commission-panel-looking-at-economy-education-and-health-2312463/>

47 Colum Eastwood SDLP leader, <https://www.belfastlive.co.uk/news/sdlp-launches-first-panel-new-20533335>

48 ‘The Political, Economic and Legal Consequences of Irish Reunification’ [https://jimocallaghan.com/wp-content/uploads/2021/03/Jim\\_Speech\\_Irish\\_reunification\\_.pdf](https://jimocallaghan.com/wp-content/uploads/2021/03/Jim_Speech_Irish_reunification_.pdf)

49 Ibid, p 8.

50 Ibid p 9.

51 <https://www.finegaele.ie/app/uploads/2021/04/Towards-a-new-ireland-Neale-Richmond-2021.pdf>

It is easy to call for a border poll as soon as possible to agree for Northern Ireland's departure from the UK and assimilation into the existing Irish State. Such an approach may sound feasible, but it is unambitious and doomed to fail. A United Ireland that is no different to the Ireland of today is simply not good enough if we want to achieve a peaceful, prosperous island where all are welcome. When the time comes for the discussion of what a New Ireland should look like, we need to be imaginative and generous in the formation of a newer, better, version of what we have now on either side of the border.<sup>52</sup>

54. The paper sketches options in relation to the economy, international relations and the political system, legal system, education, policing, infrastructure, healthcare, and symbols. There is also consideration of the steps towards a border poll.
55. The Shared Island Unit is part of a broader Shared Island Initiative.<sup>53</sup> The Programme for Government (of the current Irish Government) contains a dedicated section on a Shared Island.<sup>54</sup> The following is stated there:

We are committed to working with all communities and traditions on the island to build consensus around a shared future. This consensus will be underpinned by the Good Friday Agreement and by the absolute respect for the principle of consent.<sup>55</sup>

56. There is a strong focus within this work on improving established mechanisms of sharing on the island and building on them. The tendency to acknowledge the debate on the constitutional future without directly addressing it is reflected, for example, in this speech by An Taoiseach, Micheál Martin, in October 2020:

As a vital part of the Good Friday Agreement, we definitively resolved how we decide on the constitutional future for the island, founded on the principle of consent. As Taoiseach, I respect and I affirm everyone's right on the island to make the case for the constitutional future they wish to see for Northern Ireland, whether they are nationalist, unionist, or neither. The genius of the Agreement is that we do not need to be defined or dominated by constitutional questions, as we were in the past. We can all work together for a shared future without in any way relinquishing our equally legitimate ambitions and beliefs – nationalist, unionist, or neither.<sup>56</sup>

57. A Shared Island Fund was established to support the initiative and fund a range of collaborative North/South projects, including capital funding. There have been a number of Shared Island Dialogues, which have included reflection on the environment, rural and community development, equality, and the role of civil society.<sup>57</sup> Research is also ongoing within this framework. There is, for example, a research partnership with the Economic and Social Research Institute (ESRI).<sup>58</sup> This has produced four reports on: cross-border trade in services; the attractiveness of the island of Ireland for high-value, foreign-direct investment; analysis of primary healthcare systems; and a comparison of education and training systems.<sup>59</sup> Several scoping papers have also been produced, including on children's care and early education, and migrant integration, with full reports due in late 2022.<sup>60</sup> The National Economic and Social Council (NESC) produced a report in April 2022: "Shared Island Shared Opportunity: NESC Comprehensive Report", which contains a range of

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52 Ibid p 13.

53 <https://www.gov.ie/en/campaigns/c3417-shared-island/>

54 Programme for Government: Our Shared Future pp 103-107, <https://www.gov.ie/en/publication/7e05d-programme-for-government-our-shared-future/>

55 Ibid p 104.

56 [https://merrionstreet.ie/en/news-room/speeches/online\\_address\\_by\\_an\\_taoiseach\\_on\\_shared\\_island.html](https://merrionstreet.ie/en/news-room/speeches/online_address_by_an_taoiseach_on_shared_island.html).

57 <https://www.gov.ie/en/publication/3eb3c-shared-island-dialogues/>.

58 <https://www.gov.ie/en/publication/645ff-shared-island-research/>.

59 <https://www.gov.ie/en/publication/645ff-shared-island-research/>.

60 Ibid.

specific recommendations on economy and investment, social policy, climate and biodiversity, wellbeing measurement, and data coordination.<sup>61</sup> Many of these are again about advancing enhanced all-island co-operation as well as identifying areas where more work could usefully be undertaken. The Irish Research Council has also funded initiatives in this area, including a North-South Legal Mapping Project and an All-Island Network to Combat Hate, with more projects to come.<sup>62</sup> Other initiatives are underway, including a partnership with the Standing Conference on Teacher Education, North and South.<sup>63</sup>

58. Oireachtas Committees also have a significant role to play in this work and there have been calls for the establishment of, for example, a special committee to address it.<sup>64</sup> It is notable that work has been done and more is planned. The Oireachtas Committee on the Implementation of the Good Friday Agreement produced a report – prepared by Senator Mark Daly – in August 2017: “Brexit and the Future of Ireland Uniting Ireland & Its People in Peace & Prosperity”<sup>65</sup>. The Committee has built upon this in a number of recent evidence sessions on the potential for constitutional change, including by the authors of this report.<sup>66</sup> A major new development, however, is the Seanad Public Consultation Committee work on the constitutional future of the island of Ireland.<sup>67</sup>

The purpose of this public consultation is to invite submissions from all the people and interested groups and organisations to consider the constitutional future of the Island of Ireland, listening to the voice of all people on the island and people of all traditions and opinions. In particular, we wish to hear the voices of the Unionist Community and their vision for the future.<sup>68</sup>

59. The Committee has provided an indicative list:

1. Views of young people from throughout the island on this issue should be listened to, including the voice of all Communities and Traditions in Northern Ireland on their vision for the future.
2. The criteria for a referendum and lessons from other referendums here and in other jurisdictions.
3. What are the societal and economic opportunities and challenges that should be considered, such as: All Island Health Care, Housing, Education, Economy, Climate Change, Biodiversity, Culture and Language, Reconciliation, etc., including issues such as the question of the subvention to Northern Ireland.<sup>69</sup>

This consultation process is likely to generate even more momentum around this conversation across the island of Ireland.

60. This is merely a snapshot of ongoing work. But what it demonstrates is that the Irish Government and political parties are giving considerable thought to the future of the island of Ireland. There are two main strands to this effort. The first is the focus on a shared island framework. Much of this is

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61 [http://files.nesc.ie/nesc\\_reports/en/157\\_shared\\_island\\_comprehensive.pdf](http://files.nesc.ie/nesc_reports/en/157_shared_island_comprehensive.pdf)

62 <https://research.ie/2021/12/09/taoiseach-micheal-martin-t-d-and-minister-simon-harris-t-d-announce-eleven-awardees-under-the-irish-research-councils-shared-island-research-strands/>.

63 <https://scotens.org/8349-2/>

64 Neale Richmond, ‘Preparations for a border poll should begin sooner rather than later’ <https://www.irishnews.com/news/northernirelandnews/2022/05/28/news/platform-fine-gael-td-neale-richmond-preparations-for-a-border-poll-should-begin-sooner-rather-than-later-2725393/>

65 [http://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint\\_committee\\_on\\_the\\_implementation\\_of\\_the\\_good\\_friday\\_agreement/reports/2017/2017-08-02\\_brexit-and-the-future-of-ireland-uniting-ireland-and-its-people-in-peace-and-prosperity\\_en.pdf](http://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_the_implementation_of_the_good_friday_agreement/reports/2017/2017-08-02_brexit-and-the-future-of-ireland-uniting-ireland-and-its-people-in-peace-and-prosperity_en.pdf).

66 [https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint\\_committee\\_on\\_the\\_implementation\\_of\\_the\\_good\\_friday\\_agreement/submissions/2021/2021-02-16\\_opening-statement-professor-colin-harvey-and-mark-bassett-b-l-lecturers-school-of-law-queen-s-university-belfast\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_the_implementation_of_the_good_friday_agreement/submissions/2021/2021-02-16_opening-statement-professor-colin-harvey-and-mark-bassett-b-l-lecturers-school-of-law-queen-s-university-belfast_en.pdf)

67 <https://www.irishnews.com/news/northernirelandnews/2022/05/28/news/platform-fine-gael-td-neale-richmond-preparations-for-a-border-poll-should-begin-sooner-rather-than-later-2725393/>

68 Ibid.

69 Ibid.

directed towards exploration of existing collaboration and how to build on it. It often openly avoids any discussion of the constitutional question. A generous interpretation is that this is an attempt to address planning and preparation for a potential referendum indirectly. But the risk is that the required focused effort is simply avoided. The second strand noted above is much more open on the question of the constitutional future, in the sense that it anticipates a new and united Ireland and encourages dialogue about what might be proposed and how that will be achieved.

61. The momentum and trends around Irish reunification are plainly prompting reflection within unionism in Northern Ireland and at Westminster. One example of this is the proposed establishment of what appears to be a publicly funded research centre oriented primarily towards the priorities of unionism: the Castlereagh Foundation.<sup>70</sup> The title of the Foundation is telling. This suggests that political unionism is aware of the work that needs to be done in building the case for remaining in the UK. However, the fact that this is being taken forward by the Westminster Government raises significant questions around respect for the “rigorous impartiality” obligations of the GFA. This more “muscular unionism” reflects a definite policy response from the current British Government. It remains to be seen what impact it would have on views about the constitutional future.

### **Civic Society**

62. Much of the impetus for the post-Brexit resurgence of interest has come from civic initiatives.<sup>71</sup> The most well-known is Ireland’s Future, which, in addition to a range of events, open letters, and opinion pieces, has produced substantial policy papers on, for example, the economy, and citizenship, rights and identity.<sup>72</sup> These papers are written in an accessible format and address questions around the referendum process and the case for reunification. The extent of engagement with Ireland’s Future events and the ambitions of this organisation mean it increasingly looks like the lead civic-campaigning group for Irish reunification.
63. There are other examples, including the work of the Constitutional Conversations Group and the Shared Ireland podcast series.<sup>73</sup> These groups have produced significant work in organising events, preparing papers, and in the case of podcasts, collating a wide and diverse range of voices.

### **Universities and Research Institutes**

64. The involvement of universities and academics in the various Shared Island Initiatives has been noted above. There has been notable work commenced and completed since we produced our earlier report. The ARINS academic initiative is one prominent example.<sup>74</sup> It has produced a wide range of relevant academic research outputs, combined with a podcast series with the participating scholars.<sup>75</sup> There are also several partner projects noted, including on “Gendering Constitutional Conversations”<sup>76</sup>.

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70 Clause 8 of Identity and Language Bill (Northern Ireland), if enacted, will empower the Northern Ireland Secretary of State to establish such a body. This follows paragraph 25 of Annex A to the “New Decade, New Approach” Agreement of January 2020.

71 Detailed in Frank Connolly, *United Nation: The Case for Integrating Ireland* (2022: Gill Books, Dublin).

72 <https://irelandfuture.com/publications/>

73 The Constitutional Conversations Group, for example, held a People’s Assembly in August 2022 as part of Féile an Phobail <https://feilebelfast.com/events/the-first-peoples-assembly-on-a-new-constitution-for-a-new-ireland-an-chead-tionol-na-ndaoine-ar-bhunreacht-nua-deirinn-nua/?occurrence=2022-08-04>. The Shared Ireland podcast series has produced a remarkable range of interviews: <https://sharedireland.com/>.

74 ARINS: Analysing and Researching Ireland North and South <https://www.ria.ie/arins>: ‘ARINS is a joint project of The Royal Irish Academy, an all-island body, and the Keough-Naughton Institute for Irish Studies at Notre Dame’s Keough School of Global Affairs, a research institute of international standing. We seek to engage recognised experts across the spectrum of disciplines, perspectives and points of view, inviting contributions in the form of academic papers, blog posts, and proposals for partnerships.’

75 <https://www.ria.ie/read-arins-research>.

76 See further: <https://www.ria.ie/read-arins-research>. And Ashe, F., Rooney, E. and McMinn, J. (2022) *Gendering Constitutional Conversations: A Report on Women’s Inclusion through Constitutional Discussion* (The Transitional Justice Institute, Ulster University: Belfast).



65. The UCL Constitution Unit Working Group on Unification Referendums on the Island of Ireland produced its final report in May 2021<sup>77</sup>. The report examines, in considerable depth, the framing and process dimensions of the referendums anticipated in the GFA. Other initiatives include a DCU-QUB seminar series “Reflections on a United Ireland”<sup>78</sup>, the QUB podcast series “Constitutional Futures”<sup>79</sup>, and there are other individual and collaborative projects involving several universities.<sup>80</sup>

### The Withdrawal Agreement and the Trade and Co-operation Agreement

66. The UK left the EU on the basis of negotiated and binding international agreements. These set out the terms of departure and the nature of the future relationship. In our earlier report we noted the guarantee given to Ireland – following the German reunification precedent – that Irish reunification would mean automatic re-entry to the EU, and we have discussed this above.<sup>81</sup> Unlike the discussions on Scottish independence, this matter is settled. In our view, this alters the nature of the conversation and the planning process. This is about a reunification process taking place within the territory of an EU Member State.
67. As noted, the question of constitutional status is addressed explicitly in the Protocol.<sup>82</sup> This provision makes clear that the Protocol does not affect the existing guarantees on the constitutional status of Northern Ireland. The official title of the Protocol acknowledges also, for example, that there are two legal jurisdictions on the island of Ireland (Northern Ireland and Ireland). This has not prevented misleading claims being made about the constitutional implications. The reality is, however, that the constitutional status of Northern Ireland within the UK will only change in the way provided for in the GFA. This position has been confirmed in case law and the courts have made clear the meaning of the principle of consent<sup>83</sup>, the fact that the Protocol does not affect Northern Ireland’s constitutional position within the UK<sup>84</sup>, as well as how the referendum will come about.<sup>85</sup>
68. The WA and the TCA establish the basis for the ongoing relationship between the EU and the UK. They contain a wide range of normative guarantees and create a new institutional architecture for engagement and co-operation. Despite the attempt to put mitigations in place via the Protocol, the situation is not comparable to EU membership and there is a real risk over time of significant divergence.

### Conclusion

69. The scale of preparatory work ongoing on the constitutional future of Ireland is impressive. There is much more to be done but it is plain that a good start has been made. It is evident from the above there has been a notable lack of necessary preparation from the EU institutions and member states. This is problematic. While it may flow from an understandable desire to respect the constitutional framework of the GFA, it neglects the need for legitimate advance planning ahead of potential change within a member state.

77 <https://www.ucl.ac.uk/constitution-unit/research-areas/elections-and-referendums/working-group-unification-referendums-island-ireland>.

78 Recordings from this series are available here: [https://www.youtube.com/watch?v=zMAUPqdWq2c&list=PLjrV30SsHdbD\\_bCiojhTS0q-dEGDGQkIAj](https://www.youtube.com/watch?v=zMAUPqdWq2c&list=PLjrV30SsHdbD_bCiojhTS0q-dEGDGQkIAj)

79 Available at <https://www.qub.ac.uk/schools/SchoolofLaw/news/QUBConstitutionalFuturesPodcastSeries.html>

80 See, for example, the work undertaken by Colin Murray and Aoife O’Donoghue including, “Life after Brexit: operationalising the Belfast/ Good Friday Agreement’s principle of consent” (2019) 42 *Dublin University Law Journal* 14; and the work of Brendan O’Leary, including *Making Sense of a United Ireland* (Penguin 2022). Worth noting here other contributions including Richard Humphreys’ *Beyond the Border: The Good Friday Agreement and Irish Unity after Brexit* (2018 Irish Academic Press); Kevin Meagher, *A United Ireland: Why Unification Is Inevitable and How It Will Come About* (2022 Biteback Publishing); and Ben Collins’ *Irish Unity: Time to Prepare*, (2022 Luath Press).

81 See EU and Irish Unity report Chapter 2, pp 23-44 on The EU, the Right to Self Determination and the Mechanics of Reunification.

82 Article 1.

83 Miller I [2017] UKSC 5 [135]: “In our view, this important provision, which arose out of the Belfast Agreement, gave the people of Northern Ireland the right to determine whether to remain part of the United Kingdom or to become part of a united Ireland. It neither regulated any other change in the constitutional status of Northern Ireland nor required the consent of a majority of the people of Northern Ireland to the withdrawal of the United Kingdom from the European Union. Contrary to the submission of Mr Lavery QC for Mr McCord, this section cannot support any legitimate expectation to that effect.”

84 Re Allister [2022] NICA 15.

85 Mc Cord above n16

## **Section C: Public International Law**

### **Introduction**

70. The legal and economic relationship between the EU and the UK is now principally governed by the WA and the TCA. The GFA features prominently in the Protocol to the former. The continuing operation of the TCA presupposes effective implementation of the WA. Both parties have undertaken to perform their respective duties in good faith.
71. This section of the report considers the current legal and political relationship between the WA, the TCA, and the GFA in public international law and EU law together with its possible implications for Ireland. There are legal connections between the three, which have yet to be fully examined. An important objective of the WA is to protect the GFA. The TCA now governs the current and future relationship between the EU and the UK in many areas but was dependent on the conclusion of the WA. Its continued operation remains dependent on adherence to the WA.
72. At the time of writing, adherence to that promise of good faith implementation by the UK is in serious if not yet permanent doubt. The current British Government intends to abandon its obligations to the EU, and to the people of Northern Ireland, through the enactment of domestic legislation which deprives the Protocol of many of its most important features. Those elements have, to date, prevented the re-emergence of a hard border on the island of Ireland. Such contempt for international-law obligations by the British Government is concerning in and of itself but it could also result in understandable apprehension that the self-determination provisions of the GFA might be similarly disregarded or frustrated. If the British Government is prepared to walk away from a recently negotiated international agreement with the EU, what are the risks it might do likewise with the GFA and the Irish Government?
73. The publication of the Northern Ireland Protocol Bill can be seen as the latest in a series of measures taken to demonstrate hostility to European commitments, including in the sphere of human rights. Alongside the Bill is the Northern Ireland (Legacy and Reconciliation) Bill, which will have the effect of preventing effective investigation of many Troubles-era deaths.
74. Should this trajectory continue, the EU should consider how it intends to react to this development in British government policy now and in the near future. It may be necessary to ascertain what instruments, if any, it could utilise to ensure the right of Irish self-determination is respected by the UK, as well as the possibility of a return to the EU under the terms of the GFA for the people of this region. Comprehensive examination of the legal position is a first step. It is a separate analysis from whether it should invoke those levers. It involves determination of (i) to what extent, if any, UK frustration of the GFA provisions on Irish self-determination are a breach of the WA/TCA; and (ii) to what extent, if any, could the EU take proportionate retaliatory measures under the WA/TCA for the purpose of ensuring the constitutional future of the jurisdiction is determined by the people of Ireland as promised by the GFA?

### **Principle of Good Faith in International Law**

75. At the outset, the position in public international law must be examined. A cardinal rule of which is *pacta sunt servanda*. Treaty obligations must be observed by state parties and the obligations and rights assumed must be performed in good faith. It has been a principle of customary international law for centuries and has been codified in article 26 of the Vienna Convention on the Law of Treaties of 1969 (VCLT).<sup>86</sup> It provides as follows:

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<sup>86</sup> It is replicated in article 26 of the Vienna Convention on the Law of Treaties between States and International Organisations (1986).



Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

76. The importance of *pacta sunt servanda* to the international rules-based order is self-evident, as there is little purpose in signing treaties with states or organisations that do not commit to adhere to obligations voluntarily assumed therein. The entire system of public international law relies upon state adherence to promises made and contained in treaties. It has been termed as “arguably the oldest principle of international law”<sup>87</sup>; as “the fundamental principle of the law of treaties”<sup>88</sup>; and “a rule of jus cogens by logical necessity”<sup>89</sup>. There is little difficulty in stating the rule in clear terms in the abstract, but the manner of enforcement is less certain and often context-dependent. The basic principle is that unilateral and extra-territorial enforcement is prohibited in the absence of a permissive rule to the contrary.<sup>90</sup>

77. Article 27 VCLT codifies another fundamental rule of customary international law. It provides as follows:

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

78. The international-law perspective on this point is absolutely clear in the relevant case law of international tribunals.<sup>91</sup> A state which has broken a stipulation of international law cannot justify such a breach by reference to its own domestic law, regardless of the character, scope, and/or nature of that domestic law. In the *Free Zones*’ case, the Permanent Court stated that:

... a state cannot adduce as against another state its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force. Applying these.<sup>92</sup>

79. Article 3 of the International Law Commission’s Articles on State Responsibility addresses the position in similarly clear terms:

The characterization of an act of a state as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.<sup>93</sup>

80. Article 46(1) VCLT also provides that a state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law which governs competence to conclude treaties. This is subject only to the narrow exception where the particular violation was manifest and concerned a rule of fundamental importance. A manifest violation is one which would be objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith. There is, however, no general legal obligation for states to keep themselves informed of legislative or constitutional developments in other states.

87 Malcolm M. Shaw, *International Law*, (8th edition, Cambridge University Press, 2017) , pg. 685

88 Yearbook of the International Law Commission (1966), Volume II, pg. 211. Available at [https://legal.un.org/ilc/publications/yearbooks/english/ilc\\_1966\\_v2.pdf](https://legal.un.org/ilc/publications/yearbooks/english/ilc_1966_v2.pdf)

89 Robert Kolb, *Peremptory International Law: Jus Cogens – A General Inventory*, (Bloomsbury,1937), pg. 56-58.

90 *Lotus (France v. Turkey)*, Permanent Court of International Justice, judgment of 7 September 1927, series A, no.10, [45] – [48]

91 *Cameroon v. Nigeria (Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria)*, ICJ Reports (2002), pg. 303, 430; *Liechtenstein v. Guatemala (Nottebohm Case)*, ICJ Reports, (1955) 23; *Applicability of the Obligation to Arbitrate under section 21 of the United Nations Headquarters Agreement of 26 June 1947*, ICJ Reports (1988), 12; *Libya v. UK, Libya v. United States of America (Lockerbie Case)*, ICJ Reports (1992) 3; *Treatment of Polish Nationals and other Persons of Polish Origin or Speech in Danzig Territory*, Permanent Court of Justice, 4 February 1932, Advisory Opinion, Series A/B No. 44.

92 *Treatment of Polish Nationals and other Persons of Polish Origin or Speech in Danzig Territory*, Permanent Court of Justice, 4 February 1932, Advisory Opinion, Series A/B No. 44

93 International Law Commission, ‘Report on the Responsibility of States for Wrongful Acts’; produced at fifty-third session in 2001. Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4. Available at [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf)

81. In the case of *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, the ICJ restated the principle in trenchant terms and held that, even if in the case of reciprocal wrongful conduct by the parties, such circumstances could not bring the Treaty to an end or justify its termination.<sup>94</sup> Instead, the parties were obliged to seek a solution within the co-operative context of the Treaty. At paragraph 114, the ICJ said:

The Court is of the view, however, that although it has found that both Hungary and Czechoslovakia failed to comply with their obligations under the 1977 Treaty, this reciprocal wrongful conduct did not bring the Treaty to an end nor justify its termination.

The Court would set a precedent with disturbing implications for treaty relations and the integrity of the rule *pacta sunt servanda* if it were to conclude that a treaty in force between States, which the parties have implemented in considerable measure and at great cost over a period of years, might be unilaterally set aside on grounds of reciprocal noncompliance.

It would be otherwise, of course, if the parties decided to terminate the Treaty by mutual consent. But in this case, while Hungary purported to terminate the Treaty, Czechoslovakia consistently resisted this act and declared it to be without legal effect.

82. The principle of adherence to Treaty obligations is also subject to a number of narrow recognised circumstances which preclude wrongfulness. They have been set out in the International Law Commission's Draft Articles on State Responsibility. They are consent, self-defence, force majeure, distress, and necessity. This last possibility, the doctrine of necessity (*etat de necessitie*), requires greater consideration in the current circumstances.
83. The commentary of the ILC on necessity is generally accepted as a correct statement of the law, including by the British Government.<sup>95</sup> It provides:

Article 25. Necessity

1. Necessity may not be invoked by a state as ground for precluding the wrongfulness of an act not in conformity with an international obligation of that state unless the act:
    - a. Is the only way for the state to safeguard an essential interest against a grave and imminent peril; and
    - b. Does not seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole.
  2. In any case, necessity may not be invoked by a state as a ground for precluding wrongfulness if:
    - a. The international obligation in question excludes the possibility of invoking necessity; or
    - b. The state has contributed to the situation of necessity.
84. As can be seen, necessity may, in limited circumstances, provide a valid basis in international law for a state signatory to a treaty to fail to perform one or other of its obligations. The burden of proof lies with the state asserting the defence in line with the general rule of *actori incumbit probatio* (he who asserts a proposition must prove it). The state must demonstrate that the act in question is to safeguard an essential interest against a peril; the peril shall be grave and imminent; the course of

<sup>94</sup> Case Concerning *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports, p. 7, [114]

<sup>95</sup> The justification published by the Foreign & Commonwealth Office for the Northern Ireland Protocol Bill: UK government legal position states as much. It is available at: <https://www.gov.uk/government/publications/northern-ireland-protocol-bill-uk-government-legal-position/northern-ireland-protocol-bill-uk-government-legal-position>.

action taken must be the only way available to safeguard that interest, and the plea is excluded if there are otherwise lawful measures available, even if they are more costly or less convenient; and no other essential interest shall be seriously impaired as a result of the breach. The conditions are cumulative rather than disjunctive.

85. In addition, even if the conditions are satisfied, the defence may not be invoked while the state in default was renounced recourse or substantially contributed to the situation of necessity. Necessity is, therefore, close to self-preservation as seen in the famed Caroline Affair of 1837.<sup>96</sup> It is rarely successfully invoked in practice.<sup>97</sup>
86. The principle of good faith is also reflected in the manner in which treaties are to be understood and applied. Article 31 of the Vienna Convention on the Law of Treaties (VCLT) sets out the rules of interpretation when any court is construing an international treaty. A treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.<sup>98</sup> Treaties are to read as a whole and in light of any subsequent agreement, subsequent state practice, and any relevant rules of international law applicable in the relations between the states.<sup>99</sup>
87. The objective is to ascertain the common intention of the parties by considering the text, objective, and context of the instrument. In its early advisory opinion in Admission of a State to the United Nations, the International Court of Justice stated that:

the first duty of a tribunal which is called upon to interpret and apply provisions of a Treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur.<sup>100</sup>

88. Article 32 sets out the limited circumstances in which the true meaning of a provision can be determined when the ordinary approach would lead to an ambiguous, obscure, manifestly absurd or unreasonable result. Supplementary means of interpretation are appropriate, including the *travaux préparatoires*.<sup>101</sup>
89. A further interpretative canon is *ut res magis valeat quam pereat* (“That the thing may rather have effect than to fail/to be destroyed”). It is also called the validation principle. This maxim suggests that treaties are to be interpreted with reference to their declared objects and purposes and that particular provisions should be interpreted to give the fullest effect consistent with the normal sense of the words and with other parts of the text. The general principle is explained by Hernandez in the following manner:

First, all provisions of the treaty are presumed to have been intended to have significance, or to be necessary to convey the intended meaning. Second, the treaty as a whole, and each of its provisions, must be taken to have been intended to secure some purpose. Third, any interpretation that would make the text ineffective or meaningless would be incorrect.<sup>102</sup>

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96 The incident concerned the burning of the ship *Caroline* in the Niagara river. The diplomatic exchanges between US Secretary of State Daniel Webster and new British envoy to the United States Lord Ashburton are often taken as the seminal statement of the law on anticipatory self-defence. The two agreed that under international law a state must show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. Cited at British Foreign and State Papers 29 (BFSP), p. 1137.

97 *United States v. Great Britain (Neptune Case)*, United States-Britain Mixed Commission, decision of 25 June 1797; *Russia v. Turkey (Russian Indemnities Case)* Permanent Court of Arbitration (1912) 11 RIAA 421; *Case Concerning Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports, p. 7.

98 Vienna Convention on the Law of Treaties (1969), article 31(1) VCLT

99 Article 32 VCLT.

100 Admissions Case (Conditions of Membership of the United Nations), ICJ Reports, 1950, pg. 4, 8

101 In the case of the Ireland – Northern Ireland Protocol reference would also be made to the Joint Report of the Negotiators of the EU and the UK of 8 December 2017 on progress during phase 1 of negotiations under article 50 TEU would be appropriate. For discussion of the Joint Report and its consequences for the final shape of the WA Emily Jones, “The Negotiations” in Federicco Fabbrini (ed) *The Law and Politics of Brexit: Volume II* (OUP)(2020) and Michael Dougan, “The UK’s Withdrawal from the EU: A Legal Analysis”, (OUP, (2021), pg. 121-123.

102 Gleider Hernandez, *International Law*, (2019, OUP), pg. 184

90. These rules of adherence, exception, and interpretation are set out in some detail above to demonstrate to readers the poverty of the British Government's arguments that it is acting consistently with its obligations under the Protocol. The assertion of necessity at the present time is plainly unsustainable.

### Good Faith Provisions in EU Law

91. The relationship between the EU and its member states is set out in the Treaties. Familiarity with the principles of conferral<sup>103</sup>, proportionality<sup>104</sup>, subsidiarity<sup>105</sup>, legal certainty<sup>106</sup> and protection of fundamental rights<sup>107</sup> are also required for an adequate understanding of how they interact in the areas of exclusive and shared competences. These concepts guide the actions of the institutions and the member states within the scope of the Treaties.

92. The principle of loyal and sincere co-operation in article 4(3) TEU is also prominent. It provides:

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

93. The provision is far too general to be directly effective by itself, but its influence on the development of both substantive and procedural aspects of EU law cannot be doubted.<sup>108</sup> Amongst other things, the provision, or its predecessor<sup>109</sup>, has contributed to the recognition and development of the principles of direct effect for Treaty articles<sup>110</sup>, the primacy of Union law<sup>111</sup>, indirect effect<sup>112</sup>, direct effect for Directives<sup>113</sup>, state liability for breach of EU law<sup>114</sup>, and guides the Commission in taking enforcement proceedings under article 258 TFEU. The duty applies to the member states and the institutions, and informs the Court's case law in the free-movement provisions. It also features in the Union's external action.<sup>115</sup>

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103 Under article 5(1) TEU the limits of Union competence are governed by conferral. In accordance with article 5(2) TEU, the Union shall only act within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

104 Articles 5(1), 5(3) and 5(4) TEU. Proportionality is also a general principle of EU law recognised by the CJEU in its case law.

105 Article 5(3) TEU provides that under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

106 Recognised as a general principle of EU law in *Duff & others v. Minister for Agriculture* Case 63/93, (1996) ECR I-00569 and *Commission v. Greece* Case 236/95, (1996) ECR I-04459

107 Recognised first as a general principle of EU law by the CJEU in its case law and now largely codified in the Charter of Fundamental Rights for the European Union.

108 Geert De Baere and Timothy Roes, "EU Loyalty as Good Faith", (2015) *International and Comparative Law Quarterly* 64(4) 829-874; Marcus Klamert, "The Principle of Loyalty in EU Law (OUP) (2014)

109 Article 86 ECSC; article 5 EEC; and article 10 EEC.

110 As first recognised in seminal case of *Van Gend en Loos* Case 26/62, (1963) ECR 1.

111 *Costa v ENEL* Case 6/64 (1964) ECR 585; *Simmenthal*, (No.2) Case 106/77 (1978) 3 CMLR 263; *International Handelsgesellschaft* Case 11/70 (1972) CMLR 255; *Melloni v. Ministerio Fiscal* Case 399/11 (2013) 2 CMLR 43; *Aklagaren v. Fransson* Case 617/10 (2013) 2 CMLR 46.

112 *Von Colson and Kamann v. Land Nordrhein-Westfalen* Case 14/83 (1986) 2 CMLR 43

113 *Van Duyn* Case 41/74, (1974) ECR 1337; *Marshall v. Southampton & South-West Hampshire Area Health Authority (Teaching)* Case 152/84, (1986) ECR 723.

114 *Francovich v. Italy*, Case 9/90, (1991) ECR I-5357; *Brasserie du Pêcheur v. Germany & R. v. Secretary of State for Transport, ex parte Factortame (No.3)* Case C-221/89, (1991) ECR I-3095

115 Article 205 of the Treaty on the Functioning of the European Union (TFEU)



### Good Faith Provisions in the WA and TCA

94. The legal and trading relationship between the European Union and the United Kingdom is now principally set out in the WA and the TCA. The former has the hybrid status of being both EU law and international law, as it was agreed between the Union and a departing member state. The latter is between the Union and a third country. The legal basis for the adoption of the TCA by the Union was article 218 TFEU. The negotiations were conducted by the Commission, with the Council adopting the Agreement after the consent of the European Parliament was granted.
95. The principle of loyal co-operation contained in article 4(3) TEU continues to apply to the member states and the institutions of the Union. It does not apply *directly* to the UK in the same manner. Instead, it is clear that the ordinary principles of public international law are the starting point for an understanding of the current relationship between the UK and the EU. However, the question of whether, and to what extent, the principle of good faith and sincere co-operation in the WA and TCA equates to that set out in article 4(3) TEU, and how it will influence that relationship, is yet to be fully defined.<sup>116</sup>
96. Both the WA and the TCA constitute international treaties which will, at a minimum, attract the general principles of public international law, including that of *pacta sunt servanda*. This doctrine holds that the rights and duties of the signatories are intended to be adhered to, conducted in good faith and reliance on internal law, or the rules of the organisation cannot justify failure to perform the Treaty. Unilateral suspension or amendment by either party is not permitted unless expressly or implicitly provided for in the relevant Treaties. In the case of the WA, the position is clear. Article 168 WA requires that both the UK and the Union only have recourse to the dispute resolution procedures provided for therein.<sup>117</sup>
97. The WA and its Protocol took the particular form that it did, in large part, to protect the GFA and prevent the emergence of a hard border on the island. The TCA was concluded between the UK and the EU as a result of the satisfactory conclusion of the WA between the parties. In political, if not legal terms, the latter was entirely dependent on the former.<sup>118</sup> Both treaties contain good faith provisions, which are potentially relevant to the matter of Irish reunification under EU law. This is suggested on the basis that the GFA has, in some respects, become a part of EU law. While the Union was obviously not a signatory to the 1998 Treaty between the UK and Ireland, it now features prominently in the Protocol. Its protection, including the right to Irish self-determination, is therefore a concern for the Union, its institutions and member state governments.
98. A tentative comparison can be made with the status the ECHR has achieved in EU law.<sup>119</sup> Although the EU is not a signatory to the document, all of the member states are<sup>120</sup>; the substantive rights

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116 Christopher McCrudden, "Good Faith and Sincere Co-Operation", in Christopher McCrudden (ed), *The Law and Practice of the Ireland-Northern Ireland Protocol* (CUP)(2022); Manuel Kellebauer, Thomas Lieflander and Eugenia Dumitriu Segnana, "The UK EU Withdrawal Agreement: A Commentary", [2.46]

117 Article 168 WA provides: For any dispute between the Union and the United Kingdom arising under this Agreement, the Union and the United Kingdom shall only have recourse to the procedures provided for in this Agreement

118 There is no express or implicit prohibition in the Treaties which would prevent the EU from entering into a trade agreement with a departing member state which had not concluded a withdrawal agreement treaty under article 50 TEU. However, that article 50(2) TEU.

119 For history of legal development see Gráinne de Búrca, "The Evolution of EU Human Rights Law", and Eleanor Spaventa "Fundamental Rights in the European Union" in Catherine Barnard & Steve Peers (eds), *European Union Law*, (3rd edition) (OUP) (2021).

120 The CJEU frequently makes reference to the ECHR and the national constitutional traditions of the member states as inspiration for its development of human rights. The position is stated by the CJEU in Opinion 2/13, (2014) EUECJ Avis 2-13. At paragraph 37 it is said: "According to well-established case-law of the Court of Justice, fundamental rights form an integral part of the general principles of EU law. For that purpose, the Court of Justice draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories (judgments in *Internationale Handelsgesellschaft*, 11/70, EU:C:1970:114, paragraph 4, and *Nold v Commission*, 4/73, EU:C:1974:51, paragraph 13). In that context, the Court of Justice has stated that the ECHR has special significance (see, in particular, judgments in *ERT*, C 260/89, EU:C:1991:254, paragraph 41, and *Kadi and Al Barakaat International Foundation v Council and Commission*, C 402/05 P and C 415/05 P, EU:C:2008:461, paragraph 283). Article F(2) of the Treaty on European Union (which became, after amendment, Article 6(2) EU) codified that case-law."

contained in the Convention were gradually recognised as general principles of EU law<sup>121</sup>; the CJEU makes frequent reference to the Strasbourg jurisprudence to inform the correct interpretation of EU law<sup>122</sup>; and the Charter now proclaims that its provisions afford at least equivalent protection.<sup>123</sup>

99. It may be termed as unorthodox or achieved in an indirect manner but the GFA now forms part, or at an absolute minimum, informs part of EU law. The substantive provisions of the Protocol are intended to safeguard the GFA. It requires a combined and purposeful reading of the WA provisions relating to the GFA and the mutual requirement of good faith for a full understanding of the current position. There is a reasonable argument that a failure to adhere to the terms of the GFA by the UK or Ireland could engage the good faith provisions contained in EU law. This is not a straightforward contention however and must be tempered by the clear terms of article 1 of the Protocol, which protects rather than alters the substance of the GFA and respects the essential state functions and territorial integrity of the UK. The substance of the Agreement is the same but the manner in which it will be protected has, to at least some extent, been expanded and further internationalised.
100. The nature and scope of the power to call a referendum in Northern Ireland, and the extent to which it is also a public law duty conferred on the Secretary of State for Northern Ireland under the Northern Ireland Act (1998), has been examined in detail by the Court of Appeal in the *McCord* judgment, as noted above.<sup>124</sup> The WA and its Protocol does not alter that in any way. The holding of a referendum on the future constitutional status of Northern Ireland is quite obviously an essential state function of the British Government. There is no role for the EU in arranging such a vote under the GFA or on any reading of the Protocol. However, a fundamental objective of the WA and its Protocol is the protection of the GFA in all its parts. The Union holds an interest in ensuring that the Agreement is given effect as intended.
101. It cannot be said that a referendum on Irish unity provided for by UK law, in a manner consistent with the GFA, threatens the territorial integrity of the United Kingdom. Irish reunification, pursuant to the terms of the GFA, is a fundamental feature of the UK constitution, and the WA recognises that as it is. The continuation of partition is now, and can only ever be, dependent on the consent of the electorate in Northern Ireland. The territorial integrity of the UK is not threatened by the GFA provisions on consent and unification. The EU has no power to create a right to choose transfer or cession of Northern Ireland from the UK to Ireland where one does not already exist. Equally, it cannot alter the mechanism by which it can arrive, the threshold for approval or the terms to be voted on by the electorates. All of those matters were agreed in April 1998 and endorsed by the people of Ireland in the referendums of May 1998. The territorial integrity of the UK, at least in Northern Ireland, is based on the principles of consent and self-determination.
102. The promise of good faith between the parties in the WA appears to follow the language used in article 4(3) TEU. It is also similar to the promise of sincere co-operation in European Economic Area (EEA) Agreement between the Union and the EFTA states.<sup>125</sup> Article 5 WA provides:

The Union and the United Kingdom shall, in full mutual respect and good faith, assist each other in carrying out tasks which flow from this Agreement.

121 First in the case of *Stauder v. City of Ulm* Case 29/69, (1969) ECR 419 and subsequently in *Nold v. Commission* Case 4/73, (1974) ECR 491, (1974) 2 CMLR 338.

122 See the publications provided by the European Union Fundamental Rights Agency (FRA) for the most comprehensive and up to date accounts of the use of ECHR jurisprudence by the CJEU. Available at <https://fra.europa.eu/en/eu-charter>.

123 Article 52(3) of the Charter of Fundamental Rights for the European Union (CFR).

124 (2020) NICA 23.

125 Article 3 of the Treaty on the European Economic Area (EEA) provides: "The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement. Moreover, they shall facilitate cooperation within the framework of this Agreement".

They shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from this Agreement and shall refrain from any measures which could jeopardise the attainment of the objectives of this Agreement.

This Article is without prejudice to the application of Union law pursuant to this Agreement, in particular the principle of sincere cooperation.

103. The article requires mutual assistance and contains both a positive obligation to take all appropriate measures and a negative obligation to refrain from any measures which would jeopardise the attainment of the objectives of the Agreement, including those contained in the Protocol. In this respect, the text seems to echo the duty of sincere co-operation between the Union and the member states found in article 4(3) TEU. The requirement of good faith is mirrored in article 3 TCA. The parties promise to take all necessary measures and refrain from any steps that would jeopardise the attainment of the objectives. Article 4(1) TCA provides:
1. The provisions of this Agreement and any supplementing agreement shall be interpreted in good faith in accordance with their ordinary meaning in their context and in light of the object and purpose of the agreement in accordance with customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969
  2. For greater certainty, neither this Agreement nor any supplementing agreement establishes an obligation to interpret their provisions in accordance with the domestic law of either Party
  3. For greater certainty, an interpretation of this Agreement or any supplementing agreement given by the courts of either Party shall not be binding on the courts of the other Party
104. Articles 3 and 4 TCA contain elements which are clearly intended to distinguish them from article 4(3) TEU. For example, the possibility of direct effect and supremacy of the TCA is expressly excluded if based on the TCA itself.<sup>126</sup>
105. The mutual obligation of good faith is further addressed in the duty to undertake good faith consultations when it is considered there has been a breach of obligation as set out in articles 698 and 738 TCA. The TCA establishes distinct procedures for settling disputes between the parties. Most, but not all, of the Agreement is subject to the Main Dispute Mechanism.<sup>127</sup> A Partnership Council is established consisting of representatives of the EU and the UK and is co-chaired by a member of the European Commission and Minister of the British Government. The entire TCA may be suspended or terminated by either party with 12 months' notice.<sup>128</sup> There are also provisions relating to suspension or termination of specific parts of the Agreement.<sup>129</sup>
106. Of greatest relevance to this report, however, are the links between the WA and the TCA. They can be seen to be mutually enforcing. This is unsurprising given that, from the EU perspective at least,

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126 See also article 5(1) TCA on Private Rights. It provides that "Without prejudice to Article SSC.67 of the Protocol on Social Security Coordination and with the exception, with regard to the Union, of Part Three of this Agreement, nothing in this Agreement or any supplementing agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement or any supplementing agreement to be directly invoked in the domestic legal systems of the Parties".

127 Part Six of the Trade & Co-Operation Agreement sets out the system of dispute resolution concerning the interpretation and application of the Treaty. It is, however, subject to a number of important exclusions and qualifications. Unlike the WA there is no role for the CJEU in the dispute settlement provisions. Provisions of the TCA will be interpreted in line with public international law, including the Vienna Convention on the Law on Treaties 1969.

128 Article 779 TCA provides: "Either Party may terminate this Agreement by written notification through diplomatic channels. This Agreement and any supplementing agreement shall cease to be in force on the first day of the twelfth month following the date of notification."

129 For fuller explanation of the conditions, procedure, and exclusions relevant to partial suspension see House of Commons Library "The UK-EU Trade and Co-operation Agreement: Governance and Dispute Settlement" by Stefano Fella (3 August 2021) available at <https://commonslibrary.parliament.uk/research-briefings/cbp-9106-2/>; and EU Commission Trade Directorate "The EU-UK Trade Agreement Explained". Available at <https://ec.europa.eu/info/strategy/relations-non-eu-countries/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement>



the latter was dependent on the former. The TCA allows for some of its provisions to be suspended if a party does not comply with an arbitration ruling made under an earlier agreement such as the WA.<sup>130</sup> Article 178(2)(b) WA also provides that non-compliance with an arbitration ruling under its dispute-settlement mechanism can result in parts of the WA or any other agreement between the UK and the EU being suspended under the conditions set out in that agreement.

### **Obligations under the Ireland – Northern Ireland Protocol**

107. Article 12(1) of the Protocol imposes on the authorities of the UK the responsibility for implementing and applying the provisions of Union law applicable in Northern Ireland. Article 12(4) confers on the Union's institutions, offices, bodies, and agencies powers of supervision and enforcement equivalent to those under the Treaties. However, those express powers are limited to certain issues: (i) presence of Union officials during Protocol inspections under article 12(2); (ii) free movement of goods under article 5; (iii) technical assessment under article 7; (iv) VAT and excise in accordance with article 8; (v) the single electricity market in article 9; and (vi) state aid under article 10.
108. Article 1(3) and its promise to protect the 1998 Agreement in all its parts is not included in these particular enforcement provisions. The principle of legal construction, sometimes known as *expressio unius est exclusio alterius* (to include one thing is to exclude the other), may apply. The principle has been recognised as an important presumption by the CJEU in previous instances.<sup>131</sup>
109. However, the Protocol is within the scope of EU law.<sup>132</sup> The obligations and rights assumed by the Union must be exercised for the objectives contained in the Treaties. That includes democracy, respect for the rule of law, and the establishment and functioning of the internal market. The principal purpose of the Protocol, expressed at length in the preamble, is to accommodate the unique circumstances which exist on the partitioned island of Ireland in the aftermath of Brexit.
110. In circumstances in which the UK government was deliberately frustrating the proper operation of the Protocol and simultaneously refusing to call a vote on Irish unity in circumstances envisaged by the GFA, what if any course of action is open to the institutions of the Union? A first step is to understand the legal position. Could enforcement action be brought by the Commission and adjudicated on by the CJEU? Is it likely that such circumstances would lead to the suspension of the TCA? Clearly, the Union could not enforce a vote but could the other penalties available under the WA and TCA be invoked?
111. If the question is posed in terms of "Could the EU force the UK to hold a unity vote in Northern Ireland?", the answer is clearly no. Such an outcome to litigation of that character is inevitable, wherever it was to be heard, including before the CJEU. A situation in which distinct courts in distinct jurisdictions come to distinct answers on the same question is to be avoided. National courts in the UK and Ireland would approach the GFA in terms of its implementation into national law. The CJEU would approach the GFA in terms of its effect in EU law. Practical and political reasons also weigh heavily in favour of ensuring such a scenario from arising.
112. However, if the question is framed "Can the EU react to UK bad faith with respect to the GFA?", the answer, as a matter of EU law at least, is likely to be "yes". Whether it is advisable in any particular circumstances, and what form it should take is less certain, but breaches of international law, informing the content of EU law, by a third country partner state could lead to appropriate countermeasures which would reflect the gravity of the matter. This is not a situation of restrictive

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130 Article 749(4) TCA provides: "Where a Party persists in not complying with a ruling of an arbitration panel established under an earlier agreement concluded between the Parties, the other Party may suspend obligations under the covered provisions referred to in Article 735. With the exception of the rule in point (a) of paragraph 3 of this Article, all rules relating to temporary remedies in case of non-compliance and to review of any such measures shall be governed by the earlier agreement."

131 MIP Metro Group Intellectual Property GmbH & Co. KG v. OHIM Case T-191/04, (2006) EUECJ, [23]

132 The Agreement would come within scope of article 216 TFEU. It was, of course, also based on article 50 TEU.



measures but, conceivably, is a limiting of access to the economic benefits of trade and co-operation with the EU should the UK treat its obligations under the GFA with the same disregard that it has shown for the Protocol.

113. The objectives of the WA and the Protocol are set out in the text. With regard to the Protocol, it includes those objectives in the preamble and article 1. The protection of the GFA in all its dimensions features prominently. Those aims will determine the CJEU's interpretative approach. Consequently, that should inform the other institutions and the member state governments. The extent to which these good faith articles will influence the EU remains unclear, but there is already reason to believe it may be relevant. Reliance on the good faith provisions featured prominently in the EU Commission statements which accompanied the enforcement proceedings.<sup>133</sup>

### UK Breach of International Law

114. The unilateral abandonment of the obligations in the Protocol by the British Government must be considered to be inconsistent with the principle of *pacta sunt servanda*. The UK is in deliberate breach of its obligations. There is no other appropriate legal description. The Northern Ireland Protocol Bill cannot be justified on grounds of necessity, and fundamentally undermines the bargain struck between the EU and the UK in late 2019, which allowed for the WA and TCA which followed.
115. The objectives of the TCA are different to those in the WA, and express reference to the GFA is absent. Instead, this Treaty determines the future relationship between the UK and the EU in those subject areas which are within its scope. The substantive provisions of the WA are examined in a previous chapter. As has been said elsewhere, there is often a marked distinction between what the Protocol text says and what it actually does.<sup>134</sup> However, there can be little doubt that the parties to the WA, including the British Government, understood what the special arrangements in Northern Ireland would actually require.<sup>135</sup>
116. Equally, it must again be emphasised that the WA and TCA are connected. It is not open to one or other of the parties to disregard the former but continue to claim the benefits of the latter indefinitely and without consequence. To discard the WA, and its Protocol, is to jeopardise the continuation of TCA and the mutually beneficial (even if inferior to actual membership) trading relationship it created.
117. The task of unravelling 47 years of economic and political integration between the UK and the member states of the EU, including Ireland, remains complex. Both the EU, comprising of its institutions and member states, and the United Kingdom have accepted significant compromises to mitigate the damaging effect of Brexit on the island of Ireland. Weatherill describes the Protocol as a delicate balance, which is the result of departures from orthodox approaches made on both sides; reluctant compromises, it must again be emphasised, that were undertaken to address the unique circumstances on the island of Ireland.<sup>136</sup> It was conceived as a stable and lasting solution and was intended to apply alongside the future relationship. Pursuant to article 182 WA, the Protocol forms an integral part of the Treaty.
118. The EU has accepted an invisible or soft border between its territory and the territory of the UK; has

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133 Statement on infringement proceedings on 15 March 2021 available at [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_1132](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1132); Statement on infringement proceedings on 15th June 2022 available at [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_22\\_3676](https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3676)

134 Stephen Wetherill, "Interpreting the Protocol" in Christopher McCrudden (ed), *The Law and Practice of the Northern Ireland Protocol* (OUP) (2022)

135 The Constitution Society (27th April 2022) available at <https://consoc.org.uk/publications/the-belfast-good-friday-agreement-and-brex-it-by-andrew-mccormick/> "Former Stormont Official criticises UK government's attitude over NI Protocol" available at <https://www.rte.ie/news/brexit/2022/0427/1294751-protocol-andrew-mccormick/>; see also House of Commons Briefing Paper on "The October 2019 EU-UK Withdrawal Agreement" Number CBP 8713.

136 Ibid, footnote 134, section 6.3

approved the enforcement of EU law by the authorities of a non-member state; and has conceded the separation of the free-movement-of-goods provisions from the other related aspects of the internal market system in this particular context. The UK has recognised the need for distinct trading and anti-discrimination rules for Northern Ireland compared with Great Britain. In return for such compromises, the parties have ensured that the economic dislocation of Brexit has been managed, and the exchange of goods, services, capital and payments, and data continues, albeit on altered terms.

119. As set out already, the Protocol aims to preserve the all-island economy and the GFA in all its dimensions. A hard border on the island of Ireland is prevented by the continuation of the CTA, and Northern Ireland, in effect, remaining within the internal market for the free movement of goods. This was achieved by Northern Ireland aligning with the EU with respect to customs, regulation of goods for reasons of consumer protection, public and animal health, environmental protection, VAT, state aid, and rules on agri-food. The outcome has been to maintain frictionless access to the EU market and prevent checks on goods moving between NI and the Republic. The other outcome has, inevitably, been the introduction of additional checks on the trade in goods between Northern Ireland and Britain.
120. The Protocol is an exercise in damage limitation. It is an attempt to mitigate some but not all of the economic, political, and social harm occasioned on Northern Ireland and the Republic of Ireland by the very fact of (and the particular manner of) Brexit. To put it bluntly – the Brexit project is the problem, and not the partial solution to the problem (the Protocol). Without the Protocol, things would, and could soon, be very much worse for all. The implementation and enforcement of the Union’s customs’ code on the north-south border was a prospect rejected by both the EU and the UK at an early stage of the WA negotiations.<sup>137</sup> The agreement regarding the border was a necessary ingredient in the overall relationship between the UK and EU. It was an important part of the bargain struck, which ensured the adoption of provisions on the financial settlement, the transition period, and citizens’ rights. Without the WA, it is also mistaken to suppose that the TCA would have been agreed, when and in the manner it was.
121. The “best of both worlds” argument is often raised by supporters of the Protocol. The arrangements are inferior to actual membership of the EU and clearly preferable to the situation on the Dover-Calais crossing, which is governed solely by the goods provisions of TCA. The problems are caused by Brexit and not by the Protocol. No more effective mechanism was proposed, and mutually acceptable, which could accommodate the priorities of the EU and the priorities of the UK, and adequately mitigate the damage imposed on the island of Ireland. The free movement of services, workers, and payments and capital do not benefit from these arrangements.
122. At the time of writing, the British Government has announced an intention to abandon the obligations it freely signed up to in the WA. The Northern Ireland Protocol Bill is currently making its way through the legislative process at Westminster. It breaches the good faith clauses in the WA, as well as the principle of *pacta sunt servanda*. As a dualist state with the supremacy of Parliament still at the centre of its constitution, the enactment of the legislation will, in principle, require the Northern Ireland courts to apply the latter amending legislation.<sup>138</sup>
123. The obligations contained in the Protocol on both the UK and the EU are clear. The conduct of the British Government and the DUP in preventing the functioning of the NI Assembly and the Executive subsequent to the Agreement do not alter this. The continuation of grace periods for

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137 The UK position was set out by Prime Minister Theresa May on 17 January 2017. There was to be “no return to the borders of the past”. Full text available at <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>. For the EU see Negotiating Directives for Article 50 negotiations by General Secretariat of the Council for the European Union (22nd May 2017). The EU and the UK subsequently agreed Joint Report of 8 December 2017 which contained the pledge to avoid a hard border on the island of Ireland.

138 *R(Miller) v. Secretary of State for Exiting the European Union* (2019) UKSC 41; *R(SC, CB and 8 children) v. Secretary of State for Work and Pensions* (2021) UKSC 26.

important aspects of the Union's rules on the free movement of goods do not change this either. It should not need to be necessary to restate a fundamental principle of politics and law – facts do not change the law. The implementation of the Protocol has been staggered, first by the transition period and then by some agreed grace periods, and more recently deliberately frustrated by the British Government's actions. The greatest threat to its operation, however, is contained in the Northern Ireland Protocol Bill. It was published on 13th June 2022, and accompanied by a policy paper<sup>139</sup> and the British Government's legal position.<sup>140</sup>

124. The intention to disregard the Protocol is manifest. Clearly the UK cannot unilaterally alter the obligations it freely entered into with the EU. Instead, its purpose is to ensure non-fulfilment of the obligations within its own domestic legal order. Article 2 WA (rights of individuals), article 3 WA (common travel area) and article 11WA (north-south co-operation) are excluded from modification either by the Act itself or by subsequent regulations by the Minister.<sup>141</sup> However, if enacted, the proposed legislation will remove the direct effect of parts of the WA in UK domestic law.<sup>142</sup> It also alters the arrangements for the movement and regulation of goods.<sup>143</sup> The WA provisions on state aid<sup>144</sup>, VAT<sup>145</sup>, the role of the CJEU<sup>146</sup>, and the supervision and enforcement of the WA by EU officials are removed.<sup>147</sup>
125. Previously, it had been opined in the UK media that the British Government could escape its obligations by virtue of article 62 VCLT on grounds of changed circumstances<sup>148</sup> or by facile assertion that Parliament, in the end, could and would do as it pleased regardless of any international law consequences.<sup>149</sup> This argument seems to have been abandoned, and the breach of international law is instead poorly disguised by reference to the doctrine of necessity, as noted above.<sup>150</sup>
126. The Bill also contains a clause which would allow UK Ministers powers to implement any future UK-EU agreement on the Northern Ireland Protocol through secondary legislation. This would remove the need for further primary legislation if an agreement between the parties was to be reached. The breadth of this provision is remarkable. It is, perhaps, an indication that, should negotiations reopen, the Act would not be given effect.
127. The asserted defence of necessity set out in the British Government's legal position is not, it is submitted, credible. The document refers to the elements of necessity generally accepted but they cannot reasonably be said to apply in the current circumstances. Gone is the candid (but perhaps politically naïve) admission that was raised in defence of the UK Internal Market Bill that it would break international law in a "very specific and limited manner".<sup>151</sup> Instead, there is no admission of what is plain – that the UK intends to break the Agreement regarding the Northern Ireland Protocol but expects to retain the other benefits it secured in the WA and TCA.

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139 <https://www.gov.uk/government/publications/northern-ireland-protocol-the-uks-solution/northern-ireland-protocol-the-uks-solution>.

140 <https://www.gov.uk/government/publications/northern-ireland-protocol-bill-uk-government-legal-position/northern-ireland-protocol-bill-uk-government-legal-position>.

141 Clause 15(3) of the Northern Ireland Protocol Bill.

142 Clauses 2 and 3 of the Northern Ireland Protocol Bill, if enacted, will amend section 7A of the European Union (Withdrawal) Act (2018). This provision gives effect to article 4 WA which provides that the Treaty is to have the same effect in UK law as it does in the territory of the member states.

143 Clauses 4-6 concern the movement of goods, while clauses 7-11 concern the regulation of goods. The latter provide for a dual regulatory regime and disappplies EU law.

144 Clause 10

145 Clause 17

146 Clause 13 and clause 20

147 Clause 13

148 House of Commons Briefing Paper "Could the Withdrawal Agreement be terminated under international law" No. 8463, 26 March 2019. . Available at <https://commonslibrary.parliament.uk/research-briefings/cbp-8463/>

149 "UK prepared to unilaterally tear-up Northern Ireland post-Brexit trade deal", Financial Times, 20 April 2022. Available at <https://www.ft.com/content/327c4909-fa63-44c8-9c74-206eebe5849e>

150 Ibid, footnotes 95 and 140

151 Statement by Northern Ireland Secretary of State Brandon Lewis in the House of Commons on 8 September 2020. Available in Hansard at Northern Ireland Protocol: UK Legal Obligations, volume 679. See <https://hansard.parliament.uk/commons/2020-09-08/debates/2F32EBC3-6692-402C-93E6-76B4CF1BC6E3/NorthernIrelandProtocolUKLegalObligations>.



128. There were reports that the legal advice was sought and published in an unorthodox manner.<sup>152</sup> The role of the Treasury Counsel, as chief independent legal advisor to the UK government, appears to have been sought but on a limited basis which would not require examination of the necessity defence.<sup>153</sup>
129. Article 16 of the Protocol contains an effective alternative remedy if the complaints made by the UK were, in fact, justified. That provision allows for safeguarding measures to be adopted unilaterally in circumstances where the application of the Protocol leads to serious economic, societal, or environment difficulties that are liable to persist. Any such measures would be limited to what is strictly necessary and adopted in the manner set out in annex 7 to the Protocol. The Union and the UK agreed to immediately enter into consultations in the Joint Committee with a view to finding a mutually acceptable solution. It is similar in form to the equivalent provision in the EEA Agreement.<sup>154</sup>
130. Also, the operation of the Protocol was foreseeable. It cannot reasonably be described as presenting grave peril, and no evidence of such a situation is offered in the UK position paper. In any event, the circumstances in which the necessity argument would succeed are beyond those which would qualify under article 16 of the Protocol. No convincing case is made explaining why recourse to breach on grounds of necessity is required but reliance on article 16 NIP is not. The ordinary passage of the Bill through the legislative process suggests that it is not urgent.
131. On the 15th June 2022 and the 22nd July 2022, the European Commission announced the commencement of infringement proceedings against the UK for not complying with significant parts of the Protocol. The legal basis for such proceedings is found in article 12(4) of the Protocol, together with article 258 TFEU. The proceedings allege that the UK authorities are responsible for: (i) failure to introduce applicable customs requirements, supervision requirements, and risk controls on the movement of goods from Northern Ireland to Great Britain; (ii) failure of notification to transpose Directive 2020/262 on excise duties into national law; (iii) failure to notify the transposition of Directive 2020/1151 concerning excise duties on alcohol; and (iv) failure to implement EU rules on VAT for e-commerce. Further proceedings concern the continuing failure to carry out obligations under the EU's sanitary and phytosanitary rules.
132. These measures may appear dull, impenetrable or unnecessary, and the EU's response unjustified to some readers in the UK. However, the rules are critical to the integrity of the EU's internal market and Northern Ireland's privileged access to it in respect of goods. The Protocol prevents the recent chaotic scenes at Dover from being replicated at the border on the island of Ireland.<sup>155</sup> The scenes of significant transport delays are the alternative rather than the replacement of the Protocol or the unrealistic expectation that the EU is to tolerate the continued non-fulfilment of the obligations that the UK negotiated, ratified, and signed up to. The good faith provisions of the WA and TCA require adherence to what has been agreed and recourse to the dispute resolution mechanisms where appropriate. The same obligations of good faith apply to the EU, and should they not be adhered to the UK has equal recourse to the dispute resolution and enforcement procedures under the WA.

### **Lessons for the Future?**

133. The breach of the Protocol requirements by the UK is indisputable and the precise terms of the Northern Ireland Protocol Bill must be regarded as intentionally provocative. The removal of the role of the CJEU, in particular, amounts to a unilateral rewriting of the Agreement, which could

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152 <https://www.instituteforgovernment.org.uk/blog/northern-ireland-protocol-bill>.

153 For an explanation of what occurred and suggestions of why, see "The Northern Ireland Protocol Bill: Legal (and perhaps illegal) goings on by Jonathan Jones QC on 14th June 2022. Available at <https://www.instituteforgovernment.org.uk/blog/northern-ireland-protocol-bill>.

154 Article 112(1) – 112(3) of the EEA Agreement.

155 "I was wrong about post-Brexit Dover queues at Dover but for the right reason – Rees Mogg" in the Independent by Simon Calder on 2 August 2022; "What's bee causing lorry queues at Dover?" In BBC News on 9 February 2022; "Lorries in Huge Dover queues due to Brexit" in Financial Times on 25 January 2022



not be justified even if the grounds of necessity existed for other measures. The EU's institutions, and its member state governments, must recognise it as a fundamental and deliberate breach by the UK. The enforcement proceedings brought by the Commission are a first and necessary step in seeking to ensure a return to mutual and voluntarily assumed obligations. However, such an outcome may not be enough on its own. A successful result before the CJEU for the Commission's application will inevitably require further steps and a political solution with the UK based on the substance of the Protocol. The forum for such compromise is likely to be the Joint Committee. Such a process, leading to the outcome described, should cause reflection on whether the current arrangements are the best long-term solution for the EU. The possibility of Irish reunification, pursuant to the GFA, is the alternative.

134. As set out already, the Protocol was conceived as a stable and lasting solution to the unique problems posed for Ireland by Brexit. It requires good faith implementation from both the EU and the UK. It was intended to apply alongside any agreement on the future partnership. That partnership is now contained in the TCA and makes provision for the exchange of services, data protection, recognition and enforcement of judgments, movement of capital and payments, amongst other matters. The WA was a necessary prior condition to the TCA. If the British Government does not intend to adhere to the Protocol, then the value of its promises in international treaties, including the TCA, is devalued.
135. The Protocol, in some ways, can be considered as a suspension bridge between the UK and the EU. The extent of future divergence between the two will be felt most keenly in this jurisdiction. Its purpose is set out in the Preamble. Both the UK and the EU recognised the unique circumstances which existed on the island of Ireland as a result of partition. Northern Ireland is within the United Kingdom but was a part of the island of Ireland. The provisions of the internal market and EU membership had, together with the ending of the conflict with the GFA, mitigated many of the practical disadvantages of the border for the people who live in Ireland. That progress was put in jeopardy by Brexit and a bespoke arrangement was necessary. Northern Ireland is unlike any other part of the UK in this respect.
136. Should the UK prove to be unwilling to adhere to its obligations under the WA and the Protocol, the EU should consider what other outcomes would best secure its medium and long-term objectives. The outcome of the proceedings brought by the Commission are awaited but a number of features to the EU response are notable. First, there has been broad political support from the institutions and national governments (including the Irish government) for the approach taken. Second, the Commission makes use of the existing legal instruments when political negotiation in the JC has been frustrated by the UK government stance. Third, the justification for the litigation is based, in part, on the principle of loyal and sincere co-operation. Fourthly, the Commission position implicitly invokes the continuation of TCA.

## **Section D: Human Rights, Equality, and the Case for Irish Unity**

### **Introduction**

137. One of the concerns expressed throughout the Brexit process was that the entire project was inspired by a profound antipathy towards a meaningful culture of human rights and equality in the UK. Some of that has already been sketched above. Whatever view is taken of that argument, Brexit opens up the space for a further erosion of international accountability on rights' protection. The antipathy of Brexiteers to European institutions extends beyond the EU, with the European

Court of Human Rights providing a particular focus of attention. Across a range of areas, the direction of travel is ominous, with a number of reforms raising serious human rights' concerns. That is not to suggest that Irish reunification will resolve these problems and difficulties; the EU and Ireland have serious rights-based challenges and often do not adhere to or live up to existing obligations. The deliberations on constitutional change do, however, offer the potential to reaffirm and renew discussions about equality and rights in Ireland, with EU membership offering more secure guarantees and effective forms of legal enforcement. Constitutional change provides an opportunity to widen and deepen "progressive" conversations about the content and form of a new and united Ireland.

### **'No Diminution'?**

138. One of the arguments advanced during the Brexit negotiations was about the impact on human rights and equality. While many associate human rights' protection in Europe with the Council of Europe, the EU has evolved a significant body of guarantees. The supremacy of EU law gives the normative framework particular strength. The complex post-Brexit legal framework does offer guarantees of substance, but once again it does not equate to continuing EU membership.
139. One of the more neglected topics in the often intense debates on the Protocol is its inclusion of provisions on equality and rights. Article 2 of the Protocol provides this:
1. The United Kingdom shall ensure that no diminution of rights, safeguards, or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards, and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.
  2. The United Kingdom shall continue to facilitate the related work of the institutions and bodies set up pursuant to the 1998 Agreement, including the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland, and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland, in upholding human rights and equality standards.
140. This has been incorporated into domestic law, including in the Northern Ireland Act (1998). With respect to its area of coverage, it attempts to prevent regression and, in certain circumstances – relating to equality and non-discrimination – it involves a "keeping pace" obligation.<sup>156</sup> This means that Northern Ireland enjoys legal protections that have not been secured elsewhere. Making effective use of this provision, and ensuring it is properly understood, will be a major challenge. Notable again, for example, is the way that elements of the GFA have made their way into this aspect of the Protocol, including the right to seek constitutional change and the right to pursue national aspirations.
141. The TCA references human rights.<sup>157</sup> This includes human rights' conditionality, rules around the consequences of denouncing the ECHR in the area of criminal law, and protections in relation to social rights (a general non-regression rule for example<sup>158</sup>). There is a general commitment to human rights<sup>159</sup>:

<sup>156</sup> For further information, <https://nihrc.org/our-work/brexit>.

<sup>157</sup> Steve Peers, Human Rights and EU/UK Trade and Cooperation Agreement, <http://eulawanalysis.blogspot.com/2021/01/analysis-3-of-brexit-deal-human-rights.html>

<sup>158</sup> Article 387(2): A Party shall not weaken or reduce, in a manner affecting trade or investment between the Parties, its labour and social levels of protection below the levels in place at the end of the transition period, including by failing to effectively enforce its law and standards.

<sup>159</sup> Article 763.

## **MAKING THE CASE FOR IRISH UNITY IN THE EU**

1. The Parties shall continue to uphold the shared values and principles of democracy, the rule of law, and respect for human rights, which underpin their domestic and international policies. In that regard, the Parties reaffirm their respect for the Universal Declaration of Human Rights and the international human rights' treaties to which they are parties.
142. In relation to law enforcement co-operation, the following is, for example, stated<sup>160</sup> :
1. The cooperation provided for in this Part is based on the Parties and Member States' longstanding respect for democracy, the rule of law, and the protection of fundamental rights and freedoms of individuals, including as set out in the Universal Declaration of Human Rights and in the European Convention on Human Rights, and on the importance of giving effect to the rights and freedoms in that Convention domestically.
  2. Nothing in this Part modifies the obligation to respect fundamental rights and legal principles as reflected, in particular, in the European Convention on Human Rights and, in the case of the Union and its Member States, in the Charter of Fundamental Rights of the European Union.
143. There is considerable merit in engaging with and making effective use of the standards, guarantees, and institutional mechanisms created under these new agreements. From the perspective of protecting human rights and equality, it is essential that these are used to attempt to mitigate the damage that Brexit is likely to do. One point must be underlined: However generously interpreted and skilfully applied, this framework is inferior to EU membership.

### **A Hostile Environment for Rights and Equality**

144. There is merit in the view that the “Brexit project” is bigger than merely leaving the EU. The “take back control” message also spoke to a deep suspicion of the internationalised forms of accountability that EU membership was one aspect of. The trends since Brexit suggest that concerns are well-founded. From reforms of immigration, asylum, and nationality law to the now-paused proposals around repeal of the Human Rights Act (1998), the post-Brexit landscape is worrying human rights' advocates.<sup>161</sup> The proposals reflected a deep hostility to the European Court of Human Rights and its jurisprudence, with the language of “mission creep”, “common sense”, and the assertion of the primacy of the UK's Supreme Court featuring heavily.<sup>162</sup>
145. The GFA contains significant commitments on human rights. Of most direct relevance here are the safeguards in place for the Strand One democratic institutions and this:

The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.<sup>163</sup>

146. The British Government's proposals claimed not to infringe the Agreement:

37. The protection of human rights is at the heart of the peace settlement in Northern Ireland. It is woven into the terms of the 1998 Belfast (Good Friday) Agreement. The

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160 Article 524.

161 <http://www.humanrightsconsortium.org/uk-legislation-condemned-rights-removal-bill/>

162 <https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/human-rights-act-reform-a-modern-bill-of-rights-consultation>

163 Rights, Safeguards and Equality of Opportunity, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1034123/The\\_Belfast\\_Agreement\\_An\\_Agreement\\_Reached\\_at\\_the\\_Multi-Party\\_Talks\\_on\\_Northern\\_Ireland.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1034123/The_Belfast_Agreement_An_Agreement_Reached_at_the_Multi-Party_Talks_on_Northern_Ireland.pdf)

government remains fully committed to the Belfast (Good Friday) Agreement and our proposed reforms will not undermine that Agreement.

38. The multi-party agreement which forms part of the Belfast (Good Friday) Agreement provides that '[t]he British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention...' The UK and Ireland committed to implementing the multi-party agreement in a bilateral agreement between the two governments. The Belfast (Good Friday) Agreement does not specify how the Convention is to be incorporated into the law of Northern Ireland, and any reform will keep the Convention rights incorporated into the Northern Ireland law and indeed UK law. Individuals will retain direct access to the courts to pursue remedies for breaches of those rights. The clear ambition was for the UK to ensure that all people of Northern Ireland enjoy the protection of the rights in the Convention in domestic law.
147. The way in which the Convention is received in the UK, provisions on positive obligations and restrictions placed on the way the rights will function, all posed risks to the GFA. It is to be hoped that these plans have now been abandoned, but it would be wise to be cautious and vigilant about what might come next.
148. A troubling and dangerous scenario is unfolding in Northern Ireland. The Agreement raised expectations about the potential for transformative change in the areas of equality and rights. Giving effect to the ECHR, and the creation of the Northern Ireland Human Rights Commission, were really only first steps in what many hoped would be a journey towards a strong and robust framework of human rights' guarantees. An example of this is the Bill of Rights process. As is well known, the Agreement placed the onus on the Northern Ireland Human Rights Commission to advise the UK on a Bill of Rights:
  4. The new Northern Ireland Human Rights Commission ... will be invited to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights are to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and – taken together with the ECHR – to constitute a Bill of Rights for Northern Ireland.

Among the issues for consideration by the Commission will be:  
The formulation of a general obligation on government and public bodies fully to respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland; and a clear formulation of the rights not to be discriminated against, and to equality of opportunity in both the public and private sectors.
149. The process was launched in March 2000 and the Commission submitted its advice on 10



December 2008. But a Bill of Rights has never been enacted.<sup>164</sup> The latest attempt to revive the process has ended in another political stalemate, with the DUP being a familiar obstacle to rights-based progress.<sup>165</sup> Prospects for advancing this project do not appear good at present, but if the political opportunity does arise at some future point, it is apparent that the work has been done.

150. The dominant theme in the post-Brexit picture is about making the best of what is in place and preventing further regression on rights and equality. Many look to the proactive approach in Scotland, where the Scottish Government is attempting to advance a much more ambitious human rights' agenda.<sup>166</sup> This approach to using devolved power is unlikely to be successful in Northern Ireland for well-known political reasons, and the way in which the power-sharing system currently functions. The loss brought about by Brexit will therefore be particularly felt in Northern Ireland, mitigated to some extent by the protections that article 2 offer.

### A New Ireland?

151. This section should not be read as the endorsement of any simplistic and unhelpful narrative that Irish reunification alone – and thus return to the EU – in itself will result in a seismic transformation in the fields of equality and rights. It will not. There are chronic and ongoing human rights and equality challenges across the island of Ireland. That is why the language of a new and united Ireland is so attractive to many. This constitutional debate opens up the chance to learn the lessons of history from both jurisdictions on the island. It is striking, for example, that the idea of a new constitution has entered the conversation at an early stage. That will offer the opportunity to renew discussion on a Bill of Rights, and the chance should be taken to ensure that Irish reunification includes better equality guarantees, extensive coverage for socio-economic rights, and includes environmental rights, among other matters.

### Conclusion

152. This section is not a comprehensive guide to the post-Brexit human rights' picture in Northern Ireland. As in the earlier report, the argument here is that Brexit is part of a larger agenda that is hostile to a meaningful culture of equality and rights anywhere in the UK. In particular, to the external international accountability and scrutiny that this brings. The agreements in place mitigate the damage of Brexit but are no substitute for EU membership. The Protocol is, in this sense, not the “best of both worlds”. Return to the EU would be better. The conversation on a new and united Ireland opens up the potential for a wider and deeper discussion of equality and rights. It is essential that people participate at an early stage to ensure that this opportunity is taken.

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164 Colin Harvey and Anne Smith, 'Designing Bills of Rights in Contested Contexts: Reflections on the Northern Ireland Experience' (2020) 44 *Fordham International Law Journal* 357; Colin Harvey and Anne Smith, 'Advancing a Bill of Rights for Northern Ireland' Oxford Human Rights Hub, 17 August 2020, <https://ohrh.law.ox.ac.uk/advancing-a-bill-of-rights-for-northern-ireland/>; Anne Smith and Colin Harvey, 'Where Next for a Bill of Rights for Northern Ireland?' (2018) <http://qpol.qub.ac.uk/where-next-for-a-bill-of-rights-for-northern-ireland/>; Colin Harvey and Anne Smith, 'The Return of the Bill of Rights for Northern Ireland?' <http://qpol.qub.ac.uk/return-bill-rights-ni/>; Colin Harvey, 'From civil rights to human rights?' <<http://ukandeu.ac.uk/from-civil-rights-to-human-rights/>>; Northern Ireland Human Rights Commission, *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* (NIHRC, 10 December 2008); Anne Smith, Monica McWilliams, and Priyamvada Yarnell, *Political Capacity Building: Advancing a Bill of Rights for Northern Ireland* (Transitional Justice Institute, University of Ulster, 2014); Colin Harvey and Alex Schwartz, 'Designing a Bill of Rights for Northern Ireland' (2009) 60 *Northern Ireland Legal Quarterly* 181; Anne Smith, Monica McWilliams, and Priyamvada Yarnell 'Does Every Cloud have a Silver Lining? Brexit, Repeal of the Human Rights Act and the Northern Ireland Bill of Rights' (2016) 40 *Fordham International Law Journal* 79.

165 See the work of the Ad Hoc Committee on a Bill of Rights, including its final report: <http://www.niassembly.gov.uk/assembly-business/committees/2017-2022/ad-hoc-committee-on-a-bill-of-rights/>

166 First Minister's Advisory Group on Human Rights Leadership, *Recommendations for a new human rights' framework to improve people's lives*, (10 December 2018) <http://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf>; National Taskforce on Human Rights Leadership, <https://www.gov.scot/groups/national-taskforce-for-human-rights-leadership/>; Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill [2021] UKSC 42.

# Section E: Economic & Monetary Union

## Overview

153. Irish reunification, pursuant to the GFA, will result in the territory of Northern Ireland joining the member state of Ireland and becoming part of the EU. This will result in altered borders and new circumstances for the state but a continuation of the obligations which attach to membership of the EU, including, in the sphere of the internal market, membership of the single currency and economic and monetary union.
154. The EU operates an internal market. Some features of the internal market fall within the exclusive competence of the Union under article 3 TFEU, such as the customs' union, competition rules, monetary policy for the member states whose currency is the euro, and the common commercial purpose. Other aspects are shared competence, in which the Union and members both contribute to the internal market under article 4 TFEU. The current division between national and supranational competence will continue and will not be changed by Irish reunification. Instead, the size of the territory in which Ireland must ensure the faithful and effective application of the Treaties will increase to include the jurisdiction of Northern Ireland.
155. The original underlying purpose for what was initially called the common market is easy enough to state in broad terms – it is to facilitate free trade, achieve fair competition, specialisation, comparative advantage, and economies of scale, which should contribute to increased growth and prosperity, security of supply, more efficient use of resources, and greater quality and consumer choice. This goal lay at the heart of the original EEC Treaty and was contained in article 2 EEC. The internal market is deeper and wider than its predecessor “the common market”. Its evolution will continue with the EU institutions, including the CJEU, and where appropriate the member states, determining the balance to be struck in particular subject areas between economic and non-economic interests.
156. Article 26(2) TFEU now defines the internal market as an area without internal frontiers in goods, persons, services, and capital. These freedoms are found in specific articles of the Treaty and in a range of secondary legislation. The CJEU has also played a critical role in ensuring the development of the internal market.
157. The internal market is a fundamental feature of the economy and politics of the European Union. For much of the period from the Treaty of Rome in 1957 to the Maastricht Treaty in 1992, the establishment of the internal market was the principal focus of the member state governments and the institutions of the EU. The identification and removal of barriers to intra-community trade often seemed to be the foremost priority. This approach has, however, been balanced by the recognition of legitimate and necessary public-interest requirements. The regulation of the internal market also features aspects of consumer protection, environmental protection, and other interests.<sup>167</sup>
158. In the case of Irish reunification, the whole island of Ireland will return to a situation comparable to that which existed prior to the UK's withdrawal from the European Union in March 2020. The entire island will again benefit from all aspects of the internal market on an equal basis and form part of the Union's customs area. Both jurisdictions will, however, form part of a single member state but the arrangements between Northern Ireland and the Republic and the continent will be restored.
159. As explained elsewhere in this report, some of the worst effects of Brexit for the island of Ireland

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<sup>167</sup> Such interests may be contained in harmonization legislation or, more typically, contained in national measures which are subsequently recognised as “mandatory requirements” or “public interest requirements” by the CJEU in its case law. An exhaustive list is beyond the scope of this work but Barnard, summarises them as concerning the protection of public goods and values, protection of individuals and protection of public order. Please see Catherine Barnard, “The Substantive Law of the EU: The Four Freedoms”, (6th edition), (2019) (OUP), pg. 168-170

were deferred by the transition period in article 127 WA until the 31st December 2020, while others continue to be mitigated by provisions of the Protocol. The return to full membership of the customs' union and the internal market for Northern Ireland does not, at this juncture, appear to pose any insurmountable difficulties. The greatest immediate disadvantage will be the dislocation between the economy of Northern Ireland and the rest of the UK. At the time of writing, much (though by no means all) of the substantive rules on the free movement of goods, services, and capital continue in place as retained EU law. The often threatened "bonfire of EU red tape" to create a "Singapore on the Thames" has not, to date, occurred. The greatest immediate benefit will perhaps be the restoration of free movement of workers and EU citizens on the island.

160. Economic and monetary union and membership of the single currency poses greater initial obstacles, however. It can be argued that EMU, and the launch and stabilisation of the euro currency, have occupied a comparable prominence in the EU's priorities in the years since the millennium to that played by the establishment of the internal market project in earlier years. Although EMU was an official objective of the EC from 1969<sup>168</sup>, progress on that front was limited and often marked by disagreement about how and when it could be achieved.<sup>169</sup> The early years of the euro saw several member states, including the UK, Denmark, and Sweden, opt out of participation. There was also difficulties in member states adhering to conditions of the growth and stability pact and in having a single interest rate for a diverse economic zone. The credit crunch and then sovereign debt crisis of 2008-2010 demonstrated beyond any doubt some of the fundamental weaknesses of the system. The policy and legal response to such problems has been a much greater level of supranational economic governance.
161. Economic and monetary union was, and to some extent continues to be, characterised by a fundamental asymmetry. Monetary policy is centralized while economic policy remains the responsibility of national governments. In the main the member states remain free to identify the tax unit, tax base, rate of tax and manner of collection. Choices on priorities for taxation and expenditure are subject to some important limits, however. The recent history of EMU has resulted in the creation of a number of new institutions, policies, and processes often underpinned by law. It has also increased the scope of powers at the disposal of the EU institutions. The degree of solidarity and interdependence between member states means that economic policy differences are often mediated not only within states but now between them and in conjunction with the institutions of the EU. The current system has undoubtedly contributed to greater economic stability and ensured the survival of the single currency, but legitimate concerns about its long-term democratic legitimacy remain. This is the economic and monetary policy environment in which Irish reunification will occur.
162. For present purposes, it is sufficient to acknowledge that Irish reunification will have important implications for Ireland and its eurozone partners. The probable economic consequences are beyond the scope of this work. The intergovernmental and supranational architecture concerned with economic and monetary union can, and should, be utilised to assist in planning for Irish unity. That task can, and should, begin now. The applicable law already exists but authoritative economic analysis upon which to identify problems and propose credible solutions is still awaited. This work must commence, in the first instance, with the Irish authorities on the basis of a comprehensive picture of the Irish and Northern Irish economies.

### **International Law on Consequences of Cession**

163. Changes in the government of a state or its internal constitutional arrangements do not, in general,

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168 Commission Memorandum to the Council on the co-ordination of economic policies and monetary co-operation within the Community of 12 February 1969; the "Barre Report" available at [https://ec.europa.eu/archives/emu\\_history/documentation/chapter2/19690212en-015coordinateconpoli.pdf](https://ec.europa.eu/archives/emu_history/documentation/chapter2/19690212en-015coordinateconpoli.pdf).

169 Ian Bache, Stephen George and Simon Bulmer, *Politics in the European Union*, (3rd edition) (OUP)(2011), chapter 28, Economic and Monetary Union



affect the legal personality of the state in international law. States are bound by international acts performed by previous governments. Changes in the territory of a state may, in certain circumstances, affect its legal personality, however. When one state replaces another on a particular territory, the question arises as to whether the rights and obligations of the former state can be said to have transferred to the other state.

164. The peaceful transfer of territory from one state to another by way of cession has certain consequences for the receiving state in public international law. The Vienna Convention on Succession of States in Respect of Treaties (1978) entered into force in 1996. However, neither the UK nor Ireland are currently signatories to the Treaty. Instead, the position in international law for each state is probably best described as being governed by customary international law which, on the whole and in the main, largely coincides with the terms of the Convention. It is generally, though not universally, accepted that localised treaties which impose duties or confer rights in a specific territory will carry over.<sup>170</sup> The same is probably true of human rights' treaties.<sup>171</sup> On the other hand, non-localized treaties do not. In the case of partial succession, such as cession where the predecessor state is not extinguished, no succession to treaties can occur.<sup>172</sup>
165. As already set out, in the event of Irish reunification pursuant to the GFA, the whole island will form one state for the purposes of international law and EU law. Ireland will continue to be subject to the obligations of membership of the European Union. It will also continue its membership of various international organisations and remain subject to its existing treaty obligations, though it will then have to take adequate steps in national law to ensure those obligations extend to the north. In such circumstances, the GFA could be interpreted as requiring that at least an equivalent level of protection is in place. On this issue, Dickson is surely correct to suggest that "the guiding principle for the governments of Ireland and the UK should be that there is no regression in the degree of protection currently afforded"<sup>173</sup>. Such an outcome could be achieved with a "no diminution" clause comparable to that found in article 2(1) of the Protocol.<sup>174</sup>
166. The report of the International Law Commission, in its Thirty-Third Session, considered the current position regarding the Succession of States in Respect of State Property, Archives, and Debt. The Report led to the drafting of the Vienna Convention on Succession of States in respect of State Property, Archives, and Debts. It was completed on the 8th April 1983 but has not yet entered into force. Neither the UK nor Ireland are signatories. A review of the supporting commentary for the Commission's report shows that the provisions drafted are broadly descriptive of state practice and academic writing on the subject. It considered that rules should be arranged into three broad categories: (i) succession in respect of part of territory; (ii) newly independent states; and (iii) uniting and separating of states.
167. Article 14 of the 1983 Convention concerned the consequences for state property in the case of transfer of part of the territory of a State. What is state property will be determined in accordance with national law. It provides as follows:
  1. When part of the territory of a state is transferred by that state to another state, the passing of state property of the predecessor state to the successor state is to be

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170 Article 12 of the Vienna Convention of 1978 provides that a succession of states shall not affect obligations, or rights, "relating to the use of territory" and "established by a treaty for the benefit of any territory of a foreign state and considered attaching to the territories in question". The International Court described the provision as reflecting customary international law in *Gabcikovo-Nagymaros* ICJ Reports (1997) pg. 7, 69-72.

171 Application of the Convention on the Prevention and the Punishment of the Crime of Genocide, Preliminary Objections, ICJ Reports, 1996, p. 595, pg.641-651. The Judge concluded that there is a principle of contemporary international law that there is automatic state succession to so vital a human rights' convention as the Genocide Convention. The ECtHR took the same view in *Bijelic v. Montenegro* (App. 11890/05 of 28th April 2009). Rights attach to persons in the territory in question and continue notwithstanding dissolution.

172 James Crawford, *Brownlie's Principles of Public International Law*, (8th ed OUP 2012), pg. 438.

173 Brice Dickson, "Implications for the Protection of Human Rights in a United Ireland", *Irish Studies in International Affairs*, 2021, Vol. 32, No. 2, *Analysing and Researching Ireland, North and South* (2021), pg. 589-610, 590 -]

174 Brice Dickson, "Implications for the Protection of Human Rights in a United Ireland", *Irish Studies in International Affairs*, 2021, Vol. 32, No. 2, *Analysing and Researching Ireland, North and South* (2021), pg. 589 -610, 607



settled by agreement between them.

2. In the absence of such agreement:
  - a. immovable state property of the predecessor state situated in the territory to which the succession of states relates shall pass to the successor state;
  - b. movable state property of the predecessor state connected with the activity of the predecessor state in respect of the territory to which the succession of states relates shall pass to the successor state.

168. The Commission also considered the effect of transfer of part of the territory of a state to another with regard to state debts. The problem is now addressed in article 37 in the 1983 Convention:

1. When part of the territory of a state is transferred by that state to another state, the passing of the state debt of the predecessor state to the successor state is to be settled by agreement between them.
2. In the absence of an agreement, the state debt of the predecessor state shall pass to the successor state in an equitable proportion, taking into account, *inter alia*, the property, rights, and interests which pass to the successor state in relation to that state debt.

169. The Commission considered that there was a divergency in state practice and in legal literature on the legal principle to be applied concerning the passing (or non-passing) of the state debt of the predecessor state to the successor state, depending on whether it was considered general debt or localized debt. It was concluded that:

... while there appeared to exist a fairly well-established practice requiring the successor state to assume a localised state debt, no such consensus can be found with regard to general state debts. Although the refusal of the successor state to assume part of the general debt of the predecessor state seems to prevail in writings on the subject and in judicial and state practice, political considerations or considerations of expediency have admittedly played some part in such refusals.<sup>175</sup>

170. This situation was also found to be in the case by Menon.<sup>176</sup> It was said that:

The transfer of part of a state's territory closely follows Article 15 of the 1978 Vienna Convention on Treaties dealing with the traditional "moving treaty-frontiers" rule. The rule covers cases where a territory which is not a state undergoes a change of sovereignty, for reasons of succession, cession, or the attachment of territory where the successor state is an already existing state.

In this situation, the rules concerning the passing of the state debt of the predecessor state to the successor state are relatively less developed. The practice of states has not been sufficiently uniform to suggest that a body of rules has become part of customary international law. Decisions of international tribunals are few and have limited use in the development of general principles. The writings of publicists in clarifying and identifying the governing principles are not only few but are divided.

171. The reference to "equity" in article 37(2) of the 1983 Convention is also found in article 14(2) on the passing of state property and in article 27 on the passing of state archives. Read together, it suggests that the apportionment of debts and assets should be equitable and consistent. There should be correlation between the different exercises. This is based, it seems, on logic and fairness

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175 Report of the International Law Commission on the work of its thirty-third session; commentary on article 35, paragraph 36

176 P. K. Menon, *The Succession of States and the Problem of State Debts*, 6 B.C. Third World L.J. 111 (1986), <http://lawdigitalcommons.bc.edu/twlj/vol6/iss2/2>

rather than by reference to consistent state practice. In the case of dissolution or succession, as opposed to cession, there is a much greater history of division of state debt and assets. The examples of the dissolution of Czechoslovakia, the Soviet Union, and Yugoslavia resulted in a division of assets and debts, but cannot be considered to be equivalent to cession as would occur with Irish reunification pursuant to the GFA. If any presumption at all exists, it is that responsibility for general public debt of the predecessor state remains with that state after succession.

172. Again, it must be emphasised that the Convention does not bind either the UK or Ireland. It cannot be said that the provisions are declarative of existing customary international law or state practice either. They are not. But it does identify what is possible and perhaps offers the best description of what is likely to occur. The states will be expected to come to an agreement but the contention that a united Ireland is clearly bound to accept a proportionate element of UK State debt with or without any accompanying expectation of a division of UK State assets is surely precarious.

### **Economic Consequences of Irish Reunification**

173. The most significant EMU issues to be considered in the event of Irish reunification can already be recognised: the continued movement of capital and payments between Ireland and the EU; an integrated all-island banking system which adheres to EU law; and Ireland's obligations with respect to government spending, deficit, and public debt. Also, of fundamental importance to Ireland and its eurozone partners is the promotion of economic growth and price stability. None of these challenges should appear insurmountable but they require honest and serious assessment at an early stage. They are matters for economists rather than lawyers, but the applicable legal provisions can be identified and credible solutions constructed within those legal parameters.
174. It requires, however, leadership from an Irish government to initiate this aspect of the planning for reunification, and transparency from the UK Government on the current economic and financial situation in Northern Ireland. Once those elements are in place, assistance, advice, and economic and financial support can, and should, be sought from the EU, as happened with German reunification in 1990. Responsible economic forecasting and planning for Ireland should, it is submitted, henceforth include consideration of what is, after all, a "constitutional imperative" for the state and a core element of the GFA.
175. The Eurogroup is an informal body created in 1997 in which national finance ministers from the euro-area member states discuss matters relating to their countries' common responsibilities related to the single currency. Its role was formally set out in article 137 TFEU (rules specific to the eurozone) and protocol no.14 to the TFEU (regular informal meetings of the Eurogroup). The European Central Bank (ECB), the managing Director of the European Stability Mechanism, and representatives of the Commission also participate in the meetings. Its main task is to ensure close co-ordination of economic policies among the euro-area member states. It also aims to promote conditions for stronger economic growth but also examines broader issues which may have an impact on fiscal, monetary, and structural policies of euro-area member states. Meetings are generally held each month. The current President of the Eurogroup is Paschal O'Donoghue.
176. The Eurogroup considers the economic and budgetary policies of eurozone member states. It may also discuss the terms of financial assistance for eurozone countries should they experience severe financial difficulties. The outcome of meetings are presented to the public by way of press conference and/or the issuing of written public statements. The Eurogroup adopts its work programme every 6 months. This is assisted by the Eurogroup Working Group (EWG). It is an expert body that provides research and advice. It complements the meetings of the Union's Economic and Financial Affairs Council (Ecofin). Those meetings focus upon economic policy, taxation, and the regulation of financial services.
177. This forum seems appropriate to commence timely in-depth and continuing analyses of the likely economic consequences for Ireland, and its eurozone partner nations, of Irish reunification pursuant

to the provisions of the GFA. The manner in which reunification can come about is established, as are the legal consequences, in public international law of transfer of the jurisdiction by cession from the UK to Ireland. The existing duties and expectations of EMU and membership of the single currency are known. An authoritative assessment of the macroeconomic position of Northern Ireland in a united Ireland should take place. The forum will be one of a number which will assist in economic planning.

178. The assistance of the European Commission is also merited. The most recent Country Report on Ireland from the EU was published on the 9th June 2022.<sup>177</sup> A brief review shows that the principal findings were that Ireland's economy performed very well prior to the Covid-19 crisis. It was the only country to avoid a recession during the pandemic and this was attributed, in large measure, to the strong performance of multinationals based in the state. Of principal concern were re-emerging labour shortages, rising energy costs, the need for structural reforms to health and long-term care, and inflation. With regard to the public finances, the report was positive. Debt to GDP ratio fell to a ten year low of 57.2% reflecting strong growth. Debt to GNP, however, was high at 95%.<sup>178</sup> The pandemic also put the continued reduction in debt ratio on hold but no sizeable increase occurred.
179. The report also looks at some longer-term challenges such as reform of pension system, housing, regional disparities, an aging population, and the narrow character of Ireland's tax base. In October 2021, Ireland announced that it would join the global OECD/G20 inclusive framework agreement aimed at reforming international tax rules.<sup>179</sup> The key reform is intended to be a minimum effective tax rate of 15%. This will require both national legislation and secondary legislation at the EU level.
180. As can be seen from the above, the Country reports seek to anticipate future opportunities and potential problems which are relevant to economic performance. The reunification of Ireland, pursuant to the provisions of the GFA, is surely a matter of sufficient importance to warrant consideration in future reports. This inclusion can, and should, consider the benefits and costs for the Irish economy and from now on analyse the implications for the various obligations undertaken by the state in EMU, membership of the single currency, and the growth and stability pacts.
181. It is suggested that all national, international, and supranational forums in which Irish economic performance is reviewed should contribute to sensible planning for the possible outcome of reunification. It is a constitutional objective of the state and one of the centre pieces of the GFA. Its realisation in the short, medium, or long-term future should inform economic modelling and planning from this time onwards. The European Council has already noted the possibility of it occurring.
182. Those questions such as the current UK subvention, comparisons of economic performance, living standards, disparities and imbalances in economic growth, and future opportunities can be addressed. The electorates on the island, north and south, are entitled to sufficient and reliable information. The choice of which option holds the greatest promise for future prosperity and contentment is theirs. Those affected by Irish reunification, such as the EU institutions and national governments, should also be informed of the likely consequences for them.
183. At the time of writing, the ECB is in the investigation stage of the Digital Euro.<sup>180</sup> This exercise recognises the move away from cash to digital payments and is intended to ensure financial stability and access to central bank money. The final design is yet to take shape but the basic model is described as being like euro banknotes but digital. It would be an electronic form of

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177 Commission Staff Working Document; Recommendation for a Council Recommendation on the 2022 National Reform Programme of Ireland; 2022 COM (2022) 615 final; SWD (2022) 640 (final)

178 Ibid, pg. 4

179 Ibid, pg. 12

180 See <https://www.ecb.europa.eu/press/blog/date/2022/html/ecb.blog220713~34e21c3240.en.html>.



money, issued by the Eurosystem (the ECB and the national central banks of the euro area), and would be accessible to all citizens and firms. It is stated that a digital euro would not replace cash, but rather complement it and give people an additional choice about how to pay and make it easier to do so, contributing to accessibility and inclusion.<sup>181</sup> The Irish Central Bank is participating in the project also.<sup>182</sup>

184. It is suggested that when the project takes greater shape, and appropriate legal bases in EU law are enacted, the Irish Government and the European institutions should consider how the system could support Irish reunification if such an outcome received support in concurrent referendums. This new financial architecture for the euro is likely to take on greater importance in the years ahead. Research, which examines the extent to which this eases or complicates a change of currency in Northern Ireland, would be beneficial.

### Assessments of Irish Reunification

185. There has been some welcome research on the likely economic costs and benefits arising from Irish reunification. In the first report we had considered the contributions of Fitzgerald and Morgenroth<sup>183</sup>, Seamus McGuinness and Adele Bergin<sup>184</sup>, Thurmann<sup>185</sup> and Dr. Kurt Hubner for KLC Consulting<sup>186</sup>. Since that time there have been a number of valuable contributions, including from Sinn Féin<sup>187</sup>, Dr. Graham Gudgin<sup>188</sup>, and others. The debate has also featured in the Irish media.<sup>189</sup>
186. It is suggested that, to date, the most helpful recent intervention has come from Professor John Doyle. It is clearly not the only worthwhile contribution to the discussion of the immediate macroeconomic consequences of Irish unity, and informed critical responses have also been considered.<sup>190</sup> However, it is the most detailed account to date of the issues. His article is entitled “Why the Subvention Does Not Matter: Northern Ireland and the All-Ireland Economy”<sup>191</sup>. The main lines of argument are summarised here to give readers a greater understanding of the conclusions reached and the possible consequences for EMU.
187. Northern Ireland’s economy is described as very weak, featuring relatively high levels of economic inactivity and poverty together with low growth, wage levels, and productivity when compared to the Republic. The article also seeks to explain the source of the regularly cited subvention figure of £10 billion from the UK Treasury to fund public services in Northern Ireland. The significant elements of the subvention are said to be: (i) taxation raised by the UK in Northern Ireland; (ii)

181 [https://www.ecb.europa.eu/paym/digital\\_euro/html/index.en.html](https://www.ecb.europa.eu/paym/digital_euro/html/index.en.html).

182 <https://www.centralbank.ie/financial-system/payments-and-securities-settlements/a-digital-euro>

183 John FitzGerald and Edgar L.W. Morgenroth, *The Northern Ireland Economy: Problems and Prospects*, TEP Working Paper No. 0619 July 2019; Institute for Government, *Irish Reunification*, available at <http://www.instituteforgovernment.org.uk/explainers/irish-reunification>.

184 *The Political Economy of a Northern Ireland Border Poll* <http://www.iza.org/publications/dp/12496/the-political-economy-of-a-north-ern-ireland-border-poll>.

185 *Northern Ireland’s Income & Expenditure in a Reunification Scenario* by Gunther Thumann for the Oireachtas Joint Committee on the Implementation of the Good Friday Agreement (2018). Available at <http://www.senatormarkdaly.ie/uploads/1/3/5/6/135670409/imf-merged-.pdf>

186 *Modelling Irish Unification* by KLC Consulting (2015) available at [https://cain.ulster.ac.uk/issues/unification/hubner\\_2015-08.pdf](https://cain.ulster.ac.uk/issues/unification/hubner_2015-08.pdf)

187 *Economic Benefits of a United Ireland (Discussion Paper)* November 2020; available at [https://www.sinnfein.ie/files/2020/Economic\\_Benefits\\_of\\_a\\_United\\_Ireland.pdf](https://www.sinnfein.ie/files/2020/Economic_Benefits_of_a_United_Ireland.pdf)

188 Graham Gudgin, “The Island of Ireland: Two Distinct Economies”, *Policy Exchange* (June 2022) available at <https://policyexchange.org.uk/wp-content/uploads/The-Island-of-Ireland.pdf>; Graham Gudgin, “The Island Economies: Comparative Living Standards”, John Wilson Foster and William Beattie Smith (eds), *The Idea of the Union: Great Britain and Northern Ireland*, (2021) (Belcover Press).

189 “What would be the economic costs and benefits of a united Ireland?”, *Eoin Burke-Kennedy* in *Irish Times* on 7th May 2021 - <https://www.irishtimes.com/business/economy/what-would-be-the-economic-costs-and-benefits-of-a-united-ireland-1.4557508>; “What do we know – and not know – about the costs of a united Ireland” *CJ McKinney* in the *journal.ie* on 26th March 2021 - <https://www.thejournal.ie/united-ireland-economy-2-5388619-Mar2021/>; “United Ireland Would Cost up to £10 Billion per year” *Bimpe Arche* in *Irish News* on 17th September 2019; “Truth is that the union with Britain has been an economic calamity for Northern Ireland” – *David McWilliams* in the *Irish Times* on 18th June 2022; “No, the UK will not pay a united Ireland’s pensions” *Newton Emerson* in *Irish Times* on 10th February 2022.

190 Alan Barrett, “Response to Why the Subvention Does Not Matter”, *Irish Studies in International Affairs: ARINS* 32 (2) (2021), available at <http://doi.org/10.3318/isia.2021.32b.31FULL>

191 John Doyle, “Why the Subvention does not matter”, *Irish Studies in International Affairs*, Vol. 32, Issue 2, 314-334.



public expenditure in Northern Ireland; and (iii) a proportionate allocation to Northern Ireland of central UK expenditure. It concludes that it is essentially an accounting exercise by the UK Office for National Statistics that would not be directly relevant to a united Ireland. Those elements of current subvention that are likely to transfer to a united Ireland would, in the author's view, amount to a deficit of approximately £2.8 billion.<sup>192</sup> That calculation is based on a number of political and economic assumptions.

188. Professor Doyle describes the relative strengths and weakness of the economies in the Republic and in Northern Ireland. He then sets out a number of conclusions. The first is that liability for pensions would be the subject of a negotiated settlement between the Irish and British governments rather than an automatic and full transfer of such costs to a united Ireland. While pension contributions of workers are paid from general taxation and not held in a separate fund, the author states that:

While pensions will be a matter for bi-lateral negotiation between the two governments, it is consistent with other practice that the UK would accept such obligations, which had been built up through tax and social insurance contributions, and caring responsibilities up to the date of Northern Ireland leaving the UK, while a united Ireland would take over such future liabilities building up from day one of the new state.<sup>193</sup>

189. The second significant element is UK public debt. It is stated that "this debt is the legal responsibility of the UK, and any agreement from the government of Ireland to take over some of the debt could only be agreed voluntarily as part of a wider transitional package"<sup>194</sup>. There is also an argument for the proposition that assets as well as liabilities are distributed between two successor states. Instead, Doyle suggests that it is probable that a stand-still agreement would be reached.
190. The author also demonstrates that UK defence costs attributed to Northern Ireland on a pro-rata basis, including the costs of UK nuclear weapons and foreign wars, would not transfer to a united Ireland. Service personnel could transfer to the Irish Defence Forces or remain in the British military but the nominal allocation of £1.139 billion per annum is unrealistic. Also, relevant to the calculation of the subvention is the fact that taxes such as corporation tax, capital gains tax, and VAT are generally paid by companies from their head office regardless of where that profit was earned or the activities conducted. This appears to result in an underestimate of tax revenues collected in Northern Ireland.
191. Readers are advised by Doyle that the most important issue for future public finances of a united Ireland is not the subvention, but rather the performance of the all-Ireland economy and the public policy decisions taken by the new state in the areas of health, education, and welfare.<sup>195</sup> If, after an initial transition period, the economic performance of the north can be brought to levels equivalent to those in the Republic, then any subvention would cease to be relevant.<sup>196</sup>
192. Our report does not intend to challenge the economic assumptions made in this significant contribution to the debate. That is a task to be performed by economists. Instead, our focus is to consider the correctness of the political assumptions as a matter of law. There are some aspects of public international law which are relevant to state responsibility for debt in cases of transfer. As set out above, there is no identifiable rule of international law which holds that the cession of the territory of Northern Ireland to reunified Ireland will automatically result in a corresponding proportionate transfer of UK debt. There is no localised debt as part of UK public debt, within the scope of that term in public international law, which would be treated in a distinct manner. UK public debt will be the subject of negotiation. Any agreement on public debt is likely to be

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192 Ibid, pg 330

193 Ibid, pg 324

194 Ibid, pg 324

195 Ibid, pg 330

196 Ibid, pg 333

influenced by accompanying agreements on liability for existing pensions and agreements on the division of state assets.

193. The question of responsibility for pensions similarly finds no definitive answer in international law, European Union law, or national law. At the time of writing, there is no provision in Irish pension law which addresses the status of UK pensions in the event of reunification pursuant to the GFA. Eligibility and the status of past contributions to either the UK or the Irish system will be determined by national law. The final determination of this issue between the parties will also be influenced by human rights' law, anti-discrimination law, and principles of legitimate expectation. Both states have international obligations regarding socio-economic rights. The principles of equivalence of rights' protection and no diminution should also apply. The issues is of enough significance to warrant discrete examination.
194. The UK and Ireland have many social security agreements with other states (and each other), which govern how pensions can be calculated. They are each the result of negotiation and seek to achieve simplification and co-ordination of payments. It is correct to say that national insurance contributions already made by workers in Northern Ireland (now part of the UK) do not result in guaranteed payment of pensions by the UK authorities in all situations. The recent rule changes regarding increased contributions and qualifying retirement ages demonstrate that. Equally, however, it cannot be said that the transfer of Northern Ireland, and its base of taxpayers, to reunified Ireland means that payment of pensions will automatically, completely and immediately fall only to Ireland. Such an absolutist position does not find any support in law.
195. The best available guide (though obviously imperfect) to what is most likely to occur in practice is found in the Social Security Convention of 2019 between the two states. It was agreed on a bi-lateral basis during the contentious Withdrawal Agreement negotiations and came into effect at the end of the transition period on the 31st December 2020. It recognised the special status that UK and Irish nationals have whilst resident in each other's countries, and aimed to preserve the reciprocal social security rights established through the Common Travel Area and fortified in EU law, including Regulation 1408/71 and Regulation 574/72 on the co-ordination of social security systems and updated in Regulations 883/2004, 987/2009 and Regulation 859/2003 on nationals of third countries.
196. The objective of the Convention was to ensure that the position of nationals who moved between the states would not be affected by Brexit. The Convention will ensure Irish and UK nationals residing and/or working in the UK or Ireland do not lose their accrued contributions or rights to social security benefits when moving between the two countries, whilst at the same time preventing any double or over-provision of benefits, or double liability for social security contributions, in both countries at the same time.
197. The Convention covers social security contributions and pensions as well as family benefits and benefits in respect of sickness and invalidity, maternity and paternity, unemployment, accidents at work, and occupational disease and bereavement. It also provides for the necessary administrative arrangements for data sharing, social-security debt recovery, and mutual cooperation necessary for implementing reciprocity.
198. The basic principle underlying the Convention is that benefits accrued in one state through contributions can be enjoyed in the other state. Article 5 promises equal treatment of benefits, income, facts, or events. The Convention adopts the broad model that contributions during employment lead to entitlement regardless of the location. Article 62 commits the parties to all responsible efforts to resolve any dispute between them with the possibility of submission to an independent arbitration panel. The basic analogy is that Northern Ireland workers who have paid tax and made national insurance contributions prior to reunification can be regarded as having

created an expectation of eventual benefit. Neither the financial settlement aspect of the WA<sup>197</sup> nor the previous publications concerning pensions in an independent Scotland<sup>198</sup> provide a more reliable basis for the outcome of negotiations on the issue of pensions between the UK and Ireland.

## **Section F: Merits of Irish Reunification from the Perspective of the EU**

### **Overview**

199. The authors submit that Irish reunification, pursuant to the GFA, is a legitimate political and strategic aspiration for the EU and its member states. There are no normative prohibitions on the Union supporting such an outcome and taking reasonable preparatory steps. This cannot be considered to be objectionable by anyone committed to respecting the GFA. Irish unity is an outcome which is broadly consistent with the EU's enlargement policy, furthers the principle of self-determination, and offers practical benefits which, from the viewpoint of Brussels, would seem preferable to the current Protocol arrangements. It would see the return of the full benefits of EU membership to Northern Ireland and could conceivably lead to improved relations with the UK in the short to medium term. Under the terms of the GFA, the Irish and British Governments are committed to offering the choice and implementing the outcome of such referendums. The steps that the EU could take would only be consistent with this reality.
200. The binary choice between continued partition outside the EU and unification with a member state is one for the people of the island of Ireland. However, the GFA itself does not limit the ability of the EU to plan, prepare for, and support Irish Unity as envisaged by the Agreement. As explained earlier, the phrase "without external impediment" in the text does not exclude such planning by the EU institutions. Any contribution to the debates would, of course, have to adhere to the national electoral laws of Ireland and the UK and respect the competences in the Treaties. However, none of these sources prohibit the adoption of a position in support of reunification by the Union nor the taking of appropriate preparatory steps consistent with the balance of competences in the Treaties.
201. The Protocol does not change the substantive position which exists on the island of Ireland but it does bring the protection of the GFA within the scope of EU law. Article 1(1) of the Protocol states that its provisions are without prejudice to the constitutional status of Northern Ireland as part of the UK. Article 1(2) states that the Protocol respects the essential state functions and territorial integrity of the UK. Article 1(3) sets out the minimum arrangements necessary to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North-South cooperation, to avoid a hard border, and to protect the 1998 Agreement in all its dimensions.
202. Read together, the provision can be seen as merely declaratory. It preserves the current constitutional arrangements but introduces an EU commitment to them. It does what it was intended to do – protect the GFA from the consequences of Brexit. It puts into a legal text what has been EU policy – protect the GFA from the consequences of Brexit. However, it cannot be said that the Union is required to adhere to a policy of ignoring one of the two outcomes envisaged by the GFA. The jurisdiction of the UK in Northern Ireland is now, and has since the Agreement, been conditional

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197 Part Five of the Withdrawal Agreement (articles 133 – 157).

198 See, for example, Pensions in an Independent Scotland, published on 1st August 2014 by fullfact.org; "Who pays the State Pension in an independent Scotland?"; David Eiser & David Bell in the Herald on 5th February 2022; available at <https://fraserofallander.org/who-pays-the-state-pension-in-an-independent-scotland/>; Newton Emerson in Irish Times on 10th February 2022 "No, the UK will not pay a united Ireland's pensions".



upon the assumed consent of a majority of people living there. Union or unity by consent is also the policy and constitutional position in both the UK and under Bunreacht na hÉireann.

203. Such a suggestion emphatically does not amount to the insertion of the Irish constitutional imperative to unity (in either the past or current formulation) as a European one. It is not a resurrection of the original articles 2 and 3 in a European guise. The process that can deliver unity has already been agreed and the outcome of a united Ireland in the EU is acknowledged and should be reasonably well understood. Instead, the exercise would be one which examines the merits of Northern Ireland's return to the EU as part of the territory of an existing member state – Ireland. The EU has in the past adopted a supportive position with regard to German reunification and, at the present time, holds one in favour of the peaceful and agreed reunification of Cyprus. Neither comparison is completely equivalent, of course, but it is the right time now to consider the case for Irish unity from Brussels.
204. This report attempts to stimulate debate in the EU institutions about EU interests in the scenario of the continuation of partition viewed against the possibility of Irish unity, with Northern Ireland, once again, part of the EU. It is only a first step and ultimately the assessment of what is in the best interests of the Union (Brexit, partition, and the protocol or Irish unity) will have to be taken within and between the institutions.
205. Support for respect for all aspects of the GFA, as protected by the Protocol, has been expressed in various quarters. This can be seen in the current programme for Government in Germany<sup>199</sup>; the responses of the German Chancellor Olaf Scholz<sup>200</sup> and EU Commissioner Maroš Šefčovič<sup>201</sup>, and the responses of Spanish government Ministers, Pascual Navarro Rios and Jose Manuel Albares, in the Cortes to questions from Senator Gorka Elejabarrieta.<sup>202</sup> The UK disregard for its obligations in the Protocol have been noted across the EU. The response has been consistent in condemnation and seeking a swift return to negotiations on implementation. Should that UK disregard become persistent, it may, however, result in deeper consideration of the possible benefits of Irish reunification pursuant to the GFA.
206. The most prominent example of support for Irish reunification was reflected in the comments made by French President Emmanuel Macron in August of 2019 that all the problems of Brexit would be solved by Irish unity.<sup>203</sup> The remark may have been initially spurred by frustrations at the manner of negotiations with the UK, but it reveals a deeper truth. The choice on reunification is for the people of Ireland but the outcome of unity would offer benefits to the EU. An external border of the EU across the island of Ireland has required the complex arrangements in the Protocol. Those arrangements have led to political tension with the current British Government. Brexit has also resulted in a large number of EU citizens residing outside of the territory of the Union (in Northern Ireland) and consequently deprived of the full enjoyment of that status in the location where they live.

### **Success of Past EU Enlargement**

207. The growth of the (then) European Communities from the 1950s into the European Union of today is well-known. The original six member states to the Treaty of Rome were West Germany, France, Italy, Belgium, the Netherlands, and Luxembourg. The first enlargement in 1972 saw the United

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199 “We insist on full compliance with the agreements that have been agreed, in particular with regard to the Northern Ireland Protocol and the Good Friday Agreement” <https://www.spiegel.de/politik/koalitionsvertrag-der-ampel-parteien-im-wortlaut-darauf-haben-sich-spd-gruene-und-fdp-geeinigt-a-3e25c4da-088a-4971-8a4d-4797a4ecf089>.

200 “Germany Criticises UK attempts to change Northern Ireland Protocol” available at <https://www.aa.com.tr/en/europe/germany-criticizes-uks-attempt-to-change-northern-ireland-protocol/2612973>.

201 Statement of Vice President on 13 June 2022 available at [https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT\\_22\\_3698](https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_22_3698)

202 <https://thediplomatinspain.com/en/2022/06/albares-eu-must-not-take-one-step-back-in-negotiations-with-london/>

203 “Macron insists any Brexit deal must guarantee stability in the north” Irish Times, 23 August 2019, available at <https://www.irishtimes.com/news/politics/macron-insists-any-brexit-deal-must-guarantee-stability-in-north-1.3994527>.



Kingdom, Denmark, and Ireland join. Greece joined in 1981. Spain and Portugal joined in 1986. In 1995 Sweden, Finland, and Austria joined. The most significant enlargement came in 2005 with the accession of ten new member states: Malta, Cyprus, Poland, Czech Republic, Hungary, Slovakia, Slovenia, and the Baltic republics of Latvia, Lithuania, and Estonia. Romania and Bulgaria joined in 2007. The most recent addition was the accession of Croatia in 2013.

208. The EU continues to operate an enlargement policy. States may apply for membership but are expected to fulfill a set of political and economic conditions. Any European state which respects EU democratic values in line with article 2 TEU and is committed to promoting them may seek membership. At the moment, the candidate countries are Turkey, North Macedonia, Montenegro, Serbia, Ukraine, and Moldova.<sup>204</sup> Those states will have to satisfy the various criteria set out and agreed at the 1993 Copenhagen European Council meeting.<sup>205</sup> They will then have to adhere to the procedural and substantive conditions set out in article 49 TEU. Satisfactory completion of the political, economic, and administrative conditions will have placed the state in a position to adopt the Union's *acquis*.
209. The Commission had previously described EU enlargement as the Union's "most successful foreign policy instrument"<sup>206</sup>. The institution continues to emphasize the importance of the policy. Through its Directorate-General for Neighborhood and Enlargement Negotiations, it published its most recent communication on enlargement in October 2021<sup>207</sup>. It repeated that "a credible enlargement policy is a geostrategic investment in peace, stability, security, and economic growth in the whole of Europe. With each successive enlargement, the EU has been able to extend its benefits to more citizens."<sup>208</sup>
210. The EU Parliament is equally supportive of EU expansion. Under article 49 of the TEU, Parliament must give its consent to any new accession to the EU. It also has a significant say over the financial aspects of accession: its budgetary powers give it direct influence over the amounts allocated to the Instrument for Pre-accession Assistance (IPA). Parliament is fully involved in the Stabilisation and Association Process and its consent has been required for the conclusion of all Stabilisation and Association Agreements pursuant to article 218(6) of the TFEU.
211. Parliament's Committee on Foreign Affairs appoints standing rapporteurs for all candidate and potential candidate countries. Parliament expresses its positions on enlargement in the form of annual resolutions responding to the Commission's latest annual "country reports". It maintains regular bilateral relations with the parliaments of all candidate and potential candidate countries through its delegations.

### **EU Approach to National Referendums**

212. As set out already, Irish reunification does not pose any of the difficult practical and legal problems that can arise with the accession of a new member state. The article 49 TEU process is not necessary. Treaty amendment, the approval of each member state through their own constitutional arrangements or the approval of any of the institutions, is not required. Instead, reunification will be an example of the changing borders of an existing state. This situation has already been adopted by the European Council in April 2017. Different opportunities and challenges will accompany Irish

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204 Bosnia-Herzegovina and Georgia have also applied for EU membership but are yet to achieve official candidate status. Available at <https://ec.europa.eu/environment/enlarg/candidates.htm>

205 European Council: Conclusions of the Presidency at Copenhagen 21-22 June 1993; updated and revised by European Council conclusions at Laken on 14-15 December 2001; European Council conclusions at Brussels on 14-15 December 2006; The Council's latest conclusions on enlargement were concluded on 14 December 2021.

206 Communication from the Commission to the Council and the European Parliament; "Wider Europe-Neighbourhood: New framework for relations with the Eastern and Southern Neighbours", Doc. COM (2003) 104, March 11, 2003, p.4.

207 EUROPEAN COMMISSION Strasbourg, 19.10.2021 COM(2021) 644 final COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS 2021 Communication on EU Enlargement Policy.

208 Ibid, pg. 27

unity. EU law has a settled legal position on the question of each member state determining the scope of its own territory.<sup>209</sup>

213. Equally, the complex legal questions concerning the status of new states succeeding from existing member states – that would inevitably have accompanied internal enlargement with an independent Scotland in 2014 or an independent Catalonia in 2014/2015 – do not arise. There is no doubt as to the constitutionality of Northern Ireland leaving the UK and uniting with Ireland. Again, the process for reunification is well-established and the outcome is understood. The question, which has yet to be adequately considered, is whether Irish reunification will, on balance, be to the benefit or to the detriment of the EU?
214. There is no discernible legal impediment to the EU adopting a policy position in favour of Irish unity pursuant to the GFA. The requirement in article 4(2) TEU that the Union shall respect the equality of member states and respect their essential state functions, including the territorial integrity of the state, no longer applies to the UK. In any event, support for Irish unity is consistent with the position of Ireland and is recognised as legitimate by the constitutional arrangements in the UK. The Northern Ireland Act (1998) gives effect to the promise of self-determination. To support one particular outcome in joint referendums held on the island of Ireland could not be regarded as objectionable.
215. There have been a large number of national referendums related to the EU in member states and candidate countries since 1972. One study conducted by the European Parliament lists a total of 58 in that time period.<sup>210</sup> They have included votes on joining the Union, ratification of proposed Treaty amendment, adoption of the single currency, adoption of the proposed constitution for Europe, adoption of specific EU policies, acceptance of proposed bail-out terms, and withdrawal from the European Union. There have also been a number of referendums in Switzerland concerning the country's relationship with the EU.
216. The approach of the EU and its institutions, as well as member state governments, have varied over time and from vote to vote but there is no precedent which suggests that support for one outcome rather than another is prohibited. Instead, the extent of political support seems to be related to the utility of such support to the favoured outcome. Each plebiscite will be a matter for the voters in the particular country, and subject to national electoral law, but on most occasions it is possible to identify the desired outcome of the EU and the extent of contribution to the debate. For example, EU support for the remain cause in the 2016 Brexit vote was, it seems, muted due to the calculation that such vocal support would be counter-productive.<sup>211</sup> A different approach was taken in the Cypriot referendum on ending the partition of the island.<sup>212</sup> EU support for political outcomes was particularly notable in repeat referendums regarding the Maastricht treaty in Denmark in 1992 and with the second votes for the Nice and Lisbon Treaties in Ireland in 2001 and 2008 respectively.<sup>213</sup>
217. Shortly after the successful referendums in 1998, when speaking in the European Parliament in May 1998 John Hume thanked the European institutions, in particular the Commissions headed by Jacques Delors and Jacques Santer, and the-then President of the EP Jose- Maria Gil-Robles, for

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209 Article 52 TEU

210 The authors in "Fostering Civic Engagement", European Parliamentary Research Service, available at [https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/729358/EPRS\\_IDA\(2022\)729358\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/729358/EPRS_IDA(2022)729358_EN.pdf)

211 "Angela Merkel says she hopes Britain will remain in the EU" in Guardian on 2 June 2016 available at <https://www.theguardian.com/politics/2016/jun/02/angela-merkel-britain-remain-eu-european-union>

212 <https://www.robert-schuman.eu/en/eem/0291-failure-of-the-referendum-on-the-reunification-of-the-island>

213 Grainne de Burca "If at first you don't succeed: Vote, Vote again: Analyzing the Second Referendum Phenomenon in EU Treaty Change" Fordham International Law Journal, 2011, Vol. 33, issue 5, 1472; Ece Ozlem Atikcan "Asking the public twice: why do voters change their mind in second referendums on EU treaties?" Available at <https://blogs.lse.ac.uk/europpblog/2015/10/19/asking-the-public-twice-why-do-voters-change-their-minds-in-second-referendums-on-eu-treaties/>

what he called the powerful strength and support for “the peace movement on our streets”<sup>214</sup>. He credited the example of European reconciliation as a major influence on the philosophy of creating peace. Those compliments were also echoed by then UK Secretary of State for Northern Ireland Mo Mowlam and Irish Minister for Foreign Affairs David Andrews.<sup>215</sup>

### **EU Approach to Unity Referendums**

218. Should the European Union adopt a position of overt support for Irish unity, this would be broadly consistent with its previous practice of support for particular outcomes in national referendums but not direct intervention. It could also be justified on the basis of its promotion of democracy and human rights (including self-determination) under articles 2, 3, and 21 TEU, and article 205 TFEU.
219. Support for Irish unity in referendums on the island of Ireland, when they are scheduled in accordance with the terms of the GFA, does not equate to a denial or inappropriate undermining of Northern Ireland’s current status as part of the UK. Nor does sensible planning now for such an outcome. The adoption of such a policy, would not, it is submitted, be in any way inconsistent with the GFA itself or the WA’s promise to respect UK territorial integrity and essential state functions. It does not amount to an external impediment to the principles of consent and self-determination which form the basis of the Agreement itself. When the UK has undertaken to hold such a vote, in a concurrent manner with the authorities in Ireland, each referendum will be subject to national electoral law. The outcome of the concurrent referendums will have practical, political, and economic consequences for the EU, so an objective assessment of where its shared interests lie is reasonable.
220. Once it is demonstrated that the EU can have a position on Irish reunification, the next question will be what that position should be and whether it is preferable to one of neutrality. The choice for voters in Northern Ireland will be a binary one: the United Kingdom outside the EU (and in the Protocol) or reunification as a member state of the EU? In the Republic of Ireland, the choice will be whether to amend various aspects of the constitution to achieve a united Ireland within the EU or not. Many subjects will influence the outcome, and emotional factors are bound to be at least as significant as practical ones. However, membership of the EU for a united Ireland may well be a significant factor in the consideration of many voters who have yet to commit wholeheartedly to one outcome or the other. The greater the electorate’s access to reliable information on the consequences of the outcomes, so much the better.

### **Current Governance and Dispute Arrangements in the Protocol**

221. The WA and TCA created a complex structure of rights and enforceability between the EU and the UK. Access to the CJEU for litigants in Northern Ireland is severely restricted under the WA<sup>216</sup> and does not feature in the TCA.<sup>217</sup> The implementation of the WA is governed by three UK-EU institutions. They are, respectively, the Joint Committee (JC), the Specialised Committee on the Implementation of the Protocol on Ireland and Northern Ireland (INISC), and the Joint Consultative Working Group. The TCA also creates a number of committees, including the Trade Partnership Committee.<sup>218</sup>

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214 Debate in European Parliament on 29th April 1998 available at [https://www.europarl.europa.eu/doceo/document/CRE-4-1998-04-29\\_EN.html](https://www.europarl.europa.eu/doceo/document/CRE-4-1998-04-29_EN.html).

215 “Mowlam thanks EU for role in underpinning Agreement” on 30th April 1998 available at <https://www.irishtimes.com/news/mowlam-thanks-eu-for-role-in-underpinning-agreement-1.1256543>.

216 Article 158 WA for references concerning Part Two on Citizens Rights; Title X (articles 86-91) on Judicial and Administrative Procedures; and article 12 of the Ireland- Northern Ireland Protocol

217 Instead, in accordance with Part Six, there may be recourse to an independent arbitration panel by either of the parties should consultations fail to reach a solution. The “dual vigilance” system of the EU Treaties whereby the Commission, the member states and, most importantly, affected individuals can assert their rights before national courts with the possibility of preliminary reference to the CJEU is gone.

218 Article 8 TCA.



222. Those committees are described in brief terms below. The purpose of so doing at this juncture is to allow for consideration of whether these arrangements are, in the medium and long-term, preferable to the situation which would exist if Northern Ireland was part of a united Ireland. It is also to consider whether future planning issues could be raised directly within those mechanisms.
223. The choice for voters in Northern Ireland is membership of the EU or the mitigations of the Protocol, although reliant on implementation by the UK authorities. Consequently, the outcome for the EU will be a return to the ordinary application of EU law in Northern Ireland, with arrangements between the EU and the rest of the UK settling into a more orthodox relationship with a third country. There has been much commentary on the fact that such a relationship is the favoured outcome of the UK.<sup>219</sup> Much less commentary has, to date, been devoted to consideration of whether such an outcome would be welcomed by the EU if the issues relating to Brexit and the Irish border were to be resolved through reunification pursuant to the GFA.
224. Pursuant to article 164 WA, the JC is responsible for the implementation and application of the Agreement. Application refers to rules which are clear and unconditional, while implementation would appear to concern rules which are not self-enforcing.<sup>220</sup> The Union and the UK may each refer to the Joint Committee any issue relating to the implementation, application, and interpretation of the Agreement. It is co-chaired by members of the British Government and the Commission and takes decisions by mutual consent.<sup>221</sup> Each side is required to give effect to decisions of the JC and they enjoy the same status in national law as the WA itself.<sup>222</sup> For a limited period and in defined circumstances, the JC may adopt decisions amending the Protocol.<sup>223</sup>
225. A further issue arises under article 13(3) of the Protocol. It provides that Union Acts should be read as including those Acts as amended or replaced. This means that certain aspects of EU internal market law will apply without any formal UK or, specifically, NI input. The practical advantage of such dynamic alignment is to ensure no disparity between rules north and south and so preserve full access to the internal market in goods. But there is an obvious democratic deficit in such circumstances as rules take effect without any direct contribution from voters in Northern Ireland. The contrast with the democratic benefits of EU membership is notable. However, the Court of Appeal in the Allister case was unanimous that there was no breach of the right to participate in democratic elections as provided for in article 3 of protocol 1 to the ECHR.<sup>224</sup> The democratic consent mechanism, contained in article 18 of the Protocol, offered a means by which citizens could express their opinion.
226. The JC has responsibility for defining the criteria for considering that a good brought into Northern Ireland from outside the Union is not at risk of subsequently being moved into the Union<sup>225</sup> ; operation of the UK trader scheme<sup>226</sup>; review the application of VAT rules<sup>227</sup>; agricultural support scheme<sup>228</sup>; and review of working arrangements for EU representatives present in Northern Ireland.<sup>229</sup> The JC is also tasked with making proposals for amendment and/or replacement of articles 5-10 of the Protocol if necessary after a rejection of the Protocol in line with the mechanism

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219 Stephen Booth "Post Brexit Freedoms and Opportunities for the UK" for Policy Exchange, available at <https://policyexchange.org.uk/publication/post-brexit-freedoms-and-opportunities-for-the-uk/>; Anand Menon, Paula SurrIDGE & Alan Wager "British Politics after Brexit" for UK in a Changing Europe, available at <https://ukandeu.ac.uk/wp-content/uploads/2022/02/UKICE-British-Politics-after-Brexit.pdf>

220 Kieran Bradley "Agreeing to Disagree: The European Union and the United Kingdom after Brexit" (2020) EU ConsLR 379; Dagmar Schiek "Brexit and the Implementation of the Withdrawal Agreement" DCU Brexit Institute Working Paper No.9 – 2021, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3801909](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3801909).

221 Article 166(3) WA.

222 Article 166(2) WA.

223 Article 164(5) WA.

224 *Allister v Secretary of State for Northern Ireland, Peoples v. The Prime Minister* [2021] NICA 22, (2022) 3 CMLR 8

225 Article 5(2) of NIP

226 Article 6(2) of NIP provides that "The Joint Committee shall keep the application of this paragraph under constant review and shall adopt appropriate recommendations with a view to avoiding controls at the ports and airports of Northern Ireland to the extent possible".

227 Art 8 NIP

228 Article 10(2) & annex 6 to the NIP

229 Article 12(3) of NIP



set out in article 18. Articles 5-10 are those which ensure Northern Ireland enjoys most, though not all, of the benefits of the EU internal market in respect of the free movement of goods.<sup>230</sup> If consent was withdrawn for the continuation of the provisions, the parties would, again, have to construct an agreement which avoided a hard border on the island. Article 18 means, therefore, that articles 5-10 of the Protocol will only ever have a provisional status as it is subject to confirmatory votes every 4 or 8 years. This should be contrasted with the situation which would prevail in the event of Irish reunification pursuant to the GFA.

227. Informal political meetings have been a feature of the JC to date. Also, representatives from the Northern Ireland Executive are invited as part of the UK delegation<sup>231</sup>, and representatives from the Irish Government and other member states may attend. However, the short history of the JC to date has not, it is suggested, been an encouraging one. The structures are imperfect and require commitment to finding solutions from both sides. The consensual approach to addressing difficulties with the Protocol envisaged by the Agreement has not been adhered to. Instead, the parties have regularly issued separate statements. The greatest culpability for the disappointment must, however, lie with the unilateral actions taken by the British Government.
228. Article 165(1)(c) WA and article 14 of the Protocol together established the Specialised Committee on Ireland-Northern Ireland. It can make recommendations to the JC on the operation of the Protocol. It may examine proposals concerning the implementation and application of the Protocol from the North-South Ministerial Council and North-South Implementation bodies set up under the GFA.<sup>232</sup> It may also consider any matter brought to its attention regarding rights and equality matters protected under article 2 of the Protocol by the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland, and/or the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland.<sup>233</sup>
229. Article 15 describes the Joint Consultative Working Group as a forum for the exchange of information and mutual consultation. It reports to the Specialised Committee and does not take binding decisions.
230. As can be seen from the above description, the system of decision-making and dispute settlement is unique to the situation of Northern Ireland. Legitimate questions continue concerning the transparency of such bodies. The arrangements have, to date at least, achieved their primary purpose of ensuring a soft border between north and south. But it is complex and requires good faith and co-operation from both sides to work effectively. Those characteristics have not yet been demonstrated by the British Government, and the publication of the Northern Ireland Protocol Bill, and the resultant enforcement proceedings by the Commission, show that serious problems remain and are quite likely to persist.
231. Consequently, when assessing whether Irish reunification, pursuant to the GFA, is in the strategic interests of the EU, the institutions and member state governments should consider the outcomes. This is an objective assessment of the status quo and the likely trajectory of UK governments over the short, medium, and long term. The UK's abandonment of liberal social-market democracy and casual disrespect for international law is not inadvertent. The confrontation with the EU over Northern Ireland often appears to be the objective – a conscious choice.
232. In the case of continued partition, Northern Ireland will remain in the Protocol, and the UK will continue to profess a desire to ensure no hard border. But there is a high risk that it will continue

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230 The rules on customs and duties in articles 28-30 TFEU; quantitative restrictions and measures equivalent to quantitative restrictions in articles 34-36 TFEU; prohibition on discriminatory taxation in article 110 TFEU; and state aid in article 107 TFEU are the building blocks of the internal market in the free movement of goods.

231 Katy Howard, 'The Committees of the Protocol', in Christopher McCrudden (ed), *The Law and Practice of the Ireland-Northern Ireland Protocol*, (2022) (OUP)

232 Article 14(b) NIP

233 Article 14(c) NIP

to unilaterally sabotage the minimum necessary factors which ensure that this outcome actually occurs. This has a damaging effect on UK-EU relations and raises the possibility of suspension of some of the mutually beneficial aspects of the TCA. The dispute-settlement and enforcement proceedings, whether under the WA or the TCA, remain a source of confrontation rather than mutual commitment to effective outcomes. The principal cause of this appears to be attitudes adopted towards the Northern Ireland Protocol. These tensions affecting Northern Ireland's place in the UK internal market (*de jure*) and the EU internal market for goods (*de facto*) will only grow as the extent of regulatory divergence in Britain evolves.

233. At the present time under the Protocol, the protection of part of the internal market is left to the national authorities of the UK, who do not, it must be said, apply the relevant rules in good faith. This has the potential to require the EU to introduce its own checks somewhere on Union territory to ensure interests such as consumer protection or environmental protection are adhered to. The checks may be located at the border on the island of Ireland or on the movement of Irish goods to other member states. The first scenario would represent the defeat of one of the Union's fundamental interests in the Brexit process – the prevention of a hard border. Geography, politics, and economics combined to convince all interested parties that the prospect of creating a customs' border to surround Northern Ireland was simply not feasible. The parties' mapping report found 142 areas of cross-border co-operation.<sup>234</sup> The volume of cross-border traffic in goods, persons, and vehicles along the 310-mile border meant the idea was unworkable as well as undesirable. The second scenario would undermine the key Union objective of an internal market in which there exists between the member states an area without internal frontiers in goods, services, persons, and capital.
234. The agreed process by which the people of Northern Ireland could choose between the continued operation of the Protocol in Assembly elections has been cast aside. Should the Northern Ireland Protocol Bill become law, the democratic process set out in article 18 will be frustrated. This feature was proposed by the British Government and agreed between the parties to the Brexit negotiation. The choice for the elected Northern Ireland Assembly between the continuation of articles 5-10 of the Protocol or a new arrangement is to be withdrawn. It should be noted, again, that the results of the recent election appeared to produce a majority in favour of the Protocol.<sup>235</sup> Instead, the British Government intends to legislate to confer powers on Ministers to disapply the fundamental features of the Protocol. Such an outcome will remove the critical features of the WA settlement with regard to Northern Ireland. Free movement of goods across the border, co-operation in the JC, and democratic consent by the electorate in the Assembly elections will be unilaterally cast aside by the UK, while at the same time expecting to retain the considerable practical and economic advantages of the WA and the TCA. The "have your cake and eat it" philosophy has not yet disappeared.
235. This outcome of continued partition, with Northern Ireland in the UK and out of the EU, is to be compared with a situation in which Northern Ireland becomes part of a member state once again. In those circumstances, the jurisdiction comes within the scope of the Treaties and can make a full contribution to the democratic life of the Union through EP elections, national elections, and direct petition to the institutions. It will be a contributor to, and recipient of, Union funds. The region can,

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234 UK government policy paper of 7th December 2018 "Technical explanatory note: North South Co-operation mapping exercise, available at <https://www.gov.uk/government/publications/technical-explanatory-note-north-south-cooperation-mapping-exercise>; EU Commission paper of 21st June 2019 "Mapping of North-South Co-operation and implementation bodies, report and key findings of exercise", available at [https://ec.europa.eu/info/publications/mapping-north-south-cooperation-implementation-bodies-report-and-key-findings-exercise\\_en](https://ec.europa.eu/info/publications/mapping-north-south-cooperation-implementation-bodies-report-and-key-findings-exercise_en); UK government scoping document of 20th June 2019, available at <https://committees.parliament.uk/committee/366/committee-on-the-future-relationship-with-the-european-union/news/104826/uk-government-documents-relating-to-mapping-exercise-examining-northsouth-cooperation-on-the-island-of-ireland-published/>

235 In the election held on the 5th May 2022, the breakdown of MLAs by party was as follows: Sinn Féin (27), DUP (25), Alliance (17), UUP (9), SDLP (8) and others (4). There was no overall majority for Unionist parties or Nationalist parties. However, there would appear to be an overall majority in the NI Assembly in favour of maintaining the Protocol as currently drafted rather than seeking a replacement for articles 5-10. See <https://news.sky.com/story/majority-of-northern-ireland-assembly-members-say-they-reject-reckless-protocol-legislation-12632867>; <https://www.irishtimes.com/politics/2022/06/13/northern-ireland-protocol-majority-of-mlas-sign-letter-rejecting-proposed-law/>

again, participate in EU funding programmes.

236. The reunification of Ireland will enlarge and simplify the operation of the Union's internal market. The jurisdiction of Northern Ireland will, again, benefit from the interconnected nature of the free movement of goods, services, persons, and capital. The common commercial policy will apply. It will be a full part of the internal market applying the relevant Treaty articles and secondary legislation. The rules of the internal market will be upheld by national authorities committed to their obligations under the Treaties and subject to supervision and enforcement by the Union's own institutions. The reunified member state of Ireland will be a eurozone member.
237. Citizens of the Union will again be provided with the opportunity to enter, reside, work, and seek permanent residence in accordance with the Treaties and the Citizens Rights Directive. British citizens resident in Northern Ireland should be granted the ability to enter, reside, work, and seek permanent residence across the member states on the same terms as are available in the CRD.<sup>236</sup> The alternative is a life navigating the hostile environment contained in the Immigration Acts with only the protections of the WA. The discriminatory and ineffective nature of such a system is well-known but remains fundamentally unreformed. Entry to the UK, including the jurisdiction of Northern Ireland, for Union citizens (other than Irish citizens), will soon be subject to electronic travel authorizations under part 6 of the Nationality and Borders Act (2022) and the Immigration Rules.
238. The reunification of Ireland will also offer the EU a greater opportunity to continue its support for a post-conflict society in Europe. It will offer a chance to revisit and further the contribution already made to Northern Ireland. To revisit the words of John Hume to the European Parliament – all conflict stems from a view that difference is a threat.<sup>237</sup> The differences in political outlook in a united Ireland can, it is suggested, best be managed under a “European roof”. The European institutions and their member state governments will be aware that the development of the Union has always benefited from enlargement. There is no compelling reason to believe that Irish unity, achieved pursuant to the terms of the GFA, will not continue that trend.
239. Finally, Irish unity would also remove a significant source of irritation and confrontation between the EU and the UK. The Protocol would no longer be needed. The ambitions of “Brexit Britain” would not need to cater for the unique situation on the island of Ireland. Instead, the relationship between Ireland and Britain would continue in the institutions created by the GFA whilst the dispute settlement and enforcement procedures in the WA and TCA would become the forum for co-operation. The work of the JC could focus on matters other than the good faith operation of the Protocol.
240. Writing in Liverpool in December 2020, Dougan offers the following warning to decision makers in the European Union:

... the UK's increasingly abrasive approach to the future relationship also poses serious challenges for the EU itself – above all, the risk of an aggressive competitor on our very doorstep, actively undertaking market deregulation and encouraging social dumping as an alternative economic model; as well as constantly engaging in attempts to undermine the political unity and solidarity of the member states. Even looking beyond the current generation of Tory politicians in office, the further and harder the UK does drift away from the European norm, the more difficult life will eventually be, even for a new administration more sympathetic to close relations with, or indeed, renewed membership of the Union.

But in the meantime, we should continue firmly to locate the debate on future UK-EU

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236 As set out in the 2019 Report this will require legislation at the EU level.

237 Debate in European Parliament on 29th April 1998 available at [https://www.europarl.europa.eu/doceo/document/CRE-4-1998-04-29\\_EN.html](https://www.europarl.europa.eu/doceo/document/CRE-4-1998-04-29_EN.html).

relations within the wider geo-political landscape currently afflicting the developed world: the UK Tories are now fully converted to the cause of hard-right, post-truth populism, in international cahoots with their equally dangerous allies in the likes of Trump's USA and Bolsonaro's Brazil. Until the present crisis passes or at least recedes, the Union and its friends are effectively acting in existential defence of liberal social-market democracy – and that point should never drift far from the minds of those responsible for negotiations with the UK<sup>238</sup>.

241. This distinction between the EU and the UK is one that will become clear to many voters on the island. The people of Ireland have a choice as to which future they wish. Northern Ireland can remain in the UK and outside the EU or it can unite with the Republic of Ireland and enjoy the benefits of EU membership.
242. It is worth repeating that there is, and throughout a century of partition has probably always been, a clear majority on the island in favour of Irish reunification. The GFA is not a pro-reunification or a pro-partition document. It is not Unionist or Nationalist in outlook. However, it is not neutral on the fundamental importance of self-determination. This promise is not merely ornamental. The Union between Great Britain and Northern Ireland draws legitimacy only from the consent of the majority of the people of Northern Ireland. Irish reunification is to be given effect if expressed in concurrent referendums. There is only one way out and there is only one basis for its continuance: consent.
243. Partition should not be maintained where it is in defiance of the wishes of the people of Ireland in the two separate jurisdictions. Equally, without concurrent support, unity cannot be imposed. The current arrangement can be characterised as one of dual or parallel consent between the two jurisdictions. Indirectly, it affords greater weight to northern votes. This is the process by which consent to union with Britain or unity with the south will be delivered.
244. In accordance with the GFA, the choice of constitutional future is with the electorates on the island of Ireland. However, the consequences will reverberate further afield, including in the institutions of the EU. It is time for those institutions to consider where the interests of the Union best lie and what steps can and should be adopted at this stage.

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<sup>238</sup> Michael Dougan, *The UK's Withdrawal from the EU: A Legal Analysis*, (2021)(OUP), pp. 344-345







GUE/NGL

**THE**   
**LEFT** IN THE  
EUROPEAN  
PARLIAMENT



**QUEEN'S  
UNIVERSITY  
BELFAST**