

Open borders between UK and Ireland could crumble after Brexit

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Since the 1920s we and the people of the UK have enjoyed the benefits of the Common Travel Area (CTA) — an open borders travel area between the UK, including Isle of Man and Channel Islands, and Ireland. However, despite its importance, it has never been legislated for and is not legally binding, and it relies on co-operation between the Irish and British authorities.

Although the CTA does not have a legislative origin, it is mentioned in certain provisions of both Irish and UK domestic

legislation. The Irish and British governments signed a joint statement in December 2011 renewing their commitment to the CTA and acknowledging it as a “legitimate and fundamental public policy” for both countries. The joint statement further states that the freedom of movement for persons travelling between Ireland and Northern Ireland is “of immense importance to the economic, social and cultural wellbeing of both jurisdictions”.

It is worth noting, however, that CTA arrangements have for the most part been put in place on an administrative basis and many of its details have not been made public.

The operation of the CTA is reflected in three protocols to the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU). Protocol 19 provides that Ireland and the UK may opt out from the Schengen system and Protocol 21 provides that Ireland and the UK may opt out of certain other immigration or asylum legislation. Protocol 20 refers expressly to the CTA, stating that Ireland and the UK are free to “continue to make arrangements between themselves relating to the movement of persons between their territories”.

As part of the CTA, Ireland and the UK work together on immigration matters and two visa programmes have been launched. The first is the Irish Short Stay Visa Waiver programme, allowing short-term visitors from certain non-EEA countries who already have permission to visit or live in the UK to visit Ireland from the UK without the requirement of a separate visa. The other is the British Irish Visa Scheme, which permits visitors from China and India to travel to and around the CTA on a single visa.

As regards the Irish-Northern Irish border, under the CTA this is a “soft” border, with Irish and Northern Irish citizens crossing freely without being subject to routine immigration controls. Commerce also takes place across the border without duties or customs checks.

The impact which Brexit will have on the CTA is uncertain. The CTA pre-dates Ireland and the UK’s membership of the EU and it does not depend on either state’s continued membership of the union for its existence.

However, after Brexit the border between Ireland and the UK will also constitute the border between the UK and the EU. Given that

the CTA arrangements are not legally binding on Ireland it may be difficult to argue that they should take precedence over Ireland's obligations to its fellow EU member states. For this reason it is possible that all EU member states may have to consent to any agreement reached as to the CTA's status post-Brexit.

Notwithstanding that the Irish and UK governments, as well as the EU, have stated that maintenance of the CTA is a "priority", Brexit will give rise to a number of challenges, including: if and how the protocols annexed to the TFEU will operate; what and how passport controls for Irish, Northern Irish, UK, EU and EEA citizens will operate; if and how the visa programmes will continue and operate; what consents of other remaining member states may be required for new or revised arrangements; and what border arrangements might come into play.

Like most Brexit related matters, there is a lot to be done and no room for complacency.

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