

Brexit, Devolution and Human Rights – Roundtable

Event Report

Date: 27 April 2017

Venue: The Bingham Centre for the Rule of Law

Organisers:

- This event was organised by the Bingham Centre for the Rule of Law together with the Europa Institute and the Global Justice Academy of the University of Edinburgh.

Background:

- This event followed a successful workshop on 27 October 2016 at Edinburgh Law School on 'Brexit and the British Bill of Rights', co-organised by the Bingham Centre, the Europa Institute and the Global Justice Academy of the University of Edinburgh, and the Human Rights Centre at Queen's University Belfast. A research paper edited by Dr Tobias Lock and Dr Tom Gerald Daly, '[Brexit and a British Bill of Rights](#)', presents key themes from the 2016 workshop. That workshop was generously supported by the Thomas Paine Initiative.
- This second event provided an opportunity for academics, practitioners and parliamentarians to come together to continue the conversation. The first panel considered the impact of Brexit on human rights and the consequences of Brexit for Scotland, focusing on the government's [White Paper 'Legislating for the United Kingdom's withdrawal from the European Union'](#) (the Repeal Bill White Paper). In the second session, speakers examined the implications of Brexit for Northern Ireland, focusing on transitional justice issues, the peace process and questions of identity, and options for Northern Ireland going forward.

PART 1. Brexit and Human Rights

Assessing the Threat to Human Rights

The Repeal Bill White Paper confirms that the UK will remain party to the [European Convention on Human Rights](#) (the ECHR). It states "The UK's withdrawal from the EU will not change the UK's participation in the ECHR and there are no plans to withdraw from the ECHR".¹ However, whilst the government's plans for ECHR withdrawal – and proposals to repeal the [Human Rights](#)

¹ Para 2.22.

[Act 1998](#) (the HRA) and create a British Bill of Rights – appear to have been abandoned at present,² Brexit will likely still threaten existing human rights within the UK.

Crucially, Brexit will remove a key barrier to ECHR withdrawal. As noted by one commentator, “Article 2 TEU names respect for human rights and the rule of law as one of the founding principles of the EU, which every state applying to accede to the EU must respect” and there is therefore “a good argument to be made that present EU Member States must continue to adhere to these founding values which presupposes ECHR membership”.³ In this way, Brexit has made withdrawal easier.

Brexit and the EU Charter of Fundamental Rights

Roundtable participants emphasised that Brexit will lead to a weakening of the UK’s human rights framework. This echoes the conclusions of the earlier workshop in Edinburgh that Brexit presents a “clear reduction in formal protection of fundamental rights in the UK”, in particular through the discontinued application of the [Charter of Fundamental Rights of the EU](#) (the EU Charter).⁴

The Repeal Bill White Paper confirms that the EU Charter “will not be converted into UK law by the Great Repeal Bill”.⁵ The White Paper asserts that the loss of the EU Charter will not adversely affect the “substantive rights that individuals already benefit from in the UK” as “Many of these underlying rights exist elsewhere in the body of EU law which we will be converting into UK law” and “Others already exist in UK law, or in international agreements to which the UK is a party”.⁶ However, the EU Charter adds value in two key respects.

First, in certain areas, the EU Charter provides more extensive rights protection than the ECHR/HRA. For example, an express right to the protection of personal data, an ‘updated’ right to a fair trial, a freestanding guarantee on equality and prohibition on discrimination, and a variety of social and economic rights.⁷ So, whilst the EU Charter is of narrower application than the ECHR/HRA (it applies when Member States are implementing EU law), it is both wider and deeper in terms of its rights coverage.⁸ Second, the EU Charter (where it applies) may provide greater individual remedy than the ECHR/HRA. Under Section 4 of the HRA, where a provision of primary legislation is found to be incompatible with a Convention right a court may make a “declaration of incompatibility” – however, the law continues in force until Parliament decides whether to change it and, if so, how. In contrast, where a law is in violation of the EU Charter, the law will be set aside.

This was demonstrated in the case of [Benkharbouche/Janah v Sudan Embassy/Libya \[2015\] EWCA Civ 33](#). In that case, the Sudanese and Libyan Embassies in London sought to rely on the State Immunity Act 1961 in response to claims by two former members of domestic staff. The Court of Appeal made a declaration of incompatibility under the HRA in respect of certain provisions of the 1961 Act. However, the Court disapplied the provisions of the 1961 Act to the extent necessary to allow the employment claims falling within the scope of EU law to proceed.

2 See Conservative Party manifesto 2017 at page 37, available at <https://s3.eu-west-2.amazonaws.com/manifesto2017/Manifesto2017.pdf>

3 See Tobias Lock, ‘Reassessing the European Convention on Human Rights in the Light of Brexit’, E-International Relations blog (10 July 2017), available at <http://www.e-ir.info/2017/07/10/reassessing-the-european-convention-on-human-rights-in-the-light-of-brexit/>

4 See Tobias Lock and Tom Gerald Daly (Editors), ‘Brexit and the British Bill of Rights’ (February 2017) at page 5, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2913566

5 Para. 2.23.

6 Para 2.25.

7 For further discussion, see Angela Patrick, ‘Mapping the Great Repeal: European Union Law and the Protection of Human Rights – A Background Paper for the Thomas Paine Initiative’ (October 2016) at para 56, available at <https://rightsinfo.org/app/uploads/2016/12/1Mapping-the-Great-Repeal-Thomas-Paine-Initiative-November-2016.pdf>

8 Article 51 of the EU Charter.

Without the different mechanisms of the EU Charter, the outcome for the claimants would have been very different.

Human Rights and the Brexit Negotiations

As Brexit progresses, there exists considerable uncertainty as to what extent human rights will feature in negotiations and in any future agreements. For example, pre-Brexit, might the EU Charter act as a constraint on negotiations? In the context of free trade agreements, might the UK be required to remain a party to the ECHR? Might a future UK-EU trade agreement stipulate UK compliance with the EU Charter? Beyond UK-EU trade relations, what are the human rights implications of any future trade agreements that the UK will be concluding with the rest of the world?

If such human rights clauses were included, how would they be enforced? What role, if any, would the Court of Justice of the EU (CJEU) hold post-Brexit? If not the CJEU, which body would have jurisdiction and which other dispute settlement mechanisms might be incorporated within future trade agreements?

In this respect, it is worth highlighting a recent CJEU Opinion. In [Opinion 1/15 of the Court \(26 July 2017\)](#), the CJEU concluded that a proposed agreement between the EU and Canada on the transfer and processing of Passenger Name Record (PNR) data could not be concluded in its current form as it was incompatible with the EU Charter “in so far as it does not preclude the transfer of sensitive data from the European Union to Canada and the use and retention of that data”.⁹ The Opinion set out a range of modifications required for the proposed agreement to be compatible with the EU Charter.

Part 2. Scotland

The Transition of Powers, Common Policy Frameworks and the UK Single Market

One of the shortest sections of the government’s Repeal Bill White Paper is the part concerning the devolution settlements and it has been described by one commentator as “particularly woolly on this issue”.¹⁰ It addresses two key issues: the repatriation of powers from the EU, and delegated powers.

First, as regards the transition of powers, there are concerns from a Scottish perspective about whether powers will return to Holyrood or Westminster. The White Paper emphasises that “As powers are repatriated from the EU, it will be important to ensure that stability and certainty is not compromised, and that the effective functioning of the UK single market is maintained”.¹¹ Most existing EU competences are reserved to the UK Parliament and the main policy areas that are devolved to Scotland include justice and home affairs, agriculture, fisheries and the environment.¹² Given the prospect of increasing divergence between the nations of the UK in the absence of a common EU framework,¹³ the White Paper sets out the government’s intention to “replicate the current frameworks provided by EU rules through UK legislation”.¹⁴ It will also

9 Para 232. See also European Commission statement, ‘EU-Canada PNR agreement: Commission statement on the Opinion of the European Court of Justice’ (26 July 2017), available at http://europa.eu/rapid/press-release_STATEMENT-17-2105_en.htm

10 See Tobias Lock, ‘The Great Repeal Bill and the Challenge of Bringing Laws Home’, Scottish Centre on European Relations (3 April 2017) <https://www.scer.scot/database/ident-1251>

11 Para 4.3.

12 See Alan Page, ‘The implications of EU withdrawal for the devolution settlement’ (4 October 2016) at page 4, available at http://www.parliament.scot/General%20Documents/The_implications_of_EU_withdrawal_for_the_devolution_settlement.pdf

13 Alan Page (4 October 2016) above, at page 4.

14 Para 4.4.

begin “intensive discussions with the devolved administrations to identify where common frameworks need to be retained in the future, what these should be, and where common frameworks covering the UK are not necessary”.¹⁵

One commentator has noted, “The UK government is clear in its wish to re-open discussions about the devolution settlement. In many regards this may be justified. After all, the devolution settlement was made in the background of EU membership, so that the devolved powers in the areas largely or entirely covered by EU competence were never intended to be exercised in different ways in different parts of the UK. Brexit makes this a possibility and therefore it makes sense to rethink whether all of these powers should remain devolved”.¹⁶ However, he also notes that “many in the devolved nations will consider the result of this unpalatable and a politically unacceptable power grab”.¹⁷

It was noted at the roundtable that Brexit presents a major challenge for Scotland in terms of contesting changes to the devolution settlement and providing effective scrutiny of the Brexit process. It was also observed that the White Paper offers little guidance about the form of these “common policy frameworks” or about the “UK single market”. The term “UK single market” was regarded by some as an attempt to undermine the economic arguments for Scottish independence.

Second, the White Paper provides that “Legislation that is within the competence of the devolved legislatures or ministers giving effect to EU law will also need to be amended as we leave the EU” and therefore it proposes to give “the devolved ministers a power to amend devolved legislation to correct law that will no longer operate appropriately, in line with the power we propose should be held by UK ministers”.¹⁸ Some commentators have warned, “Parliament must seek to ensure that it does not also bring about a dramatic rebalancing of law-making power in favour the executive, the marginalisation of legislative scrutiny and a potentially dangerous unsettling of the territorial constitution”.¹⁹ It was noted at the roundtable that far from restoring the primacy of parliament and taking back control, the White Paper relies heavily on secondary legislation and Henry VIII clauses.

The Sewel Convention and the Scotland Acts

The [Scotland Act 2016](#) enshrines the Scottish Parliament and the Scottish Government as a permanent part of the UK's constitutional order. Furthermore, the 2016 Act puts the Sewel Convention upon a statutory footing. Section 28(7) of the [Scotland Act 1998](#) provides that “This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland”. The 2016 Act inserts, “But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament”.²⁰ This is done through a ‘legislative consent motion’ (LCM) passed by the Scottish Parliament.

However, in the landmark case of [R \(Miller\) v Secretary of State for Exiting the European Union \[2017\] UKSC 5](#), the Supreme Court concluded that the “the UK Parliament is not seeking to

15 Para 4.4.

16 Tobias Lock (3 April 2017) above.

17 Tobias Lock (3 April 2017) above.

18 Para 4.6.

19 Mark Elliott and Stephen Tierney, ‘The “Great Repeal Bill” and Delegated Powers’, Public Law for Everyone (7 March 2017), available at <https://publiclawforeveryone.com/2017/03/07/the-great-repeal-bill-and-delegated-powers/>

20 For further discussion, see Iain Jamieson, ‘Putting the Sewel Convention on a Statutory Footing’, Scottish Constitutional Futures Forum blog (27 April 2016), available at <http://www.scottishconstitutionalfuture.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/7001/Iain-Jamieson-Putting-the-Sewel-Convention-on-a-Statutory-Footing.aspx>

convert the Sewel Convention into a rule which can be interpreted, let alone enforced, by the courts"; and that "the purpose of the legislative recognition of the convention was to entrench it as a convention".²¹

The implications of the Sewel Convention and the possible role that LCMs may play in the Brexit process going forward are not wholly settled matters. In this regard, one commentator has observed:

"Moreover, it is clear that the Sewel Convention... will be engaged by any extension of matters that are reserved to Westminster and Whitehall. Yet it is highly unlikely that the devolved legislatures will be willing to supply such consent. This does not mean that the UK Parliament is legally unable to press ahead in the face of devolved opposition. Indeed, it did precisely that when it recently enacted the European Union (Notification of Withdrawal) Act 2017, against the express wishes of the Scottish Parliament and in spite of the fact that the Sewel Convention arguably applied. But the legal freedom to press ahead regardless does not mean that doing so would be politically possible. Far less does it mean that it would be constitutionally prudent".²²

Equally, it may not be in the interests of Scotland (nor the wider UK) to withhold consent. As the same commentator has explained: "Thus if LCMs are not forthcoming, then the UK Parliament would be legally free to press ahead with the enactment of the Withdrawal Bill in spite of devolved opposition. To say that that would be political folly would be a gross understatement. But the risks for the devolved nations are considerable as well, given [that] derailment of the Bill by the devolved nations might plunge the UK into utter chaos if it were to leave the EU without having the Withdrawal Bill in place".²³

Part 3. Northern Ireland

Northern Ireland's Exceptionalism

One major conclusion from the roundtable was the recognition that the devolved administrations are very different, and in turn will be affected by Brexit in distinct ways. Whilst devolution has often been an afterthought in Brexit debates,²⁴ it is increasingly recognised that Northern Ireland is in an exceptional situation.

[Theresa May's letter to the European Council President \(March 2017\)](#) giving notification of the UK's intention to leave the EU, acknowledged the need to "pay attention to the UK's unique relationship with the Republic of Ireland and the importance of the peace process in Northern Ireland" and set out the aim to "avoid a return to a hard border between our two countries".²⁵ This was echoed in the [EU's Guidelines for Brexit Negotiations \(April 2017\)](#) which emphasised that "In view of the unique circumstances on the island of Ireland, flexible and imaginative solutions will be required, including with the aim of avoiding a hard border, while respecting the integrity of the Union legal order".²⁶

²¹ Paras 148-149.

²² Mark Elliott, 'The Government's White Paper on the "Great Repeal Bill": Some Preliminary Thoughts', Public Law for Everyone (30 March 2017), available at <https://publiclawforeveryone.com/2017/03/30/the-governments-white-paper-on-the-great-repeal-bill-some-preliminary-thoughts/>

²³ Mark Elliott, 'The EU (Withdrawal) Bill: Initial Thoughts', Public Law for Everyone (14 July 2017), available at <https://publiclawforeveryone.com/2017/07/14/the-eu-withdrawal-bill-initial-thoughts/>

²⁴ See e.g., 'Devolved administrations must not be an 'afterthought' in Brexit talks', Public Sector Executive (8 December 2016), available at <http://www.publicsectorexecutive.com/Public-Sector-News/devolved-administrations-must-not-be-an-afterthought-in-brexit-talks>

²⁵ At point (v).

²⁶ At para 11.

Northern Ireland's exceptionalism exists on several fronts. First, Northern Ireland is geographically separate from the rest of the UK and is the only part of the UK to share a land border with another EU Member State. Second, the ramifications of all-island issues are extensive and are not limited solely to trade matters. Third, the socio-political context of Northern Ireland distinguishes it from other devolved administrations. As an emerging post-conflict society, Northern Ireland stands apart owing to the peace process, transitional justice issues and questions of identity. Fourth, the particular nature of its devolution arrangements set it apart from Scotland and Wales. Finally, Northern Ireland is expected to be more adversely affected economically by Brexit. Further details about all of these issues can be found in a recent [European Policy Centre \(EPC\) Discussion Paper 'Northern Ireland and Brexit: The European Economic Area Option' \(April 2017\)](#).

Cross-Border Issues and the Practical Impact on Daily Lives

To assess the threat that Brexit poses to Northern Ireland, in particular relating to its border with the Republic of Ireland, one must appreciate the scale of day-to-day cross-border activity. However, the government's Repeal Bill White Paper does not engage with the implications for the border nor the potential impact for individual citizens, businesses and consumers.

A recent [EU Select Committee report 'Brexit: UK-Irish Relations' \(December 2016\)](#) concluded that "Despite ministerial recognition of the substantial implications Brexit could have for cross-border economic activity on the island of Ireland, there is still significant uncertainty over how the UK plans to mitigate these effects, and over the priority they will receive in withdrawal negotiations".²⁷ It also emphasised that "It is extremely important for both Northern Ireland and the Republic of Ireland that an agreement is reached which takes into account the all-island nature of their economies"; and that "It is in the interest of the Irish economy, North and South, that the current movement of people, goods and services within the island of Ireland is maintained".²⁸ In particular, the EU Select Committee report noted evidence that the agricultural sector operates on an all-island basis and that Northern Ireland depends on the single market for wholesale electricity within the island of Ireland.²⁹ The report also discussed the impact of Brexit on cross-border cooperation in fields such as policing and security, and healthcare.³⁰ The manufacture of dairy products and alcoholic drinks are further examples of cross-border activity that could be significantly impacted by Brexit.³¹

Furthermore, it is estimated that 177,000 lorries, 208,000 vans and 1.85m cars travel to and from Northern Ireland each month, and that 30,000 people travel to work from one side of the border to the other each day.³² There are currently no clear solutions to the uncertainty these people face.

The greatest uncertainty lies in what form the land border will take. Theresa May has said we need to see "as seamless and frictionless a border as possible".³³ The [EU's Brexit Negotiating Directives \(May 2017\)](#) stated that "Negotiations should in particular aim to avoid the creation of a hard border on the island of Ireland, while respecting the integrity of the Union legal

27 At para 4, page 65.

28 At para 5, page 65.

29 See discussion at paras 68-73.

30 See discussion at paras 143-157.

31 See e.g., <http://www.politico.eu/article/trouble-at-the-border-brexit-threatens-irish-supply-chains/> and e.g., <http://www.telegraph.co.uk/business/2017/03/04/ireland-forgotten-frontier-brexit/>

32 See <https://www.theguardian.com/uk-news/2017/apr/23/northern-ireland-brexit-border-old-wounds-troubles>

33 See <https://www.theguardian.com/uk-news/2017/may/13/goodwill-on-both-sides-to-resolve-irish-border-issue-says-theresa-may>

order”.³⁴ However, many questions remain.³⁵ How will customs operate post-Brexit? Will there be passport checks? How will this influence the risks of smuggling? In addition, as will be discussed below, the implications of Brexit for the border also threaten the peace process in Northern Ireland.

Transitional Justice and the Peace Process

Northern Ireland is an emerging post-conflict society which is very delicate. At the roundtable, the urgent need for a comprehensive approach to the past, that can help develop more stable institutions, foster reconciliation and meet the needs of victims, was stressed. However, it was also noted that Brexit is undermining such efforts and has the potential to threaten the peace process more broadly. The impact of Brexit on ongoing negotiations to implement legacy proposals in the [Stormont House Agreement](#) was also highlighted.

The EU Select Committee report, noted above, emphasised the “positive role played by the EU in relation to the peace process”.³⁶ It set out four key areas: (i) “the safeguards that EU membership provides in underpinning the [Belfast/Good Friday Agreement](#)”; (ii) “the role that common UK-Irish EU membership played and continues to play in transforming relations between the two countries”; (iii) “the effect of common EU membership in diluting cross-community tensions in Northern Ireland”; and (iv) “the positive impact of EU funding in Northern Ireland”.³⁷ The EU Select Committee report concluded that “The peace process is supported by a majority of people from across the communities, and it would be irresponsible to overstate the threat posed by Brexit. Nevertheless, Brexit is already proving politically divisive. All sides must remain vigilant to ensure that the momentum behind the peace process is maintained”.³⁸

In this regard, the EU’s Brexit Negotiating Directives, noted above, stated that the EU is “committed to continuing to support peace, stability and reconciliation on the island of Ireland” and stressed that nothing in the withdrawal agreement should “undermine the objectives and commitments set out in the Good Friday Agreement”.³⁹ At the roundtable, it was noted that the Irish government as part of the EU 27, is thus having a guarantor role as regards the Belfast/Good Friday Agreement. However, as noted above, the government’s Repeal Bill White Paper is silent on the situation in Northern Ireland.

Outside of an EU context, the EU Select Committee’s report emphasised the importance of the ECHR as a “crucial safeguard” to the Belfast/Good Friday Agreement.⁴⁰ In addition, there is an obligation under the Belfast/Good Friday Agreement to incorporate the ECHR into Northern Ireland law which – alongside additional rights – would constitute a Bill of Rights for Northern Ireland. In this regard, the Northern Ireland Human Rights Commission delivered advice on a Bill of Rights to the Secretary of State for Northern Ireland in December 2008, but “very little progress has been made towards the adoption of the instrument”.⁴¹ Finally, the ECHR has been an important mechanism for addressing Northern Ireland’s legacy of conflict, so there are concerns about the British government’s proposals to withdraw from the ECHR (currently on hold, as noted above).

34 At para 14.

35 See e.g., <https://www.economist.com/news/britain/21725012-nobody-wants-hard-border-which-might-include-passport-and-customs-controls-yet-there-no>

36 At para 159.

37 At para 159.

38 At para 22, page 68.

39 At para 14.

40 At para 18, page 67.

41 See www.nihrc.org/publication/category/Bill-of-Rights

At the roundtable, the possibility of ECHR withdrawal was seen as part of wider opposition to international norms and calls for greater national sovereignty, which have started to impact on efforts to ensure accountability in Northern Ireland. For example, it was noted that a recent [House of Commons Defence Committee report 'Investigations into Fatalities in Northern Ireland involving British Military Personnel' \(April 2017\)](#) recommended “the enactment of a statute of limitations, covering all Troubles-related incidents, up to the signing of the 1998 Belfast Agreement, which involved former members of the Armed Forces” to be “coupled with the continuation and development of a truth recovery mechanism which would provide the best possible prospect of bereaved families finding out the facts, once no-one needed to fear being prosecuted”.⁴² It was suggested that developments such as these could make it difficult to implement the Stormont House Agreement in its current form, as it calls for the creation of a Historical Investigations Unit with the power to refer cases for prosecution.

Questions of Identity

Questions of identity are also re-emerging in Northern Ireland and were reinforced by the EU Referendum. Northern Ireland, as with Scotland, voted to remain in the EU,⁴³ and the referendum results in Northern Ireland were shaped by national identity.⁴⁴ In this way, Brexit has become a central question in an ongoing conversation about national identity in Northern Ireland. In this context, there have been renewed calls for a vote on a united Ireland, and while previously the primary focus of a border poll would have been national identity, now it is likely to be about EU membership.⁴⁵

Responding to Brexit in Northern Ireland

It was noted at the roundtable in April that the only official statement from the Northern Ireland Executive on priorities for Brexit was a letter from the First Minister and deputy First Minister to the Prime Minister in August 2016.⁴⁶ As the recent EPC Discussion Paper notes, “The letter contained ‘initial thoughts’. However, the essential assumption underpinning the comments was clear. Any change to the status quo would have major implications for the Northern Ireland economy and any change to the border would have potentially significant economic, social and political consequences. The status quo should therefore be maintained”.⁴⁷ However, as the EPC Discussion Paper also highlights, there are “no official proposals from the Northern Ireland Executive currently indicating how the clear preference for maintaining the status quo might be achieved” and thus “no further specific demands have been made of the UK government by the Executive or the Assembly”, which is in contrast to the situation in the Scotland and Wales.⁴⁸

As the EPC Discussion Paper comments, the government’s Repeal Bill White Paper has “exacerbated concerns that the views and interests of the region – as with Scotland – are effectively being ignored in practice by the UK government, despite the recognition in principle that the Northern Ireland peace process should not be endangered”.⁴⁹ It was suggested at the roundtable that the UK government is prioritising Brexit over stability in Northern Ireland. In this

⁴² At para 5, page 17.

⁴³ See <https://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information>

⁴⁴ See discussion in Jonathan Tonge, ‘The Impact and Consequences of Brexit for Northern Ireland’ (European Parliament Constitutional Affairs Briefing, 2017) at pages 4-5, available at

[http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/583116/IPOL_BRI\(2017\)583116_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/583116/IPOL_BRI(2017)583116_EN.pdf)

⁴⁵ See discussion <http://www.irishnews.com/news/2017/03/11/news/are-we-any-closer-to-a-border-poll--960596/>

⁴⁶ Letter available at www.executiveoffice-ni.gov.uk/publications/letter-prime-minister-rt-hon-theresa-may-mp

⁴⁷ At page 4.

⁴⁸ At page 4.

⁴⁹ At page 5.

respect, it was noted that the British Prime Minister was absent from key negotiations in early 2017 and that the legacy talks were then postponed until after the UK General Election.

One option explored in the EPC Discussion Paper is to seek Northern Ireland's continued participation in the European Economic Area (EEA) (which currently includes the EU and Iceland, Liechtenstein and Norway). As the Discussion Paper observes "Adopting the EEA option for Northern Ireland would achieve much of what the First Minister and deputy First Minister were seeking in their August 2016 letter to the Prime Minister. It would retain current arrangements regarding the movement of goods, services, capital and labour. It would also allow existing levels of market integration on the island of Ireland to be largely maintained, albeit not completely".⁵⁰ Moreover, "The EEA would also go some way to safeguarding the status quo as regards maintenance of the spirit, if not the letter, of the Belfast/Good Friday Agreement, in providing membership of both Northern Ireland and the Republic of Ireland in a common European economic entity".⁵¹ In addition, "A much harder border on the island of Ireland would be avoided; the economic impact of Brexit on Northern Ireland would be lessened; and Brexit-related concerns for the future of the peace process would be reduced".⁵²

The EPC Discussion Paper notes areas that the EEA option for Northern Ireland would not cover – For example, it notes that Northern Ireland would be outside the EU's Common Agricultural Policy and the Common Fisheries Policy; that the EEA has no regional policy like those regional programmes in the EU which support development in less prosperous regions; that the EEA option would not automatically include participation in EU research or educational/training programmes such as Erasmus+ and that separate arrangements would be needed; and that the EEA option would not involve police and judicial cooperation on criminal matters, though again separate arrangements could be negotiated as part of what the Discussion Paper terms an 'EEA-Plus' relationship.⁵³

The EPC Discussion Paper then considers the feasibility of the EEA option for Northern Ireland. It notes several key challenges including that it would involve changes in the EEA Agreement and in the devolution arrangements relating to Northern Ireland; and the need for agreement and cooperation from the UK Parliament and government, the Irish government and the existing EEA members.⁵⁴

This report was prepared by Lucy Moxham, Associate Senior Research Fellow at the Bingham Centre, with assistance from James Campbell, a Research Assistant at the Bingham Centre.

⁵⁰ At pages 5-6.

⁵¹ At page 6.

⁵² At page 9.

⁵³ At pages 6-8.

⁵⁴ At page 8.