

Northern Ireland and 'Brexit': the European Economic Area Option

Belfast, 4 April 2017

Executive Summary

UK withdrawal from the EU poses many challenges for Northern Ireland. The preferred option of the First Minister and deputy First Minister is, in many respects, for the *status quo* to be maintained. An approach that could mitigate some of the impact of Brexit on Northern Ireland and maintain much of the economic *status quo* is for Northern Ireland to become a member of the European Economic Area (EEA). This paper sets out what the EEA offers and highlights how EEA membership might be achieved as well as the issues it raises. In the EEA, Northern Ireland would retain full access to the Single Market. It would continue to be part of a European market with the free movement of goods, services, capital and people. EEA membership would also permit some citizenship rights to be maintained. It would not be a panacea, however. It would also bring with it political and legal challenges. But it is a known arrangement and would therefore ensure a significant degree of certainty.

1. On 23 June 2016 voters in the United Kingdom (UK) voted on whether to remain in or leave the European Union (EU). The overall UK vote was 51.9% in favour of leaving. As a consequence, the UK government is currently preparing to trigger Article 50 TEU and beginning the formal process of withdrawal. In doing so, consideration is being given to the terms of the 'divorce' as well as the nature and content of the United Kingdom's post-'Brexit' relationship with the EU. In Northern Ireland, 56% voted to remain in the EU.
2. Brexit poses major challenges for Northern Ireland. It threatens to disrupt access to the EU market and especially cross-border trade with the rest of Ireland, disrupt significantly integrated cross-border markets and supply- and production-chains, and impede the movement of workers and people more generally across the border. It raises questions about the future of the Common Travel Area and the Belfast/Good Friday Agreement as well as cooperation on policing and criminal justice matters. The challenges cannot be easily dismissed. The Secretary of State for Northern Ireland, James Brokenshire, has admitted with regard to the movement of goods across the border between Northern Ireland and the Republic of Ireland: 'I agree with those who say that this presents one of the most complex challenges in our preparations for Exit'.¹
3. In some ways the most obvious way to mitigate some of the key impacts of Brexit on Northern Ireland is for Northern Ireland to join the European Economic Area (EEA). This paper sets out the case and addresses the difficulties.²

¹ Brokenshire, J., *Institute of International and European Affairs (IIEA) Speech*, Dublin, 1 March 2017 (www.gov.uk/government/speeches/institute-of-international-and-european-affairs-iiea-speech)

² The paper is the product of discussions among specialists and experts in EU legal and political affairs. The participants include: Brian Doherty (formerly Departmental Solicitors Office, Northern Ireland), Dr. John Temple Lang (formerly Legal Service of the European Commission), Prof. Christopher McCrudden FBA (School of Law, Queen's University Belfast; University of Michigan Law School), Dr. Lee McGowan (School of History, Anthropology, Philosophy and Politics, Queen's University Belfast), Prof. David Phinnemore (School of History, Anthropology, Philosophy and Politics, Queen's University Belfast), Prof. Dagmar Schiek (School of Law, Queen's University Belfast). An earlier draft was discussed at a Roundtable consisting of civil servants, business interests, and political representatives on 30 March 2017.

The uniqueness of Northern Ireland

4. UK withdrawal from the EU poses many challenges. Often there has been a tendency in the operation of UK government mechanisms concerning devolution to view the concerns raised in and regarding Northern Ireland as simply another set of concerns from a devolved region. The Northern Ireland perspective on Brexit is presented and discussed in those processes, such as the Joint Ministerial Committee, that situate Northern Ireland alongside Scotland and Wales.
5. There can therefore be a tendency to view the concerns in the shadow of the more forcefully and better articulated perspective of the Scottish Government whose opposition to Brexit and calls for 'Scotland's Place in Europe'³ to be maintained are driven and justified by essentially political considerations resulting from the 62% 'remain' vote in Scotland and the quest of the Scottish National Party (SNP) for Scottish independence.
6. The case for some form of dedicated consideration of Northern Ireland, however, follows from practical and political challenges that arise from a unique combination of specific factors that set it apart from the other devolved administrations in the United Kingdom, both Scotland and Wales.
7. First, Northern Ireland is the only part of the United Kingdom that shares a land border with another EU member state. The effect is that a denser set of cross-border trade relations and economic interdependencies exists on the island of Ireland than exist between any other part of the United Kingdom and EU member states. This is particularly so in the border region. While relations and interdependencies have long existed, they have become more extensive and more intense through 43 years of shared UK and Irish membership of the EU. Moreover, in several sectors the level of trade integration means that a fair claim can be made to the existence of an all-island market and in some instances an all-island economy. A UK withdrawal from the EU, its Single Market and its customs union threatens to disrupt and damage those markets and economies irreparably.
8. Second, Northern Ireland is geographically detached from the rest of the United Kingdom. This can be an obstacle to full economic relations between Northern Ireland and the rest of the United Kingdom. As far as trade is concerned, the detachment can place producers and suppliers in Northern Ireland at a competitive disadvantage in the UK market. It does, however, encourage the development of supply chains across the land border and on an all-island basis. These, in turn, have contributed to the development of highly integrated all-island markets subject, in an EU membership context, to an essentially uniform regulatory framework governing those cross-border markets. In addition, key infrastructures have been developed on an all-island basis. An obvious example is the single electricity market whose further development is being pursued through a north-south interconnector.
9. Third, all-island perspectives are not limited to trade, but also encompass other aspects of economic integration, such as free movement of labour and capital. Again, while there is considerable movement of persons between the island of Ireland and Great Britain, there is also considerable movement of persons between the north and the south of Ireland. Further, the all-island interaction is not limited to the economic sphere, but encompasses the societal and civic sphere as well. For example, the higher education sector and the health sector – both partly defined as public sector – are partly integrated across the state border. Police cooperation on the island is another aspect, as well as cooperation of civil society in cultural, leisure and other projects.
10. Fourth, there is the particular socio-political context. The Northern Ireland facing Brexit is a radically transformed place compared to the Northern Ireland of the 'Troubles' with its

³ Scottish Government, *Scotland's Place in Europe*, Edinburgh, December 2016 (www.gov.scot/Resource/0051/00512073.pdf)

associated violence and terrorism. Northern Ireland is in the midst of a peace process and was on the way to becoming a post-conflict society. However, memories and legacies of the conflict remain and paramilitary activity has not been eliminated. Moreover, the political institutions of the peace process – an elected Assembly and a power-sharing government – remain fragile, their future uncertain, particularly in the light of recent political developments and Assembly elections. Further direct rule from Westminster cannot be ruled out. Exacerbating the situation are tensions over Brexit, a lack of an agreed plan on the issue, and a fear that a UK withdrawal from the EU that fails to address the legitimate concerns of interests in Northern Ireland could act as a catalyst for a further deterioration of inter-communal relations.

11. Fifth, the particular nature of Northern Ireland's devolution arrangements sets it apart from Scotland and Wales, in five important respects:
 - a. the arrangements in Northern Ireland are a fundamental part of a larger peace agreement, meant to bring about reconciliation between the two major communities;
 - b. Northern Ireland's devolution arrangements are underpinned by a bilateral treaty, binding in international law, between the United Kingdom and the Republic of Ireland;
 - c. the devolution arrangements in Northern Ireland assume that both the United Kingdom and the Republic of Ireland will be members of the EU – joint membership in the EU provides an important mechanism by which concerns over nationality and sovereignty are reduced;
 - d. the North-South institutions which form part of that agreement have references to the relevance of the commonality of EU membership embedded in them;
 - e. Northern Ireland's devolution arrangements depend on the consent of both communities if they are to continue, demonstrated most obviously by the requirement that power-sharing between unionism and nationalism is a compulsory part of those arrangements.
12. Finally, Northern Ireland is likely to be more adversely affected economically as a consequence of Brexit than much of the rest of the United Kingdom. Analysis by *Oxford Economics*, commissioned by the Department of Enterprise, Trade and Investment, of the economic implications of Brexit indicates that Northern Ireland's economy 'is likely to be relatively more vulnerable to the type of structural changes triggered by a UK exit from the EU in comparison to the rest of the UK'. Whereas across nine scenarios the modelling found that on average, by 2030, UK gross value added would be 1.8% lower than baseline, in Northern Ireland it would on average be 2.8 % lower than baseline.⁴
13. The unique challenges that Northern Ireland faces in the context of Brexit are widely acknowledged. The Prime Minister, Theresa May, in her letter to the European Council notifying the United Kingdom's intention to withdraw from the EU, suggested as a principle for the Article 50 negotiations that the UK and the EU 'must pay attention to the UK's unique relationship with the Republic of Ireland and the importance of the peace process in Northern Ireland'. The land border and the need 'to avoid a return to a hard border' were highlighted.⁵
14. The Prime Minister's comments were followed by a general statement from the Minister for Exiting the European Union, David Davis, acknowledging that each of the UK's devolved

⁴ Oxford Economics, *The Economic Implications of a UK Exit from the EU for Northern Ireland: A Briefing Paper*, Oxford, February 2016 (<https://d1iydh3qrygeij.cloudfront.net/Media/Default/Brexit/Brexit-NI-Report.pdf>)

⁵ Theresa May, *Letter to His Excellency Mr Donald Tusk*, London, 29 March 2017 (<https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50>)

administrations have ‘individual circumstances’ that need to be reflected in the UK government’s approach to the Article 50 negotiations.⁶

15. Northern Ireland’s uniqueness is also reflected in particular in the draft EU guidelines for negotiating the UK’s withdrawal from the EU, due to be adopted by the EU-27 at their European Council meeting on 29 April 2017. The draft guidelines note the EU’s consistent support for ‘the goal of peace and reconciliation enshrined in the Good Friday Agreement’, adding that ‘continuing to support and protect the achievements, benefits and commitments of the Peace Process will remain of paramount importance [to the EU]’. Specific reference is then made to ‘the unique circumstances on the island of Ireland’ requiring ‘flexible and imaginative solutions ... including with the aim of avoiding a hard border, while respecting the integrity of the Union legal order’.⁷

The *Status Quo* as Northern Ireland’s Priority

16. For Northern Ireland, the UK Government’s White Paper offers few indications of how the range of issues raised by the First Minister and deputy First Minister in their post-referendum letter to the Prime Minister in August 2016 will be addressed in either the terms of withdrawal or the future UK-EU relationship.⁸
17. The letter identified the need to ensure that the border does not become an impediment to the movement of goods, services and capital and that it ‘will not become a catalyst for illegal activity or compromise in any way the arrangements relating to criminal justice and tackling organized crime’. It added: ‘It is equally important that the border does not create an incentive for those who would undermine the peace process and/or the political settlement.’ The particular significance of the border for the agri-food sector and for animal health was also identified.
18. More generally on the economy, the letter insisted that business not incur additional costs as a consequence of the United Kingdom leaving the EU. There was a need ‘to retain as far as possible the ease with which we currently trade with the EU member states and, also importantly retain access to labour’. The letter went on: ‘Policies need to be sufficiently flexible to allow access to unskilled as well as highly skilled labour. This applies not only to businesses and the private sector but also to public sector employers who are heavily dependent on EU and other migrant labour’. The ‘many thousands’ of cross-border workers were also noted.
19. In essence, on the movement of people, goods and services, the First Minister and deputy First Minister called for the maintenance, as far as possible, of the *status quo*. They singled out energy and the need to ensure that ‘nothing in the negotiation’ of UK withdrawal undermines ‘this vital aspect’ of the Northern Ireland economy. Also highlighted – again – was the agri-food sector and the high proportion of food and agricultural output that is exported to other EU and non-EU markets.
20. 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.

6 David Davis, *Commons statement on the Great Repeal Bill White Paper*, 30 March 2017 (<https://www.gov.uk/government/speeches/david-davis-commons-statement-on-the-great-repeal-bill-white-paper>).

⁷ Council of the European Union, *European Council (Art. 50) (29 April 2017 – Draft guidelines following the United Kingdom’s notification under Article 50 TEU*, XT 20110/17 LIMITEBXT 5, Brussels, 31 March 2017, point 11. The draft guidelines have not been officially published, but can be viewed online via *Politico* at www.politico.eu/article/european-councils-draft-guidelines-following-the-uks-article-50-notification-text-2/

⁸ The Executive Office, *Letter to the Prime Minister, The Rt Hon Theresa May MP*, Belfast, 10 August 2016 (www.executiveoffice-ni.gov.uk/publications/letter-prime-minister-rt-hon-theresa-may-mp)

21. Implicit in the letter of the First Minister and deputy First Minister was that it would be desirable if Northern Ireland, with the United Kingdom withdrawing from the EU, could remain in the customs union and the Single Market and maintain existing trade access to EU markets for agricultural goods. There should continue to be tariff- and quota-free trade with the EU for all goods, and there should be no new administrative burdens for traders. There should be unimpeded movement of services, capital and people.
22. The only formal statement on Northern Ireland's priorities in the Brexit process is this letter of the First Minister and deputy First Minister to the Prime Minister. Disappointingly, there has been no official follow-up from the Northern Ireland Executive, and in the short term the negotiations on the formation of the Executive following the Assembly elections on 2 March 2017 will probably delay further the opportunity to develop such a follow-up, unless this issue is included in the negotiations themselves and an agreement reached that addresses it in more detail. There are, therefore, no official proposals from the Northern Ireland Executive currently indicating how the clear preference for maintaining the *status quo* might be achieved. Three political parties have, however, launched proposals for some form of 'special status' to be established.⁹
23. No such agreed plan yet exists, however, and thus no further specific demands have been made of the UK government by the Executive or the Assembly. This is in contrast to the situation in Scotland and Wales where the Scottish Government and the National Assembly for Wales have both issued reports on the implications of withdrawal from the EU.¹⁰

A Hard Brexit

24. According to the UK Government's White Paper its key aims for the post-Brexit UK-EU relationship include the negotiation of a 'wide-ranging, bold and ambitious free trade agreement' and the establishment of 'a new strategic partnership' with the EU.¹¹ The White Paper and the letter of notification of withdrawal offer few insights into the content of either.
25. The choice expressed in the White Paper and the stress there and in successive speeches of the Prime Minister point clearly to a clean break from the EU, with loss of EU membership and an extensive decoupling of the United Kingdom from many, if not most, aspects of EU-based integration and cooperation activities. The *status quo* is not being maintained. Notably, the United Kingdom will not be remaining in either the customs union or the Single Market.
26. This position – widely viewed as a 'hard Brexit' – provides little comfort and much concern to many people and business interests in Northern Ireland, and especially those in border areas. It provides little comfort either to the 56% of the Northern Ireland electorate who voted for the United Kingdom to remain in the EU.

⁹ The first formal call for 'special status' was a motion tabled in the Northern Ireland Assembly by the Social Democratic and Labour Party (SDLP) and debated on 17 October 2016. Sinn Féin published its *Case for the North to Achieve Designated Special Status within the EU* in November 2016 (www.sinnfein.ie/files/2016/The_Case_For_The_North_To_Achieve_Special_Designated_Status_Within_The_EU.pdf). The SDLP in February 2017 adopted a paper entitled *Securing our Future in Europe: Proposals for a Special Status for Northern Ireland within the EU*, (www.newry.ie/attachments/article/4720/eustatus.pdf). The Alliance Party issued its *The Case for Special Status: How to Mitigate the Impact of Brexit on Northern Ireland* in March 2017 (www.allianceparty.org/article/2017/0010987/alliance-publishes-paper-calling-for-ni-special-status).

¹⁰ Scottish Government, *op cit.*; Welsh Government, *Securing Wales' Future: The Transition from the European Union to a new relationship with Europe*, Cardiff, January 2017 (<https://beta.gov.wales/brexit>)

¹¹ Department for Exiting the European Union, *The United Kingdom's exit from and new partnership with the European Union White Paper*, London, January 2017 (www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper)

27. Moreover, rejection of the Single Market and of the customs union is widely regarded as reflecting the preferences of more hard-line ‘Brexiters’. It is not a position that reflects the concerns that have been voiced on the implications, and challenges, of Brexit for Northern Ireland. If anything, the content of the 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.

Maintaining the *Status Quo* for Northern Ireland: the EEA Option

28. If the concerns raised by the First Minister and deputy First Minister are to be addressed in the terms of UK withdrawal from the EU and in the nature and substance of the post-Brexit UK-EU relationship, there is an urgent need for creative thinking on how this might be achieved. One option, which we explore in this paper, is to secure continued participation of Northern Ireland in the European Economic Area (EEA), the arrangement that was originally established in 1994 to extend the Single Market to Austria, Finland, Iceland, Liechtenstein, Norway and Sweden. Today the EEA encompasses the EU and Iceland, Liechtenstein and Norway.
29. The UK government has rejected the EEA option *for the United Kingdom as a whole*. This does not, however, necessarily preclude *part* of the UK participating in the EEA. The Scottish Government has made a strong case for Scotland to be allowed to remain in the EEA, even if there are significant practical challenges flowing from the fact that Scotland is geographically attached to England.¹² Those challenges do not arise in the same way or to the same extent in the case of Northern Ireland given its geographical location. The UK government also appears to have rejected party political calls for a ‘special status’ for Northern Ireland, which we understand to mean that the UK government will not accept that Northern Ireland should remain within the EU. The government has not, we understand, rejected Northern Ireland being in the EEA.

Implications for Northern Ireland of membership in the EEA

30. In the remainder of this paper, the implications of Northern Ireland’s membership in the EEA are examined. We have attempted to set these implications out as dispassionately as possible. Whether these implications will be regarded as advantages or disadvantages is for the reader to judge.
31. Northern Ireland would, along with the rest of the United Kingdom, withdraw from the EU. It could then avail itself of participation in the EEA, a dynamic arrangement that is based on the aim of allowing EFTA member states to participate in the EU Single Market, i.e. the free movement of goods, services, capital and people, and adherence to EU norms and standards in that context.
32. Inside the EEA, Northern Ireland would, along with the rest of the United Kingdom, be outside the customs union and outside the jurisdiction of the Court of Justice of the European Union. The United Kingdom as a whole would remain firmly outside the EU’s commitment to ‘ever closer union’.¹³
33. An important attraction of the EEA option is that it is a known quantity. The EEA is well established and the obligations and benefits are clear. The possibility of participation can be discussed in the full knowledge of what would be involved. The EEA option would therefore provide valuable certainty and clarity about the future for Northern Ireland which would not be

¹² Scottish Government, *op cit*. Also, Culture, Tourism, Europe and External Relations Committee, *Determining Scotland’s future relationship with the European Union*, Scottish Parliament, SP Paper 99, 4th Report, 5 March 2017 (http://www.parliament.scot/S5_European/Reports/CTEERCS052017R04.pdf).

¹³ Including decisions taken under the so-called ‘catch-all’ or ‘flexibility clause’ contained in Article 352 TFEU.

provided otherwise by any EU-UK agreement if or until one is finalized, which may take a long time.

34. With the EEA, the economic situation and trading environment that EU membership has delivered would remain substantially unchanged, allowing much of the *status quo* regarding the Single Market to be maintained as far as Northern Ireland is concerned. The legal framework, however, would change fundamentally.
35. 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. Other than continued EU membership or the application of EU law to Northern Ireland in some other way, the EEA is the only existing arrangement that can achieve this.
36. Joining the EEA would result in little direct change for companies and individuals in Northern Ireland so far as the everyday running of their businesses would be concerned. The institutional changes involved would also have little practical effect on most people because the EEA would substantially maintain the *status quo*. Companies in Northern Ireland providing goods and services in the EU would retain full access to existing European markets, and would continue to trade freely with the rest of the United Kingdom.
37. Membership in the EEA would allow the existing regime relating to the bespoke single electricity market on the island to be maintained as it would allow Northern Ireland to remain a member of the Internal Energy market in common with the Republic of Ireland.
38. The EEA is not simply the EU under another name, however, and constitutes a lesser degree of economic integration than the EU, in particular because it does not comprise a customs union. That means that if Northern Ireland were a member of the EEA, it could and would need to make whatever arrangements regarding customs issues that were thought appropriate with the rest of the United Kingdom, as well as being in the EU Single Market.
39. 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.
40. The EEA option for Northern Ireland would allow a key red line apparently set by the United Kingdom in negotiations to be maintained. The United Kingdom would be outside the jurisdiction of the Court of Justice and the direct applicability of EU law. Dispute resolution, where necessary, would be through mechanisms already provided for in the EEA Agreement. For Northern Ireland, outside the EU, this would involve reference to the EFTA Court.¹⁴ The EFTA Court, however, operates under the principle of homogeneity, which means that it is under a legal obligation to take into account the developed ECJ case law, and to avoid divergence.
41. Importantly, even if it were a member of the EEA, Northern Ireland would be outside the EU's Common Agricultural Policy (CAP) and the Common Fisheries Policy (CFP). In other areas, it would not be subject to EU directives on the approximation of indirect taxation such as Value Added Tax (VAT). The EEA has no rules on VAT, so Northern Ireland would be free to use the UK sales tax system, whatever it may be.
42. In the EEA, Northern Ireland would remain outside the single currency and would not be subject to any directives or regulations relating to economic and monetary union and the eurozone.

¹⁴ EFTA is the European Free Trade Association. It was established in 1960 with the UK as a founder member. Its current membership comprises Iceland, Norway, Liechtenstein and Switzerland (which does not participate in the EEA).

43. Outside of the CAP, yet inside the Single Market, if Northern Ireland were in the EEA, it would be able to benefit from any post-withdrawal UK agricultural policy and the market access arrangements the United Kingdom secures for agriculture in its trade agreement with the EU. The possibility of securing market access arrangements specific to producers in Northern Ireland may arise. The arrangements would be separate from the EEA.
44. The EEA has no regional policy, so Northern Ireland would not be able to access benefits such as those available in the EU for less prosperous regions.
45. In the EEA, there would continue to be free movement of persons from the EU, including the Republic of Ireland, into Northern Ireland. Accordingly, access to migrant labour would be maintained, as well as the right of tourists from other EU Member States to come to Northern Ireland (under the freedom to receive services). As the Citizens' Rights Directive (Directive 2004/38/EC) has been integrated into the EEA Agreement, this Directive would also apply to new members, enabling some free movement of persons for purposes other than economic ones.
46. The openness of Northern Ireland to free movement of persons from the EU would entail control of movement from the rest of the UK to Northern Ireland. Further, the UK might wish to apply immigration controls to movement from Northern Ireland to the rest of the UK, if it wishes to limit immigration of EU nationals. However, the control of immigration into the UK results from its withdrawal from the EU, and thus exists independently of the proposed participation in the EEA. The EEA option does not solve the question of how the controls are to be operated, but importantly it does not accentuate them.
47. The EEA would not entail the maintenance of EU citizenship for UK citizens. A consequence of this is that free movement for purposes other than economic activity would not be protected. However, the EU Citizenship Directive is part of the EEA Agreement (see above), which also establishes a wider commitment to accepting EU social policy. On that basis EU law on sex discrimination has been incorporated into the EEA Agreement. This forms part of the EU's anti-discrimination *acquis* that currently underpins equality law and policy in Northern Ireland".
48. A modest payment into the EU budget would need to be made on behalf of Northern Ireland. Given Northern Ireland's GDP it is expected that this would, on a *per capita* basis, be smaller than Norway's payment.
49. Membership of the EEA would not, in itself, avoid a customs border between Northern Ireland and Ireland, although EEA membership means that no tariffs could be raised by EU member states on goods produced in Northern Ireland. Rules of origin would have to be applied to ensure that goods originating elsewhere in the United Kingdom or in states beyond the EEA do not enter the Republic of Ireland (and therefore the EU) without paying any tariffs that would be applicable. How and where rules of origin would be applied would need to be addressed separately by the United Kingdom in negotiations. Rules of origin checks could be applied at the point at which VAT (or whatever other sales tax there might be) is first paid in the importing state. The experience on the frontier between Sweden and Norway, as another border between the EU and EEA, would be relevant for the land border between Northern Ireland and the Republic of Ireland.
50. Correspondingly, rules of origin would have to be applied to goods moving from the EU through the Republic of Ireland into Northern Ireland or the rest of the United Kingdom, to ensure that any UK tariffs applicable to goods of EU origin are paid.
51. In terms of external trade, the United Kingdom would continue to negotiate trade agreements with non-EU States on behalf of Northern Ireland, since Northern Ireland would continue to be part of the United Kingdom in all respects except insofar as was necessary to enable it to be in the EEA. Northern Ireland would be able to benefit from the terms of these trade agreements to that extent.

52. The EEA option would not automatically include Northern Ireland's participation in EU research framework programmes or educational and training programmes (e.g. Erasmus+). Separate arrangements would need to be negotiated to allow for participation and determine financial contributions.
53. The same applies to many other programmes and areas of cooperation, including the EU structural funds. However, it is worth noting that the EEA Agreement provides for participation of EFTA EEA member states in EU programmes and cooperation activities.
54. The EEA would not involve cooperation in areas such as police and judicial cooperation on criminal matters, although arrangements based on the forms of cooperation that non-EU EEA participants have with the EU (e.g. covering justice and home affairs and policy cooperation) could be negotiated separately as part of an 'EEA-plus' relationship..
55. The human rights protections provided through the Treaty of Lisbon, especially the EU Charter of Fundamental Rights, would no longer apply to Northern Ireland. The existing standards of human rights protection would therefore need to be maintained and, in some areas, enhanced if human rights standards are to be maintained overall. This will be particularly important in areas relating to immigration, refugees, and free movement of people.
56. Participation in the EEA would create opportunities for Northern Ireland to be represented either directly or through the UK government in the EEA bodies, i.e. the EEA Council (at ministerial level) and the EEA Committee (at official level). This would provide a role in EU decision-shaping, but not EU decision-making.
57. An additional judge would have to be appointed to the EFTA Court, representing Northern Ireland or the United Kingdom (whichever was the relevant member, see below).
58. Finally, Northern Ireland's membership of the EEA would not affect the existing constitutional position of Northern Ireland as part of the United Kingdom. The guarantee in section 1 of the Northern Ireland Act 1998, that 'Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section' would remain unaffected.¹⁵

Is Northern Ireland's Participation in the European Economic Area Feasible?

59. Northern Ireland participation in the EEA would involve changes in both the EEA Agreement, and in the devolution arrangements relating to Northern Ireland, with the need for agreement and co-operation from the UK Parliament and government, the Irish government, and the existing members of the EEA.
60. There are two different arrangements by which Northern Ireland could join the EEA. The first option is that the UK would become a signatory to the EEA Agreement – a move that would currently require the UK to join EFTA – but its application would be limited to Northern Ireland. The EEA Agreement would require amendment to allow an EFTA member state to participate only in so far as part of its territory is concerned. Any amendment to the EEA Agreement would require the support of the EU, its member states and the participating EFTA member states (i.e. Iceland, Liechtenstein and Norway).
61. The second option is that Northern Ireland itself would become a member of the EEA. Membership of EFTA would probably be required and the EEA Agreement would need to be

¹⁵ The UK government has recently accepted that if voters in Northern Ireland were to opt for unification with the Republic of Ireland, Northern Ireland 'would be in a position of becoming part of an existing EU member state, rather than seeking to join the EU as a new independent state'. See 'Northern Ireland can leave the UK for Europe, admit ministers', *The Times*, 28 March 2017 (<http://www.thetimes.co.uk/article/northern-ireland-could-leave-the-uk-for-europe-admit-ministers-37tf5zlh7>).

amended to allow Northern Ireland as a sub-national entity to participate in the EEA and in the EEA bodies.

62. The EEA option would require UK legislation and Northern Ireland legislation to allow for Northern Ireland's participation. This would involve an increase of the powers devolved to the Northern Ireland authorities. Supplementary agreements on e.g. security, scientific cooperation, would presumably continue to be made by the UK on behalf of Northern Ireland, as well as on its own behalf.
63. For Northern Ireland to join the EEA, the UK Parliament would need to adopt legislation applying specifically to Northern Ireland either: (i) setting out the main arrangements for EEA membership; or (ii) devolving to Northern Ireland the powers needed to give effect to whatever arrangements were agreed between the United Kingdom, the EU, and Northern Ireland. Whatever arrangements would be agreed for Northern Ireland would have to be consistent with the agreements between the United Kingdom and the EU.
64. There would have to be a political agreement in principle between Belfast, London, Brussels and Dublin on the concept of Northern Ireland being allowed to join the EEA as a trade entity separate, *de facto* or *de jure*, from the United Kingdom. If governments in Belfast, Dublin and London and the European Commission were to agree on this, it seems unlikely that the other EU member states and the other EEA states would object.
65. Since Northern Ireland now presumably fulfills its obligations under EU law, it would not need to adopt any substantive legislation to implement the new agreement.

Conclusion

66. UK withdrawal from the EU poses many challenges for Northern Ireland. These could be mitigated by joining the EEA and thereby maintaining the free movement of goods, services and capital between Northern Ireland and the EU.
67. Such an approach would, as far as much economic activity is concerned, maintain the *status quo*. It would therefore address a range of the concerns set out in the only substantive statement so far to emerge from the Northern Ireland Executive on Northern Ireland's interests in the case of Brexit: the August 2017 letter of the First Minister and deputy First Minister to the Prime Minister.
68. Many of the challenges associated with the imposition of a hardened border as a consequence of a 'hard' Brexit – challenges acknowledged officially and unofficially in London, Dublin and Brussels – would be addressed. 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.
69. Participating in the EEA would, however, be distinct from EU membership. There would be no participation in the CAP or the EU's structural funds; and Northern Ireland as part of the United Kingdom would be outside the customs union which would allow the UK government to conclude its own trade agreements with other states.
70. Joining the EEA would be no panacea for the challenges associated with Brexit. It would also pose a number of political and constitutional challenges for the United Kingdom and require the EEA Agreement to be amended.
71. The EEA option would, however, ensure a high degree of continuity with the *status quo*. With the EEA there would be clarity; the economic uncertainty surrounding Brexit would therefore be reduced.