The EU and Irish Unity

PLANNING AND PREPARING FOR CONSTITUTIONAL CHANGE IN IRELAND

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The EU and Irish Unity:

Planning and Preparing for Constitutional Change in Ireland

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Introduction

The Good Friday Agreement (GFA) contemplates Irish reunification following referendums in both jurisdictions on the island. Due to the likely withdrawal of the United Kingdom (UK) from the European Union (EU), this outcome offers a path back to the benefits of full membership for the population of N. Ireland. For many on the island of Ireland the end of partition would be the achievement of a cherished constitutional and political goal. In our view, reunification is also in the long-term strategic interest of the EU.

The nature of the UK-EU future relationship and its consequences for N. Ireland (in any interim period before reunification) are yet to be determined with precision. The referendums will have to be triggered and delivered pursuant to the constitutional processes in both states. However, votes in favour of reunification will have implications for the EU, as a result of Ireland's continuing status as a Member State. This outcome also provides an available solution to some of the challenges that Brexit presents; Irish reunification therefore offers opportunities for the EU.

This report identifies and explains the likely consequences and legal processes that will arise. In our view, it is time for the EU to take the next step, and this report outlines how the institutions can begin to support the process of planning and preparing for constitutional change in Ireland.

Chapter 1 considers the current state of the debate on Irish unity. We conclude that the momentum towards referendums on Irish reunification is established and responsible actors should begin to undertake the necessary preparatory work. Chapter 2 examines the mechanics of Irish reunification in the context of EU membership. It identifies the democratic principles which underpin the EU's legal order, and how they interact with the principle of consent and the right to self-determination. The transfer of sovereignty from the UK to Ireland would be an example of cession rather than the creation of a new state in international law. It is tolerably clear that Irish membership of the EU would continue, although significant constitutional changes within Ireland are likely and desirable. The role of

the institutions is also examined. The precedent of German unification and the contribution of the (then) European Communities is detailed. Chapter 3 considers the protection of rights in EU law in the eventuality of Irish reunification, and why there is justified concern about the equality and human rights implications of remaining within the UK. In this section the question of the rights of British citizens resident on the island of Ireland, and how they would be given effect, is examined. Chapter 4 deals with the current obligations on Ireland that arise from economic and monetary union. Chapter 5 provides a conclusion that underlines the potential and the opportunities of a future together for the island of Ireland within the EU, and the practical steps that each of the institutions might take.

At the outset, it is accepted that the EU must live up to its own foundational values on human rights, equality and social justice, and that this remains a challenge for many Member States and the institutions. In our view, there is no room for complacency. It is also acknowledged that the institutions can only play a supportive role in many areas discussed in this report. However, there do exist matters which can, and should, be addressed by the EU institutions now. This would represent prudent planning for what is a recognised and agreed democratic right that presents the EU with an available solution to aspects of Brexit. The right to self-determination is conferred on the people of Ireland by international law and the process defined in the GFA. This right requires effective protection from all states and the EU – not just from the British and Irish Governments. A supranational union of states committed to democracy, human rights and the rule of law should take steps to vindicate that right in the context of widespread acknowledgement of its centrality to the GFA. We believe that work on this should commence now by all those who accept the need for responsible planning for what is a likely and attractive constitutional scenario for the EU, and one that will have implications for Member States.

Reasonable measures examined in the report include: clear endorsement and reaffirmation of the existing approach of the European Council by the other institutions; consideration of how EU law can accommodate a united Ireland that will, for example, have a large population of resident British citizens; the extension and more effective protection of rights within the Union's legal order; the inclusion of voices and perspectives from N. Ireland after Brexit; consideration of what greater representation in the European Parliament is required in the event of reunification; the consequences for the current rules on economic and monetary

union for a united Ireland (that will continue to be a member of the eurozone); what, if any, amendments to the current legislative processes may be necessary; and the creation of structures, by relevant institutions, to carry forward the suggestions made here.

We argue in this report that work on these questions must start now, and that the EU must have a significant role in supporting the process. It is time for the EU institutions to take the next step and embrace responsible planning and preparation for a process of constitutional change in Ireland that provides a solution to several challenges that Brexit will present.

Chapter I

Sharing the Island: The Good Friday Agreement, the EU and Constitutional Change

A Conversation about Constitutional Change

There is a growing discussion about constitutional change on the island of Ireland. This is taking place across these islands and internationally. Brexit has accelerated the debate, as more people in N. Ireland consider options and constitutional futures. The decision of the UK to leave the EU, following the referendum of 23rd June 2016, raised complex challenges and it left many of the hard questions unaddressed.[1] For N. Ireland this has been particularly problematic. The region voted to remain, and the process has divided the main political parties. For example, Sinn Féin (the electorally largest nationalist party) supported 'remain', while the most significant unionist party, the Democratic Unionist Party (DUP) advocated 'leave'. This split has continued throughout the Brexit negotiations. The challenges are complicated further by the collapse of power-sharing government in January 2017 (following the decision of the late Martin McGuinness to resign as deputy First Minister due to widespread frustration with the performance of the DUP, including a major financial scandal) and the emergence of a 'confidence and supply' arrangement between the DUP and the Conservative Party following the General Election in June 2017.

Much of the exhaustive debate has focused on how to mitigate the consequences of Brexit for N. Ireland. The Protocol on Ireland/N. Ireland has been the subject of intensive analysis.[2] While there is widespread acknowledgement in N. Ireland that it is a sensible measure to try to alleviate some (and only *some*) of the problems that Brexit will bring, it has been fiercely resisted by the current British Government, and the DUP in particular. For a measure that is

[1] For example, the position of all those residing in N. Ireland who will be, or entitled to be, Irish citizens (EU citizens) following Brexit, see European Parliament resolution of 18 September 2019 on the state of play of the UK's withdrawal from the European Union (2019/2817(RSP)), http://www.europarl.europa.eu/doceo/document/TA-9-2019-0016_EN.html.
[2] https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_0.pdf.

essentially about preservation and conservation the portrayal of the 'backstop' has at times been remarkably inaccurate. What this has highlighted is the extent to which the questions raised for the island of Ireland cut to the heart of the implications of Brexit. UK departure from the EU will split and divide the island of Ireland in ways that cut to the core of the GFA. The arrival of a new Prime Minister (Boris Johnston) in July 2019 changed the picture dramatically and signalled a new and distinctive approach.[3] The continuing presence of the 'backstop' now became the major source of grievance, and a target, as the British Government insisted on its desire to leave on 31st October 2019.

Whatever form Brexit does eventually take, and if it happens at all, many have noted a fairly obvious point. The debate on Irish unity will have an added dimension following Brexit that will alter the nature of the constitutional conversation. It becomes a way for the region to return to the EU, and that is the principal focus of this research report. Any future conversation about Irish unity will not be confined to the British and Irish Governments, it must involve the full participation of the EU. That would be true if the UK remained in the EU, but early involvement will now become essential as a direct result of Brexit.

The result is that increasing attention is shifting to constitutional conversations about how the island is shared in the future, the timeframe for what is often referred to as a 'border poll', and what role the EU might play in this. The difficulty remains that there are several unanswered questions about the process, as many interventions understandably concentrate on the merits of this option.

The aim in this report is to outline the context for the unity conversation and its current state, and consider the implications of EU law, policy on the mechanics of unification, the protection of rights and on matters such as economic governance. The intention is to make clear that following Brexit reflection on constitutional futures must also embrace a discussion about the supportive role of the EU and the part that it will play in Irish reunification.

[3] https://www.gov.uk/government/publications/pm-letter-to-donald-tusk-19-august-2019.

The Good Friday Agreement and Irish Unity

What is the framework?

The debate on Irish unity is framed by the GFA, as a multi-party agreement and, in the form of the British-Irish Agreement, international law.

The relevant provisions of the GFA provide as follows:

> *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 of 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 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 of 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****; (Emphasis added)*

These constitutional matters are at the core of the British-Irish Agreement that forms the bilateral international legal framework (binding on both states) that will shape the discussion of unity referendums and will also speak to what follows.

The following provisions are also relevant considerations:

> *(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 that 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. (Emphasis added)*

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 N. Ireland rests on continuing consent. The constitutional question is deliberately open-ended; it is not a 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 N. 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. This will raise questions, for example, for those British citizens who benefit from this birthright guarantee who wish to identify and be accepted as British only in the event of constitutional change.

These arrangements are at the constitutional core of what was and remains a compromise, and they were approved in concurrent referendums held on 22nd May 1998. There is a clear, agreed and established way for the principle of consent to be tested. As the UK moves to the status of a 'third country' outside of the EU, and the border on the island of Ireland becomes an external border of the EU, it is unsurprising that there has been a sharpened focus on this particular GFA mechanism. It is inevitable that talk about constitutional change has become

so widespread; it would be remarkable if people were not to mention what is an intrinsic aspect of any comprehensive consideration of the GFA *in all its parts*. There is nothing 'dangerous', 'divisive', 'toxic', or 'unhelpful' about serious reflection that relates to a credible, viable and anticipated constitutional outcome.

What is the meaning of the term 'border poll'?

When people use the term 'border poll' they are referring to the question of whether N. Ireland will remain within the UK or join a united Ireland. Although it is widely used and adopted, it is questionable how helpful the term itself is in capturing the full complexity of this constitutional conversation that will involve voting in both parts of the island and include fundamental changes for everyone. It is, of course, a debate about the continuing existence of the border, but it will also be a significant island-wide discussion about how this island is shared in the future in areas such as health, education, and good governance, among other matters. In considering the logistical aspects of this process thought might be given to the adoption of more inclusive and nuanced terminology by all participants, without in any way attempting to distract or detract from what is being proposed.

The principles and mechanisms are set out in the GFA, and have been given effect in domestic law through the Northern Ireland Act 1998 (see provisions below), and the new versions of articles 2 and 3 of *Bunreacht na hÉireann*:

> ***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 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.*

Who decides?

There is discussion about how this will be taken forward, but 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 both jurisdictions, and thus these will be subject to the differing traditions, rules and processes in each. For example, Ireland has a much more extensive history of holding referendums, with a clear and established process for any constitutional referendum.

This is in keeping with the way the GFA was itself endorsed, but there are crucial political and symbolic factors to consider also. It will be essential for the legitimacy of the eventual outcome that this is conducted as an exercise in *concurrent consent* by the people of the island as envisaged in the GFA, this was a powerful argument for the approach adopted in 1998, and we see no reason to depart from it for this exercise in self-determination also.
Concurrent referendums took place on the 22nd May 1998 across the island of Ireland. The two electorates were asked to consider the outcome of the multi-party negotiations which culminated in the Agreement of 10th April 1998.

In Northern Ireland the question was posed in the following form:

> *Do you support the agreement reached at the multi-party talks on Northern Ireland and set out in Command Paper 3883?*

In Ireland, the question was posed in the following form:

> *Do you approve of the proposal to amend the Constitution contained in the under mentioned Bill? (Nineteenth Amendment of the Constitution Bill, 1998*

As can be seen, the questions posed were different, and they had distinct legal consequences in each jurisdiction. In N. Ireland, the outcome amounted to a direction to the UK Government to propose primary legislation in Westminster to implement the GFA. Parliament duly enacted the Northern Ireland Act 1998. This statute was later described as having 'constitutional status' in *Robinson v. Secretary of State for Northern Ireland and others* (although there has been judicial scepticism expressed about this constitutionalised language since then).[4] In Ireland, articles 2 and 3 of *Bunreacht na hÉireann* were amended to remove the territorial

[4] [2002] UKHL 32.

claim to the whole of the island of Ireland. The entry into force of the British-Irish Agreement (the bilateral treaty that provides the international legal underpinning for this political agreement) was conditional on key steps being taken by both states.

The critical point, however, is that the referendums were essentially the same in substance. The electorate was being asked to endorse or reject a new constitutional arrangement. A rejection in either jurisdiction would have meant continuation of the status quo. No doubt, this would have prompted renewed efforts to find consensus but this too would, inevitably, have had to find approval in both jurisdictions by way of concurrent referendums. There could have been no internal solution for N. Ireland that would have acquired comparable democratic legitimacy. Similarly, any unilateral amendment of *Bunreacht na hÉireann* would only have had limited capacity to bring about a new constitutional dispensation.

From a nationalist/republican viewpoint the endorsement of the GFA by way of an all-island vote in 1998 could rank alongside the December 1918 vote for an independent Irish republic. From a unionist/loyalist viewpoint the referendum had the twin credentials of approval by a majority in N. Ireland and the enactment of primary legislation by the UK's 'sovereign parliament'. Unionism had also now ensured that the principle of consent was recognised in the Republic's constitution.

As noted above, in its international legal manifestation, the GFA also offers a *normative* framework for the unity conversation: there are provisions in the GFA that are clearly intended to continue to have relevance in the event of Irish unity and the principles (including all relevant safeguards) are of fundamental significance to guiding the approach.

The procedure for holding a referendum in the Republic of Ireland is governed by article 46 of the constitution, and Referendum Acts. In short, the proposal must be approved by both houses of the Oireachtas (or deemed to be passed), submitted to and approved by the electorate and signed into law by the President.

Consequently, it can be said, in purely legal terms, that the decision to propose a referendum on unity lies with the Oireachtas, while the approval or rejection of the unity proposal rests with the electorate. To date there have been 38 proposals to amend the constitution. All have

been supported by the Irish Government (but not all proposals have been approved by the electorate[5]).

At the present time, in the UK the procedure for holding a referendum is principally governed by the Political Parties, Elections and Referendums Act 2000. In accordance with the common law and the constitutional principle of the legislative supremacy of the Westminster Parliament, referendums are often constructed around the particularity of the matters under discussion, are advisory and cannot bind Parliament. In respect of a referendum on Irish unity the position appears somewhat distinctive. In the draft clauses/schedules for incorporation in British legislation of the GFA the UK Government agreed to the following:

> *(2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland.*

That undertaking binds the UK Government in international law to facilitate Irish unity (by laying *agreed proposals* before Parliament) should such a preference be expressed in a referendum in N. Ireland. It has also been enacted in section 1(2) of the Northern Ireland Act 1998. But it must be noted that the principle of parliamentary supremacy holds, and the obligation is to put proposals to Parliament that 'may be agreed' between both governments (indicating that extensive discussions would either follow such a vote and/or would have been agreed in advance of the vote). In this intergovernmental dialogue it must be recalled that while the UK will function within its existing constitutional requirements (including the legislative supremacy of the Westminster Parliament), Ireland will be engaged as an EU Member State, and will also be bound by the EU's legal order in these discussions.

The Westminster Parliament will have a decisive role both before and after the referendums. As the debate on Brexit has demonstrated, the outcome of these deliberations cannot be taken for granted, and the Irish Government, the EU and the people of the island of Ireland cannot be sure of what will follow. That is why international and EU support may also be vital in ensuring that the GFA is fully respected. The nature of the proposals to be put to the

[5] *Ten reasons voters rejected the abolition of the Seanad*, 6th October 2013, https://www.irishtimes.com/news/politics/ten-reasons-voters-rejected-the-abolition-of-the-seanad-1.1551909.

Westminster Parliament arguably should not be left to negotiation between both governments; this process will have implications for EU Member States. These are matters that should be worked out in advance of any vote by a full range of participants so that people will be clear what the precise implications will be. As the Brexit negotiations have demonstrated, there is also no guarantee that the British Government will be able to get its way at Westminster. This suggests that building cross-party consensus around whatever proposals emerge will be vital for a smooth and successful outcome in the Westminster Parliament. It also underlines why the EU, and other international actors, must be involved in the dialogue about the constitutional future of Ireland.

In N. Ireland, the manner in which a referendum on Irish unity would be facilitated, and the form it would take, is less certain. The relevant statutory provisions are found in the Northern Ireland Act 1998. This legislation was the UK's response to the obligations it assumed under the GFA.

Section 1 and Schedule 1 are set out below:

1. Status of Northern Ireland.

(1) It is hereby declared 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 in accordance with Schedule 1.

(2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland.

Schedule 1: Polls for the Purposes of Section 1

1. The Secretary of State may by order direct the holding of a poll for the purposes of section 1 on a date specified in the order.

2. Subject to paragraph 3, the Secretary of State shall exercise the power under paragraph 1 if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland.

3. The Secretary of State shall not make an order under paragraph 1 earlier than seven years after the holding of a previous poll under this Schedule.

4 (1) An order under this Schedule directing the holding of a poll shall specify—

(a) the persons entitled to vote; and

(b) the question or questions to be asked.

(2) An order—

(a) may include any other provision about the poll which the Secretary of State thinks expedient (including the creation of criminal offences); and

(b) may apply (with or without modification) any provision of, or made under, any enactment.

The High Court considered these provisions in judicial review proceedings in *An Application for Judicial Review by Raymond McCord*.[6] The applicant had contended that the failure of the Secretary of State to have in place a policy which sets out the circumstances in which a border poll would be called was unlawful. The application was dismissed. In summary, the court held:

- There is no wide-ranging public law principle which requires that a decision maker given statutory powers is bound to produce and publish a policy establishing how the power would be exercised.
- Schedule 1 paragraph 1, Northern Ireland Act 1998 confers on the Secretary of State a general discretionary power to call a poll (even where he/she is not of the view that it is likely that a majority of voters would vote for a united Ireland).
- Pursuant to Schedule 1 paragraph 1(2) the Secretary of State is under *a duty* to call a poll if it appears to her that a majority would be likely to vote for a united Ireland.
- Within the scope of her discretion, decision making by the Secretary of State requires political assessment and a degree of flexibility. It is for the Secretary of State to decide what matters should be taken into account.
- Therefore, in purely legal terms, the decision to call a poll lies at the discretion of the Secretary of State for Northern Ireland subject to public law principles that arise around section 1(2) Northern Ireland Act 1998.

Notable in this judgment, however, is the distinction drawn between the *broad discretionary power* of the Secretary of State to call a poll (for a variety of reasons) and the *duty* to do so if

[6] [2018] NIQB 106.

it appears likely that a majority of voters would vote for a united Ireland. The judgment suggests, for example, that there would be nothing to prevent the Secretary of State initiating a poll with respect to a 'no-deal Brexit', even where the principal issue was continuing membership of the EU (in a reunified Ireland). In other words, the Secretary of State is not confined exclusively to evidence with respect to support for Irish unity, and in the consideration of these questions can make as assessment of what should be taken into account. There are advantages and disadvantages, in political terms, to this level of flexibility, and it suggests that the route to a referendum may rest on political pressure rather than legal compulsion.

The date of the poll, the question to be asked and the franchise of those entitled to vote will be determined by the Secretary of State in an order pursuant to schedule 3. This leaves the option of setting a timeframe and date that gives sufficient space for the necessary preparatory work to be done.

Who will vote and how will the outcome be measured?

Additional process questions are addressed in another paper.[7] It is worth drawing out the key themes here. Eligibility to vote may become a major source of debate, and it is likely to differ in both jurisdictions (a fact that may itself be a source of contention). For example, the restriction of voting rights in referendums in the Republic to Irish citizens may raise challenging questions. The implications of the decision of N. Ireland to leave the UK mean that a generous approach to voting rights is merited, following, for example, the approach adopted to the Scottish independence referendum. There is no guarantee that this will be the case, and evidence around, for example, age-profile and constitutional preferences may become factors in the pragmatic considerations of the political parties.[8] However, there is a strong and compelling argument for a generous and inclusive franchise for this referendum

[7] See Mark Bassett and Colin Harvey, *The Future of our Shared Island: A Paper on the Logistical and Legal Questions Surrounding Referendums on Irish Unity*, available at: https://brexitlawni.org/library/resources/the-future-of-our-shared-island/. For proposals on taking the process forward see Colin Harvey, 'Sharing the Island: A Way Forward?' https://eamonnmallie.com/2019/06/sharing-the-island-a-way-forward-by-professor-colin-harvey/; Colin Harvey, 'Preparing for a Return to the EU: Unity as Our Way Back?' https://eamonnmallie.com/2019/09/preparing-for-a-return-to-the-eu-unity-as-our-way-back-by-professor-colin-harvey/. See also, Alan Whysall, *A Northern Ireland Border Poll* (UCL Constitution Unit, 2019).

[8] Lord Ashcroft, *My Northern Ireland survey finds the Union on a knife-edge* https://lordashcroftpolls.com/2019/09/my-northern-ireland-survey-finds-the-union-on-a-knife-edge/#more-16074.

in N. Ireland given the potential consequences. Early confirmation of this approach would be helpful.

The wording of the question will be significant and, again, may be a source of disagreement. Here it may be wise to rely on the explicit language of the GFA and to follow that as closely as possible. However, as indicated elsewhere, the position in the Republic is complicated by existing constitutional realities and how reunification could be achieved in a way that does not lead to potentially conflicting outcomes.[9]

There has been discussion about how consent should be determined in N. Ireland specifically. Will this be by a majority of votes cast by the eligible electorate or will there be a weighted majority or some other form of special arrangement? Seamus Mallon, for example, has called for generosity towards unionism through the use of a weighted majority that would provide a form of 'parallel consent' in order to address concerns.[10] That has been rejected by other contributors to the debate, including Gerry Adams.[11] The worry is that this becomes a new form of 'unionist veto' that, among other things, does not recognise parity of esteem between the different constitutional preferences.

Altering the GFA in order to accommodate a new weighted majority rule would be a mistake. The fears that this speaks to can be addressed in other ways that are more faithful to the overarching ambitions of the GFA. While there are genuine concerns about how unionism/loyalism would respond to a vote for constitutional change, and legitimate questions about how that community will be accommodated in a new Ireland, the response of nationalism/republicanism should also be factored into the assessment. Changing the rules at this point would be disastrous, and undermine a faith in the promises of the GFA that is already being tested to the limit. The threshold for approval in N. Ireland should be a majority of votes cast. This has been the approach adopted in recent referendums. The introduction of a minimum requirement could be criticised as anti-democratic, inconsistent with the express terms of the GFA, and it would suggest that the exercise was being illegitimately

[9] Bassett and Harvey above n 7 paras 80-87.
[10] Seamus Mallon, *A Shared Home Place* (with Andy Pollak, Lilliput Press, 2019).
[11] Gerry Adams, *The Numbers Game*, 23rd May 2019 http://leargas.blogspot.com/2019/05/the-numbers-game.html. See also, Richard Humphreys, *Beyond the Border: The Good Friday Agreement and Irish Unity after Brexit* (Merrion Press, 2018).

prejudged in favour of one option. Contemplate, for example, the practical implications for N. Ireland if there was a 55% vote in favour of reunification that did not result in that outcome. It is doubtful the region could function within the current constitutional arrangements in the aftermath of such a result.

There is a better way forward. It would be much more effective to ensure that maximum reassurance (through, for example, strong human rights and equality guarantees framed by the GFA) is provided in advance to *all communities* whatever the eventual outcome. That is where the hard work of persuasion should take place, and why detailed planning and preparation is so significant, and therefore why the conversation about the required protections will matter so much. The focus should not be on altering the voting requirements but on the *nature and substance of the guarantees* for particular communities *and* everyone that will be on offer in the event of majority support for reunification.

Equivalence, human rights and constitutional change

The way to address anxiety about constitutional change is to provide precise, ambitious and generous guarantees that will offer meaningful protections into the future. There are already express provisions in the GFA that speak to the matter of continuing protection. These have been noted above. There is also extensive reference in the GFA to human rights, with the parties endorsing specific measures, and both governments making commitments to take further action. There is a concept of particular significance that is embedded in the thinking behind the GFA: equivalence. In its willingness to take additional steps to protect rights the Irish Government indicated that the 'measures brought forward would ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland.'[12] At minimum the Irish Government thus agreed to keep pace with N. Ireland. The rationale for this can be easily stated: any decision to leave the UK and join a united Ireland should result in no diminution of available guarantees. This has encouraged and led to welcome change in the Republic, in a context where the expectations around rights protection in N. Ireland have been dented, for reasons that include the failure of the British Government to deliver a Bill of Rights.[13] One of the neglected implications of the equivalence doctrine is that it should, in

[12] Rights, Safeguards and Equality of Opportunity, para 9.
[13] NI Human Rights Commission, *A Bill of Rights for Northern Ireland: Advice to the Secretary of State*, http://www.nihrc.org/publication/detail/advice-to-the-secretary-of-state-for-northern-ireland. See also the work

principle, incentivise the case for enhanced human rights reform in N. Ireland as a way of leveraging these into any new constitutional arrangements. Protections and guarantees that can be secured now in N. Ireland should endure, if this principle is respected.

Those who are serious about Irish reunification should, as part of the planning and preparation for the referendums, be pressing for fundamental reform in relation to human rights and equality now, on the island of Ireland and in the EU. Rather than engage in a distracting and counterproductive conversation about the voting threshold for a referendum in N. Ireland, time would be better spent by all participants in advancing the changes needed to assuage the worries of all communities about their shared future together on the island of Ireland and within the EU.

The State of the Unity Debate

There has been a remarkable outpouring of work on Irish reunification in recent years, much of it prompted by the constitutional conversations triggered by Brexit. The aim here is simply to give a flavour of this, with a view to framing the state of the debate and underlining why the EU must join and support this vibrant and dynamic discussion.

First, there has been extensive civic leadership in this constitutional conversation. Grassroots movements such as Think32,[14] Shared Ireland,[15] Ireland's Future,[16] and the Constitutional Conversations Group,[17] among others, have demonstrated a commitment to innovation in their approaches to ensuring debate. What is noteworthy about these initiatives is the way that they have gathered a diverse range of voices in accessible formats. These efforts have also included significant civic gatherings in Belfast, Newry and Derry. There seems little doubt that, for example, the event held in the Waterfront Hall, Belfast on 26 January 2019 will be

undertaken by the Joint Committee of both commissions on a charter of rights for the island of Ireland, http://www.nihrc.org/documents/charter%20of%20rights/charter-of-rights-advice-june-2011-final.pdf

[14] https://twitter.com/Think32_.

[15] https://twitter.com/SharedIreland.

[16] https://twitter.com/IrelandsFuture.

[17] https://www.derryjournal.com/news/conversation-on-irish-constitution-and-reunification-to-be-held-in-derry-tomorrow-1-9042674.

regarded as one of the more influential such interventions in recent times.[18] There is an evolving civic movement for fundamental constitutional change on the island of Ireland.

Second, leading commentators and public figures have made significant contributions. This includes interventions by Mary McAleese,[19] Peter Robinson,[20] Fintan O'Toole,[21] Tony Connelly,[22] David McWilliams,[23] Martina Devlin,[24] Paul Gillespie,[25] and Paul Gosling,[26] among many others. Along with continuing global media interest in this question,[27] this has helped to create a tangible sense of a conversation that must be taken seriously in the public sphere. This is happening at a time when the Irish Government is still taking every available opportunity to insist that this is not the right time for the discussion.[28] How long it can continue to hold to this position remains to be seen.

Third, there was a mixed reaction from political parties committed to Irish reunification. Sinn Féin and SDLP have, for reasons that are not hard to understand, been at the forefront of this argument historically. Sinn Féin, in particular, has played a dynamic and leading role in pressing this matter, and has often faced hostility (and what increasingly looks like political

[18] *Nationalists looking at 'new constitutional horizons', Belfast conference hears,* 26th January 2019, https://www.irishtimes.com/news/politics/nationalists-looking-at-new-constitutional-horizons-belfast-conference-hears-1.3772099.
[19] Mary McAleese, *Brexit Institute Lecture*, DCU, 29th March 2019, http://dcubrexitinstitute.eu/wp-content/uploads/2019/03/Mary-McAleese-Speech-29.03.2019.pdf.
[20] *Professorial speech from Rt Hon Peter Robinson*, 7th June 2018, http://qpol.qub.ac.uk/professorial-speech-rt-hon-peter-robinson/.
[21] Fintan O'Toole, *Ireland is not ready for unity but may have to take that step,* 20th August 2019, https://www.irishtimes.com/opinion/fintan-o-toole-ireland-is-not-ready-for-unity-but-may-have-to-take-that-step-1.3990937; Fintan O' Toole, *It's a united Ireland, but not as we know it,* 25th May 2019 https://www.irishtimes.com/opinion/fintan-o-toole-it-s-a-united-ireland-but-not-as-we-know-it-1.3900593.
[22] Tony Connelly, *Brexit: is England's difficulty Ireland's opportunity?* 27th July 2019, https://www.friendsofeurope.org/insights/brexit-is-englands-difficulty-irelands-opportunity/.
[23] David McWilliams, *Why the idea of a united Ireland is back in play,* 30th November 2018, https://www.ft.com/content/7d5244a0-f22d-11e8-ae55-df4bf40f9d0d.
[24] Martina Devlin, *Prospect of reunification a reminder that an eye for an eye and a tooth for a tooth leaves everyone blind and toothless,* 11th May 2019, https://www.independent.ie/opinion/comment/martina-devlin-prospect-of-reunification-a-reminder-that-an-eye-for-an-eye-and-a-tooth-for-a-tooth-leaves-everyone-blind-and-toothless-38101006.html.
[25] Paul Gillespie, *Ireland can transform a Brexit crisis into a breakthrough,* 14th September 2019, https://www.irishtimes.com/opinion/ireland-can-transform-a-brexit-crisis-into-a-breakthrough-1.4017326
Paul Gillespie, *Sinn Féin can no longer claim ownership of Irish unity,* 18th March 2017, https://www.irishtimes.com/opinion/sinn-f%C3%A9in-can-no-longer-claim-ownership-of-irish-unity-1.3014645.
[26] http://www.paulgosling.net.
[27] For just one example among many see: *How a 'No-Deal' Brexit Could Open a Path to Irish Unity,* 15th February 2019, https://www.nytimes.com/2019/02/15/world/europe/brexit-northern-ireland.html.
[28] *Leo Varadkar*: *Post-Brexit vote on Irish unity not the way forward*, 6th August 2019, https://www.bbc.co.uk/news/uk-northern-ireland-49247754.

discrimination) for doing so.[29] The SDLP has also been involved and has focused on questions such as timing.[30] Despite party political differences, both main nationalist parties in N. Ireland have undertaken extensive work on the subject, and are to be commended for doing so. There might be merit in these parties agreeing a shared position on how to take this forward.

Other political actors have been involved in the debate. For example, Senator Mark Daly (Fianna Fáil) has played a leading role, and been a central figure in encouraging concrete thinking.[31] During the Brexit negotiations there was also much reflection (in an internal UK context) on the impact it was having on the future of the union.[32] Just as people are considering the future of Ireland, many are also pondering if the UK in its current form has any future at all.

Fourth, universities also began to show some interest. For example, the Institute for British-Irish Studies, UCD launched a major programme on *Constitutional Futures after Brexit*[33] and UCL Constitution Unit announced a new *Working Group on Unification Referendums on the Island of Ireland*.[34] Research papers produced by, for example, Seamus McGuinness and Adele

[29] *Sinn Féin: vote on Irish reunification must follow no-deal Brexit*, 31st July 2019, https://www.theguardian.com/uk-news/2019/jul/31/sinn-fein-border-poll-ireland-unity-must-follow-no-deal-brexit; *Sinn Féin call for Irish unity poll 'destructive', Taoiseach says,* 11th December 2018, https://www.irishtimes.com/news/politics/oireachtas/sinn-f%C3%A9in-call-for-irish-unity-poll-destructive-taoiseach-says-1.3727738; *Brexit: Call for Irish border poll during deadlock 'irresponsible',* 13th February 2019, https://www.bbc.co.uk/news/uk-northern-ireland-47227297.

[30] *SDLP calls for Border poll on united Ireland after Brexit negotiations,* 30th May 2017 https://www.irishtimes.com/news/politics/sdlp-calls-for-border-poll-on-united-ireland-after-brexit-negotiations-1.3101566.

[31] See, for example, Oireachtas Joint Committee on the Implementation of the Good Friday Agreement, *Brexit and the Future of Ireland, Uniting Ireland and its People in Peace and Prosperity,* August 2017 https://webarchive.oireachtas.ie/parliament/media/committees/implementationofthegoodfridayagreement/jcigfa2016/brexit-and-the-future-of-ireland.pdf.

[32] See, for example, *Brexit: Are Tories worried about the future of the union?* 4th July 2019, https://www.bbc.co.uk/news/uk-politics-48866927.

[33] http://www.ucd.ie/ibis/t4media/IBIS%202019%20Constitutional%20Futures%20Final.pdf.

[34] https://www.ucl.ac.uk/constitution-unit/research/elections-and-referendums/working-group-unification-referendums-island-ireland. There are many other examples of ongoing academic engagement with the questions raised, including from: Colin Murray (Newcastle); Aoife O'Donoghue (Durham); David Kenny (TCD); and Oran Doyle (TCD).

Bergin,[35] and books by Richard Humphreys,[36] Paul Gosling,[37] and Kevin Meagher[38] have all made significant contributions.

Finally, how to assess the state of the current discussion on Irish unity and the remarkable level of interest in this constitutional conversation? There is little doubt that some of the speculation about the future of the union in Britain is targeted instrumentally at the DUP and unionist parties in particular. This is most evident in commentary from British political actors that occasionally feels like an attempt to persuade the DUP to alter its view on the 'backstop'. Such tactical deployments of the 'unity argument' are understandable in context, but they do risk a questionable portrayal of the agreed and legitimate constitutional provisions of the GFA. There is nothing threatening or anxiety-inducing about such a core element of the constitutional compromise that underpins the peace process. 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 context of Brexit.

It is notable that political and civic interventions on the island of Ireland are much more nuanced. Many of these impressive contributions spring not from short-term and transparent political goals, but from a genuine desire to map out a path to a different constitutional future for the island of Ireland, and take seriously the idea that the status of N. Ireland remains an open question and may well change soon.

[35] *The Political Economy of a Northern Ireland Border Poll* https://www.iza.org/publications/dp/12496/the-political-economy-of-a-northern-ireland-border-poll. See also, 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*, https://www.instituteforgovernment.org.uk/explainers/irish-reunification.
[36] *Beyond the Border*, above n 11; Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, 2008).
[37] Paul Gosling, *A New Ireland: A New Union and New Society* (2018).
[38] Kevin Meagher, *A United Ireland: Why Unification Is Inevitable and How It Will Come About* (Biteback Publishing, 2016).

Towards a Future Together within the EU?

Brexit has accelerated the conversation around Irish unity. This is a logical and reasonable response when considering the future of this island. There is clear merit in ensuring careful planning and preparation for this significant constitutional exercise. The political and practical reality is that although the process will be formally triggered by the British Government referendums on Irish unity will have to receive support from the Irish Government, and will also involve the EU. As many now suggest, the Irish Government must undertake the required preparatory work, including in dialogue with the British Government, on the process. There is a particular responsibility on the Irish Government to provide clarity and certainty about the implications of a vote for unity. The British Government has a responsibility to provide clarification and confirmation as well on the matters noted above, including voting rights. This does not negate the significance of civic dialogue about the constitutional future or community-level initiatives, but it is to argue that such an exercise will require government-level resourcing and support. This now needs to be brought to the heart of government in Ireland. There is an urgent and pressing need for the Irish Government to establish an institutional mechanism to take this work forward, and to mainstream government-level planning for Irish reunification.

The next phase of the discussion about the constitutional future must include a better sense of what people are being asked to vote for or against. This argument is occasionally deployed as a way to avoid this conversation entirely; the approach suggested here is different. There is an obligation on those making the case for change to offer a coherent and persuasive view of what the future will hold in the new arrangements. Those voting in these referendums must have a firm idea about the consequences of their decision. There is no reason why such preparatory work cannot commence and, in our view, it must also include the EU.

It should be recalled that 'events' could take over (particularly in the context of Brexit), so sensible and comprehensive British-Irish-EU planning would be wise. If the UK did exit the EU without a deal, there is evidence that a majority might consider Irish unity.[39] That cannot be ignored, as it would indicate that the existing 'sovereignty arrangements' were redundant (as

[39] See Lord Ashcroft polling above n 8.

consent for remaining in the UK would be absent). Here it should be observed that the Irish Government was so effective in the Brexit negotiations precisely because it had anticipated and planned for a 'leave' vote. Such governmental-level preparation would not prevent a more participatory and inclusive constitutional conversation on the island. However, the work should start now, and be led by the Irish Government in parallel with civil society conversations and must involve the EU's institutions.

In considering this, it should be noted that N. Ireland would be joining a pre-existing state (within the EU) whose current constitution anticipates reunification, and in the context of an international agreement that guarantees continuity of protection. This will be a managed transition over time that will enjoy considerable international support, it is therefore possible to exaggerate the logistical and practical challenges of achieving this objective: given the Irish Government's existing obligations, this will not be a 'blank page' constitutional conversation. There will be a carefully managed transition that will be supported by two governments, include the EU, and have the endorsement and support of other international institutions and actors. The basic normative principles to guide the process are already there and full respect for the GFA indicates how this discussion might proceed.

Chapter II

The EU, the Right to Self-Determination & the Mechanics of Reunification

Introduction

The question of Irish reunification, pursuant to the provisions of the GFA, under European Union law, requires familiarity with the Treaties and the institutions but also with public international law. The Union's legal powers and responsibilities are set out in the Treaties and can be quite easily identified, understood and explained. So too can the principles and powers which should guide the approach of the Union and its institutions.

How the Union, its Member States and institutions would react to successful reunification referendums in Ireland will, however, also be influenced by politics, history and economics. It must be acknowledged that it is not an exclusively legal question. The precedent of German unification in 1990 offers much assistance but cannot serve as a complete model. Member State and institutional support for the successful completion of the project can be assumed, but the Union in 2019 is a quite different entity. Alongside planning by the national governments of Ireland and the UK there should be planning at the supranational level by the EU institutions.

The GFA contemplates a united Ireland which will take the form of N. Ireland joining the Republic of Ireland following successful referendums in each jurisdiction. The EU will obviously not impose territorial change on a Member State nor will it compel the UK or Ireland to hold referendums to do so. The outcome of such an exercise in self-determination will, however, have important consequences for the EU.

There is important preparatory work that can, and should, be undertaken now in expectation of referendums in the near future. The consequences for the EU will depend on the precise

nature of the future relationship with the UK, but there are matters that can be anticipated and can be addressed in advance.

These could include: confirmation by all of the EU's institutions of the approach to reunification adopted by the European Council; consideration of the manner in which citizens in N. Ireland will be represented in the European Parliament; what the consequences for the current economic and monetary union rules for Ireland would be; what derogations or transitional measures would be necessary to accommodate reunification; and what amendments to EU law (and Irish law) are necessary to safeguard the position of British citizens resident on the island of Ireland.

Approach to Irish Reunification

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 provides as follows:

> *… 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.*** *(Emphasis added)*

In broad terms, it can be seen that the institution views the reunification of Ireland as a reshaping of the borders of the State. The EU will approach Irish reunification, it seems, with three considerations in mind. The first is unsurprising and explicit: reunification will follow the procedures set out in the GFA. The second is reunification will be viewed by the EU in the light of well-established principles of public international law. The third is implied, and is based on the German reunification precedent of 1990. The EU can be expected to facilitate rather than frustrate the exercise of self-determination by the people of the island of Ireland. Should the states of the UK and Ireland, subject to their own constitutional processes, and in accordance with the GFA, agree upon and implement Irish reunification, the EU will welcome such an outcome.

It should also be stated that the EU response will be guided by its commitment to democracy, human rights, international law and solidarity among Member States. The model of German

reunification, subject to context-specific qualifications, should be followed. Critically, however, it is anticipated at this stage that neither Treaty amendment nor the accession of a new reunited Ireland will be necessary.

This is significant as the accession of a new Member State under article 49 TEU involves a more exacting procedure. Article 49 TEU provides as follows:

> *Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.*
> *The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.*

In addition, a new Member State will have to adhere to the accession criteria set out in the Copenhagen criteria of 1993. This will require adoption, implementation and enforcement of all current EU rules (acquis). At present these rules are divided into 35 policy fields each of which is negotiated and monitored separately. Financial arrangements and the possibility of transitional arrangements are also included. It is the Commission which monitors progress with respect to meeting such commitments.

The EU, Democracy, International Law and Self-Determination

The democratic principles of the EU are given effect in Title II of the TEU. The provisions require that the Union observes the principle of equality of citizens,[40] recognise that EU citizenship is additional to national citizenship,[41] note that the functioning of the Union shall be based on representative democracy,[42] and that citizens are directly represented at the

[40] Art 9 TEU.
[41] Art 9 TEU.
[42] Art 10(1) TEU.

Union level in the European Parliament.[43] Article 11 TEU provides for a European Citizens' Initiative (ECI) that relates to a request for a policy initiative. Article 12 TEU recognises the principle of subsidiarity, and the fundamental role of national parliaments under the Treaties. Article 7 TEU contains a procedure whereby the Union may ultimately vote to suspend the voting rights of a Member State judged to be responsible for the existence of a serious and persistent breach of the values contained in article 2 TEU. This is a sanction of last resort, but its significance should not be overlooked. It confirms the EU's commitment to democratic values.

The EU's external action on the international scene is also to be guided by democratic values, together with respect for the principles of the UN Charter and international law.[44] Democracy promotion has been established as a strategic goal of EU security policy for many years.[45]
The Union has also made upholding human rights a core aspect of its external trade relations. Article 207 TFEU provides that the establishment of a common commercial policy is an exclusive competence of the Union. Article 217 TFEU licences the Union to enter into agreements with third states. The promotion of European values, including human rights and democracy, will continue to play a central role in future negotiations.[46]

It is essential that the question of Irish self-determination pursuant to the GFA, as a rights-based matter and one repeatedly acknowledged by the EU and the UK, is factored explicitly into negotiations on the future relationship. This is a democratic right which is founded in international law, given expression in the GFA, and is a fundamental constitutional feature of both Ireland and the UK. It must be stressed that locating this within future negotiations between the EU and the UK does not represent any undertaking beyond that which already exists. It would simply be to afford it due prominence in the future relationship discussion.
It is clear that the protection and promotion of democratic values is central to the European project. The exercise of the right to self-determination by the Irish people, in accordance with the GFA, should be regarded and framed as fully consistent with the EU's own democratic objectives.

[43] Art 10(2) TEU.
[44] Art 21(1) TEU.
[45] Since adoption of the Treaty on European Union.
[46] European Commission, *Trade for All: Towards a Responsible Trade & Investment Policy* (2015).

The European Communities, and later the EU, are the result of international treaties between the contracting Member States. As such, they can be described as creatures of international law, albeit of a *sui generis* character. The EU is expressly required to respect international law in the Treaties.[47] The CJEU has also recognised general international law as part of EU law.[48] Article 351 TFEU allows for Member States to continue to honour commitments made to non-Member States under earlier agreements. Obligations assumed by the Member States continue, although this does not necessarily mean that corresponding rights continue unaffected.[49]

The principles of jurisdiction and sovereignty are fundamental to public international law. They relate primarily, but not exclusively, to territory. As Shaw states:

> *The principle whereby a state is deemed to exercise exclusive power over its territory can be regarded as a fundamental axiom of international law. The development of international law upon the basis of the exclusive authority of the state within an accepted territorial framework meant that territory became perhaps the fundamental concept of international law*.[50]

In broad terms, jurisdiction has been understood to mean that a state has authority to address any relevant matter arising either inside or outside its territory. This is prescriptive jurisdiction. The enforcement of such jurisdiction, however, can only occur in a state's own territory unless another state permits and facilitates a different approach. At the same time a state has absolute and exclusive power of enforcement of its laws within its own territory unless qualified by some rule of international law.

International public law also governs the acquisition of sovereignty over territory. Five distinct methods of acquiring territory have traditionally, if not universally, been identified: cession; occupation; accretion; subjugation; and prescription.

Cession is the peaceful transfer of ownership of territory from one state to another. It has the effect of replacing one sovereign with another by agreement of the contracting states. Joint intention to transfer is essential. Territory can be ceded by treaty settling a border dispute,

[47] Art 3(5) and Art 21 TEU.
[48] *Poulsen & Diva Navigation* c-286/90, para 9; *A Rcake GmbH & Co. v. Hauptzollant* c-162/96, para 45.
[49] *Commission v. Italy Case* 10/61 (1962) ECR I-4287, para 12; *Levy* c-158/91 (1993) ECR I-4287.
[50] Malcolm N. Shaw, *International Law*, (8th ed, OUP, 2018) p 361.

by way of gift, transfer of land for money or by the withdrawal of colonial administration. The acquiring state assumes the rights and duties of the departing one.[51]

The form of cession is explained in the following way by the authors Jennings and Wattes[52]:

> *The only form in which a cession can be effected is an agreement normally in the form of a treaty between the ceding and the acquiring state; or indeed between several states including the ceding and the cessionary state. The latter has often been the position where the cession is part of a peace settlement; for a cession may have been the outcome of peaceable negotiations or war, and may be with or without compensation, although certain duties may be imposed on the acquiring state …*
> *Cessions of territory have often been part of a treaty of peace imposed by the victor. A treaty imposed by certain kinds of force is now subject to the rule expressed in article 52 of the Vienna Convention on the Law of Treaties, that the treaty is void 'if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations'; past treaties of cession must however be subject to the principle of inter-temporal law.*

Examples of cession include: Austria ceding Venice to France and in turn France ceding the territory to Italy in 1866; purchase of Alaska by the United States from Russia in 1867; Spain sold the Caroline islands to Germany in 1899; Sweden ceded Wismar to Mecklenburg in 1803; sale by Denmark to the United States of territories in the West Indies in 1916; and the transfer of sovereignty over the Crown Colony of Hong Kong by the UK to China with effect from 1 July 1997 following the Joint Declaration of 1984.

Cession by plebiscite was also adopted in a number of cases in Europe. The Treaty of Versailles of 1919 contained articles allowing for the populations of Euben and Malmedy,[53] the Saar basin,[54] part of upper Silesia,[55] and part of Schleswig[56] to determine the state to which they would belong.

It should also be noted that amendments to a state's constitution or domestic law, even the adoption of an entirely new constitution, does not affect the legal personality of a state in international law. Domestic law cannot abolish existing nor create new rules of international

[51] *Island of Palmas Case*, Court of Permanent Arbitration, Hague Court Reports, 2d 83 (1932).
[52] *Oppenheim's International Law*, (9th ed, OUP, 2008) vol I, p 680.
[53] Art 34.
[54] Art 49.
[55] Art 88.
[56] Art 94.

law. Similarly, the unification of two states will normally create a new state only where the two states have such an intention.

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; change in the status of St. Pierre-et-Michelon from French overseas territory to overseas department; Algerian independence from France; German reunification in 1990; and a revised border agreement between Belgium and the Netherlands in 2018. Member States are free to define their own borders in accordance with the generally accepted principles of international law. The Treaties apply throughout the territory of the Member States,[57] subject to the provisions on the association of overseas countries and territories.[58]

The EU engaged with the problem of partition on the island of Cyprus before and after accession. The 'Annan Plan' for confederation of two constituent states was rejected by Greek Cypriots in a referendum, though approved by Turkish Cypriot voters in the north. Nonetheless, the Republic of Cyprus became an EU Member State. Its position within the Union 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.[59] Union citizenship extends to all Cypriot citizens, and the country is allocated seats in the European Parliament on the basis of the population of the island as a whole.

The EU does not recognise the authority of the self-declared Turkish Republic of Northern Cyprus. Cross-border movement in persons, goods and services are covered in Regulation (EC) 866/2004. Financial aid is provided under Regulation (EC) 389/2006. Both pieces of legislation identify effecting reunification of the country as among their objectives as does Regulation

[57] Art 52 TEU; art 355 TFEU.
[58] Arts 198-204 TFEU.
[59] Art 1(1) of Protocol 10 to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which European Union is founded; *Official Journal* L 236, 23/09/2003 P. 0955 – 0955.

1311/2013.[60] This approach is a pragmatic response to the island's continuing division. It seeks to reconcile the requirements of the effectiveness, uniformity and certainty of Union with the possibility of reunification in the future. The Commission continues to update the Council and European Parliament in respect of progress towards reunification and the implementation.[61]

There is also evidence of a general, if not universal, observance of international law in the approach of the institutions. However, on occasion the CJEU has been fierce in its protection of the autonomy of EU law. In the joined cases of *Kadi and Al Barakatt International Foundation v. Council and Commission*,[62] the CJEU identified a significant qualification to this principle of adherence to international law. EU Regulations, said to be based on rules of international law including resolutions of the UN Security Council, must be consistent with the 'principles that form part of the very foundations of the Community legal order'.[63] In that case restrictive measures which froze the financial assets of individuals suspected of links to Al-Qaeda were not sufficiently detailed and specific to allow effective exercise of the rights of the defence and judicial review of the lawfulness of the sanctions. Consequently, they were contrary to the Treaties and had to be annulled.

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 UN Charter identifies respect for it as one of the fundamental purposes of the organisation. The adoption of Resolution 1514 (XV)[64] and Resolution 2625 (XXV)[65] by the UN General Assembly, placed this principle at the centre of international relations for much of the second half of the 20th century:

> *The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.*

[60] Council Regulation No. 1311/2013 of 2nd December 2013 laying down the multiannual financial framework for years 2014-2020.
[61] COM (2019) 323 Final of 5th July 2019; COM (2018) 487 Final of 22nd June 2018.
[62] Cases c-402/ and c-415/05.
[63] *Kadi*, para 304.
[64] Entitled 'Declaration on the Granting of Independence to Colonial Countries and Peoples', of 14th December 1960.
[65] Entitled 'Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in accordance with the Charter of the United Nations' of 24th October 1970.

The right is given further expression in article 1 of the International Covenant on Civil and Political Rights 1966, and article 1 of the International Covenant on Economic, Social and Cultural Rights 1966.

> *Article 1*
> *1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*
>
> *2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.*
>
> *3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.*

The right to self-determination was not considered to be part of international law before the adoption of UN Charter.[66] While its existence and importance are now beyond dispute, it is the application of the rule which sometimes causes controversy. The exercise of the right was initially recognised as applying to all peoples in all colonial territories.[67] Since 1960 the right has not been expressly confined in any international or regional treaty to the colonial context. State practice has shown an acceptance of the right in the dissolution of the USSR and Yugoslavia. A further example is found in the Treaty on the Final Settlement of Germany of 12th September 1990, which provided:

> *The Federal Republic of Germany, the German Democratic Republic, the French Republic, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America …*
> *Resolved in accordance with their obligations under the Charter of the United Nations, to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace …*

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[66] *Report of International Committee of Jurists in the Aaland Islands Case*, LNOJ Special Supp, No. 3, p5 (1920) and Oppenheim Vol I, p 282.
[67] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* notwithstanding Security Council resolution 276 (1970) (1971) ICJ Rep 16; *Western Sahara Case* (1975) ICJ Rep 12.

> *Welcoming the fact that the German people, freely exercising their right of self-determination, have expressed their will to bring about the unity of Germany as a state so that they will be able to serve the peace of the world as an equal and sovereign partner in a united Europe …*

It can now be described as applying to all states, not just colonial powers, and as having obtained the status of *erga omnes.*[68] Such an obligation should also be considered to be binding upon international organisations such as the EU and its Member States. An obligation of this character has been described by the ICJ in the following terms[69]:

> *33.... An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.*
>
> *34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character.*

The principle of self-determination has also been described as having both an external and internal aspect. The former can be affected through independence from a former colonial power, merger with an existing state or secession from an independent state. The latter aspect requires change in the internal constitutional arrangements and administrations within a state but not necessarily in the external relationships between sovereign states. Examples could include devolution, regional autonomy or federalism. In what is widely considered to be an accurate summation of the concept, in *Reference Re Succession of Quebec* the Canadian Supreme Court said the following[70]:

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[68] *East Timor Case (Portugal v Australia)* (1995) ICJ Rep 90, para 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion (2004) para 88; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* ICJ Advisory Opinion (2019), para 180: 'Since respect for the right to self-determination is an obligation *erga omnes*, all States have a legal interest in protecting that right …'

[69] *Belgium v Spain (Second Phase)* ICJ Rep 1970 3 at para 33.

[70] (1998) 2 SCR 217.

126. The recognised sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination – a people's pursuit of its political, economic, social and cultural development within a framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right of unilateral secession) arise in only the most extreme of cases and, even then, under carefully defined circumstances.

127. The international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states. The various international documents that support the existence of a people's right to self-determination also contain parallel statements supportive of the conclusion that the exercise of such a right must be sufficiently limited to prevent threats to an existing state's territorial integrity or the stability of relations between sovereign states.

The right to self-determination is not absolute, and can be made subject to the principle of *uti possidetis juris*,[71] rights of others in the population, territorial integrity of sovereign independent states and the prohibition on the use of force in article 2(4) of the UN Charter.

The CJEU acknowledged the importance of the principle of self-determination within the EU legal order in the case of *Council v. Front Polisario*[72]:

> *… the customary principle of self-determination referred to in particular in art.1 of the Charter of the United Nations is, as the International Court of Justice stated at paras 54–56 of its Advisory Opinion on Western Sahara, a principle of international law applicable to all non-self-governing territories and to all peoples who have not yet achieved independence. It is, moreover, a legally enforceable right erga omnes and one of the essential principles of international law (East Timor, (Portugal v Australia), judgment, ICJ Reports 1995, p.90, para.29 and the case law cited).*
>
> *As such, that principle forms part of the rules of international law applicable to relations between the EU and the Kingdom of Morocco, which the General Court was obliged to take into account.*

This case should be taken as authority for the proposition that the EU recognises the international law position on self-determination. Respect for this fundamental human right is a duty of the institutions and Member States. There has been some legitimate criticism of the extent to which the EU respects the right to self-determination when the exercise of that right

[71] States emerging from colonial administrative control obliged to accept pre-existing colonial boundaries in the interests of international peace and security and stability.
[72] *Council v. Front Polisario* (2017) 2 CMLR 28, paras 88-89.

is not accommodated by their national constitutional arrangements.[73] Alfred De Zayas, independent UN expert, characterised the current denial of self-determination as a violation of three of the founding pillars of the EU – human rights, rule of law and democracy.[74]

In the case of Irish reunification, the right to self-determination has been expressly acknowledged by the UK and Ireland in the GFA. The process by which it will be delivered, and precise form it shall take, has been agreed. It will see the jurisdiction of N. Ireland leave the UK and form part of a sovereign united Ireland. This outcome can only occur following successful referendums in both jurisdictions on the island.

Consequently, much of the controversy surrounding the scope of the principle should not arise in this context. Instead, what is required from the EU and its institutions is a clear recognition of the relevance of the principle in its protection of rights and democratic values, and in its construction of the future relationship between the UK and the EU. Should Brexit occur in the near future, there will exist a body of EU citizens outside the territory of the Member States who will be deprived of many of the tangible benefits of EU law which accompany that status. In that context, the right to self-determination, recognised as an *erga omnes* obligation in international law and read with agreed GFA processes between Ireland and the UK, should be at the forefront of its approach and policies.

The choice to effect unity or continue partition is one for the people of the island of Ireland. But the existence of that right in international law imposes duties on all states in the international legal order and on the EU. Article 1(1) of the Protocol on Ireland/N. Ireland to the Withdrawal Agreement emphasises the importance of the principle of consent under the GFA, and repeats that any change in the constitutional status of the jurisdiction can only be made with the consent of the majority of its people. The corollary to such a principle is the

[73] Nicolas Levrat, *The Right to National Self-Determination within the EU: A Legal Investigation*, EUBorders Working Papers, Series 8 (September 2017).
[74] https://ideasforeurope.eu/news/eu-is-based-on-democracy-rule-of-law-human-rights-when-you-ignore-self-determination-you-ignore-all-three-says-de-zayas/. For pre-GFA reflection on the Irish context see, Richard J Harvey, 'The Right of the People of the Whole of Ireland to Self-Determination, Unity, Sovereignty and Independence' (1990) 11 NYL Sch J Int'l & Comp L 167 and also, following the Agreement, Christine Bell and Kathleen Cavanaugh, ' "Constructive Ambiguity'' or Internal Self-Determination? Self-Determination, Group Accommodation, and the Belfast Agreement' (1998) 22 Fordham Int'l LJ 1345. See also, Colm Campbell, Fionnuala Ní Aoláin and Colin Harvey, 'The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland' (2003) 66 Modern Law Review 317.

opportunity and right to seek and achieve reunification. In our view, there is a duty to acknowledge, respect and give effect to that right to self-determination. Those who will be offered that choice are (currently) EU citizens. It is incumbent on the EU and its institutions to make such preparations as are reasonably necessary now.

Reunification of Germany and the Lessons for Irish Reunification

The experience of German unification is instructive both in terms of law and politics. It serves as an example of how unification of a partitioned nation can be achieved consistent with international law, democratic principles and a Member State's obligations under the Treaties. This account attempts to identify the most important events leading to reunification, and the legal environment in which they occurred.

The Potsdam Conference of 1945 established four zones of military occupation by the Allied powers. Former German territory east of the Oder-Neisee line was transferred to Poland and the Soviet Union pending a final peace treaty. Initially, at least, the occupying powers would have expected a united Germany to coalesce and emerge as a member of the UN. However, the politics and the general climate of the Cold War prevented such an outcome.

Instead, in 1949 the states of the Federal Republic of Germany (FRG) and German Democratic Republic (GDR) emerged. The former was a parliamentary constitutional democracy with a capitalist economy while the latter was a socialist republic with a centrally planned economy, which severely limited private enterprise.

West Germany was a founding member of the European Communities in the 1950s. It became a NATO member in 1955. East Germany had co-ordinated its economic policies with the Soviet Union and other eastern bloc states in the Council for Mutual Economic Assistance (CMEA). It was a founding member of the Warsaw Pact.

The western Allied powers had reserved rights in the FRG. The new state's sovereignty was limited in respect of the status of Berlin, reunification and a final peace treaty. In 1952 Britain,

France and the USA committed to working with the FRG to achieve a unified and liberal-democratic Germany integrated within the European Community.[75]

However, the special relationship between west and east Germany was recognised in a number of ways. First, intra-German trade was considered a domestic matter by the FRG. Second, the Basic Law of the FRG imposed a binding constitutional obligation on the state to work towards reunification. Article 23(2) provided the accession method, while article 146 contemplated the adoption of a new all-German constitution by which this could be achieved. Third, the population of the GDR was entitled to citizenship of the FRG and could avail of the rights that status conferred when present in the west.

The ambition to achieve reunification also featured in the FRG's participation in the European Communities. The Treaty of Rome contained a declaration from the German delegation that:

> *The Federal Government proceeds from the possibility that in case of a reunification of Germany a review of the Treaties on the Common Market and EURATOM will take place.*

FRG citizenship law allowed for all Germans, including those in the east, to be considered citizens of the FRG, and thereby benefit from the economic rights contained in the free movement provisions. There was also a protocol on German Internal Trade which modified the original article 227(1) EEC.[76] It provided that the existing system of cross-border trade in Germany could continue and would be considered a German domestic matter. The agreement of the Commission to all such measures was required but never refused. The Member States were permitted to take appropriate measures to prevent difficulties that might arise for them. During this period the GDR maintained its ideological opposition to capitalist integration in western Europe. However, cross-border German trade continued and provided economic benefits.

The peaceful revolution of October and November 1989 heralded the end of the ruling SED party in east Germany. The Berlin Wall came down on the night of the 9th – 10th November 1989. On the 28th November 1989, Chancellor Kohl proposed eventual federation between

[75] Art 7(2) of the Convention on Relations between the Three Powers and the Federal Republic of Germany (General Treaty), signed at Bonn on 26th May 1952.
[76] Protocol on German Internal Trade and Connected Problems of 25th March 1957 – made an integral part of the Treaty by virtue of art 239 EEC.

the two states in his famous 'Ten Point Program for the Overcoming of the Division in Germany and Europe'. On the 1st December 1989 the GDR parliament rescinded the clause in the constitution which defined the country as a socialist state under the leadership of the SED. The Treaty on the Final Settlement with respect to Germany was signed by the 'two plus four' states in Moscow on the 12th September 1990. German unification occurred on the 3rd October 1990.

Any comprehensive account of the extraordinary sequence of events that led to a reunited Germany as a member of the then European Communities is beyond the scope of this work. Instead, it is considered as one example of the approach of the Member States and the institutions to the exercise of self-determination by citizens of the (then) European Communities. The endeavour had the benefit of a readily available constitutional path to unity in the German constitution, the support of external superpowers and European governments, and the political leadership of Chancellor Helmut Kohl. The greatest credit should, of course, go to the true protagonists of the story – the German people. But another feature is the support of the European institutions.

Prior to the dramatic events of autumn 1989 there was no real European policy on German unification. The EC institutions, and Member State governments, did not regard the issue as an immediate priority. Of much greater import at this time were the reforms necessary to establish the internal market. This was to change, however, when faced with the prospect of overwhelming demand for unification through self-determination. The goals of German unity and establishment of the internal market were to run in parallel.

The European Parliament adopted a resolution on the general situation in central and eastern Europe.[77] It called for respect for human rights, the right to self-determination, support for integration, pluralist democratic politics and security based on existing borders. In respect of German unity, it stated that the EP:

> *Considers that the people of the GDR should be entitled to exercise their right to self-determination, i.e. their right to determine which political and economic system should be developed and which form their state should take, including the possibility of forming part of a unified Germany within a united Europe;*

[77] EP Resolution of 23rd November 1989, OJ C323 of 27th December 1989, pp 109-111.

The European Council, the voice of the national governments, was the next institution to endorse the possibility of German reunification. At the Strasbourg summit of the 8th and 9th December 1989 the conclusions of the President of the European Council were that:

> *We seek the strengthening of the state of peace in Europe in which the German people will regain its unity through free self-determination. This process should take place peacefully and democratically, in full respect of the relevant agreements and treaties and of all the principles defined by the Helsinki Final Act, in a context of dialogue and East-West cooperation. It also has to be placed in the perspective of European integration.*

In a speech to the European Parliament on the 17th January 1990 the European Commission President Jacques Delors indicated further political and institutional support for German unification:

> *East Germany is a special case … there is a place for East Germany in the community should it so wish.*

The European Commission set up working groups and received a mandate to establish a task force. In February 1990, the European Parliament formed a temporary committee to consider the impact of the process of German unification on the European Community. It contained 20 members and was chaired by Alan John Donnelly MEP. The committee first met on the 1st March 1990 and identified priorities and defined working methods. It collected information from relevant political actors, held meetings that were attended by members of the Commission and representatives of national governments, and consulted with other parliamentary committees.

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'. In summary, the principal matters of agreement were:

- German unification was to be achieved through three stages identified by the Commission: (i) an interim adjustment stage beginning with the introduction of inter-German monetary union, accompanied by a number of social and economic reforms in the GDR; (ii) a second transitional stage, beginning with the formal

unification of the two Germanys; and (iii) a final stage corresponding to the full application of Community legislation.

- The Community would ensure that the integration of the territory of the German Democratic Republic into the Community was accomplished in a smooth and harmonious way. The European Council was satisfied that this integration would contribute to faster economic growth in the Community, and agreed that it would take place in conditions of economic balance and monetary stability.
- The integration would become effective as soon as unification was legally established, subject to the necessary transitional arrangements. It would be carried out without revision of the Treaties.
- During the period prior to unification, the Federal Government would keep the Community fully informed of any relevant measures discussed and agreed between the authorities of the two Germanys for the purpose of aligning their policies and their legislation. Furthermore, the Commission would be fully involved with these discussions. In this period the German Democratic Republic would benefit from full access to the European Investment Bank, Euratom and ECSC loan facilities, in addition to Community support in the context of the coordinated action of the Group of 24 countries and participation in Eureka projects.
- As regards the transitional arrangements, the Commission would as soon as possible, and in the context of an overall report, submit to the Council proposals for such measures as were deemed necessary, and the Council would take decisions on these rapidly. These measures, which would enter into force at the moment of unification, would permit a balanced integration based on the principles of cohesion and solidarity and on the need to take account of all the interests involved, including those resulting from the *acquis communautaire*.
- The transitional measures would be confined to what is strictly necessary and aim at full integration as rapidly and as harmoniously as possible.

From a legal perspective, the critical aspect was the view of the Commission, and accepted by the European Council, that German unification would not equate to the accession of a third state to membership of the Communities. Consequently, the accession procedure then contained in article 237 EEC would not apply. The Treaties would not have to be amended,

and the consent of the European Parliament and the other Member States, through their own national ratification procedures, was not required. The automatic extension of EC law was based on the international law principle of moving treaty boundaries. It was considered consistent with precedents of territorial expansion and the articles which provide that the Treaties apply to the whole of a Member State's territory.[78] No third state, including the nations of CMEA, objected to this approach.

The Council also accepted the Commission view that reunification meant that the Treaties, all secondary legislation and international treaties concluded on behalf of the Communities would automatically apply in the territory of the former GDR. The treaties entered into by the GDR with third states presented difficulties, but this was to be addressed through denunciation by the GDR, re-negotiation and limited derogations.

For its part, the FRG agreed not to seek any additional members of the European Commission nor an increase in its weighted voting power within the Council of Ministers. The question of additional MEPs for increased German population was eventually resolved through granting observer status to 18 representatives from the former GDR until the European Parliamentary elections of 1994.

A further summit in Dublin on the 25th-26th June 1990, this time attended by the democratically elected Prime Minister of GDR Lothar de Maizière, noted the progress made, and welcomed the Treaty between the FRG and GDR establishing a monetary, economic and social union of the 18th May 1990. This instrument resulted in the GDR aligning its laws with that of the Communities in a range of subject areas – economic, trade, agricultural and political. As Giegerich states:

> *But the GDR also underwent a total remodelling of its political system when it agreed to introduce a free, democratic, federal and social basic order governed by the rule of law and to abolish all constitutional provisions to the contrary…*
> *… the GDR could by constitutional amendment transfer sovereign powers to inter-governmental institutions and institutions of the Federal Republic or consent to limitations upon its rights of sovereignty.*

[78] Unless exceptions have been agreed in the Treaties themselves. Art 79 ECSC, art 227(1) EEC, art 198 EURATOM.

> *Finally, the GDR agreed to introduce a great number of laws of the Federal Republic already in line with Community law pertaining to currency, credit, money and coinage, competition, commerce and corporations and partnerships, workers' participation in management etc in full or in part ... Thus a considerable part of the acquis communautaire was adopted by the GDR before formal reunification …*
> *The GDR moreover had to adjust its entire legal system to the principles of a free democratic basic order and a social market economy.*[79]

In June 1990 the Schengen II Accord was signed and the state parties accepted that visa-free travel would also apply to the territory of the GDR. A customs union between the Community and the GDR came into effect on 1st July 1990. The East German parliament, the *Volkskammer,* passed a declaration of accession to the FRG on the 23rd August 1990. The Unification Treaty was signed by the two German governments in Berlin on the 31st August 1990. Unification was to take effect on 3rd October 1990.

Regulation (EEC) No. 2684/90[80] and Directive 90/476/EEC[81] were enacted to address the necessary interim measures. Together they delegated to the Commission considerable power to authorise derogations from existing secondary legislation by the FRG. Each of the legislative acts were deemed necessary as a result of the Council being unable to act in the timeframe available.[82] They were described as the result of extraordinary circumstances and could not be cited as precedent in the future.

Although socio-economic realities remain problematic, from the vantage point of 2019, the legal and political process of reunification and its integration in the EU must, by any fair measure, be considered a success. Both the EU and Germany have benefited from its coming to pass in a peaceful and democratic manner. The constitutional obligation to work towards unity was achieved. It occurred within a unique international framework. It remains an impressive example of the principle of national self-determination made real within a relatively brief period of time. It was primarily driven by the ambition and desire of the

[79] Thomas Giegerich, 'The European Dimension of German Reunification: East Germany's Integration into the European Communities' ZaöRV 51/1991, 384 – 450, pp 435-436 https://www.zaoerv.de/51_1991/51_1991_2_a_384_450.pdf.
[80] On interim measures applicable after the unification of Germany, in anticipation of the adoption of transitional measures by the Council either in cooperation with, or after consultation of, the European Parliament, 17th September 1990.
[81] On interim measures applicable after the unification of Germany, in anticipation of the adoption of transitional measures by the Council in cooperation with the European Parliament, 17th September 1990.
[82] Art 1 of each.

German people but external factors also made vital contributions. International support was, for example, present from the former Allied powers and Germany's European colleagues.
The European institutions can also claim much credit. They can be described as initially reactive rather than anticipating the move to unity, but it cannot be said that any of the institutions frustrated or delayed matters. Even within the context of progress towards the establishment of the internal market the institutions were consistent and accommodating in their support. The project received critical political and moral support at an early stage from the interventions of the European Parliament and the European Council. The Commission's strong endorsement of the international law principle of moving boundaries and its practical assistance, for example, in identifying those aspects of applicable EC law that would require transitional arrangements together with the provision of effective answers, was helpful. Also, the acceptance by all the institutions of the need to delegate some measure of legislative power to the Commission in certain subject areas should be recognised as a pragmatic concession to the effective exercise of the right to self-determination in a contextually sensitive way.

There are some important lessons for Irish unity. The first is that all relevant parties recognised German reunification as an exercise in self-determination by the German people. This right is a fundamental element of the international legal order and had to be respected. In the context of Irish unity, successful referendums, pursuant to the GFA, will assume a formidable democratic legitimacy which should not subsequently be frustrated. It will be seen as an exercise in self-determination which must be accommodated within the EU's legal order.

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 the East German Lander joining the Federal Republic is explicit, just as the possibility and process for the reunification of Ireland is, following the GFA amendments in 1998. 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 of 2017. It could not have been possible without consensus among the 27 Member States.

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) Communities 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 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. The European Council has already accepted this approach, and clearly signalled that a reunified Ireland would not be viewed as a new Member State. Treaty revision will not be necessary.

Fourth, the institutions and Member State governments were consistent in their view that German unification could be accommodated alongside existing priorities – principally the establishment of the internal market. It would be neither wise nor necessary to delay or significantly alter the direction of the project. Where difficulties arose this was addressed through transitional arrangements and derogations for Germany in respect of the east of the state rather than a comprehensive redrawing of the rules of the establishment and functioning of the internal market. Commission supervision and assistance was provided alongside safeguards for the other Member States.

In the context of Irish unity, it must be assumed that 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 in respect of goods, services, persons and capital will be relevant, but it must be assumed that any such divergence, particularly in respect of N. Ireland should specific arrangements ultimately be agreed in any withdrawal agreement, will not be as dramatic as existed between east and west Germany in 1990. Also, the population of N. Ireland is quite small compared to that of the GDR at the time of unification.[83] It should not be necessary for Ireland to seek significant derogations from the bulk of the rules of the internal market. What may be necessary, however, is specific temporary solutions to its obligations under economic and monetary union, in addition to greater rights in EU law for British citizens resident in a united Ireland.

[83] The population of GDR in 1990 was approximately 16.1m while the current population of N. Ireland is approximately 1.8m.

Institutions of the European Union

Article 13 TEU identifies seven institutions of the EU. The relationship between these institutions is not directly comparable to that of any of its Member States. The traditional separation of powers between executive, legislative and judicial branches of government is not replicated at the supranational level. Instead, the Union architecture is sometimes described as a balance of interests between the Union, its Member States and its citizens. The Commission, the Council of Ministers and the European Parliament can be described as the dominant actors.

European Parliament

The European Parliament comprises of directly elected representatives of the Union's citizens.[84] It exercises legislative and budgetary functions as well as ensuring political control and consultation in accordance with the Treaties.

The institution utilises a system of degressive proportionality, which allocates members, in part, in relation to the size of a Member State's population. Significant variations between Member States exist however. At the present time the population of the island of Ireland is represented in the 9th European Parliament by three MEPs elected from N. Ireland and eleven MEPs from the Republic. An additional two MEPs have been elected from the jurisdiction of the Republic but are yet to take their seats due to the delay in the UK's departure from the Union.

The current European Parliament electorate in the Republic is approximately 3.5m, while the electorate in N. Ireland is around 1.3m. In the event of a united Ireland the total voting population would amount to approximately 4.8m. This would place Ireland alongside the Member States of Slovakia, Finland and Denmark in terms of population size. Each Member State was allocated 14 seats in the Parliament under the 2018 revisions. Consequently, in order to remain consistent with the Union's principles of representative democracy and equality of citizens it would seem necessary to allocate 14 MEPs to a united Ireland.

[84] Art 14(2) TEU.

Article 232 TFEU requires the institution to manage its own affairs through the adoption of rules of procedure. The EP has published a compendium of the main legal acts related to the rules of procedure for the 2019-2024 term.[85] Chapter V of the Rules of Procedure concerns Resolutions and Recommendations. Rule 143 permits any member to table a motion for resolution on a matter falling within the spheres of activity of the EU. Rule 144 allows for debates on cases of breaches of human rights, democracy and the rule of law.

Much of the day-to-day work of the European Parliament is carried out in committees. In the case of legislative proposals, or other measures which the institution considers, a rapporteur will be appointed. They will be responsible for drafting the EP's response. Article 230(2) requires the Commission to respond orally or in writing to parliamentary questions put to it by the EP or its members.

Article 50 TEU sets out the procedure by which a Member State can withdraw from the EU. Any withdrawal agreement between the EU and the departing Member State requires the approval of the Council, acting by qualified majority voting, but also the consent of the European Parliament. Since the notification by the UK of its intention to withdraw, the European Parliament has contributed to the negotiations in a number of ways. On the 5th April 2017 it adopted a resolution which sets out its conditions for the final approval of any UK-EU withdrawal agreement.[86] The resolution acknowledged the importance of the GFA and stated that the Parliament was:

> *… especially concerned at the consequences of the United Kingdom's withdrawal from the European Union for Northern Ireland and its future relations with Ireland; whereas in that respect it is crucial to safeguard peace and therefore to preserve the Good Friday Agreement in all its parts, recalling that it was brokered with the active participation of the Union, as the European Parliament emphasised in its resolution of 13 November 2014 on the Northern Ireland peace process.*
> *Recognises that the unique position of and the special circumstances confronting the island of Ireland must be addressed in the withdrawal agreement; urges that all means and measures consistent with European Union law and the 1998 Good Friday Agreement be used to mitigate the effects of the United Kingdom's withdrawal on the border between Ireland and Northern Ireland; insists in that context on the absolute*

[85] http://www.europarl.europa.eu/sipade/rules/compendium/Compendium_EN.pdf.
[86] European Parliament resolution of 5th April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union (2017/2593 RSP).

need to ensure continuity and stability of the Northern Ireland peace process and to do everything possible to avoid a hardening of the border.

Resolutions on UK withdrawal from the EU were also adopted on the 3rd October 2017, 13th December 2017, 14th March 2018 and 18th September 2019, reaffirming the importance of respect for the GFA *in all its parts* – including, of course, the provisions on reunification.[87]
The Parliament has also set up a Brexit steering group, coordinated by Guy Verhofstadt. The group guides the Parliament's approach to Brexit and co-ordinates with parliamentary committees to prepare resolutions for debate.

In November 2017, Parliament's Constitutional Affairs Committee (AFCO) obtained a report from the Directorate General for Internal Policies entitled 'Brexit and the Good Friday Agreement'.[88] It examined ways in which, through differentiation and 'flexible and imaginative solutions', the Agreement can be upheld and the context for its effective implementation maintained.

Parliament must approve the final conclusion of any withdrawal treaty.[89] In the case of accession of a new Member State to the Union under article 49 TEU Parliament must give its consent. Such consent is not required, however, in the case of Member State enlargement or altered territorial borders.

The Parliament must also provide its consent to the conclusion of international agreements under articles 207 TFEU or 217 TFEU in a number of circumstances[90] – the most important of which being in those policy areas covered by the ordinary legislative procedure. Since this requirement will likely apply to any future international agreement between the EU and a post-Brexit UK, it is reasonable to expect the establishment of a steering group similar to that coordinated by Mr Verhofstadt during that process. Such a group should be encouraged to highlight the centrality of the right to self-determination in Ireland to the European

[87] European Parliament resolution of 3rd October 2017 on the state of play in negotiations with the United Kingdom (2017/2847 RSP); European Parliament resolution of 13th December 2017 on the state of play of negotiations with the UK (2017/2964 (RSP); European Parliament resolution of 14th March 2018 on the framework of the future EU-UK relationship (2018/2573 RSP).
[88] 'UK Withdrawal ("Brexit") and the Good Friday Agreement', Policy Dept for Citizens' Rights & Constitutional Affairs, Dir. General for Internal Policies of the Union, PE 596.826 (November 2017), David Phinnemore and Katy Hayward.
[89] Art 50(2) TEU.
[90] Art 218(6) TFEU.

Parliament. This would be consistent with the Union's stated policy of incorporating human rights concerns in its external trade relations, and its formidable defence of the GFA in all its parts.

In advance of the holding of referendums on the island of Ireland in respect of reunification, the European Parliament can continue to demonstrate its support for the self-determination provisions of the GFA by adopting resolutions promising the institution's support for a united Ireland in the EU. This can also be achieved by thematic Committees preparing reports on different aspects of reunification, and submitting questions and requests to the European Commission to compile the necessary research.

As set out elsewhere, it was the European Parliament which took the initiative in pledging the support of the (then) Communities and its peoples for German unification. This provided vital democratic legitimacy for the project. The Parliament holds distinct moral and political authority within the Union's constitutional makeup due to the fact that its members are directly elected. The Parliament has a special responsibility to protect the interests of EU citizens. This extends to democratic rights, such as the right to vote and the right to self-determination in accordance with international law and the provisions of the GFA.

In the likely event of UK ending its membership, there will exist on the island of Ireland a relatively large body of Irish and EU citizens without a mechanism to allow for direct participation in the democratic life of the body. At present Irish citizens not resident in the state are excluded from the franchise for the Dáil.[91] They will also lose the right to vote in European Parliament elections, as Ireland does not currently provide for external voting in this context either.[92] Consequently, such citizens will be excluded from national elections to the Oireachtas, from whose members the government is formed, and from the European Parliament. This means that these citizens will not be represented indirectly in the Council of Ministers or directly in the Parliament pending reunification. With respect to Irish citizens in N. Ireland in particular, there is something profoundly concerning about this situation.

[91] Art 16 of the Constitution read together with section 111 of the Electoral Act (1992) (as amended).
[92] Art 29 of the Constitution read together with section 9(1) of the European Parliament Election Act (1997).

While it is primarily a matter for the Member States as to how they give effect to the right to vote in national and European Parliamentary elections, this is subject to the principles of representative democracy and equality of citizens. Most Member States do make provision for external voting, and Ireland can be seen as an outlier in this regard. The European Parliament has previously voiced concerns about exclusions of this type.[93]

The question of voting rights for EU citizens outside of the territory of the EU is one which the European Parliament should consider. Those citizens also have a right to self-determination and to pursue a route back to full membership of the EU through the GFA. This must also take full account of the rights of British citizens resident in N. Ireland also.

It is suggested that the European Parliament should begin to undertake work on the implications for the EU of Irish reunification now, for the reasons noted above. This could include consideration of:

- The European Parliament's endorsement of the European Council statement of 29th April 2017.
- The responsibilities of the institutions with respect to the right to self-determination in Ireland.
- The level of representation for a reunified Ireland in the Parliament.
- The benefits of establishing a working group to assist the EU in its negotiations with the UK on the future UK-EU relationship under article 207 or article 217 TFEU, which includes consideration of the right to self-determination.
- Voting rights for EU citizens and British citizens resident on the island of Ireland if and when the UK terminates its membership prior to reunification
- Free movement rights for British citizens resident on the island of Ireland who continue to avail of their right to British citizenship in perpetuity.
- The implications for economic and monetary union for Ireland, the other Member States and supervising institutions in the event of Irish unity.
- The necessity and scope of transitional arrangements and derogations for Ireland in the immediate aftermath of Irish unity.

[93] European Parliament Resolution of 11th November 2015 on Reform of Electoral Law of the European Union (2015/2035 INL).

- The implications for the EU's legislative processes in the event that delegated powers are conferred on the Commission, as occurred in the context of German reunification.

The particular working structures which undertake this work is something best left to the discretion of the Parliament, but it is suggested that a Temporary Committee to examine the impact of the process of reunification on the EU would be best placed to have an overview of the issues involved, drawing on the expertise of other Committees as necessary. The Legal Affairs Committee may be best placed to consider the reunification position under international and EU law, while the Economic and Monetary Affairs Committee should address economic matters. The institutional reforms contemplated, such as an increase in Irish MEPs, would benefit from the experience and expertise of the Constitutional Affairs Committee. The Parliament should give enhanced consideration of how it will ensure that the voices and perspectives of those living in N. Ireland are included in these considerations.

European Commission

The Commission exercises a great deal of executive and administrative power, and arguably comes closer than any other one institution to being the executive of the Union. It is clearly more than an international secretariat. It is the formal initiator of legislation, manages EU competition policy, represents the EU in trade negotiations and is entrusted by the Treaties with ensuring the faithful application of Union law by the Member States. It is also very influential in the Union's policy-making process, and absolutely fundamental to managing implementation.

The Commission comprises of a commissioner from each Member State. The current Commission President Jean-Claude Juncker will be succeeded by Ursula von der Leyen on the 1st November 2019. The remaining Commissioners are allocated portfolios for defined subject areas.[94] The Commission is divided into Directorates General headed by a Director-General responsible to the Commissioner. There are also specialist services such as the Legal Service, which provides legal advice and assistance to all Directorates General.

[94] Art 248 TFEU.

The Commission exercises those powers entrusted to it by the Treaties. Article 17(1) TEU identifies its primary functions as:

- Promoting the general interest of the EU and taking appropriate measures to that end.
- Ensuring the application of the Treaties and measures giving effect to them.
- Overseeing the application of EU law (under the control of the CJEU).
- Executing the budget and managing programmes.
- Ensuring the Union's external representation (subject to the role of the High Representative of the EU for Common Foreign and Security Policy).
- Initiating the Union's annual and multi-annual programming.

The Commission adheres to the principle of collective responsibility. Simple majority vote is sufficient for the institution to adopt a position, but the more common approach is consensus. There is much academic work attempting to analyse how the institution takes decisions and the possible role played by national interests, as well as the political and ideological affiliations of individual Commissioners and the Commission as a whole.[95]

The Commission established the N. Ireland Task Force in 2007. It operated under the authority of the Commissioner for Regional Policy. Its aim was to examine how N. Ireland could benefit more fully from EU policies and effectively participate in the EU policy process. The existence of the Task Force is described as representing a 'first for the Commission in terms of the formation of a close partnership specifically with one region covering several key policy fields'.[96]

The Commission set up a task force on article 50 negotiations with the UK (TF50). It was to co-ordinate the European Commission's work on all strategic, operational, legal and financial issues related to the negotiations. It draws on support from all Commission services. The chief negotiator is Michel Barnier. TF50 has, to date, demonstrated laudable appreciation of the importance of N. Ireland for the process and the nuances of the GFA.

[95] Robert Thompson, *Resolving Controversy in the European Union: Legislative Decision Making Before and After Enlargement* (CUP, 2011), ch 4 'The European Commission's Policy Positions'.
[96] https://ec.europa.eu/regional_policy/index.cfm/en/policy/themes/northern-ireland-peace-programme/

Both of these task forces have equipped the Commission with a good understanding of the politics and economics of N. Ireland. The continuation of such focus, with an emphasis on the right to self-determination, would be welcome. In respect of Irish reunification, following successful referendums, the expertise and administrative capacity of the Commission can assist in undertaking the preparatory work necessary.

In the context of negotiations between the EU and the UK on the nature of the future relationship under either articles 207 or 217 TFEU, the Commission is required to submit recommendations to the Council for authorising the commencement of negotiations.[97] Given the importance of the principle of self-determination in the international legal order, and the Union's respect for democratic principles, it should consider the express inclusion of provisions protecting the right to vote for Irish reunification as contained in the GFA.

It is suggested that the Commission should:

- Through its Legal Services produce an opinion on the position of Irish reunification under EU law in the light of the statement of the European Council on the 29th April 2017. This was of undoubted assistance to the other institutions and Member State governments during 1990, in advance of German unification.
- Examine the responsibilities of the institutions towards respect for the right to self-determination in Ireland.
- Consider the publication of further recommendations concerning voting rights for EU citizens and British citizens resident on the island of Ireland if and when the UK terminates its membership prior to reunification.
- Consider the best legislative approach to ensuring that free movement rights are available for British citizens resident on the island of Ireland who continue to avail of their right to British citizenship in perpetuity in a united Ireland.
- Consider the inclusion of explicit provisions seeking to protect the right to self-determination in any recommendations submitted to the Council under the article 218 TFEU procedure.

[97] Art 218(3) TFEU.

- Consider the benefits of establishing a N. Ireland task force in the aftermath of Brexit which would include an emphasis on the consequence of the exercise of the right to self-determination.
- Explore the implications for economic and monetary union for Ireland, the other Member States and supervising institutions in the event of Irish unity.
- The necessity and scope of transitional arrangements and derogations for Ireland in the immediate aftermath of Irish unity.
- The implications for the Union's legislative processes in the event that delegated powers are conferred on the Commission as occurred in the context of German reunification.

European Council

The European Council comprises of the heads of government of the Member States, the President of the European Council (currently Donald Tusk, who will be succeeded by Charles Michel on the 1st November 2019), President of the Commission and the High Representative of the Union for Foreign Affairs.[98] The institution is tasked with providing the Union with general political guidance and momentum.[99] It is also responsible for oversight of Treaty reform and enlargement,[100] foreign policy making where appropriate[101] and policy monitoring.[102]

Variously described as a board of directors,[103] and the 'Queen Bee',[104] it is perhaps the most authoritative decision-making body of the EU. In the past it has been called upon to tackle the most difficult and politically sensitive issues. For example, it adopted the Union's guidelines in relation to the Brexit negotiations in April 2017,[105] while the negotiation was conducted by the Commission's Chief Negotiator Michel Barnier.

[98] Art 15(2) TEU.
[99] Art 15(1) TEU.
[100] Arts 48-50 TEU.
[101] Art 22 TEU; art 26.
[102] Art 68 TFEU; art 121 TFEU.
[103] Ian Bache, Stephen George and Simon Bulmer, *Politics of the European Union* (3rd edition, OUP, 2011) p 278.
[104] D. Curtin, *Executive Power in the European Union: Law, Practices and the Living Constitution* (OUP, 2009) pp 72-76.
[105] Special Meeting of the European Council (Art 50) (29th April 2017) – Guidelines.

Council of Ministers

The Council is the voice of the national governments in the Union's institutional architecture. It exercises legislative and budgetary functions, alongside the European Parliament, and policy-making and co-ordinating functions, as set out in the Treaties. Often referred to as the Council of Ministers it has different decision-making processes – the most common being the use of qualified majority voting. It meets in ten different configurations depending on the subject matter. Council meetings are attended by representatives from each Member State at ministerial level. The Council has its own General Secretariat staffed by permanent officials. It is divided into Directorates General, including a Legal Service, headed by a Secretary General.

In the context of negotiations with the UK on the nature of the future trading relationship, the Council assumes a central role. Article 207 TFEU concerns free trade agreements between the Union and a third state under the common commercial policy. This was the legal basis used in concluding agreements with South Korea,[106] Canada[107] and Singapore.[108] These agreements also contained essential elements human rights clauses. Article 217 TFEU governs what are often called Association Agreements between the Union and a third state. This latter category usually involves deeper and closer arrangements. Recent examples with human rights provisions include Association Agreements with Ukraine,[109] Georgia[110] and Moldova.[111] Article 218 TFEU sets out the procedure to be adopted by the Union in concluding such agreements. The Council authorises the opening of negotiations, adopts negotiating directives, authorises the signing of agreements and concludes them.[112] It also usually nominates the Commission as the Union negotiator. It can designate a special committee,

[106] Council Decision 2011/265/EU of 16th September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its member states and the Republic of Korea.
[107] Council Decision (EU) 2017/37 of 28th October 2016 on the signing on behalf of the European Union of the Comprehensive Economic and Trade Agreement between Canada and the European Union and its member states.
[108] Council Decision (EU) 2018/1599 of 25th October 2018 on the signing of the Free Trade Agreement between the European Union and Singapore.
[109] Association Agreement between the EU and its Member States, on the one part, and Ukraine of the other part of 21st March 2014.
[110]Association Agreement between the EU and EAEC and their Member States, on the one part, and Georgia, of the other part on 27th June 2014.
[111] Association Agreement between the EU and EAEC and their Member States, on the one part, and the Republic of Moldova, of the other part of 30th August 2014.
[112] Art 218(2) TFEU.

which the Commission must consult during the negotiations.[113] Prior to adopting the decision concluding the Agreement the Council must obtain the consent of the European Parliament in specific circumstances, including subject matter which falls under the ordinary legislative procedure such as the rules of the internal market.[114]

Throughout the process the Council acts by qualified majority vote unless the subject matter of the agreement comes within the field of a subject area which requires unanimity.[115] Given the expected scope and ambition of the future EU-UK trading relationship this manner of approval is the more likely. The future trading relationship, based on either article 207 TFEU or article 217 TFEU, may also qualify as a 'mixed agreement' should it touch on matters which fall under Member State competences.[116] That would mean that final ratification is subject to approval by each of the Member States in accordance with their own constitutional arrangements. This can mean that a number of legislatures within one Member State must consent.[117]

For the reasons addressed above, the protection of the GFA provisions on Irish self-determination should be included in the discussions on the future EU-UK trading relationship. The Council should consider the inclusion of explicit provisions seeking to protect the right to self-determination in any negotiating guidelines adopted under the article 218 TFEU procedure.

[113] Art 218(4) TFEU.
[114] Art 218(6)(a) read together with art 218(10) TFEU.
[115] Art 218(8) TFEU.
[116] CJEU Opinion 1/94 of 15th November 1994; CJEU Opinion 2/15 of 16th May 2017.
[117] For example, the EU-Canada Comprehensive Economic and Trade Agreement (CETA) was initially rejected by the Walloon region of Belgium.

Chapter III

Brexit, Irish Reunification and the Protection of Rights in the EU

A 'Cold House' for Rights: Brexit and the Consequences for Rights and Equality in the UK

Pulling the pillars of the Good Friday Agreement apart

Ireland is not leaving the EU, so it will continue to enjoy the guarantees and protections that attach to membership. As noted, the whole territory of a reunified Ireland will similarly attract these benefits, and that has been confirmed by the European Council.[118] The argument that runs through this report is that N. Ireland has a way to return to the EU in the event that Brexit takes place. Having established the role that the EU institutions might play in facilitating and supporting this work, this chapter concentrates on some of the human rights and equality implications.

One of the arguments raised during the Brexit negotiations was precisely that it would have serious consequences for human rights and equality in N. Ireland.[119] Much thought went into addressing these concerns, with the result that rights are explicitly referenced in the Protocol on Ireland/N. Ireland,[120] in addition to the sections of the Withdrawal Agreement dealing with citizens' rights.[121] It is plain that the Withdrawal Agreement and the Protocol would assist in mitigating the practical impact of Brexit on the island of Ireland, including in relation to citizens' rights, human rights and equality. But whatever form Brexit takes it will still leave N.

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[118] *Brexit summit: EU accepts united Ireland declaration*, 29th April 2017, https://www.irishtimes.com/news/world/europe/brexit-summit-eu-accepts-united-ireland-declaration-1.3066569.

[119] See, for example, BrexitLawNI, *Brexit, Human Rights and Equality* (2018); Human Rights Consortium, *Rights at Risk: Brexit, Human Rights and Northern Ireland* (2018); Christopher McCrudden, *The Good Friday Agreement, Brexit and Rights* (RIA – BA, 2017).

[120] Art 4: 1. The United Kingdom shall ensure that no diminution of rights, safeguards and 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. For comment see, Christopher McCrudden, *Brexit, Rights and the Ireland – Northern Ireland Protocol to the Withdrawal Agreement* (BA-RIA, 2018). See also, Dagmar Schiek, 'Brexit on the island of Ireland: beyond unique circumstances' (2018) 69 Northern Ireland Legal Quarterly 367.

[121] https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_0.pdf.

Ireland outside of the EU, as a region within a 'third country'. After Brexit, all those living in N. Ireland will be residing in a 'third country' for EU law purposes. One distinctive element (not the only one) that raises ongoing questions for the EU, in its approach to its citizens, is that the majority of people will either be or entitled to be EU citizens (by virtue of the provisions of Irish citizenship and nationality law, and the guarantees in the GFA). Combined with the challenges of protecting the GFA in this new environment, avoiding a hard border on the island of Ireland and defending existing all-island co-operation it is not difficult to see why many concluded that special arrangements were required and are still needed. The suggestion here is that the measures put in place for N. Ireland must also address, in much more detail, the implications of the self-determination provisions of the GFA for the future relationship between the EU and the UK.

The starting point is simply that retaining membership of the EU is the better long-term option, and thus thought is given here to how existing frameworks of protection might map onto the process of constitutional change that would lead to a return to the EU via the route of reunification. Brexit fundamentally damages basic pillars of the GFA, in ways that do not appear to be widely understood and will have an impact even in the event of Irish reunification. It cuts across the basic thinking and philosophy at the heart of the GFA, particularly as this relates to British and Irish identity and citizenship. Those who underplay this are profoundly mistaken, and the tendency to suggest there are no implications for the GFA is unhelpful. Some of the difficulties that Brexit creates are so fundamental that they may persist in a reunification scenario if thought is not given to this matter now and urgently by the EU and the UK.

Brexit as part of a larger agenda

Before noting the role of the EU, however, it must be underlined that its contribution should be located in context. The UK will remain bound by a range of international obligations on human rights, will still be a member of the Council of Europe and the UN, and will have domestic guarantees and institutions.[122] The difficulty is that none of these have the potential influence, impact and practical meaning that EU law does.[123] Remember that EU law trumps

[122] See information available here: https://www.ohchr.org/EN/Countries/ENACARegion/Pages/GBIndex.aspx
[123] For evidence of this see: *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62.

domestic law, and this means at present that UK courts are empowered to disapply primary legislation in cases of incompatibility.[124] Ireland also is bound by relevant international obligations,[125] and is a member of the Council of Europe and UN.[126] However, with respect to the UK, Brexit is part of a larger project that is hostile to human rights. Here it should be recalled that the Conservative Party Manifesto 2017 stated:

> *We will not bring the European Union's Charter of Fundamental Rights into UK law. We will not repeal or replace the Human Rights Act while the process of Brexit is underway but we will consider our human rights legal framework when the process of leaving the EU concludes. We will remain signatories to the European Convention on Human Rights for the duration of the next parliament.*[127]

The Conservative Party has a long-standing commitment to repeal and replace the Human Rights Act 1998 with a British Bill of Rights.[128] It has toyed with the idea of withdrawal from the European Convention on Human Rights, and expressed unease with the approach of the European Court of Human Rights.[129] The consequence is that Brexit will lead to enhanced uncertainty about the future of rights protection in the UK, some of which (but not all) would be reduced through the adoption of the Withdrawal Agreement and Protocol, and their effective domestic incorporation. However, because of the nature of the British constitution, and the primacy accorded to the legislative supremacy of the Westminster Parliament, there will always be a measure of uncertainty.[130] This might be remedied if one consequence of Brexit is the move to a codified constitution that alters the basic normative rules of the system. But in the present circumstances, and without a change of government in the UK, it is difficult to see how this conversation could credibly be taken forward. In our view, a post-Brexit UK is likely to become a 'cold house' for rights and equality, with severe consequences for N. Ireland in particular.

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[124] Ibid.
[125] See information available here: https://www.ohchr.org/EN/Countries/ENACARegion/Pages/IEIndex.aspx.
[126] Ireland is currently seeking an elected seat on the UN Security Council for 2021-2022, https://www.ireland.ie/global-diaspora/stories/ireland---united-nations-security-council-2021-2022.php
[127] *Forward Together: The Conservative Manifesto* (2017) p 37, https://www.conservatives.com/manifesto.
[128] Conservative Party, *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Law* (Conservative Party, London, 2014); Colin Harvey, 'Northern Ireland and a Bill of Rights for the United Kingdom' (British Academy Briefing, 2016); Dominic Grieve, 'Can a Bill of Rights do better than the Human Rights Act?' [2016] Public Law 223.
[129] Colin Harvey, ibid.
[130] Mark Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' in Jeffrey Jowell and Colm O'Cinneide (eds), The Changing Constitution (OUP, 9th ed, 2019) ch 2.

The EU and the Protection of Rights

A special arrangement achieved?

Before thinking about the EU's role in protecting rights, it is still worth considering the implications of the Withdrawal Agreement and Protocol agreed in late 2018.

It is arguable that a special arrangement for N. Ireland was achieved as part of the (draft) Withdrawal Agreement; and the much discussed 'backstop' is one part of that. The Protocol on Ireland/N. Ireland evolved since an earlier draft (March 2018[131]), but much of the substance remains.

First, it is a special arrangement that is intended to address the unique circumstances of N. Ireland and the island of Ireland. The aim (as spelled out in the text) is to maintain North-South co-operation, avoid a hard border and protect the GFA *in all its parts*. It will be there 'unless and until' it is superseded ('in whole or in part'). There is clear merit in recognising the special position of N. Ireland; it is not credible to suggest that the region is just like any other part of the UK.

Second, there is explicit recognition of the constitutional status provisions of the GFA and the 'principle of consent'. Their inclusion is strictly unnecessary (as nothing being proposed interferes with this principle or these provisions) but they have clearly been added to placate political opposition. Respect for the territorial integrity of the UK is also underlined for good measure.

Third, rights and equality provisions remain in the Protocol. The UK agreed to a particular interpretation of the 'no diminution' commitment from the December 2017 Joint Report. However, the adopted formulation has limitations. It is, for example, textually linked to a particular section of the GFA (Rights, Safeguards and Equality of Opportunity) and it is 'diminution' as a result of withdrawal from the EU. The guarantee includes equality and anti-discrimination aspects of union law (listed in an annex: these are six equal treatment Directives). This will be implemented through 'dedicated mechanisms'. The UK will also be

[131] https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf.

required to facilitate the work of relevant institutions, including the Human Rights and Equality Commissions in Northern Ireland.

Enforcement will be an ongoing question (unlike other parts of the Protocol, there is no reference to the jurisdiction of the Court of Justice). It is not apparent what a person will be able to do where 'diminution' is alleged. Much will depend on how this is taken forward, and the other mechanisms included in the Withdrawal Agreement (for example, it is clear that when implemented the Withdrawal Agreement will have significant domestic law implications for UK courts, including with respect to disapplication, direct effect and the ongoing role of the jurisprudence of the Court of Justice). Credible and effective enforcement machinery will be required to fulfil the requirement for 'dedicated mechanisms'.

Fourth, there is recognition that the UK and Ireland can continue with the CTA, subject to prescribed limits (for example, with respect to Ireland's continuing obligations as an EU Member State). It is widely accepted that the CTA still requires proper formalisation as part of an attempt to solidify the British-Irish 'special relationship' (that is currently being sorely tested) and provide meaningful legal guarantees to British and Irish citizens.

Finally, there will be a Specialised Committee on the implementation of the Protocol (and a joint consultative working group that will report to it). This Committee will be able to consider, for example, matters relating to the rights of individuals that have been raised by the N. Ireland Human Rights Commission, the Equality Commission for N. Ireland and the Joint Committee (of the two Commissions). It can make recommendations to the Withdrawal Agreement's Joint Committee (which is empowered to reach decisions that have the same legal effect as the Withdrawal Agreement). The ultimate dispute settlement provisions are complex, but will involve an arbitration panel, and include the Court of Justice where, for example, the dispute relates to the interpretation of a provision of Union law.

In addition to this, the Withdrawal Agreement contains extensive guarantees on the rights of EU citizens and 'UK nationals'. The Outline Political Declaration foregrounds respect for human rights as a basis for future co-operation. Notably, this involves a UK commitment (of sorts) to the European Convention on Human Rights. Attention should also be paid to Annex

4 of the Protocol, which includes, among other things, reference to labour and social standards (as well as environmental protection) in the context of a single customs territory. Human rights and equality found a place in the much discussed Protocol on Ireland/N. Ireland. That was not an inevitable outcome; many worked hard to secure inclusion. As welcome as this is, there was some disappointment and concern that the provisions are limited, that the mechanisms on implementation and enforcement appear relatively weak and that promises given from December 2017 have been neglected. To understand the special arrangement that has been agreed for N. Ireland it is therefore vital to grasp also the safeguards for rights and equality.

At the time of writing there is much fluidity in this debate, and the Protocol is under sustained attack from the British Government, but if the mechanisms ever become operational then the discussions on these matters are likely to be intense and ongoing. What is plain, however, is that they will function as a vital protective shield until such time as a future relationship that meets agreed EU-UK objectives emerge. At present, there is reason to be gravely concerned about where this may well end up, and the current British Government is sending clear signals on the nature of the future relationship it is seeking. It does not bode well for the future protection of human rights and equality.

The EU's foundational commitment to rights

The EU is underpinned by foundational values in articles 2 and 3 TEU. Just like states, the EU often does not match these commitments in practice. However, there is a treaty basis for norms that have the potential to assist in promoting and advancing the well-being of all EU citizens and others in Member States. These complement, underpin and support initiatives as well as law, policy and practice within Member States, but will also form the basis for challenging practices that erode these values. Departure from the EU therefore also pulls away a pillar of support for principles that are central to the GFA, and that is one reason why a future return to the EU is likely to become such an appealing prospect for so many.

The Charter of Fundamental Rights

The EU has increasingly adopted the 'constitutionalised' language of rights, as it has moved into the more integration space of a political union. This has gained practical recognition by, for example, placing the Charter of Fundamental Rights on a treaty basis, and making clear

that fundamental rights are part of the general principles of EU law. Article 6 TEU affords to the Charter the same legal value as the Treaties.

The Charter of Fundamental Rights is the most direct expression of the EU's legal embrace of rights. It is grouped into the following categories: Dignity (articles 1-5); Freedom (articles 6-19); Equality (articles 20-26); Solidarity (articles 27-38); Citizens' Rights (articles 39-46); and Justice (articles 47-50). Although there is overlapping coverage with the European Convention on Human Rights, the Charter does have novel provisions dealing explicitly with the right to the protection of personal data (article 8), freedom of the arts and sciences (including academic freedom) (article 13), includes socio-economic rights (for example, the right to work and seek employment (article 15) and the right of access to preventative health care (article 35)), and children's rights (article 24). EU citizens have significant political rights, guaranteed by the Charter. As noted, this includes the right to vote for and stand for election to the European Parliament in the Member State he/she is residing in, under the same conditions as a national of that state (article 39). There are rights to make referrals to the European Ombudsman (article 43), a right to petition the European Parliament (article 44) and a general right to good administration (article 41).

The scope of application of the Charter of Fundamental Rights is drawn in a specific way that reflects the particular circumstances of EU law, which also brings limitations, and makes it unlike many other regional and international human rights instruments. It must also be recalled that the EU is confined within its own legally prescribed limits, including with respect to the principle of subsidiarity. There are matters which will fall outside the sphere of EU law and the Charter is limited in this respect also. Article 51 limits the scope of application of the Charter to the scope of the Treaties, while articles 52 and 53 ensure that the standard of human rights protection in the Union can surpass but not fall below the level of protection provided by the European Convention on Human Rights.

The Charter has had an impact in, for example, Ireland, and there is a clear sense that its potential for the protection of rights is still being explored.[132] Although it will have an afterlife

[132] 'Overall, therefore, the evidence shows that the importance of the Charter in Irish jurisprudence is already considerable in fields such as asylum/immigration law, European Arrest Warrant law, data protection, family law, and social/employment law, but its importance has also been felt in the field of companies' rights, for instance. As the scope of EU law expands, it is undoubtedly the case that the influence of the Charter will

in the UK post-Brexit, it is plain that this will be a diminished role; full return to the EU will, from a rights and equality perspective, be the better option.

The EU, equality and social protections

EU law has significant things to say about equality and social protections, and these have featured prominently in the discussions around Brexit. For example, in relation to the rights of cross-border workers and on healthcare, including the European Health Insurance Card (EHIC).[133]

The EU has made an impressive contribution to the advancement of equality and non-discrimination. Article 21 of the Charter contains a strong prohibition against discrimination (including on grounds of nationality):

> *1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.*
> *2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited*

The TFEU article 19 provides a treaty basis for 'appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. EU law plays its part in areas such as gender equality and in tackling racial discrimination, among other protected grounds. It has been particularly robust in the employment sphere, and in advancing workers' rights, an area that is likely to be at significant risk in a post-Brexit UK.[134] On social protection and social inclusion, the EU Pillar of Social Rights (proclaimed on 17 November 2017 by the Parliament, Council and Commission) is an indication of the level of commitment to the values that underpin a belief in social justice.[135] The TFEU addresses social

continue to grow to include fields currently considered to be purely domestic in nature.' Suzanne Kingston and Liam Thornton, *A Report on the Application of the European Convention on Human Rights Act 2003 and the European Charter of Fundamental Rights: Evaluation and Review* (2015) 158.

[133] For further information see: https://ec.europa.eu/social/main.jsp?catId=559.

[134] For analysis of the no-deal consequences see ICTU, *The Implications of a No-Deal Brexit* (2019) https://www.ictu.ie/download/pdf/20190301142932.pdf.

[135] https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-booklet_en.pdf.

policy (articles 151-161), co-operation on health care (article 168),[136] as well as questions of economic and social cohesion (articles 174-178).

The point is simply to outline the role of the EU on matters of social protection, social inclusion and social justice and to suggest that losing this supportive supranational framework (one that has robust enforcement potential) will be a major disadvantage within a post-Brexit UK (whatever shape that takes). Again, those in support of social inclusion, equality and social protections will find that staying in or returning to the EU is simply the superior option.

Free movement rights

The free movement rights of EU citizens are perhaps the best-known and most significant examples of existing guarantees enjoyed by citizens and their family members.[137] Although implementation across the EU is still problematic it remains, in a global era of enhanced restrictions on freedom of movement and in a context where the UK is determined to 'take back control' of its border, an impressive normative achievement. The right to move to and reside in other Member States, including the right to permanent residence (embracing family members as well) does have its limitations, but it is of vital importance, and is an intrinsic part of what it means to be an EU citizen. It loss will be devastating, and although arrangements are being put in place to provide for the status of EU citizens within the UK, this marks a major shift with disturbing long-term consequences for all those EU citizens living in and seeking to enter the UK.

Cross-border workers (those who work in one Member State but live in another) have benefited in particular from the guarantees that EU law provides.[138] This includes in relation to the principle of non-discrimination and, for example, social security arrangements. This is one area where Brexit will have a major impact on the island of Ireland. Many people live

[136] See also, Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29th April 2004 on the coordination of social security systems; Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare.
[137] Art 3(2) TEU; art 21 TFEU; Titles IV and V TFEU; art 45 of the Charter of Fundamental Rights of the European Union. See also, Directive 2004/38/EC of the European Parliament and of the Council of 29th April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68.
[138] See Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29th April 2004 on the coordination of social security systems, art 1 (f) defines 'frontier worker' as: 'any person pursuing an activity as an employed or self-employed person in a Member State and who resides in another Member State to which he/she returns as a rule daily or at least once a week …'

complicated lives in border areas and have been encouraged and supported to do so through membership of the EU.

Third country nationals and rights in the EU

The rights of third country nationals[139] in the EU must be noted, and it should be recalled that is what many British citizens in Ireland will be after Brexit. If there is a no-deal Brexit, then this is effectively what British citizenship will become.

In the event of Irish reunification, there will be many people living in Ireland, as now, who are third country nationals or who may have that status as a result of Brexit. There is a patchwork of protection available which connects, in particular, to how the EU deals with the migration of third country nationals into its territory. Much will depend on the nature of the agreement that is finally reached between the UK and the EU, and the future relationship that emerges. The current version of the Withdrawal Agreement and Protocol sets out the rights that British citizens will have in Member States, and this includes acceptance of the CTA (within prescribed limits). It also deals with frontier workers. But in the longer term much will depend on what is agreed on the future relationship (and here the Political Declaration as well as more recent interventions by the British Government provide some clues) that is negotiated and how the CTA evolves.[140] As noted above, it is our view that the EU institutions must begin considering these questions now because the right to self-determination in the GFA will bring novel challenges that must be faced.

Challenges on the Path to Constitutional Change: Why the EU, Ireland and the UK Must Think about Irish Unity now

'Constitutionalising' the Good Friday Agreement in the EU-UK negotiations

Brexit poses fundamental problems and novel dilemmas for the thinking behind the GFA. It is exposing aspects of the Agreement that have not been effectively reflected in domestic UK law, policy and practice. It is striking, for example, how many core concepts have not been

[139] In this context, meaning any person who is not an EU citizen.
[140] https://www.dfa.ie/brexit/getting-ireland-brexit-ready/brexit-and-you/common-travel-area/.

given effect in legal form. Brexit is also highlighting the complex interaction between the GFA provisions and EU law.

A major challenge can be stated simply. At the heart of the GFA is a recognition of the conflict over national identity: British-Irish. There is a right to identify and be accepted as British or Irish or both. There is also an obligation of 'rigorous impartiality' that will transfer to the Irish Government in the event of reunification. Concepts of parity of esteem, mutual respect and equal treatment are everywhere present in the GFA. And this is precisely why Brexit causes such problems.

Brexit will result in the creation of a region outside of the EU that is inhabited largely by EU citizens (Irish citizens primarily) who wish to see their EU rights protected *where they reside*. There is also a real risk that Brexit will lead to a sharp distinction between those who identify as British only and others. The difficulty is that this may lead, over the longer term, to the erosion of guarantees for members of the unionist community. Irish citizens, for example, will continue to be EU citizens, and although they will reside outside the EU and continue to face significant problems, they will still enjoy rights that attach to that status. Prior to reunification that position will be complicated by residence in a third country (UK), and will depend on the precise nature of the special arrangements that do eventually emerge for N. Ireland.

In our view, and as noted above, in order to respect the parameters of the right to self-determination in the GFA, and its core principles around parity of esteem and mutual respect, it is not enough to say that the island as a whole will return to the EU or even simply to indicate that what is proposed is without prejudice to the GFA. As we note in Chapter 2, there are actions that the EU institutions can take now.

If the principles of parity of esteem, mutual respect and equal treatment are to be taken seriously within future constitutional arrangements they need to become legally embedded and operational at the appropriate legal levels. Although this is complicated by legal competencies, particularly as this relates to the EU, they cannot be left, as have been the case thus far, to wishful thinking and aspiration devoid of practical meaning.

Thinking about the status of British citizens in a united Ireland

In our view, and as argued above, the human rights and equality commitments and framework of the GFA, combined with the EU's foundational values and international obligations in this field, will assist in providing the required level of reassurance for everyone contemplating constitutional change in N. Ireland. The process of Irish reunification will, however, raise several challenges for Ireland and the EU with respect to the GFA and the treatment of, for example, British citizens. Some of this will mirror problems that are arising for Irish citizens in N. Ireland at present (where parity of esteem, mutual respect and equal treatment remains absent), and disputes about the meaning of law, policy and practice that are ongoing. Following Brexit, British citizens will no longer be EU citizens. They may also, through birth, descent or marriage be entitled to be Irish citizens (EU citizens). But the spirit and letter of the GFA suggests that they should not be compelled to take this step: the right to identify and be accepted as British only should be upheld. This is not a mandate for a lowest common denominator approach, the better option is to level up, but as we argue in Chapter 2 it will have to be addressed and resolved by Ireland and the EU. One of the more unusual aspects of the Brexit debate has been the relative silence from the main unionist parties in N. Ireland about the detrimental impact on members of the unionist community.[141]

The response to this will depend on what is proposed during or after any referendum campaign. This will be a managed transition over time that is framed by international law, EU Law, and domestic law in both states. If the ambition is to generate a 'new constitution' to address the challenges of reunification then that opens up a multiplicity of questions, including how any such new arrangement will reflect the GFA.[142] If this is achieved within the framework of the existing arrangements there will still be a requirement for significant change to ensure that there is full respect for the new pluralist Ireland that will emerge. In particular, although judicial intervention has lessened its impact in this respect, *Bunreacht na hÉireann* still has a strong textual emphasis on Irish citizenship, including in relation to political rights.

[141] https://www.newsletter.co.uk/news/opinion/colin-harvey-members-of-the-unionist-community-are-likely-to-suffer-as-a-result-of-brexit-but-is-little-conversation-about-that-1-8980371.

[142] *A united Ireland would be a 'different state', Leo Varadkar warns*, Irish Times, 6th August 2019 https://www.irishtimes.com/news/politics/a-united-ireland-would-be-a-different-state-leo-varadkar-warns-1.3978985.

Questions to consider and underline again with respect to these matters:

- How will the EU ensure, through the recognition and endorsement of precise and detailed special arrangements, that the right to self-determination in the GFA can be exercised in a way that reflects its existing commitment to the Agreement in all its parts?
- How will a reunified Ireland that is fully committed to the GFA be referenced in the Constitution? The current preamble, for example, simply does not reflect or respect a pluralist ethos.
- How will the commitment to principles such as parity of esteem and mutual respect impact on Irish law, policy and practice? For example, the national flag, language, voting rights (including the referendum leading to reunification), and eligibility to stand for election.
- How will the Irish Government approach the concept of 'rigorous impartiality' and how will this be given legal effect? Recall that this embraces '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'. How complicated will this be given the failures of successive British governments to respect this in the current constitutional arrangements? What aspects of this concept are in fact challenged in the context of reunification?
- How will the continuing birthright obligation in the GFA be provided for in law and what changes will be required in Irish and British law to accommodate this? What will the EU be prepared to do to accommodate this fundamental pillar of the GFA?
- Will an opportunity be taken, as part of the constitutional journey towards reunification, to fully embrace a strong constitutional commitment to human rights, including socio-economic rights?

British and Irish citizens in a reunified Ireland will benefit from the CTA (although note the points about proper formalisation/legalisation above). British citizens, as they will then be residing in an EU Member State, will enjoy the protections that arise from the future relationship discussions (and these could be narrow or extensive depending on what is agreed) but this will be complicated (in a reunification scenario) for British citizens born and

resident in N. Ireland. It is possible (given the form of Brexit that the current government is pursuing) that they will not, however, have access to a host of EU law rights, including free movement rights (unless some legally credible way is found to acknowledge and accommodate fully the right to identify and be accepted as British in this scenario that does not close off access to EU rights, opportunities and benefits). The option of choosing to be identified solely as a British citizen will have implications now and in the future. As noted in Chapter 2, this requires consideration by the EU became any such outcome runs directly counter to the ambitions of the GFA.

Thought will need to be given, during the future relationship discussions, on how British citizens born and resident in N. Ireland will be able to identify and be accepted as British only in the context of Irish reunification. Special arrangements will be required, and these must be operational within the EU's own legal order to ensure that in a managed transition to a new Ireland. For example, it might require, among other possibilities, acceptance and changes that ensure that British citizens born and resident in N. Ireland are regarded as nationals of a Member State for EU law purposes.

Supporting a strong, ambitious and inclusive human rights culture in a new Ireland?

Brexit has accelerated the conversation about Irish unity. It now becomes a possible return option to the EU. It poses a particular challenge for core aspects of the GFA for the two main communities in N. Ireland. What must also be underlined, however, about the GFA is that it is also careful to acknowledge (as the EU legal order also is) the centrality of *human* rights. In addition to ensuring protections for British and Irish citizens in N. Ireland in the event of Irish reunification thought should be given to transforming the human rights landscape for *everyone* in the new Ireland that will emerge.

The GFA speaks of the protection and vindication of the human rights of all and it anticipated a Bill of Rights that has never been enacted. *Bunreacht na hÉireann* has been rightly criticised for its approach to human rights, and there are proposals from the Constitutional Convention for further amendment in the sphere of, for example, socio-economic rights.[143] The opportunity should not be missed to explore the options for making Ireland a welcoming and

[143] http://www.constitutionalconvention.ie/AttachmentDownload.ashx?mid=5333bbe7-a9b8-e311-a7ce-005056a32ee4.

inclusive place for everyone who shares the island. Ireland can also play its part in ensuring that the EU evolves into a more human rights respecting supranational organisation.

The conversation about Irish reunification must become a discussion about the rights of everyone who shares the island. It can also be an opportunity to challenge the EU to live up to its own foundational values, in the specific context of supporting peace and stability on the island of Ireland.

Chapter IV

Economic and Monetary Union

Eurozone - Introduction

For much of the period 1957 to 1992 the principal focus of the Member State governments and the institutions was the establishment of the internal market. The identification and removal of barriers to intra-community trade was the foremost priority for the Commission, the subject of much of the legislative programme and also features prominently in the discussions of how to manage German unification. At the present time, it could be argued that economic and monetary union has assumed a similar centrality in a much larger Union of 28 Member States, 19 eurozone members and a much more complex system of EU law. Interdependence and solidarity between Ireland and partner governments is more deeply entrenched. In the event of Irish unity in the near future Member State and institutional concerns related to this subject area are likely to feature prominently.

The establishment of the European Coal and Steel Community (ECSC) in 1951 served both political and economic purposes. So too, it can be said, did the adoption of the euro currency. Although its origins clearly predate the emergence of German unification, it gained greater momentum with its arrival. Both the ECSC and the euro can be described as consistent with the single most significant characteristic of the European project – peace and interdependence between France and Germany.

Alicia Hinarejos provides a helpful description of the key features of the system[144]:

> *The Economic and Monetary Union is one of the most important and best known aspects of EU integration; it is also one of the most controversial. It envisages a single monetary policy, conducted by a single monetary authority; a single currency, the euro; and co-ordination of national economic policies. Not all member states of the EU participate in all phases of EMU: …. 19 member states have entered the last stage of*

[144] Catherine Barnard and Steve Peers (eds), *European Union Law* (2nd ed, OUP, 2017) ch 19: 'Economic and Monetary Union' p 573.

EMU and adopted the euro as their currency; these countries constitute the eurozone or euroarea.

Centralized monetary policy for the euro is conducted by an EU institution, the European Central Bank (ECB), assisted by national central banks; all together they form the European System of Central Banks (ESCB). At the same time, economic policy remains in the hands of the member states within certain limits. There is thus an underlying tension within EMU between a centralized monetary policy and essentially decentralized economic and fiscal policy. Ultimately, this asymmetric design of EMU proved to certain flaws that contributed to the current euro area government debt crisis.

Irish reunification will have significant implications for Ireland and its eurozone partners. The economic consequences of a reunified state are not solely matters for the Department of Finance in Dublin. This will have an impact on the other Member States, particularly eurozone countries, and the EU institutions. It is, therefore, necessary to identify those issues at an early stage and begin the process of addressing them. The legal architecture constructed in recent years to ensure the success and stability of the single currency will remain and is more likely to be fortified rather than loosened. In June of 2015 the 'Five Presidents' Report' called for closer economic co-ordination and greater efforts towards economic, financial, fiscal and political union.[145] This was to involve continued economic dialogue between the Parliament, Council, Commission and Eurogroup to progress towards capital markets union, banking union and common deposit insurance scheme.

Specific arrangements which acknowledge the financial and economic implications of adherence by Ireland and the EU to the principle of self-determination will be required. This must, it is submitted, be achieved with Ireland remaining in the euro-area and with the related system of supervision and peer review.

Free Movement of Capital and Payments

The Union's internal market is defined in article 26(2) TFEU as comprising of an area without internal frontiers in which the free movement of goods, persons, service and capital is

[145] 'Completing Europe's Economic and Monetary Union', report by Presidents Jean-Claude Juncker, Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz of 22nd June 2015.

ensured. The free movement of capital, investments and payments was not liberalised at the same rate as the other economic freedoms such as goods, services, establishment and workers. The approach of two of the critical institutions, the CJEU and the Commission, was distinct from the approach of the other connected subject areas.

The original Treaty provision was also expressed in less imperative language. Article 67(1) EEC required all Member States to 'progressively abolish between themselves all restrictions on the movement of capital'.

The Treaty provisions on capital are now found in articles 63 – 66 TFEU and secondary legislation. They apply to capital movements and payments between Member States and also between an EU Member State and a third country. In the second scenario, additional restrictions may be imposed consistent with the Treaty.[146] In its case law the Court has identified several areas in which national rules will be considered against the requirements of article 63 TFEU. They are:

- *Property purchase and investment, building and land subdivision.*
- *Currency and other transactions.*
- *Loans.*
- *Investments in companies, especially where the national rules affect those who do not have a dominant interest in the company.*
- *Golden share cases where state retains control or influence over newly privatized companies.*[147]

The Treaties require national rules which are discriminatory[148] or have the potential to hinder market access[149] for capital and payments to be a proportionate response to public interest requirements.

Following successful referendums to support Irish reunification the Treaty provisions on the free movement of capital and payments will continue to apply to Ireland as a Member State. Transfers from Ireland, including N. Ireland, will be subject to the rules set out above.

[146] Art 64(1) TFEU permits continuation of existing restrictions; art 64(2) TFEU; art 66 TFEU concerns balance of payments; art 75 TFEU permits restrictive measures.
[147] Summary from Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms*, (5th ed, OUP, 2016) p 528.
[148] *Commission v Portugal Case* C-367/98 (2002) ECR I-4731, para 30.
[149] *Commission v Spain* (2003) ECR I-4581 & *Commission v UK* (2003) ECR I-4641.

Transfers to non-Member States, such as a post-Brexit UK, could be conducted in accordance with Union law on third country states, in the absence of an international agreement between the EU and UK on such matters. Part IV of the current Withdrawal Agreement provides for a transition period to end on the 31st December 2020, in which the substance and effect of Union law, including the provisions on capital and payments, continue to apply. The possibility of an extension of up to 2 years is expressly provided for.[150] The future trading relationship in respect of capital, payments and investments between the EU and the UK will likely be addressed in a future treaty concluded under either articles 207 TFEU or 217 TFEU.

Economic and Monetary Policy

Article 3 TEU provides that the Union shall establish an economic and monetary union whose currency is the euro. Title VIII (articles 119 – 133 TFEU) in the TFEU sets out the economic and monetary policy for the Union. Member States co-ordinate economic and fiscal policies, a common monetary policy and, for the euro-area, a common currency.

Article 119(1) TFEU provides:

> *1. For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.*
>
> *2. Concurrently with the foregoing, and as provided in the Treaties and in accordance with the procedures set out therein, these activities shall include a single currency, the euro, and the definition and conduct of a single monetary policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Union, in accordance with the principle of an open market economy with free competition.*
>
> *3. These activities of the Member States and the Union shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments.*

[150] Art 132.

This is addressed through a range of measures, including the co-ordination of economic policy making by the national governments and co-ordination of fiscal policies through agreed limits on state debt and budget deficits. The Commission is obliged to monitor compliance with budgetary discipline on such criteria.

The European Central Bank conducts the monetary policy of the Union in conjunction with the central banks of the Member States whose currency is the euro. Article 282 TFEU provides as follows:

> *1. The European Central Bank, together with the national central banks, shall constitute the European System of Central Banks (ESCB). The European Central Bank, together with the national central banks of the Member States whose currency is the euro, which constitute the Eurosystem, shall conduct the monetary policy of the Union.*
>
> *2. The ESCB shall be governed by the decision-making bodies of the European Central Bank. The primary objective of the ESCB shall be to maintain price stability. Without prejudice to that objective, it shall support the general economic policies in the Union in order to contribute to the achievement of the latter's objectives.*
>
> *3. The European Central Bank shall have legal personality. It alone may authorise the issue of the euro. It shall be independent in the exercise of its powers and in the management of its finances. Union institutions, bodies, offices and agencies and the governments of the Member States shall respect that independence.*
>
> *4. The European Central Bank shall adopt such measures as are necessary to carry out its tasks in accordance with Articles 127 to 133, with Article 138, and with the conditions laid down in the Statute of the ESCB and of the ECB. In accordance with these same Articles, those Member States whose currency is not the euro, and their central banks, shall retain their powers in monetary matters.*
>
> *5. Within the areas falling within its responsibilities, the European Central Bank shall be consulted on all proposed Union acts, and all proposals for regulation at national level, and may give an opinion.*

The Governing Council of the ECB consists of members of its Executive Board together with Governors of the national central banks. Its primary task is to safeguard the value of the euro and maintain price stability. It defines this task in the following manner:

> *Financial stability can be defined as a condition in which the financial system – which comprises financial intermediaries, markets and market infrastructures – is capable of withstanding shocks and the unravelling of financial imbalances. This mitigates the*

prospect of disruptions in the financial intermediation process that are severe enough to adversely impact real economic activity.

It supervises credit and financial institutions located within the territory of the eurozone as part of the Eurosystem. This also requires defining and implementing monetary policy, conducting foreign exchange operations, holding and managing the euro area's foreign currency reserves and promoting the smooth operation of the payment systems. The ECB undertakes economic research to assist in providing conceptual and empirical evidence for policy making in the EU.

The European system of financial supervision consists of the European Systemic Risk Board and three supervisory authorities – the European Banking Authority, the European Securities and Markets Authorities and the European Insurance and Occupational Pensions Authority. During the Euro currency crisis, the European Council agreed on the need for the Euroarea member states to establish a permanent stability mechanism. It adopted Decision 2011/199/EU amending article 136 TFEU and the Eurozone states concluded the Treaty on Establishing the European Stability Mechanism (ESM) of 2nd February 2012. Its purpose was to mobilise funding and provide stability in circumstances where a contracting state faced severe financing problems.[151] The legality of such measures, some of which was outside the scope of the Treaties, was upheld by the CJEU in *Pringle v. Ireland*.[152]

The Treaty on Stability, Co-ordination and Governance for Economic and Monetary Union of 2012 was an intergovernmental treaty between members of the EU, including Ireland. The fiscal compact element of the Treaty contained a number of obligations aimed at creating a fiscal stability union. A significant aspect of the Treaty is the mandatory balanced budget rule. The signatory states undertook to enact national legislation which requires government budgets to be balanced or in surplus as defined. The condition is satisfied if the annual structural balance meets the country-specific medium term objective and does not exceed 0.5% of GDP. If government debt ratio is below 60% of GDP, and risks to long-term fiscal sustainability are low, the medium term objective can be set at 1% of GDP. The Treaty also imposes obligations on the states in rapid convergence towards the medium term objective,

[151] Art 3 Treaty on ESM.
[152] *Pringle v. Ireland* (2013) 2 CMLR 2.

temporary deviations and for an automatic correction mechanism. The Commission reports on compliance.

It also fortified the excessive deficit procedures which were in operation. The Treaty includes the numerical benchmark for government debt reduction for Member States with government debt exceeding 60% of GDP. Member States are also obliged to report on public debt issuance plans.

Article 3(1)(c) of the Treaty anticipates the possibility of a contracting state being unable to meet its medium term objective or the adjustment path towards it in exceptional circumstances. Article 3(3)(b) provides:

> *(b) 'exceptional circumstances' refers to the case of an unusual event outside the control of the Contracting Party concerned which has a major impact on the financial position of the general government or to periods of severe economic downturn as set out in the revised Stability and Growth Pact, provided that the temporary deviation of the Contracting Party concerned does not endanger fiscal sustainability in the medium-term.*

The TSCG operates alongside the relevant Treaty provisions, and a number of pieces of secondary legislation with both preventive and corrective features. The Union legislature has also introduced a system of peer-review between the Member States following the financial and sovereign debt crises earlier in the decade. This consists of:

- *Regulation 1175/2011 of 16th November 2011 which concerns surveillance of budgetary positions*
- *Regulation 1177/2011 of 8th November 2011 on speeding up and clarifying the implementation of the excessive deficit procedure*
- *Regulation 1174/2011 of 16th November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area*
- *Regulation 1173/2011 of 16th November 2011 on the effective enforcement of budgetary surveillance in the Eurozone*
- *Directive 2011/85/EU of 8th November 2011 on requirements for budgetary frameworks of member states*
- *Regulation 1176/2011 of 16th November 2011 on the prevention and correction of macroeconomic imbalances*
- *Regulation 473/2013 of 21st May 2013 on common provisions for monitoring and assessing draft budgetary plans*

- *Regulation 472/2013 of 21st May 2013 on strengthening economic and budgetary surveillance of member states in the euroarea experiencing or threatened with serious difficulties with respect to their financial stability*

Regulation 1177/2011 amends Regulation 1466/97[153] in a number of important aspects. Its primary purpose is to deter excessive government deficits for eurozone member states. Article 2(a) recognises the possibility of such a situation:

> *The excess of a government deficit over the reference value shall be considered exceptional, in accordance with the second indent of point (a) of Article 126(2) of the Treaty on the Functioning of the European Union (TFEU), when resulting from an unusual event outside the control of the Member State concerned and with a major impact on the financial position of general government, or when resulting from a severe economic downturn*

The Euro Crisis produced a system of economic governance which put in place a technocratic approach to economic co-ordination in a system that could review, criticise and ultimately sanction Member States for their democratic choices, with the objective of prioritising financial concerns and stability. However, although the EU possesses a number of extensive coercive powers it has been selective in using them in practice. The authors Leino and Saarenheimo provide the following overview of the discretion exercised to date[154]:

> *By its very nature, the concept of "good fiscal policies over the cycle" does not lend itself to easy parameterisation. The key analytical concepts of the framework—output gap and structural deficit—are unobservable and their estimates notoriously contested among economists.*
>
> *Also, a wide variety of exceptional circumstances, temporary factors and measurement issues come into play. Regulation 1467/97 as amended by the six-pack places the Commission under an obligation to, "give due and express consideration to any other factors which, in the opinion of the Member State concerned, are relevant in order to comprehensively assess compliance with deficit and debt criteria …."*
>
> *To be sure, over the last decade the EU has made considerable efforts to formalise the handling of many kinds of circumstances. Over time, exceptions or flexibility clauses have expanded, so that today Member States may be excused on the basis of at least bad economic times, investments, structural reforms, solidarity operations, costs of refugees and low inflation.*

[153] Council Regulation (EC) No 1466/97 of 7th July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and co-ordination of economic policies.
[154] Paivi Leino & Tuomas Saarenheimo, 'Sovereignty and Subordination: On the limits of EU Economic Policy Co-Ordination' (2017) 42 European Law Review 166, p 173.

To supplement the core of the fiscal framework in primary and secondary law, a sizeable body of soft law has gradually emerged, including Codes of Conduct, Common Understandings, Commission Communications and a thick application manual called the Vade Mecum. Soft law has attempted to respond to the Member States' wishes to have some guidance as to how the Commission intends to use its discretion

Irish Reunification

It is anticipated that the currency of a reunified Ireland will be the Euro. This would seem consistent with the moving boundaries principle of international law and the precedent followed in the case of German unification. Following reunification, Ireland would retain the rights and continue to be bound by the duties already entered into, including those arising under economic and monetary union. In the case of German unification monetary union between the two German states preceded accession.

The Commission Country Report for Ireland in 2019 was published on the 27th February 2019. It was based on the 2019 European Semester and assessed progress on structural reforms, prevention and correction of macroeconomic imbalances and contained in-depth reviews as required by Regulation 1176/2011. It stated the following in respect of Irish public finances:

> *Although the economy continues to strengthen, improvements in the budget balance are stalling. The general government deficit is forecast to have fallen to 0.1 % of GDP in 2018, an improvement of 0.1 % of GDP compared 2017. With the measures announced in the 2019 Draft Budgetary Plan, the deficit is expected to remain broadly stable in 2019. Risks to the budgetary projections remain on the downside. They relate mainly to macroeconomic uncertainties, the volatility of some sources of government revenues (notably corporate income taxes) and over-spending (notably within the health sector).*

On the 5th June 2019 the Council published its Recommendation. It stated the following:

> *(6) Ireland is currently in the preventive arm of the Stability and Growth Pact and subject to the debt rule. In its 2019 Stability Programme, the government expects the headline balance to improve to 0.2% of GDP in 2019 and to continue to gradually improve thereafter to 1.3% of GDP in 2023. Based on the recalculated structural balance, the medium-term budgetary objective, set at a structural deficit of 0.5% of GDP, is planned to be reached by 2020. According to the Stability Programme, the general government debt-to-GDP ratio is expected to fall to 61.1% in 2019 and to continue declining to 51.6% in 2023. The macroeconomic scenario underpinning those budgetary projections is plausible. At the same time, the measures needed to support the planned deficit targets from 2020 onwards have not been sufficiently specified.*

(7) On 13 July 2018, the Council recommended Ireland to achieve the medium-term budgetary objective in 2019. This is consistent with a maximum nominal growth rate of net primary government expenditure of 7.0% in 2019, corresponding to an allowed deterioration in the structural balance of 0.3% of GDP. Based on the Commission 2019 spring forecast, Ireland is expected to comply with the recommended fiscal adjustment in 2019.

(8) In 2020, Ireland should achieve its medium-term budgetary objective. Based on the Commission 2019 spring forecast, this is consistent with a maximum nominal growth rate of net primary government expenditure of 3.7%, corresponding to an annual structural adjustment of 0.7% of GDP. Ireland is forecast to reach the medium-term budgetary objective. General government debt is forecast to remain on a firm downward path beyond the requirements of the debt rule. Overall, the Council is of the opinion that Ireland is projected to comply with the provisions of the Stability and Growth Pact in 2019 and 2020…

The current N. Ireland budget deficit is a contested matter. Estimates of the extent of UK government subvention are widely debated.[155] However, it is generally accepted that public expenditure on services currently exceeds revenue generated by taxation. The question of what level, if any, of UK national debt, should be transferred to a united Ireland is also a question of considerable controversy.[156] It is true that on the dissolution of sovereign unions there often occurs an assessment of liabilities and assets.[157] This occurred with the Anglo-Irish Treaty of December 1921.[158]

An authoritative assessment of the economic impact of Irish unification on Irish state finances is beyond the scope of this work. However, it can readily be observed that any material increase in the Irish government deficit and national debt as a ratio to GDP is a matter which has significant consequences for the state's compliance with EU law. The macroeconomic position of a united Ireland is a concern for other Member States, is subject to supranational supervision and will have to be addressed through the peer-review system set out above.

[155] See Fitzgerald and Morgenroth above n 35; *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); *Modelling Irish Unification* by KLC Consulting (2015).
[156] https://www.irishtimes.com/opinion/four-known-unknowns-of-the-cost-of-irish-unity-1.4030297.
[157] Paul Williams and Jennifer Harris, 'State Succession to Debts and Assets: The Modern Law and Policy' (2001) 42 Harvard International Law Journal 355.
[158] Art 5 provided: The Irish Free State shall assume liability for the service of the Public Debt of the United Kingdom as existing at the date hereof and towards the payment of War Pensions as existing at that date in such proportion as may be fair and equitable, having regard to any just claim on the part of Ireland by way of set-off or counter-claim, the amount of such sums being determined in default of agreement by the arbitration of one or more independent persons being citizens of the British Empire.

While that system is one based in law it is not entirely divorced from other political priorities. Union support for the reunification of Ireland, pursuant to the GFA, will be a relevant factor in determining the assistance received. It is likely, as noted above, that there will be a managed transition over time in an international environment that will be conducive to, and supportive of, the constitutional outcome agreed between the people of the island of Ireland. The reunification of Ireland could qualify as 'exceptional circumstances' within the meaning of Regulation 1177/2011 and the enforcement measures contained in Regulations 1173/2011 and 1174/2011 need not be activated. While it is a rules based fiscal framework it is clearly not entirely mechanical in its application. The interaction between the Commission and the Council is influenced by political considerations beyond economic and monetary union. As the recent examples of low inflation, solidarity operations and cost of refugee assistance have shown, there exists a reasonable level of discretion available to the institutions in how they react to divergences from the rules. The past approach to German reunification also displays a realistic and supportive approach from the institutions.

The recognition of Irish self-determination by the EU and its institutions, supported by the national governments, would represent a policy of considerable significance. The facilitation of Irish unity, pursuant to the GFA, and consistent with democratic principles and international law, should be a priority for the EU. It is not difficult to foresee that the supervising institutions would refrain from imposing any sanction on Ireland and instead focus assistance on meeting targets over the medium term. 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 as a whole nor would it jeopardise the other priorities set out in the Five Presidents' Report.

Conclusion

A Future within the EU: Taking the Next Step

The aim of this report is to encourage a conversation about the role of the EU in supporting and assisting the process of constitutional change in Ireland. The intention is to acknowledge the fact that reunification will be one way back to the EU once Brexit has taken place. This is increasingly being recognised and discussed as a solution to some of the problems created for the EU by Brexit. It is sensible in such a context to map out, at this initial stage, matters that will need to be explored further, and to spell out what the EU can do.

This report underlines the following five points:

First, the EU and UK must address the prospect of Irish reunification in the current negotiations and in the future relationship discussions. This should be unproblematic, as the right to self-determination is a central and agreed aspect of the GFA, has already been noted by the European Council, and the principle of consent is included in the Protocol on Ireland/N. Ireland. There are complex challenges and clear opportunities that should be considered and dealt with now. It is not enough to refer simply to the GFA in all its parts or to acknowledge (as welcome as this is) that a reunified Ireland will return to the EU. More is required, and we have demonstrated in this report the role that the EU can play. There is a line of argument that managing Brexit is a task of such magnitude that the further question of reunification should be deferred. This report questions the flawed logic of that approach. As has already been acknowledged, Brexit raises legitimate questions about the exercise of the right to self-determination contained in the GFA, as one way to address and resolve some of the difficulties that the EU will face. This fact should not be neglected by anyone who is committed to defending the GFA *in all its parts* and those who are genuinely interested in finding solutions. There is a viable way back to the EU that will avoid a hard border on the island, respect the GFA and ensure all-island cooperation continues.

Second, the report demonstrates how the EU can assist in this process. In our view, there is nothing in the GFA or in the EU's own legal order that prevents it from playing a strong part in supporting and assisting a managed transition over time to reunification, if that is the democratically expressed choice of the people of Ireland. This will include outlining the consequences of the outcome in advance of the referendums, and in that way the EU can help to provide much needed clarity and certainty.

Third, as our analysis demonstrates, and the EU has confirmed, Irish reunification will be an example of cession. In other words, it is the alteration of the territory of an existing Member State rather than accession of a new state to the Treaties. This will be undertaken and achieved in line with the already agreed provisions of the GFA. Significant constitutional changes within a reunified Ireland will not alter this reality. EU law will apply to the entire territory of a reunified Ireland, subject to any agreed transitional provisions.

Fourth, other EU Member States have an interest in the economic and financial consequences of reunification. In particular, the system of European fiscal supervision and Member State peer review, now so central to economic and monetary union, will require the collection of reliable macro-economic information on Irish reunification, and how that can co-exist with current obligations in EU law and the TSCG.

And finally, there will be a pluralist 'European roof' for the process of Irish reunification. If the EU takes seriously its own foundational values, and its commitment to the GFA in all its parts, then planning and preparation for the moment when the principle of consent will be tested must begin now; it should form one part of the ongoing negotiations between the EU and UK. There is an opportunity for the EU to ensure that the island of Ireland continues to have a central role in shaping this supranational European peace project. N. Ireland has an agreed way back and, in our view, the institutions of the EU can and should function in a supportive role by clarifying the consequences of this choice and facilitating a managed transition to new arrangements.

In conclusion, we highlight once again the steps outlined in this report that we believe the institutions should take in order to support responsible and prudent planning for constitutional change in Ireland.

The European Parliament should:

- Endorse the European Council statement of 29th April 2017 and examine the support and assistance available from the EU in the event of Irish reunification.
- Acknowledge the responsibilities of the institutions with respect to the right to self-determination in Ireland.
- Examine the level of representation for a reunified Ireland in the Parliament.
- Consider the benefits of establishing a working group to assist the EU in its negotiations with the UK on the future UK-EU relationship, which must include explicit consideration of the right to self-determination and its implications.
- Consider establishing working structures to examine the impact of the process of reunification on the EU, including how to ensure that the voices and perspectives of those living in N. Ireland are included.
- Explore further the question of voting rights for EU citizens and British citizens resident on the island of Ireland if and when the UK terminates its membership prior to reunification.
- Examine the question of free movement rights for British citizens resident on the island of Ireland who continue to avail of their right to British citizenship in perpetuity.
- Consider the implications for economic and monetary union for Ireland, the other Member States and supervising institutions in the event of Irish unity.
- Consider the necessity for and scope of transitional arrangements and derogations for Ireland in the immediate aftermath of Irish unity.
- Explore the implications for the EU's legislative processes in the event that delegated powers are conferred on the Commission, as occurred in the context of German reunification.

The European Commission should consider relevant points noted above, and in addition:

- Produce, through its Legal Service, an opinion on the position of Irish reunification under EU law in the light of the statement of the European Council on the 29th April 2017 and the provisions of the GFA.
- Consider the establishment of a task force in the aftermath of Brexit which would explore the opportunities and the consequences of the exercise of the right to self-determination for Ireland and all EU Member States, and outline the assistance required and available in the event of a decision in support of Irish reunification.
- Consider the inclusion of explicit provisions seeking to protect the right to self-determination in any recommendations submitted to the Council under the article 218 TFEU procedure.

The European Council should:

- Continue to underline, at every available opportunity, the strong support for the GFA among Member States.
- Reaffirm its existing commitment that reunification will lead to automatic return to the EU, and indicate the assistance that would be provided to facilitate this, if it is the democratically expressed preference following referendums on the island of Ireland.

The Council of Ministers should:

- Consider the inclusion of explicit provisions seeking to protect the right to self-determination in any negotiating guidelines adopted under the article 218 TFEU procedure.

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