



REPORT ON HOW DESIGNATED SPECIAL STATUS FOR NORTHERN IRELAND WITHIN THE EU CAN BE DELIVERED

AN INDEPENDENT LEGAL OPINION
COMMISSIONED BY THE EUROPEAN UNITED LEFT/
NORDIC GREEN LEFT (GUE/NGL) GROUP OF THE
EUROPEAN PARLIAMENT

European United Left • Nordic Green Left



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16 October 2017

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EXECUTIVE SUMMARY

1. Of all the complex political and legal problems facing the UK and Europe in advance of the UK's exit from the European Union in March 2019, its potential impact on Northern Ireland is undoubtedly the most difficult. This Report considers why 'Brexit' poses particular challenges for Northern Ireland, in many ways; provides a reference for developing public understanding of the legal ramifications of Brexit for Northern Ireland; and analyses why a unique and creative solution is needed to minimise the risks to and concerning Northern Ireland. The Report then examines from a legal perspective how special status for Northern Ireland could be delivered, reviewing a range of potential models.
2. **Part 1 – Introduction** puts these issues in context.
 - Northern Ireland is unique; a post-conflict society which shares the UK's only land border with another Member State of the EU. In Northern Ireland today, the Good Friday Agreement 1998 remains crucial in maintaining peace; the land border between the UK and Ireland is free from almost all physical infrastructure; the Common Travel Area allows for free movement of UK and Irish citizens; both Ireland and the UK benefit from integrated cross-border markets; and citizens of Northern Ireland are entitled to hold both UK and Irish passports and have rights under EU and UK law. EU laws, policies and funding touch on almost all aspects of life in Northern Ireland and in the UK. **(1.1-1.3)**.
 - On 23 June 2016, a majority of voters in Northern Ireland (55.7%) chose to remain in the EU, but the UK as a whole voted to leave. Brexit, and the potential hardening of the land border between north and south, pose unique legal, social, political, economic and practical risks to Northern Ireland **(1.4)**.
 - Fifteen months since the referendum took place, no workable plan has yet been put forward by the UK Government to address these issues; a proposed 'digital border' has been debunked as unrealistic and unworkable. The European Parliament has affirmed the need for "*flexible and imaginative solutions*", has lamented that the absence of clear proposals has impeded negotiations, and has noted that avoiding a hardening of the border must entail either membership of the single market and customs union for the UK as a whole, or for Northern Ireland separately if the UK leaves **(1.5-1.11)**.
3. **Part 2 – Legal Framework** explains the current legal position of Northern Ireland relative to the UK and EU.
 - The Good Friday Agreement is the cornerstone of peace, and constitutes a multi-stranded agreement as well as an international treaty between the UK

and Ireland, concluded on the explicit assumption of ongoing membership of the EU for both States (2.2-2.5). It is also an aid to interpretation of the Northern Ireland Act 1998. Ireland, the UK and the EU have each undertaken to protect the Good Friday Agreement “*in all its parts*” (2.6-2.12).

- Under the devolution settlement in Northern Ireland, the UK’s relationship with the EU is an ‘excepted power’ retained by the UK Parliament in Westminster (2.47-2.52).
- Individual rights in Northern Ireland are currently protected under the GFA, the Human Rights Act 1998, and the Charter of Fundamental Rights of the EU. Protections in the current European Union (Withdrawal) Bill are likely to fall short of that protection (2.15-2.33).
- While courts have held that the consent of the Northern Ireland Assembly was not required in order for notice to be given under Article 50 of the Lisbon Treaty, the UK Government has conceded that it will be required for passage of the European Union (Withdrawal) Bill, which will affect devolved powers in various ways (2.53-2.64).

4. **Part 3 – Challenges for Northern Ireland** explores the significant challenges posed by Brexit to Northern Ireland.

- These include questions regarding geographical features, most prominently the land border and the Irish Sea; the ‘hardening’ of the land border between Northern Ireland and the Republic of Ireland; the rights of UK and Irish passport holders and of other EU citizens residing within the island of Ireland; the future role of North/South institutions; movement of both goods and people across the border; and the impact of loss of EU funding, from which Northern Ireland has benefited substantially.
- The Report concludes that Brexit is not compatible with the Good Friday Agreement “*in all its parts*”. Further, any suggestion that amendment of the Agreement would be a simple process which could be concluded by high-level bilateral agreement between States is incorrect. If any amendments are proposed, there should be a process of engagement with all parties and stakeholders and any proposed amendments would arguably need be put to the electorates in both north and south (3.12-3.16).

5. **Part 4 – Designated Special Status** examines the concept of special status and other differentiated arrangements both inside and outside the EU.

- Special status contemplates a combination of potential specific features, protections and / or entitlements afforded to a state or part of a state in its relationship with the EU (4.2-4.3).

- There is a long history of the EU being willing to agree to a range of tailored, differentiated packages with other individual states or parts of states in order to reflect particular legal, political, historical, economic and / or geographical circumstances (4.4).
 - Examples discussed include Norway (membership of the European Economic Area); Switzerland (membership of the European Free Trade Association); Turkey (customs union with the EU); Greenland (a third country with a specific association including fishing rights); Cyprus (management of a de facto internal border); and Germany (transitional arrangements made to enable the application of the *acquis* to an enlarged territory upon reunification); as well as various arrangements for island territories (4.5-4.10).
6. **Part 5 – Key priorities** reviews a number of significant requirements for Northern Ireland that must be addressed in negotiations.
- Key priorities include jurisdiction of the Court of Justice of the European Union; ramifications for trade including the customs union, the single market, and the four freedoms; the avoidance of regulatory divergence in numerous fields; retention of citizens’ rights and political rights associated with EU membership; continued operation of the Common Travel Area; future involvement in EU programmes; and a proportionate contribution to funding by the UK Government.
 - While the UK has committed to protecting a number of these priorities, the practical implications of doing so have not been fully explored, and the situation continues to develop (5.24-5.25).
7. **Part 6 – The Way Forward** proposes a range of ways to achieve special status for Northern Ireland within the EU and explains, from a legal perspective, how they might be delivered.
- There is a strong argument in principle for Northern Ireland to be formally recognised as a “*special case*”, given its unique position. It now seems to be widely accepted that some form of special solution for Northern Ireland is required (6.2-6.6).
 - Any solution must address, first, the urgent need for special arrangements for Northern Ireland once the UK leaves the EU, and second, the need to safeguard the future possibility of a united Ireland (6.3).
 - Special status for Northern Ireland inside the EU is legally possible, subject to political negotiations and decision-making between the EU and the UK. There is a range of possible solutions which have not yet been properly

explored by the UK Government. This section of the Report considers this range of possible solutions from a legal perspective.

- Proposed models include: (a) the UK as a whole remaining in the single market and customs union with the option to suspend the operation of European law for part of the territory; (b) Northern Ireland remaining in the single market and customs union separately from the rest of the UK; and (c) bespoke arrangements to safeguard the position of Northern Ireland in the event of the future reunification of Ireland and to protect the Good Friday Agreement in the interim **(6.7-6.32)**.

8. **Part 7 – Conclusions** emphasises that workable solutions are urgently required, but have not yet been forthcoming. Given the UK's failure to grapple with the complexity facing Northern Ireland, EU bodies and the Irish Government should not wait, but should instead craft creative solutions themselves. The UK Government has a duty to provide greater clarity on its own proposals and to engage constructively with alternative proposals; simply dismissing them is, in the circumstances, irresponsible.