Alumni Guide 1: The Common Travel Area and Brexit

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Introduction

Of particular importance to our alumni, particularly those both living and working in the UK is the impact of Brexit on the previously little discussed Common Travel Area (CTA).

Before dealing with the proposals regarding the future of the CTA, it may be useful to look briefly at its history. Initially the CTA, although not known as such, was introduced on the creation of the Irish Free State and pursuant to an agreement between the UK and the Irish Free State which created a common immigration area. That facility was suspended during World War 2 and passport controls were re-introduced. In fact travel between the whole island of Ireland, including that between Northern Ireland and Great Britain, was curtailed even though Northern Ireland remained part of the UK.

Following World War 2, the UK retained border controls between Great Britain and the island of Ireland, despite the fact that Ireland had in fact reverted to the previous practice that applied prior to World War 2. The United Kingdom refused to do so until such time as both Ireland and the UK adhered to a common immigration policy. Thus for some considerable time, the border, at least in immigration terms, did in fact lie in the Irish Sea with little difference applicable to individuals originating in either the North or the Republic.

The current situation

In fact the development of the CTA has emerged in an informal and non-legal manner in the years that followed World War 2. The CTA itself is not a legislative creation but one where the common interests of both governments have over time converged where it would be practically impossible and politically undesirable to enforce an immigration border between the two islands given the extensive family and commercial links that exist.

During the 1950s and 1960s the CTA that we understand today took shape but it is important to understand what that CTA consists of.

First, it is not a legal entitlement but an issue of practice.
Second, that practice is based upon similar immigration policies being applied by both jurisdictions, including those relating to temporary visitors.

Third, it relies upon a sophisticated level of data sharing between the border agencies of both the UK and Ireland.

Fourth, it only applies to citizens of the UK and the Republic of Ireland. Additional difficulties arise with the variety of British citizenship classes but we do not need to address this here.

Fifth, citizens of both the UK and the Republic of Ireland do not require a passport to travel between the two islands but do require satisfactory proof of identity, for example a driving licence.

Sixth, non-citizens of the UK or the Republic of Ireland do require a passport for travel between the islands.

Seventh, as a matter of practice the UK border agency does not routinely check people transiting between the islands for identity documents, but it can do so.

Eighth, Irish border officials have for some time checked all people transiting between the islands for identity documents. The stated aim is to identify non-CTA citizens who require a passport. A citizen of the UK or the Republic of Ireland will as stated earlier, not require a passport but a valid form of identification.

It should be noted that air travel has done more to require the production of a passport than the immigration controls of either jurisdiction. For example, travel by Ryanair requires a passport or passport card, although this is not the case with respect to Aer Lingus.

In summary, the net effect of the requirements of one of the major airlines operating between the two islands, the unilateral checks imposed by the Irish border agency and the introduction of the new passport card for travel within the EU have combined to make possession of a passport/passport card almost mandatory for those who travel between the two islands regardless of the CTA. In practice the CTA ‘feels more real’ when entering the UK than in reverse, save when travel between the two jurisdictions involves crossing the land border between the Republic and Northern Ireland. We will deal with this shortly.

**What difficulties will Brexit present with respect to the CTA?**

The UK government as well as the EU have both stated that they consider the maintenance of the CTA one of the key issues to be addressed in the Brexit negotiations. The EU’s position is also the position of the Irish government but one should note that the negotiations on Brexit are between the EU and the UK, and not
between the UK and the EU/Ireland. Ireland has considerable influence in this area but it must convince the Commission and the other member states of its argument. It cannot act unilaterally.

Despite this commitment, there are a number of issues that present difficulties for the continued maintenance of the CTA in the same form as it is today.

First, when the UK leaves the EU, the acquisition and sharing of personal data, specifically immigration and security data, will not now be internal to the EU. As a result, data protection and privacy regulations may diverge between the EU and the UK such that they are not equivalent. If that happens, then the transfer of information and data between Ireland and the UK will have to stop, bringing to an end the CTA as we know it.

Second, the CTA relies upon reciprocal and convergent visitor visa approaches by the UK and the Republic to 3rd country nationals. As the other member states of the EU become 3rd country nationals one would assume that they will still continue to benefit from visa free travel to the UK on a reciprocal basis. If the UK were to change that, then this would cause difficulties for the Irish government.

Third, immigration is predominantly a matter for member states, including that of 3rd country national visitors, however EU member states have tended to be convergent in their approach for granting visitor visas. In the absence of the UK, the EU may seek to acquire more jurisdiction over immigration issues in general. If the EU were to mandate divergence from the rules applicable in the UK, that would apply to Ireland and probably result in the end of the CTA.

Fourth, Ireland opted out of the Schengen agreement in order to retain the benefits of the CTA arrangement. At this point in time, the Schengen agreement is under considerable strain due to the migrant crisis, with a number of member states temporarily suspending the operating of the agreement. If this were to settled down in the future, Ireland may be required to join the Schengen agreement which would automatically end the CTA.

The consequences of an end to the CTA would have significantly more impact on travel between the two parts of the island of Ireland than on east-west travel outlined above. Requiring a passport/passport card with mandatory checks being introduced in border posts in Great Britain would simply replicate the procedure on arrival in Irish border posts and that which takes place in the other member states. The real difficulty would be the removal of the CTA as it relates to north-south travel.

If the CTA were to go, it should be noted that the UK government could still choose not to institute checks for passports or other identity documents for travel into Northern Ireland in the same way that the UK does not routinely stop people arriving in Great Britain from the Republic. Thus the UK could keep the CTA alive in that regard.
However, the position would not be the same for the Irish government. In the absence of an agreement, the Irish government would be forced to provide border checks between the Republic and Northern Ireland. Ireland cannot act unilaterally with respect to immigration controls as it would be a frontline border state for the EU. Surprisingly therefore, if immigration controls are to be introduced on the island it is more likely to be introduced by the Irish government as an obligation of EU membership. The UK could simply not reciprocate the arrangement on the island of Ireland although it might then revert to the post World War 2 position of an immigration check on all arrivals into Great Britain.

For Ireland therefore, it is crucial that the CTA is protected as it applies on the island of Ireland.

**Phase 1 of the EU-UK negotiations on Brexit**

In the recently concluded Phase 1 negotiation, the EU and the UK provided for the following with respect to the CTA:

54. Both Parties recognise that the United Kingdom and Ireland may continue to make arrangements between themselves relating to the movement of persons between their territories (Common Travel Area), while fully respecting the rights of natural persons conferred by Union law. The United Kingdom confirms and accepts that the Common Travel Area and associated rights and privileges can continue to operate without affecting Ireland’s obligations under Union law, in particular with respect to free movement for EU citizens.

One should note that the document at this point in time specifically states it is not legally binding and in any event as can be seen from the wording, there is an element of uncertainty into the precise meaning of the terms involved.

What is does is to give primacy to the UK and Ireland to make individual arrangements between the two countries with respect to the CTA so long as it does not conflict with the obligations of EU membership and the rights of EU citizens.

But this merely reflects what was discussed earlier. One of the greatest threats to the CTA is from the EU, not from the UK. Can the UK and Ireland negotiate a CTA agreement that is convergent with EU membership for Ireland? Bear in mind that the primary EU right affected is in fact free movement of people, which many believe to be the basis for the Brexit vote. By far the easiest would be to revert to the post World War 2 situation of having UK border checks on travel only between the two islands. But the logical consequence of doing this will be to require EU border checks between the Republic and Northern Ireland or alternatively, accept that Ireland will forever be outside the Schengen area.
Conclusion

Essentially, one likely solution for the issues that Brexit gives rise to in the case of the CTA, is the creation of a border in the Irish sea between the two islands as well as a border between Ireland and the rest of the EU. This would permit travel north-south on the island of Ireland without restriction but would impose checks on travel east-west between the two islands (which to an extent already exist) and also continue with border checks between Ireland and the rest of the EU. In some situations, Brexit may not create one border but several.