

Electronic Travel Authorisation and the Common Travel Area: How can proposals for pre-travel authorisation work on the Ireland/NI land border?

CAJ briefing note

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The Immigration White Paper published in December 2018 outlines proposals for the future border and immigration system and is the best indicator of what the new immigration system will look like across the UK.¹ The ongoing digitalisation of the immigration system is reflected heavily in the paper and it is clear the government intends to move towards an online immigration system with applications, visa documents and status checking taking place digitally. At the border, the paper proposes the use of e-gates and an electronic travel authorisation scheme which will require visitors and transit passengers to obtain permission prior to travel through an online system.

The paper also commits to the protection of the Common Travel Area stating: “The future border and immigration system will fully respect the UK’s long-standing approach to movement within the CTA. As now, there will be no routine immigration controls on arrivals in the UK from Ireland or the Crown Dependencies.”

What the Immigration White paper fails to consider is how a system of pre-clearance and border checks can apply within the Common Travel Area and particularly across the NI/Ireland land border.

Electronic Travel Authorisation (ETA)

This proposed system will impose a requirement for visitors and transit passengers who do not currently need a visa to come to the UK to obtain an Electronic Travel Authorisation (ETA). The system seems to be modelled on existing systems in other countries such as the United States ESTA scheme. The ETA scheme is described as a ‘light-touch’ online application form, where visitors apply online allowing the government to do security checks and confirm their permission to enter the UK in advance of them travelling. The permission is valid for multiple entries to the UK over a fixed period of time.

The ETA scheme will apply to EU nationals but not to Irish and British nationals. The scheme only applies to people who don’t have an immigration status, so it appears that EU nationals living in the UK prior to the end of the transition period who have obtained status under the EU Settlement Scheme will not be required to apply. The scheme will also impact non-EU nationals who have visa free travel into the UK such as Brazilian and Mexican citizens.

The ETA system includes exit checks, where every time a migrant enters or leaves the UK it is digitally recorded to ensure immigration compliance. Immigration enforcement measures will be taken using this information against those deemed to be ‘illegal’.

¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766465/The-UKs-future-skills-based-immigration-system-print-ready.pdf

The UK government updated the information on the future immigration system in July 2020 in *The UK's Points-Based Immigration System Further Details*.² This paper again commits to the protection of the Common Travel Area: “There will continue to be no routine immigration controls on journeys from within the CTA to the UK, with no immigration controls whatsoever on the Northern Ireland – Ireland land border.”

The paper confirms the implementation of the ETA plan: “We will introduce a universal ‘permission to travel’ requirement which will require everyone wishing to travel to the UK (except British and Irish citizens) to seek permission in advance of travel.”

Impact in the Common Travel Area

Thousands of non-British and Irish people rely on moving fluidly across the NI/Ireland border for work, education, healthcare and services. Many cross the border multiple times a day. The reality of the NI/Ireland border is not considered in the UK government plans for the post Brexit immigration regime. Applying for an ETA in advance of entering the UK may be a simple idea for someone visiting London for a week long holiday, but how can it work for a person who needs to cross the land border multiple times without advance notice because their nearest supermarket is in Northern Ireland or because the road to their place of work crosses the border at multiple stages?

EU nationals residing on the NI side of the border who have been able to obtain status under the EU Settlement Scheme should be exempt from ETA requirements and will be able to travel freely across the border. EU citizens living in the UK post transition who obtain status under the future immigration system appear to also be exempt. However, EU citizens residing in Ireland travelling into NI cannot obtain a UK immigration status and will be required to obtain an ETA. Nationals of countries which do not require a visa to enter the UK who are resident in Ireland also appear to be required to obtain an ETA before entering NI under this system. So for example an American citizen resident in a border region of Ireland can enter NI without a visa but under this system they will be required to obtain an ETA before doing so.

While the ETA system is designed to allow multiple entry, this is over a fixed period of time and will expire. It also appears that there will be a fee for applying for an ETA and a waiting time for approval. It is simply not realistic to expect people living in border regions to utilise this system when entering and leaving the UK fluidly is an essential part of their daily life. Preventing EU citizens and visa free nationals from crossing the border without an ETA could lead to people being unable to visit family and friends, unable to access their nearest hospital or unable to access services such as the nearest supermarket or petrol station.

It is not clear what the penalty will be for failing to obtain an ETA, as the government papers only envisage a situation where a migrant will be entering through border infrastructure where this will presumably be impossible. If entering the UK without an ETA becomes a criminal or immigration offence it could carry very serious consequences for migrants living in border areas.

The use of exit checks in informing immigration enforcement is also concerning as even someone who has obtained an ETA will not be able to show they have left the UK if they do so via the land border, where there is no physical infrastructure which will record their exit. This could lead to migrants who exited the UK via the Republic of Ireland being wrongly accused of being in the UK illegally at a later stage, with potentially devastating consequences. There is also a concern that the need to police the border could lead to increased unlawful immigration checks within the Common Travel Area. Section 1(3) Immigration Act 1971

²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/899755/UK_Points-Based_System_Further_Details_Web_Accessible.pdf

expressly prevent passengers on Common Travel Area journeys being subject to passport/immigration controls.³ Despite government assurances that checks will not occur, passport and I.D checks have been evidenced as happening within the Common Travel Area. The statutory basis for these checks is unclear and concerns have been raised over the unlawful use of counter terrorism and border security powers for the collateral purpose of routine immigration control. Racial profiling and discriminatory practices have also been evidenced in the conduct of these checks.

On the 8 March 2019, in response to a parliamentary question by MP Conor McGinn querying how the ETA system will operate within local journeys in the Common Travel Area and local journeys over the Irish land border, the (then) Minister for the Home Department Caroline Nokes responded:

“The Government intends to introduce a requirement for visitors and transit passengers who do not need a visa to come to the UK to obtain an Electronic Travel Authorisation (ETA). The requirement will not apply to Irish nationals. The detail of our ETA scheme is currently under development and requires primary legislation before it can be introduced. The UK does not operate routine immigration controls on local journeys from within the Common Travel Area and the ETA scheme will be developed to operate in a way which is consistent with those arrangements.”

Despite this, it is evident that the UK government has not considered the use of ETAs across the land border in their proposals for the post Brexit immigration system. The language around the scheme makes it clear that the scheme has been designed on the assumption that visitors using the ETA will be entering through border infrastructure for standard travel such as tourism. For example when considering the cost of an ETA the paper states: “It is anticipated that any cost of obtaining a pre-travel authorisation would be small in relation to the cost of travel.” An EU national living in Donegal who walks to the supermarket 30 minutes away in Derry might argue against that presumption for a start.

The failure to consider the nuances of the CTA and land border in particular is a glaring omission in the government’s white paper and further details paper.

The UK government has confirmed that ETA scheme is under development and will require further primary legislation. It is essential that the feasibility and impact of the application of this scheme in the border region is assessed and consulted on before this happens, and that any proposals adopted do not lead to violations of rights, particularly further racial discrimination, and/or disproportionate sanctions and detention.

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³ <https://www.legislation.gov.uk/ukpga/1971/77/section/1>