



BRIEFING PAPER

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Brexit negotiations: the Irish border question

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Summary

Negotiations between the United Kingdom and the European Union on the UK's withdrawal from the EU have begun.

The first phase of negotiations will attempt to find agreement on three main issues, the UK's financial settlement, citizens' rights and how the border between Ireland and Northern Ireland will operate. The focus of this paper is this latter issue.

The European Union and the United Kingdom agree on the principles of how the border should operate post-Brexit. They both support:

- The Good Friday Agreement and its commitments, including the right for the people of Northern Ireland to choose to hold Irish or British citizenship or both
- Preventing a hard border
- Recognising existing bilateral agreements between the UK and Ireland such as the Common Travel Area.

The European Union wants to ensure that such arrangements are still compatible with EU law, which is why it has suggested "flexible and imaginative solutions will be required."

Because of the legacy of the Northern Irish Troubles, both the EU and the UK are keen to come to an agreement, and think flexibly and creatively about solutions to the problems created by the UK's withdrawal. This suggests there is an amount of goodwill on both sides.

However, the Northern Irish border is very complex and probably the most wide-ranging of the three principal areas being discussed in the first round of the Brexit negotiations.

This complexity derives from four main areas:

- The issues of the border cut across both the exit agreement that is being negotiated and an agreement on the future relationship between the EU and the UK, on which discussions have yet to start;
- 'Creative solutions' to preventing a hard border run up against the established rules and procedures on which the Single Market and Customs Union are built;
- It is not clear whether, despite the wishes of the British and Irish governments to maintain the Common Travel Area, after the UK's withdrawal it could continue to function exactly as it does currently; and
- The problems facing the Northern Irish devolved government add another layer to the complexity. The Executive is currently suspended, the major political parties have significantly differing approaches to Brexit, and the Democratic Unionist Party (DUP), the largest party in the Assembly, has signed a confidence and supply deal with the Conservative Party, which gives it an effective veto on UK government policy in this area.

1. Overview

1.1 The negotiations begin

Negotiations between the United Kingdom and the European Union on the UK's withdrawal from the EU have begun. The first meeting between the negotiators took place on 19 June, where they agreed a joint approach to the timing, structure and initial priorities for the talks. The first phase of negotiations will attempt to find agreement on three main issues: a financial settlement for the UK's withdrawal, the rights of EU citizens in the UK and UK citizens in the EU and the focus of this paper - how the border between Ireland and Northern Ireland (i.e. the UK) will operate. Further information on the functioning of the negotiations are available in the Library briefing [Brexit: the talks begin](#).

1.2 A phased approach produces 'a dialogue'

The EU's position is that discussions on the UK's future relationship with the bloc cannot begin until sufficient progress¹ has been made in the first round of negotiations on the withdrawal agreement. Neither can any agreement covering future relations between the two sides be passed until the UK has left the EU. To bridge this gap transitional arrangements, if terms can be agreed, can be put in place in order to ensure an orderly withdrawal, as long as these are limited in time, clearly defined and subject to effective enforcement mechanisms (which will in the EU's view certainly include jurisdiction of the Court of Justice of the European Union).

However, this 'phased approach' to the negotiations, to which the UK government appears to have acquiesced, means that some of the key issues relating to the Irish border, most importantly how goods and people will move across it, are technically not on the agenda in the first phase of talks. Yet the future functioning of the border cannot be discussed without reference to UK's future trading relationship with the EU.

In an apparent nod to these complexities, the UK and EU's principal negotiators, David Davis and Michel Barnier, announced in a press conference on 19 June that a 'special dialogue' involving senior negotiators from each side has been set up to consider the issue. This dialogue will be managed between the most senior official at the Department for Exiting the European Union (DEXEU), Olly Robbins, and Mr Barnier's deputy Sabine Weyand, meaning that they will operate at a more senior level than the negotiation groups covering citizens' rights and the financial settlement.²

¹ A fuller examination on what constitutes sufficient progress can be found in the Library briefing '[Brexit: the talks begin](#)'.

² '[Border issue 'will have to wait until Brexit talks end](#)', Irish News, 20 June 2017

David Davis, in his evidence to the House of Lord's EU Select Committee on 11 July 2017, foresaw discussions on the issue of the Irish border continuing for some time:

As regards the circumstances of Northern Ireland [...] My aim was to get it started soon, although we do not expect to finish it until quite close to the end because of the other technical issues to be resolved [...] It will also depend on the final outcome on customs, free trade, citizens' rights and so on.³

1.3 EU and UK positions

The European Union has not produced a separate position paper on this policy area. Their broad approach to the Northern Ireland border issue was set out in the European Council negotiating guidelines:

The Union has consistently supported the goal of peace and reconciliation enshrined in the Good Friday Agreement in all its parts, and continuing to support and protect the achievements, benefits and commitments of the Peace Process will remain of paramount importance. In view of the unique circumstances on the island of Ireland, flexible and imaginative solutions will be required, including with the aim of avoiding a hard border, while respecting the integrity of the Union legal order. In this context, the Union should also recognise existing bilateral agreements and arrangements between the United Kingdom and Ireland which are compatible with EU law.⁴

In a speech to both houses of the Irish Parliament, Michel Barnier emphasised that while the EU does not wish to have a hard border, some sort of customs controls would have to be in place:

Brexit changes the external borders of the EU. I will work with you to avoid a hard border.

The UK's departure from the EU will have consequences. We have a duty to speak the truth.

Customs controls are part of EU border management. They protect the single market. They protect our food safety and our standards.

But I already said many times: nothing in this negotiation should put peace at risk.⁵

The UK government's negotiating objectives for Brexit as set out by the Prime Minister in January 2017 state:

- "we will work to deliver a practical solution that allows the maintenance of the Common Travel Area with the Republic, while protecting the integrity of the United Kingdom's immigration system."

³ House of Lords Select Committee on the European Union, [David Davis evidence session](#), 11 July 2017, Q1

⁴ European Council, [Guidelines following the United Kingdom's notification under Article 50 TEU](#), 29 April 2017

⁵ European Commission, [Speech by Michel Barnier at the Joint Houses of the Oireachtas \(Houses of Parliament of Ireland\), Dublin](#), 11 May 2017

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- “our guiding principle must be to ensure that – as we leave the European Union – no new barriers to living and doing business within our own Union are created.”⁶

In the Government’s May 2017 White Paper they stated:

We recognise that for the people of Northern Ireland and Ireland, the ability to move freely across the border is an essential part of daily life. When the UK leaves the EU we aim to have as seamless and frictionless a border as possible between Northern Ireland and Ireland, so that we can continue to see the trade and everyday movements we have seen up to now.⁷

And:

In recognition of their importance in the Belfast Agreement, the people of Northern Ireland will continue to be able to identify themselves as British or Irish, or both, and to hold citizenship accordingly.⁸

1.4 Positive conditions for an agreement

As detailed above, the UK and the EU largely agree on the *principles* of how the border will operate between the UK and Ireland after the UK’s withdrawal. The challenges will come in working out the details of how avoiding a hard border sits with EU rules and regulations that condition how a border between itself and a third country operates. However, the EU’s call for “flexible and imaginative” solutions suggests there is a large scope for compromise.

The driving force behind the flexibility in the EU’s approach is its acknowledgment that the success of the peace process should not be jeopardised by the UK’s withdrawal. It is also driven by the EU’s support for the Irish government. Michel Barnier in his speech to both houses of Irish parliament in May 2017 made this commitment:

I want to reassure the Irish people: in this negotiation Ireland’s interest will be the Union’s interest.

We are in this negotiation together and a united EU will be here for you.⁹

Relations between the UK and Ireland before the 2016 EU referendum were at their best since Irish independence, as evidenced by the historic state visits by the Queen to Ireland in May 2011 and President Higgins to the UK in April 2014.

It is the view of the Irish Government that Ireland’s accession to what was then the EEC, at the same time as the UK in 1973, allowed a partnership to develop between the UK and Ireland based on the equality of membership of the organisation that helped transcend the

⁶ HM Government, [The government’s negotiating objectives for exiting the EU: PM speech](#), 17 January 2017

⁷ HM Government, [The United Kingdom’s exit from and new partnership with the European Union](#), February 2017, para 4.4

⁸ HM Government, [The United Kingdom’s exit from and new partnership with the European Union](#), February 2017, para 4.7

⁹ EU Commission, [Speech by Michel Barnier at the Joint Houses of the Oireachtas \(Houses of Parliament of Ireland\), Dublin](#), 11 May 2017

past troubled relations between the two sides. Despite the challenges the UK's withdrawal from the EU will bring, Ireland is keen to maintain good relations with the UK. The cross-border bodies set up by the Good Friday Agreement (see Section 2), will likely take on a greater importance and status post-Brexit.

1.5 Issues to be addressed

The Northern Irish border is very complex and probably the most wide-ranging of the three principal areas being discussed in the first phase of the Brexit negotiations.

This complexity derives from four main areas:

- 1 The issues of the border cut across both the exit agreement that is being currently negotiated and an agreement on the future relationship between the two sides, on which discussions have yet to start;
- 2 'Creative solutions' to preventing a hard border run up against the established rules and procedures on which the Single Market and Customs Union are built;
- 3 It is not clear whether, despite the wishes of the British and Irish governments to maintain the Common Travel Area, after the UK's withdrawal it could continue to function exactly as it does currently; and
- 4 The problems facing the Northern Irish devolved government add another layer to the complexity. The Executive is currently suspended, the major political parties have significantly differing approaches to Brexit, and the Democratic Unionist Party (DUP), the largest party in the Assembly, has signed a confidence and supply deal with the Conservative Party, which gives it an effective veto on government policy in this area.

2. The Good Friday agreement

2.1 Background and implications

The [Good Friday or Belfast Agreement 1998](#) provided the foundations for the devolved arrangements in Northern Ireland, as well as being a major development in the peace process.

The Good Friday Agreement comprises two treaties: a Multi-Party Agreement involving most of the political parties in Northern Ireland (the DUP did not support the Agreement) and the British-Irish Agreement, the accord between the governments of the UK and Ireland. This British-Irish Agreement means that the UK Government has obligations under international law to another sovereign state in respect of Northern Ireland.

The Good Friday Agreement confirmed that a devolved system of government would be established in Northern Ireland, and that the people of Northern Ireland would determine whether to remain part of the United Kingdom. It also provided a guaranteed human rights framework, and bodies for UK-Irish and north-south relations. It included a right for the people of Northern Ireland to choose to hold Irish or British citizenship, or both.

The preamble to the treaty between the UK and Ireland includes a statement about the status of both countries within the EU:

Wishing to develop still further the unique relationship between their peoples and the close co-operation between their countries as friendly neighbours and as partners in the European Union.

The preamble to a treaty is not binding. However, common EU membership was an important part of the context within which Republicans found their way to participate in political institutions within the UK.

2.2 The UK government position

In the second reading debate on the *European Union (Notification of Withdrawal) Bill 2016-17*, David Jones, Minister of State at the Department for Exiting the European Union, said,

We are wholly committed to the Belfast agreement and its successors. We will work with the Irish Government to maintain the common travel area on the island of Ireland and not return to the borders of the past.¹⁰

In October 2016 the Prime Minister stated,

There is no reason to believe that the outcome of the referendum will do anything to undermine the absolute rock-solid commitment of this Government and the people of Northern Ireland to the settlement that was set out in the Belfast agreement. There is, and remains, strong support for the

¹⁰ HC Deb 1 February 2017, c1130

entirely peaceful future for Northern Ireland. That has been determined by democracy and consent. We remain committed to that and to work with others to ensure that entirely peaceful future.¹¹

2.3 The EU position

As set out in Section 1, the EU is strongly supportive of the peace process and does not want the UK's withdrawal from the EU to jeopardise this in anyway.

This approach was underlined by Michel Barnier in his speech to both houses of the Irish Parliament, on 11 May 2017:

In Northern Ireland, lifting the borders took time.

Only 15 years ago did check-points and controls totally disappear. Thanks to the Good Friday Agreement that ended decades of violence.

I was the European Commissioner in charge of the PEACE programme. And I have not forgotten my conversations with John Hume and David Trimble, who spoke to me on its importance.

I understand the Union's role in strengthening dialogue in Northern Ireland and supporting the Good Friday Agreement.

European integration helped to remove borders that once existed on maps and in minds.

Brexit changes the external borders of the EU. I will work with you to avoid a hard border.

The UK's departure from the EU will have consequences. We have a duty to speak the truth.

Customs controls are part of EU border management. They protect the single market. They protect our food safety and our standards.

But I already said many times: nothing in this negotiation should put peace at risk.

This was recognised by the 27 Heads of State and Government two weeks ago. They were very clear that the Good Friday Agreement must be respected in all its dimensions.

The Irish government position

The Irish government lobbied hard to ensure its priorities were included in the European Council guidelines on the negotiations. They held over 400 engagements with the EU27 countries and the EU institutions. The content of the guidelines and the subsequent negotiating directives on the border issue, as well as its status as one of the three major issues being discussed in the first phase of talks, suggest Ireland's efforts were successful.

The Irish Government set out its approach to Brexit in a comprehensive position paper published in May 2017.¹² It emphasises that:

¹¹ HC Deb 26 October 2017, c278

¹² Irish Government, [Ireland and the negotiations on the UK's withdrawal from the European Union: The Governments approach](#), 2 May 2017

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- 1) Brexit is a UK policy “not an EU policy or an Irish policy.” It also believes Brexit is “bad for Britain, for Europe and for Ireland.”
- 2) Ireland stands firmly behind the EU position that “Ireland’s priorities are best advanced from a position of strength as a trusted and respected member of the EU27 team.”
- 3) Ireland continues to see major benefits from its membership of the EU that outweigh any risks from the UK’s withdrawal from the bloc:

[Irish] membership of the European Union has underpinned our national values, helped our economy to prosper, not least by unhindered access to a vast single market, and assisted our transition to a less isolated society that is more equal and open. It also underscores the unequivocal conclusion that Ireland’s interests are best served by remaining a fully committed member of the EU, working with our EU partners to deliver more for our citizens

- 4) At the same time the Government pledged to “maintain our close relationship with Britain, which reflects our unique economic, political, cultural and people-to-people links. These two essential objectives need not in any way be mutually exclusive.”

The Irish Government is clear that it must secure the dividends of the Good Friday Agreement, which it identifies as an open border and freedom of the people in Northern Ireland to choose their citizenship:

The Government has made clear its priority that there be no visible, “hard” border on the island of Ireland. This will require a political and not just a technical solution, as well as recognition that the land border on the island represents a unique and unprecedented set of circumstances. The Government will also ensure the protection of the rights of those in Northern Ireland who choose to exercise their right to hold Irish, and thus EU, citizenship, and will advocate for continued EU engagement in Northern Ireland.

The Irish government underlines how important the Common Travel Area (CTA) is in the context of the Northern Ireland Peace Process and relations on the island of Ireland:

It facilitates the vast numbers of people who commute across the border and to and from Great Britain for work, business, trade, education, health, family or other reasons. For this reason, the recognition of “existing bilateral arrangements” in the EU Negotiation Guidelines is important, given that it speaks to the fundamental importance of the Common Travel Area in underpinning relationships across these islands

The Irish government is also clear that it believes the EU played a fundamental role in securing the peace process:

It has directly underpinned the Northern Ireland Peace Process in several ways:

- By providing a valuable context where Ireland and the UK could work in partnership and develop a broader relationship outside the framework of bilateral relations.
- By facilitating an island with an open border, common trading and regulatory standards, a shared framework of inter-governmental co-operation and a sense of shared European

identity which provides a crucial reassurance to the minority nationalist community in Northern Ireland.

- By direct financial supports administered through the Special EU Programmes Body which has offices in both Ireland and Northern Ireland.
- By providing a supporting legal framework that reflects and develops the rights and equality provisions of the Good Friday Agreement

It goes onto say

Ireland, with the support of EU partners and the EU institutions, will ensure that, to the extent possible, the UK's departure has a minimal impact on all of these areas and indeed that any new arrangements allow continued EU support to the reconciliation process within Northern Ireland and in the border regions.

Post-Brexit, Ireland recognises bi-lateral relations will be even more important and emphasises that the British-Irish Intergovernmental Conference and the British-Irish Council (both established under the 1998 Good Friday Agreement), in the lead up to the UK's withdrawal and afterwards, will need to be used to their fullest.

3. Role of the Northern Ireland executive

3.1 Role of the devolved administrations

The Government has said that legislation connected to the UK's withdrawal from the EU must work for the whole of the UK. Northern Ireland voted to remain in the EU in the 2016 referendum.

David Davis, Secretary of State for Exiting the European Union, has said the UK Government will work closely with, and consult, the devolved administrations to get the best possible deal for all parts of the UK. At the same time, he has warned that "no one part of the UK can have a veto over our exit."¹³

However, there has been criticism of the primary mechanism for involvement by devolved administrations, the Joint Ministerial Council, and its EU negotiations sub-committee.

Discussions between the UK, Scottish, Welsh and Northern Ireland executives take place primarily in the Joint Ministerial Committee, although there have also been some bilateral meetings.

A sub-committee has been established, known as the JMC (EN) (EN stands for EU Negotiations). This was agreed at the JMC in October 2016:

1. The Prime Minister restated the UK Government's commitment to full engagement with the Scottish Government, the Welsh Government and Northern Ireland Executive on the UK's exit from the European Union. Ministers discussed how the constituent parts of the United Kingdom should work together to ensure that the interests of all parts of the United Kingdom are protected and advanced, and to develop a UK approach and objectives for the forthcoming negotiations. They agreed to take forward multilateral engagement through a new Joint Ministerial Committee on EU Negotiations to be known as JMC (EN) which would have the following terms of reference:
2. ***Working together in EU Negotiations***
3. *Through the JMC(EN) the governments will work collaboratively to:*
 - discuss each government's requirements of the future relationship with the EU;
 - seek to agree a UK approach to, and objectives for, Article 50 negotiations; and
 - provide oversight of negotiations with the EU, to ensure, as far as possible, that outcomes agreed by all four governments are secured from these negotiations; and,
 - discuss issues stemming from the negotiation process which may impact upon or have consequences for the UK

¹³ HC Deb 10 October 2016, cc40-2

Government, the Scottish Government, the Welsh Government or the Northern Ireland Executive.¹⁴

The meetings of the JMC are not regular. According to the UK Government dates are “agreed by consensus across the four governments.”¹⁵ Michael Ellis, Deputy Leader of the House of Commons, said:

We established the Joint Ministerial Committee on European Negotiations, chaired by the Secretary of State for Exiting the European Union, which has met four times since its inception in November. The Joint Ministerial plenary, chaired by the Prime Minister personally, has also met twice—in October and January—and there has also been substantial bilateral engagement between Ministers.¹⁶

The JMC(EN) has met four times (November, December, January and February). Its March 2017 meeting was postponed because of the elections in Northern Ireland, and it has not met again since. Until a new Government has been agreed for Northern Ireland, it is likely that discussions with the devolved administrations will be bilateral.

Following the Prime Minister’s statement on the European Council on 14 March 2017, Hywel Williams (Plaid Cymru) raised criticism of the JMC(EN) mechanism:

I was glad to hear the Prime Minister say that she has been working with the devolved Administrations, but I was also slightly puzzled because the “Joint Ministerial Committee on Exiting the EU is less organised than a community council”.

Those are not my words, but those of an actual participant: the Welsh Government Minister Mark Drakeford. How is she ensuring that the interests of the devolved Governments are reflected in the Article 50 notification?

Mrs May responded:

The Joint Ministerial Committee process has been operating for some months at various levels and has brought UK Government Ministers together with the three devolved Administrations to discuss issues that have been raised on both sides, including looking at the Welsh Government’s paper on Wales’s particular concerns, which are being taken into account.¹⁷

David Anderson raised the matter again on 19 April 2017:

The JMC is supposed to be the platform through which the devolved Administrations have their voices not just heard but responded to. The Secretary of State paints a rosy picture, but he is not listening to those voices. Northern Ireland voices are not being heard at the moment, because they are not allowed to attend. From what we have heard this morning, the Scots are saying clearly that their voice is being ignored. The Welsh feel,

¹⁴ [Joint Ministerial Committee communique](#), 24 October 2016

¹⁵ WQ 66931, 7 March 2017

¹⁶ HC Deb 15 March 2017, cc169-70WH

¹⁷ HC Deb 14 March 2017, c192

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at best, less than impressed. Will the Government give this body the teeth it needs, put it on a statutory footing and let it do its job properly?

David Mundell responded:

The purpose of the JMC is to bring together the UK Government and the devolved Administrations, and to work together to formulate our position as we go forward in the negotiations. I very much regret the fact that the Northern Ireland Executive have not been able to be politically present in recent times—we all want that situation to be brought to a conclusion—but the meetings have been robust and, I believe, certainly in terms of the actions that have flowed from them, constructive.¹⁸

The Labour Party attempted to amend the *European Union (Notification of Withdrawal) Bill* during its committee stage to include a statutory role for the JMC. Jenny Chapman moved New Clause 4, which began with the following:

(1) In negotiating and concluding any agreements in accordance with Article 50(2) of the Treaty on European Union, Ministers of the Crown must consult, and take into account the views of, a Joint Ministerial Committee at intervals of no less than two months and before signing any agreements with the European Commission.¹⁹

Brexit Minister Robin Walker rejected the amendment on the grounds that the JMC was not a legislative or statutory body and the amendment would undermine its role as a “neutral forum for confidential discussions”.²⁰

He commented that:

Engaging with the devolved Administrations and discussing their priorities is exactly what the Joint Ministerial Council on EU negotiations was set up for. It brings together the constituent parts of the United Kingdom to discuss each Government’s requirement for the future relationship with the EU, and to seek a UK approach to and objectives for article 50 negotiations.

3.2 Absence of Executive

Northern Ireland has not had an Executive, nor a functioning Assembly, since January 2017. The deputy First Minister, the late Martin McGuinness of Sinn Féin, resigned, and Sinn Féin did not nominate a candidate to take his place. This set in train a sequence of statutory provisions that led to early Northern Ireland Assembly elections in March 2017. The two main parties, the Democratic Unionist Party (DUP) and Sinn Féin, could not agree on a new Executive before the statutory deadline of 27 March 2017. The UK Government extended that deadline by provisions in the *Northern Ireland (Ministerial Appointments and Regional Rates) Act 2017*, but the new date, 29 June 2017, was also missed.

¹⁸ HC Deb 19 April 2017, c659

¹⁹ [HC Deb 6 February 2017, c129](#)

²⁰ [HC Deb 6 February 2017 c183](#)

On 3 July 2017, the Secretary of State, James Brokenshire, announced that progress was still being made in talks to resolve the problem, but that there was as yet no agreement.²¹

If an agreement were reached at this stage, legislation would be needed to create an Executive, since the statutory deadline has passed for the formation of an Executive on the basis of the March 2017 election.

Interim arrangements are in place for civil servants to spend money on existing budgetary priorities, but in the long term political direction would be needed. Mr Brokenshire acknowledged that he is under a statutory duty to call another election now that the deadline for creating an Executive has passed, but noted that this was unlikely “of itself [to] resolve the current political impasse.”²²

He went on to hint at some form of direct rule:

As the Government for the whole United Kingdom, we will always govern in the interests of all those in the United Kingdom. Therefore, if resolution were to prove intractable and an Executive could not be restored, we would of course be ready to do what is needed to provide that political decision making in the best interests of Northern Ireland.²³

3.3 The Conservative Party and DUP confidence and supply agreement

After the 2017 UK general election the largest party, the Conservative Party, lacked an absolute majority. It formed a government and entered an agreement with the DUP, known as a “confidence and supply agreement”. The DUP agreed to support the Government on confidence motions, financial legislation, and certain other policies:

The DUP agrees to support the Government on all motions of confidence; and on the Queen’s Speech; the Budget; finance bills; money bills, supply and appropriation legislation and Estimates.

In line with the parties’ shared priorities for negotiating a successful exit from the European Union and protecting the country in light of recent terrorist attacks, the DUP also agrees to support the Government on legislation pertaining to the United Kingdom’s exit from the European Union; and legislation pertaining to national security.

Support on other matters will be agreed on a case by case basis.²⁴

An accompanying document set out a package of [financial support](#) to Northern Ireland.

Following a statement by the First Secretary of State in the House of Commons in which the deal was announced, the shadow First

²¹ HC Deb 3 July 2017, c899

²² HC Deb 3 July 2017, c900

²³ HC Deb 3 July 2017, c900

²⁴ [Confidence and Supply Agreement between the Conservative and Unionist Party and the Democratic Unionist Party](#), 26 June 2017

Secretary called it a "shabby and reckless deal", claiming that the deal caused potential damage to the Good Friday Agreement; that the deal was unfair to the rest of the country; and that the deal contradicted previous statements regarding the availability of public funds.²⁵

Sir John Major criticised the Conservative/DUP agreement on the grounds that it potentially jeopardised the role of the UK Government as an "honest broker" in ongoing talks to resolve the political impasse in Northern Ireland.²⁶

Damien Green stated that:

Her Majesty's Government remain fully committed to the Belfast agreement and its successors. This means that we will continue to govern in the interests of all parts of the community in Northern Ireland.²⁷

DUP and the Customs Union

The DUP set out its approach to Brexit in its [2017 General Election Manifesto](#). A common solution that has been suggested to the problem of preventing a hard border between the Republic of Ireland and Northern Ireland is for Northern Ireland to remain in the Customs Union. The DUP's manifesto is clear that while it wants frictionless trade and movement across the border it does not want any internal borders between Northern Ireland and the rest of the UK, which would be imposed if stays in the Customs Union. Its wish to participate in free trade deals the UK might negotiate outside the EU is also incompatible with Customs Union membership. The manifesto calls for:

- Ease of trade with the Irish Republic and throughout the European Union
- Maintenance of the Common Travel Area
- Strengthened relationships across the four components parts of the United Kingdom with no internal borders
- Particular circumstances of Northern Ireland with a land border with the EU fully reflected
- Frictionless border with Irish Republic assisting those working or travelling in the other jurisdiction
- Progress on new free trade deals with the rest of the world
- Comprehensive free trade and customs agreement with the European Union
- Customs arrangements which facilitate trade with new and existing market²⁸

²⁵ HC Deb 26 June 2017, c331

²⁶ "John Major warns against DUP deal as talks with Tories begin," *Financial Times*, 13 June 2017

²⁷ HC Deb 26 June 2017, c329

²⁸ Democratic Unionist Party, [2017 Westminster Manifesto](#), 31 May 2017

The DUP approach of no ‘special status’ for Northern Ireland appears to be shared by the UK government. The Secretary of State for Northern Ireland, James Brokenshire, on 1 February, gave this reply to DUP MP Sammy Wilson’s plea:

That no special arrangements, different conditions or special circumstances will be afforded to Northern Ireland that would weaken our position within the United Kingdom and treat us differently from other parts of it?

James Brokenshire:

As a Government, we are very clear about the strengths of the Union and how that matters to us all. The approach that we take is based on getting the best possible deal for all parts of the United Kingdom. Yes, there will be some specific factors in Northern Ireland of which the hon. Gentleman is well aware—we have talked about the border and there are other issues as well—but our approach is with that intent and focus. Therefore concepts of special status are the wrong approach. It is rather about looking at special factors and special circumstances and dealing with them effectively.²⁹

In oral evidence to the Exiting the European Union Select Committee in December 2016, David Davis, when asked if the government was looking at Northern Ireland staying in the Customs Union, replied “no, that is not one of the options we have been looking at—so far, anyway.”³⁰ Pressed later on the possibility of Northern Ireland having a different deal from the rest of the United Kingdom because of its particular circumstances, Mr Davis replied:

I would be loath to go down that route. It is very important for the people of Northern Ireland to see themselves as part of the United Kingdom, until they choose otherwise³¹

²⁹ [HC Deb 1 February 2017](#), Leaving the EU: Common Travel Area, vol 620

³⁰ Exiting the European Union Committee, The UK’s negotiating objectives for its withdrawal from EU, 14 December 2016, HC 815 Q 420

³¹ Exiting the European Union Committee, The UK’s negotiating objectives for its withdrawal from EU, 14 December 2016, HC 815 Q 455

4. Free movement of people and the Common Travel Area

4.1 The Common Travel Area

The Common Travel Area (CTA) is a special travel zone between the Republic of Ireland and the UK, Isle of Man and Channel Islands. It dates back to the establishment of the Irish Free State in 1922.

Nationals of CTA countries can travel freely within the CTA without being subject to passport controls. The arrangements for non-CTA nationals are more complex. Although there are minimal immigration checks for journeys started within the CTA, non-CTA nationals must have the relevant immigration permission for the country they are seeking to enter. Until the UK exits the EU, citizens of EEA member states have prevailing rights of entry and residence in the UK and Ireland under EU 'free movement' law.

Although both the Republic of Ireland and the UK maintain their own visa and immigration policies, there is a significant degree of practical cooperation and policy coordination in order to ensure the security of the CTA. Controls on the Irish border are also generally regarded as impractical and undesirable.

For further detail see the Library briefing paper [The Common Travel Area, and the special status of Irish nationals in UK law](#) (CBP 7661, 9 June 2017).

4.2 Irish nationals' special status in UK law

Irish nationals have a special status in UK law which is separate from and pre-dates the rights they have had as EU citizens since 1973.

In short, the Republic of Ireland is not considered to be a 'foreign country' for the purpose of UK laws, and Irish citizens are not considered to be 'aliens'. Furthermore, Irish citizens are treated as if they have permanent immigration permission to remain in the UK from the date they take up 'ordinary residence' here.

This special status affects Irish nationals' rights across a number of areas, including eligibility for British citizenship, eligibility to vote and stand for election, and eligibility for certain welfare benefits. It is thought that, as a result, Irish nationals have more rights than other EU/ EEA nationals resident in the UK.

Professor Bernard Ryan of Leicester University has questioned the extent to which the rights of Irish nationals in the UK are secured by existing law. He argues that new legislation will be required to protect Irish nationals' status in the UK post-Brexit. For further detail see sections 2 and 3.2 of the Library briefing paper [The Common Travel Area, and the special status of Irish nationals in UK law](#) (CBP 7661, 9 June 2017).

4.3 Freedom of movement as it operates today

Free movement is central to the concept of EU citizenship. It is a right enjoyed by all citizens of the Union (those with nationality of any of the 28 Member States).

All EU citizens have a right to reside in another EU Member State for up to three months without any conditions other than the requirement to hold a valid identity card or passport. After three months certain conditions apply, varying according to the status of the EU citizen. In order to have an ongoing “right to reside” an EU citizen must fit into one of the following categories:

- a worker or self-employed person³²
- a job-seeker (a person who is seeking employment and has a genuine chance of being employed)
- a self-sufficient person
- a student
- a family member accompanying or joining an EU citizen who fits into one of the above categories.³³

There may also be certain administrative formalities to be met.³⁴

Those who opt to exercise their free movement rights are protected against discrimination in employment on the grounds of nationality. Provisions co-ordinating social security rules ensure citizens do not lose entitlements by working elsewhere in the Union.

EU citizens who have resided legally for a continuous period of five years in another EU Member State automatically acquire the right to permanent residence there. To qualify for permanent residence, students and the self-sufficient must possess comprehensive sickness insurance cover throughout the five year period. Confusingly, while EU citizens in the UK have access to NHS care, under UK law this does not satisfy the requirement to have comprehensive sickness insurance cover.

UK immigration law as it applies to non-EU citizens is significantly more restrictive.

For further detail see section 2 of the Library briefing paper [Brexit: what impact on those currently exercising free movement rights?](#) (CBP 7871, 11 July 2017).

³² In certain circumstances, a person who is no longer working can retain “worker” or “self-employed” status - for example, if temporarily unable to work due to illness or accident, or due to involuntary unemployment: Directive 2004/38/EC, Article 7(3)

³³ A more limited range of relatives are eligible for a right of residence as the family member of a “student” than for the other categories: Directive 2004/38, Article 2(2), Article 7(4)

³⁴ Directive 2004/38, Article 7

4.4 Different positions of the EU & UK

The Government's position

In her [Lancaster House speech](#) of 17 January 2017, Theresa May noted that the CTA predates UK and Irish membership of the EU. She described the maintenance of the CTA as an important priority for the UK.

During the passage of the *European Union (Notification of Withdrawal) Act 2017* David Davis told the House of Commons that issues relating to Ireland and the peace process would be at the forefront of his mind during the negotiations with the EU. He said the Government guaranteed, “without any qualification whatever”, the retention of the CTA.³⁵

In its White Paper '[The United Kingdom's exit from and new partnership with the European Union](#)', the Government sought to emphasise the ingrained rights of Irish nationals in the UK.

4.6 The close historic, social and cultural ties between the UK and Ireland predate both countries' membership of the EU and have led to the enjoyment of additional rights beyond those associated with common membership of the EU. The special status afforded to Irish citizens within the UK is rooted in the Ireland Act 1949 and, for the people of Northern Ireland, in the 1998 Belfast Agreement.

4.7 Both the UK and Irish Governments have set out their desire to protect this reciprocal treatment of each other's nationals once the UK has left the EU. In particular, in recognition of their importance in the Belfast Agreement, the people of Northern Ireland will continue to be able to identify themselves as British or Irish, or both, and to hold citizenship accordingly.

The Government committed itself to striving to maintain the CTA:

4.8 We want to protect the ability to move freely between the UK and Ireland, north-south and east-west, recognising the special importance of this to people in their daily lives. We will work with the Northern Ireland Executive, the Irish Government and the Crown Dependencies to deliver a practical solution that allows for the maintenance of the CTA, while protecting the integrity of the UK's immigration system.

Stance of the EU Parliament

In its [resolution of 5 April 2017](#), the European Parliament recognised that Irish citizens 'will be particularly affected' by UK exit from the EU and stated its opposition to the return of a 'hard border'. The legally non-binding resolution, which sets out the EU Parliament's key principles and conditions for its approval of a withdrawal agreement between the UK and the EU, noted the need for any withdrawal agreement to address challenges arising from recent history:

20. [The EU Parliament] 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

³⁵ [HC Deb 31 January 2017 cc823-4](#)

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 need to ensure continuity and stability of the Northern Ireland peace process and to do everything possible to avoid a hardening of the border...³⁶

EU Council negotiating guidelines

At its special meeting on 29 April 2017 the European Council agreed guidelines for the negotiations. The issue of the Irish border was one of three matters that Council President Donald Tusk chose to highlight in his statement on the meeting.³⁷ The guidelines evidence the Council's wish to avoid a 'hard border' and an acceptance that the EU recognise the CTA:

11. The Union has consistently supported the goal of peace and reconciliation enshrined in the Good Friday Agreement in all its parts, and continuing to support and protect the achievements, benefits and commitments of the Peace Process will remain of paramount importance. In view of the unique circumstances on the island of Ireland, flexible and imaginative solutions will be required, including with the aim of avoiding a hard border, while respecting the integrity of the Union legal order. In this context, the Union should also recognise existing bilateral agreements and arrangements between the United Kingdom and Ireland which are compatible with EU law.³⁸

The EU Commission's negotiating directives

Four days later the EU Commission published its draft negotiating directives, translating the Council's guidelines into a legal mandate for the conducting of the first phase of the negotiations.³⁹

The negotiating directives, formally endorsed by the European Council on 22 May 2017, outline the EU's priorities for the negotiations. They make explicit reference to the CTA:

14. In line with the European Council guidelines, the Union is committed to continuing to support peace, stability and reconciliation on the island of Ireland. Nothing in the Agreement should undermine the objectives and commitments set out in the Good Friday Agreement and its related implementing agreements; the unique circumstances and challenges on the island of Ireland will require flexible and imaginative solutions. Negotiations should in particular aim to avoid the creation of a hard border on the island of Ireland, while respecting the integrity of the Union legal order. Full account should be taken of the fact that Irish citizens residing in Northern Ireland will continue to enjoy rights as EU citizens. **Existing bilateral agreements and arrangements between Ireland and the**

³⁶ European Parliament resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union ([2017/2593\(RSP\)](#))

³⁷ European Council, [Remarks by President Tusk on the Special European Council \(Art.50\) of 29 April 2017](#)

³⁸ European Council, [Guidelines following the United Kingdom's notification under Article 50 TEU](#), 29 April 2017

³⁹ European Commission, [Speech by Michel Barnier at the press conference on the adoption of the Commission's recommendation on draft negotiating directives](#), 3 May 2017

United Kingdom, such as the Common Travel Area, which are in conformity with EU law, should be recognised. The Agreement should also address issues arising from Ireland's unique geographic situation, including transit of goods (to and from Ireland via the United Kingdom). These issues will be addressed in line with the approach established by the European Council guidelines.⁴⁰

On 12 June the EU Commission published a position paper on citizen's rights. One of the five general principles for the EU's approach it sets out is:

Equal treatment amongst EU27 citizens by and in the UK in all matters covered by the Withdrawal Agreement, without prejudice to Common Travel Area arrangements between the UK and Ireland.⁴¹

4.5 The potential implications of Brexit

In the run-up to the referendum, the UK and Irish governments both expressed uncertainty about the future of the CTA in the event that the UK would leave the EU.⁴²

The Government's February 2016 paper on [*The process for withdrawing from the European Union*](#) stated:

Northern Ireland would be confronted with difficult issues about the relationship with Ireland. Outside the EU's Customs Union, it would be necessary to impose customs checks on the movement of goods across the border. Questions would also need to be answered about the Common Travel Area which covers the movement of people. This could have an impact on cross-border co-operation and trade.⁴³

Its March 2016 paper on [*Alternatives to membership: possible models for the United Kingdom outside the European Union*](#) raised similar concerns:

It is not clear that the Common Travel Area could continue to operate with the UK outside the EU, and Ireland inside, in the same way that it did before both countries joined the EU in 1973.⁴⁴

The implications of Brexit for the continued operation of the CTA remain to be seen. The UK and Irish governments are united in their desire to maintain the CTA⁴⁵ and the EU acknowledges the importance of ensuring there is no 'hard border' in Ireland. EU law also recognises the right of Ireland and the UK to maintain special

⁴⁰ European Commission, [Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union](#), 3 May 2017

⁴¹ EU Commission, [Position paper transmitted to the UK: essential principles on citizens' rights](#), 12 June 2017

⁴² [Written Question 15721](#), answered on 17 November 2015; 'Irish prime minister says border controls could return if Britain exits EU', *the Guardian*, 29 May 2016

⁴³ Cabinet Office, [The process for withdrawing from the European Union](#), Cm 9216, February 2016, page 19

⁴⁴ HM Government, [Alternatives to membership: possible models for the United Kingdom outside the European Union](#), March 2016, page 16

⁴⁵ [Written Question 41433](#), answered on 7 July 2016

arrangements, outside of the Schengen Area, on the movement of people.⁴⁶

The future of the CTA, and the nature of border controls

Might the EU have an influence over the future of the CTA?

Select committees have received contrasting evidence on the question of Brexit's impact on the CTA.

Evidence received by the Northern Ireland Affairs Committee prior to the referendum suggested that the future of the CTA is less assured:

74. (...) The European Union's Brexit Taskforce told us that as the CTA is an agreement between two EU members and protected by EU Protocol (it is currently included in an annex to the Lisbon Treaty), it would no longer apply if the UK was outside the EU. Whilst the CTA predates British and Irish membership of the EU, it is not clear that its status in international law is sufficiently robust for it to bind EU members beyond their mutual obligations to each other in the event of a Brexit. **Outside the EU, the UK would be free to negotiate a special status for Irish citizens: Professor Dagmar Schiek, Jean Monnet Chair of EU Law and Policy at Queens University Belfast, told us that there is some latitude within the EU's rules to allow some bilateral agreement between the Republic of Ireland and the UK over the border. However, she emphasised that it would require the remaining EU members to agree to this: "Under EU law, any future relation between the Republic of Ireland and the UK would be subject to agreement not only with the Republic of Ireland, but with the whole of the EU".**⁴⁷

Evidence submitted to the Lords EU Committee inquiry into Brexit's impact on UK-Irish relations cast doubt on predictions that the operation of the CTA will continue unaffected by Brexit:

The Immigration Law Practitioners' Association thought it would be optimistic to assume that the Protocol would not become the subject of Brexit negotiations. The Centre for Cross Border Studies noted that, given the references in EU Treaties, retention of at least some of the benefits of the CTA was dependent on EU agreement". Fianna Fáil agreed that it should not be assumed that the political, economic and social imperative to maintain the Common Travel Area and an open border would supersede European law and procedures. In their view, Brexit posed a "real and substantive threat to the very existence of the Common Travel Area", including the introduction of passport controls to prevent the land border being used as a back door into the UK.⁴⁸

Giving evidence to the Exiting the EU Committee, David Davis was more optimistic that the CTA can be retained. Asked how it could continue with the Republic of Ireland inside the EU and the UK having left, the Secretary of State replied:

⁴⁶ [Treaty on the Functioning of the European Union](#), Protocol 20

⁴⁷ Northern Ireland Affairs Committee, [Northern Ireland and the EU referendum](#), 26 May 2016, HC 48 2016-17

⁴⁸ Lords EU Committee, [Brexit: UK-Irish relations](#), 12 December 2016, HL Paper 76 2016-17, para 110

First, in terms of legalistic issues, the common travel area is actually a clause of the Amsterdam treaty, which I negotiated. It is not quite perfect, because it talks in terms of different members of the Union, rather than one in, one out, but it is already recognised in there.

Secondly, people have said, “Wouldn’t Ireland be a route into Britain?” Well, 50 million people land at British airports every year. It is a very long-winded way to get into the United Kingdom to come via Dublin. If you want to come in, you come as a tourist and stay. That is what happens if people are trying to come in illegally in some way. I also do not foresee a circumstance where we will stop tourists at all. We will have lots of people coming in and out of Britain, so I do not see it as being as big an issue as that question implies. The other thing I would say is that I also went to Dublin. They were equally keen to maintain this and we may well have discussions with them at some point about their own incoming security, so we have at least some watchlist-type thing there. That is for them to decide, not me.⁴⁹

Professor Bernard Ryan agrees that the continuation of CTA arrangements is compatible with EU law. He told the Lords EU Committee:

There is no apparent legal reason why the Republic of Ireland should not retain the benefit of Protocols 19 and 20 after Brexit, so as to permit bilateral co-operation with the United Kingdom outside the Schengen Zone.⁵⁰

James Brokenshire, Secretary of State for Northern Ireland, reminded the Lords EU Committee that the Crown Dependencies are outside the EU and yet within the CTA.⁵¹ Mr Brokenshire also pointed to Ireland’s decision not to become part the Schengen area. This, he felt, was a “fundamental building block” to the continuation of the CTA post-Brexit.⁵² Giving evidence as part of the same enquiry, Ambassador Dan Mulhall told the committee that Ireland is under no pressure from other EU member states to join Schengen, as they understand the unique circumstances of Northern Ireland.⁵³

Will there be immigration checks?

The Northern Ireland Affairs Committee considered three possible scenarios in the event of a significant change to EU nationals’ free movement rights in the UK:

- **A harder border between the Republic of Ireland and Northern Ireland** – it was noted that this would cause significant disruption to the people who regularly cross the

⁴⁹ Exiting the European Union Committee, *The process for exiting the European Union and the Government’s negotiating objectives*, 14 January 2017, HC 815 2016-17, [Q450](#)

⁵⁰ Lords EU Committee, *Brexit: UK-Irish relations*, 12 December 2016, HL Paper 76 2016-17, written evidence of Professor Bernard Ryan (BUI0008)

⁵¹ Lords EU Committee, *Brexit: UK-Irish relations*, 12 December 2016, HL Paper 76 2016-17, Q13

⁵² Lords EU Committee, *Brexit: UK-Irish relations*, 12 December 2016, HL Paper 76 2016-17, Q28

⁵³ Lords EU Committee, *Brexit: UK-Irish relations*, 12 December 2016, HL Paper 76 2016-17, Q4

border for work, leisure or study, and that there are doubts over the extent to which the border could be effectively policed, given the number of formal and informal crossing points.⁵⁴

- **A harder border between the island of Ireland and Great Britain** – it was noted that this would be less disruptive and easier to implement than applying controls at the border with the Republic of Ireland, and appeared to be the UK Government’s preference over applying checks at the land border. Nevertheless, the Committee considered that imposing checks on people travelling between different parts of the UK would be “highly undesirable”.
- **A harmonised approach between the UK and Ireland to immigration and border controls** – this approach would prevent hard border controls on the Irish border or controls between the islands of Ireland and Britain, and could build on the cooperation that already exists. However, the Republic of Ireland’s continued membership of the EU might constrain the policy options available.

The Committee concluded:

In the event of a Brexit, an arrangement that maintains a soft land border between Northern Ireland and the Republic but which does not see restrictions imposed on travel within the UK would need to be a priority.⁵⁵

A briefing paper published by Professor Bernard Ryan shortly before the referendum identified some specific elements of the current arrangements which might need to be amended in light of a UK withdrawal from the EU, depending on the nature of the UK’s future relationship with the EU.⁵⁶

On the other hand, some commentators have suggested that it is a “red herring” to argue that the Irish border would become a weak spot in preventing unlawful immigration to the UK. Raoul Ruparel, co-director of Open Europe, suggested immigration checks could be conducted in places other than borders:

It is very likely that the UK will continue to allow visa-free travel with the EU. Therefore, EU citizens will be free to visit the UK on holiday or to conduct some cross-border business. In reality, the enforcement of ensuring people do not over-stay cannot be at the border but via other mechanisms such as regulating access to social security and the job market. These are the things that would no longer be automatically available to EU citizens if the UK was no longer subject to free movement. But there is no real need for any greater border enforcement (though data collection and tracking of entrants should be improved). Border checks from a purely security perspective are

⁵⁴ The Committee noted that there are estimates of the number of daily cross-border commuters which vary from 18,000 to 30,000; and that there are nearly 300 formal border crossing points and many informal ones.

⁵⁵ Northern Ireland Affairs Committee, [Northern Ireland and the EU referendum](#), 26 May 2016, HC 48 2016-17, para 80

⁵⁶ Professor Bernard Ryan, [JLPA EU Referendum Position Papers 8: The implications of UK withdrawal for immigration policy and nationality law: Irish aspects](#), 18 May 2016

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already in place since the UK and Ireland are not in Schengen and it seems likely the UK could continue to trust Ireland to enforce the border of the Common Travel Area from a security perspective. The effectiveness of such checks would depend on bilateral cooperation.⁵⁷

⁵⁷ Open Europe, '[How might the effect of Brexit on Ireland & Northern Ireland be managed?](#)', 8 March 2016

5. Free movement of goods and the customs union

5.1 Background

The Irish border is 310 miles long.⁵⁸ There are nearly 300 formal crossing points and many informal ones.⁵⁹ There is a large volume of trade crossing the border. Northern Ireland exported £2.4 billion of goods to the Republic of Ireland in 2016, 31% of all goods exports from Northern Ireland. Imports of goods from the Irish Republic were £2.7 billion (27%).⁶⁰ There are close economic ties between the Northern Ireland economy and that of the Republic, especially in the agri-food sector.⁶¹ According to an article in the Economist, Guinness brewed in Dublin is transported to Belfast for bottling before returning to the Irish Republic to be exported.⁶² In its report on the Government's negotiating objectives, the Exiting the EU Committee said:

Much of Ireland's business, particularly its agri-food sector, was closely integrated between north and south, and operated on the basis of seamless cross border movement; several business and political leaders told us that over a million litres of milk crossed the border in both directions each day. There was a fear that any customs requirements would introduce costs and delays and disrupt this business.⁶³

At the moment, both the UK and the Republic of Ireland are EU Member States. Both countries are therefore part of the EU single market and customs union. This removes the need for customs checks on goods passing between them. According to Katy Hayward of Queen's University, Belfast:

For example, the introduction of EEC regulations on customs declarations in 1987 had immediate effect on the ease with which goods could be transported between north and south. Furthermore, the creation of the Single Market on 1 January 1993 erased many obstacles to cross-border trade and economic development, and customs posts on the border were immediately made redundant.

[...]

Nowadays, the clearest material indication of having crossed the border from one state into another lies merely in the subtle change of road markings, signs and speed limits.⁶⁴

⁵⁸ [The hardest border](#), BBC website, 31 May 2017

⁵⁹ Northern Ireland Affairs Committee, [Northern Ireland and the EU referendum](#), 1st report of 2016/17, HC48, 26 May 2016, para 77

⁶⁰ HMRC, [Regional Trade Statistics, Fourth Quarter 2016](#), 9 March 2017

⁶¹ HM Government, [The United Kingdom's exit from and new partnership with the European Union](#), February 2017, Cm 9417, para B.12

⁶² Why Brexit could mean a pricier pint of Guinness, The Economist, 11 July 2017

⁶³ Exiting the EU Committee, [The Government's negotiating objectives: the White Paper](#), 3rd report of 2016/17, HC 1125, 4 April 2017, para 88

⁶⁴ Dr Katy Hayward, [The origins of the Irish border](#), UK in a changing Europe, 16 January 2017

Professor Michael Dougan of Liverpool University told the Northern Ireland Affairs Committee:

With regard to potential deals, there are two facets to the customs union that we need to bear in mind, and the first is the traditional idea of customs duties, tariffs and taxes. We all know the idea that, within the customs union, within the EU, there are no customs duties between member states. There is a single tariff that separates the customs union from the outside world.

Probably less obvious is that the customs border is also about—and in many respects this is more important—regulatory enforcement. The customs border is actually about checking health and safety regulations for goods passing between the territories. It is about environmental protection. It is about countering money-laundering and counterfeited goods. That, in some respects, is the main job of the customs authorities and one of the main purposes of the customs frontier that separates the EU from outside the EU. For those two reasons—the idea of tariffs but, just as importantly, the idea of border enforcement—there does have to be a frontier, it does have to involve checks and it does have to involve all of the pre and post-customs formalities that go with the Union Customs Code.⁶⁵

5.2 Implications of Brexit

After Brexit, the Irish border will separate the UK from the EU. The Irish border will be an external EU border. The UK Government's position is that the UK will leave both the single market and the EU customs union. This means that the Irish border will become the customs border of the EU. Professor Michael Dougan told the Northern Ireland Affairs Committee:

Very quickly then, on the customs union, the common message that seems to be coming ... is that if you are not in the EU there will be a customs border. It will have to be policed in some way. I do not mean by the police; I mean policed as a customs border. The objective is to minimise the amount of disruption, to co-operate as closely and constructively as possible, so as to keep trade flowing and to minimise the disruption to people's everyday lives. That is the objective, but it will be there. There will be a customs border.⁶⁶

Michael Lux, a customs and trade lawyer and former customs official at the European Commission, told the Northern Ireland Affairs Committee:

If that [Northern Ireland remaining in the EU customs union] cannot be achieved because the UK does not want to have even a part of its territory remain in the customs union, then there are different possibilities for agreements between the EU and the UK. Each of these agreements, whether it is a customs union agreement or a free trade agreement, requires that customs controls take place at the border.⁶⁷

⁶⁵ Northern Ireland Affairs Committee, [Future of the land border with the Republic of Ireland](#), 16 November 2016, HC 700, Q5

⁶⁶ Northern Ireland Affairs Committee, [Future of the land border with the Republic of Ireland](#), 16 November 2016, HC 700, Q23

⁶⁷ Northern Ireland Affairs Committee, [Future of the land border with the Republic of Ireland](#), 1 February 2017, HC 700, Q367

At the same time as leaving the customs union and single market, the UK Government's Brexit White Paper said that the "Government recognises that Northern Ireland's particular circumstances present a range of particular challenges to be taken into account when preparing for our exit from the EU."⁶⁸ The Government has said:

... we want to ensure that cross-border trade with the EU – and particularly with Ireland – is as frictionless as possible when we leave the EU. We are committed to negotiating an exit deal that works for the whole of the UK, including Northern Ireland. We will work with the Irish Government and the Northern Ireland Executive to minimise frictions and administrative burdens and to find a practical solution that keeps the border as seamless and frictionless as possible, recognising the unique economic, social and political context of the land border between Northern Ireland and Ireland.⁶⁹

The EU also wants to avoid a hard border:

the unique circumstances and challenges on the island of Ireland will require flexible and imaginative solutions. Negotiations should in particular aim to avoid the creation of a hard border on the island of Ireland, while respecting the integrity of the Union legal order.

[...]

The Agreement should also address issues arising from Ireland's unique geographic situation, including transit of goods (to and from Ireland via the United Kingdom). These issues will be addressed in line with the approach established by the European Council guidelines.⁷⁰

It is important to note that customs are an exclusive responsibility of the EU, not the Member States. In other words, the customs issue needs to be resolved by the UK and the EU, although the Irish Government can make proposals. Michael Lux told the Northern Ireland Affairs Committee:

Ireland is not entitled to make agreements on customs issues. This is an exclusive competence of the European Union. Ireland can make proposals to the EU negotiator, which is the European Commission, of what the future agreement should look like. There I would also like to make a comment. It is very unlikely that in the short period for negotiation there will be a definitive solution to these problems. This is not an issue for this Committee, but I would like to highlight that it is very important to find a transitional arrangement with the EU for what you do until you have the final agreement. All this talk about hard Brexit and "If we do not agree we are just out" is very, very dangerous, especially for Northern Ireland.⁷¹

⁶⁸ HM Government, [The United Kingdom's exit from and new partnership with the European Union](#), February 2017, Cm 9417, para B.6

⁶⁹ HM Government, [The United Kingdom's exit from and new partnership with the European Union](#), February 2017, Cm 9417, para B.14

⁷⁰ Council of the European Union, [Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union](#), 22 May 2017, para 14

⁷¹ Northern Ireland Affairs Committee, [Future of the land border with the Republic of Ireland](#), 1 February 2017, HC 700, Q390

Both the UK and the EU wish to avoid the reintroduction of a hard border as this would be disruptive to trade. Even if there are no tariffs on cross-border trade, a hard border would mean increased costs and delays for business, especially those whose supply chains cross the border.

A hard border would also pose risks for the peace process. The Exiting the EU Committee said:

Many in Ireland are deeply concerned that the introduction of new and visible border check points would provide an opportunity and focal point for those who wish to disrupt the peace and feed a sense in some communities that the Good Friday Agreement was being undermined.⁷²

Moving checks away from the border might alleviate some of the concerns around the peace process but would still be disruptive to business.

The Irish Republic's economy is also likely to be affected. The Lords European Union Committee said "[a]ny potential negative impact of Brexit will probably be more significant for Ireland than for any other Member State"⁷³ with agri-food and manufacturing likely to be the most affected. The report noted that some sectors might benefit from Brexit, possibly because of higher inward investment.⁷⁴

5.3 Approaches to avoiding a hard border

The key issue for the negotiations is how the wish of both the EU and UK to avoid a hard border can be reconciled with the fact that it will become an EU customs border after Brexit. As customs is an exclusive competence of the EU, a purely bi-lateral arrangement between the UK and the Republic of Ireland is not possible – it must be agreed by the EU as a whole. A special status for Ireland would run counter to the idea that the EU customs frontier operates uniformly. Professor Dougan told the Northern Ireland Affairs Committee: "there is an expectation that the external frontier of the customs union acts as one and they apply the same principles".⁷⁵

A number of approaches to the border problem have been suggested. One possibility is that more checks could take place between the island of Ireland and Great Britain, rather than along the border. For example, Open Europe said:

If tighter checks were needed they may prove less controversial at certain focal points – airports and ports around the island – rather than along the Northern Irish/Republic border itself (though this isn't without difficulty since it would essentially

⁷² Exiting the EU Committee, [The Government's negotiating objectives: the White Paper](#), 3rd report of 2016/17, HC 1125, 4 April 2017, para 112

⁷³ House of Lords European Union Committee, [Brexit: UK-Irish relations](#), 6th report of 2016/17, HL Paper 76, 12 December 2016, para 39

⁷⁴ House of Lords European Union Committee, [Brexit: UK-Irish relations](#), 6th report of 2016/17, HL Paper 76, 12 December 2016, paras 39-40

⁷⁵ Northern Ireland Affairs Committee, [Future of the land border with the Republic of Ireland](#), 16 November 2016, HC 700, Q10

mean checks between Northern Ireland and the rest of the UK).⁷⁶

However, this would amount to a border within the UK and would affect trade between Northern Ireland and the rest of the UK. It could also be politically problematical for Unionists.⁷⁷

Another approach is to try to find a technological solution which might mean less intervention at the border. David Davis told the House of Lords European Union Committee:

It involves a variety of things, such as whether we are using trusted trader schemes or authorised economic operators, which is the technical term for it, to allow people to go across the border and carry things across the border without being stopped, and whether we can use ANPR and pre-tagged containers and that sort of thing. That is one area where a degree of technical work has been started.⁷⁸

Open Europe suggested:

The UK and Ireland should use technology to pre-clear almost all goods so trucks can cross without needing to stop. Inspections – when exceptionally required – should take place at dedicated zones away from the border, with UK checks recognised by Ireland and vice versa. This would remove the need for checkpoints or the presence of customs officials at the border.⁷⁹

There are, however, issues associated with relying on technology. The National Audit Office has recently highlighted some of the risks involved with the introduction of the UK's new customs system.⁸⁰ The House of Lords European Union Committee did not think technology was sufficiently advanced to remove the need for physical border checks:

Nor, while electronic solutions and cross-border cooperation are helpful as far as they go, is the technology currently available to maintain an accurate record of cross-border movement of goods without physical checks at the border.⁸¹

As mentioned by David Davis, a “trusted trader” system might help in streamlining customs procedures. Costs of registration for such schemes could be an issue for small businesses.⁸²

A number of commentators have been sceptical about whether it is possible to have “seamless and frictionless” trade across the border.

⁷⁶ Raoul Ruparel, [How might the effect of Brexit on Ireland and Northern Ireland be managed?](#) Open Europe, 8 March 2016

⁷⁷ Dr Katy Hayward, [The origins of the Irish border](#), UK in a changing Europe, 16 January 2017. See also Europe offers models for Northern Ireland border, Financial Times, 25 July 2016.

⁷⁸ [Oral evidence](#) to House of Lords European Union Committee, 11 July 2017 Q7

⁷⁹ Open Europe, [Nothing to declare: A plan for UK-EU trade outside the Customs Union](#), 27 March 2017

⁸⁰ National Audit Office, [The Customs Declaration Service](#), HC241, 13 July 2017

⁸¹ House of Lords European Union Committee, [Brexit: UK-Irish relations](#), 6th report of 2016/17, HL Paper 76, 12 December 2016, para 105

⁸² Katy Hayward, Maurice Campbell and Rob Murphy, [The Irish border as a Customs Frontier after Brexit](#), CEPS, 11 July 2017. Northern Ireland Chamber of Commerce and Industry, [Business Brexit Priorities](#), March 2017, p9

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For example, Michael Lux did not think it was possible to have no border controls:

Lady Hermon: How could the Prime Minister achieve a seamless, frictionless border? Is it achievable?

Michael Lux: It depends on how you define the term “seamless”. If you define the term “seamless” to mean there are no border controls, the answer is no, at least on the Irish side. Ireland is obliged to apply the Union law.⁸³

The Exiting the EU Committee said:

The UK Government’s aspiration for a “seamless and frictionless” border was welcomed, but neither politicians nor business leaders that we met were optimistic about this being achieved in practice. Ireland will have obligations as an EU Member State to protect the EU border with a third country, and the people that we met were sceptical that a solution would be found that would not resemble the re-emergence of a hard border but would be acceptable to the EU27 as the Northern Ireland border became one of the EU’s external borders.⁸⁴

⁸³ Northern Ireland Affairs Committee, [Future of the land border with the Republic of Ireland](#), 1 February 2017, HC 700, Q380

⁸⁴ Exiting the EU Committee, [The Government’s negotiating objectives: the White Paper](#), 3rd report of 2016/17, HC 1125, 4 April 2017, para 89

6. Other areas

6.1 Security and policing

The issue of security and policing cooperation between the UK and the EU is not on the agenda for the first phase of the talks. However, considering the legacy of the Troubles in Northern Ireland, and how these affect both sides of the border, it seems likely that some consideration of how the UK and Ireland will co-ordinate policy in these areas will be needed during the dialogue.

The EU set out its broad approach to policing and security on 12 July 2017 in its position paper: [‘Ongoing Police and Judicial Cooperation in Criminal matters’](#). It identifies 14 different instruments, such as the European Arrest Warrant, and the passenger name records directive, that the withdrawal agreement will have to provide ongoing procedures for. It also underlines how the continuation of data sharing is essential for coordination in the future, as well as establishing the UK and the EU’s right to retain the data it has already collected.

In the Prime Minister’s notice of withdrawal letter of March 29 2017 she wrote “in security terms a failure to reach an agreement would mean our cooperation in the fight against crime and terrorism would be weakened.” The government’s white paper of February 2017 set out their approach in more detail:

Chapter 11 highlights the importance this Government places on maintaining strong cooperation with our European partners in the fight against crime and terrorism. We recognise the particular significance of this in Northern Ireland. The major reviews of policing and justice that followed the Belfast Agreement recommended a strengthening of cooperation between law enforcement and criminal and civil justice agencies. Today’s effective cooperation and coordination between the justice and security agencies in Northern Ireland and Ireland are essential in containing the threat from paramilitary groups, whose objective is to threaten Northern Ireland’s security and to undermine political stability there. This operational and practical cross-border cooperation exemplifies the sort of relationship we want to have with the EU post-exit.⁸⁵

However, the UK has yet to set to produce its own position paper on police and judicial cooperation.

In his oral evidence to the Northern Ireland Committee on 13 December 2016, George Hamilton, Chief Constable of the Police Service of Northern Ireland (PSNI), emphasised how much they rely on the existing arrangements the UK has as a member of the EU and the importance of coming up with a new framework to manage future relations. He made the following points:

- The relationship between the Police Service of Northern Ireland and An Garda Síochána has never been

⁸⁵ HM Government, [The United Kingdom’s exit from and new partnership with the European Union](#), February 2017, para B.15

better. Co-operation exists at every level between our organisations and across all activities of policing

- The PSNI makes extensive use of a number of European Union justice and home affairs measures to provide a quicker, efficient and dynamic response to crime and criminality impacting on the UK and its citizens.
- The open land border with the Republic of Ireland means that there needs to be international legislation to allow the PSNI, An Garda Síochána and others to tackle effectively those who use the border to impair investigations and those who exploit the differential legislation to commit crime.
- Dissident republican terrorists use the land border to frustrate counter-terrorism efforts.
- Terrorists, organised criminals and even volume crime offenders breach bail and cross the land border routinely to try to avoid prosecution.
- 43% of Northern Ireland organised crime gangs have a cross-border dimension.
- European arrest warrants are essential in tackling terrorism, organised and volume crime across the island of Ireland, and we do make use of those.
- The CTA is also open to exploitation by criminals, organised crime groups, illegal immigrants and extremists, who can evade border controls and exploit these arrangements, aiding their criminality or, indeed, illegal travel...
- What we do require is the political and policy direction to ensure that we have a frame within which we can work to continue to keep people safe, largely through engagement with other jurisdictions, primarily the Republic of Ireland, and law enforcement agencies both sides of the border.⁸⁶

While many of the details of cross-border co-ordination can be worked out on a bi-lateral level between the UK and Ireland, the broad mechanisms for co-ordination on policing and security and the legal basis for doing so must be agreed in the withdrawal agreement.

6.2 EU funding

Northern Ireland has received a significant amount of funding from the European Union. In August 2016, the then First Minister and Deputy First Minister, Arlene Foster and Martin McGuinness, wrote to the Prime Minister to express their concerns about EU funding programmes:

EU funds have been hugely important to our economy and the peace process. Since 1994, for example we have benefited to the tune of €13 billion of funding from Europe and during the period 2014-2020 we would expect to draw down over €3.5 billion. The current uncertainty

⁸⁶ Northern Ireland Affairs Committee, [Oral evidence: Future of the land border with the Republic of Ireland](#), HC 700, Q 162

around the ability to draw down on a proportion of these funds, and the absence of EU programmes in the future is of real concern to a range of sectors.⁸⁷

Later that month the Treasury confirmed that it would stand by funding commitments for structural and investment projects signed before November 2016.⁸⁸

The UK government stated in their February 2017 White Paper that:

All European Structural and Investment Funds (ESIFs) projects signed, or with funding agreements that were in place before the Autumn Statement 2016, will be fully funded, even when these projects continue beyond the UK's departure from the EU.

[...]The Government will consult closely with stakeholders to review all EU funding schemes in the round, to ensure any ongoing funding commitments best serve the UK's national interests.⁸⁹

The Irish Government's preferred approach as set out in May 2017 is one of continued EU Engagement in Northern Ireland:

The EU has played a vital role in the peace process and this should be recognised and preserved in the context of a UK exit. The unique constitutional, historic and geographic circumstances, as well as the particular citizenship issues, all point to the need for continued EU engagement in Northern Ireland beyond the UK's withdrawal from the EU.

Ireland and the UK are currently partners in three EU-funded cross-border Cooperation Programmes with a total value to €650 million over the period 2014-2020. The programmes are important drivers of regional development in a cross-border context and allow for practical support of the peace process and the advancement of the Good Friday Agreement.

EU involvement has allowed for the realisation of projects that may otherwise have become mired in political disagreement. Removal of this constructive influence and of the funding itself would have a significant impact on the ongoing reconciliation work in Northern Ireland and the border region. In this respect, the withdrawal agreement should provide for continued EU support for and contribution to the Northern Ireland Peace Process and to future development of the region. This includes providing for the continuation of UK and EU support to PEACE and INTERREG, as well as support for the range of EU-funded programmes, where the diminution of current commitments under the 2014-2020 Multiannual Financial Framework would have a substantial impact on the prosperity and well-being of people on this island. Work beginning on successor programmes under the next Multiannual Financial Framework (MFF) also needs to ensure that they will allow for continued participation by Northern Ireland in a range of EU funded programmes with a cross-border dimension.⁹⁰

⁸⁷ Northern Ireland Executive Office, [Letter to the Prime Minister, The Rt Hon Theresa May MP](#), 10 August 2016

⁸⁸ ['Brexit: EU-funded projects in Northern Ireland will be guaranteed, Treasury says'](#), [BBC News](#), 13 August 2016

⁸⁹ HM Government, [The United Kingdom's exit from and new partnership with the European Union](#), February 2017, para 1.13

⁹⁰ Irish Government, [Ireland and the negotiations on the UK's withdrawal from the European Union: The Governments approach](#), 2 May 2017

The EU's commitment in its negotiating guidelines is to support the Good Friday Agreement and to "support and protect the achievements, benefits and commitments of the Peace Process." It has not yet made a detailed offer on development funds post the UK's withdrawal from the EU.

The European Parliament Constitutional Affairs Committee produced a briefing on the impact of Brexit on Northern Ireland. It looked at the issue of funding in its findings:

[The] EU Programme for Peace and Reconciliation in Northern Ireland, which has amounted to four peace programmes financially underwriting the peace process, providing 1.5 billion euros of funding.[...]. The EU peace projects have helped diminish the border's salience, vastly improved cross-border transport links and brought the two main communities together in seeking joint funding. The current Peace IV programme is due to expire in 2020, but an earlier Brexit could see the curtailment or abandonment of several projects.⁹¹

To date the UK Government have made no commitment to any spending on development projects post 2020. If the EU commits, as the Irish government proposes, to continue to fund projects in Northern Ireland after the UK withdrawal, it would require the assent of the UK and quite likely, continued contributions from the UK government.

⁹¹ European Parliament Constitutional Affairs Committee, [The Impact and Consequences of Brexit for Northern Ireland](#), 17 March 2017

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