

# The Northern Ireland Protocol:



The Origins of the Current Crisis

Roderick Crawford

Foreword by Rt Hon Lord Frost CMG





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## About the Author

**Roderick Crawford** was editor of *Parliamentary Brief* 1992-2012; he founded the magazine to promote a political settlement in Northern Ireland. In 2014 he began work on 'If you are safe, I am safe', a concept aimed at building conflict resolution capacity in Iraq, which he later extended to South Sudan and Yemen. He has worked on the Northern Ireland protocol since 2018.

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© Policy Exchange 2021  
Published by  
Policy Exchange, 8 – 10 Great George Street, Westminster, London SW1P 3AE

[www.policyexchange.org.uk](http://www.policyexchange.org.uk)

ISBN: 978-1-913459-51-2

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# Foreword

Rt Hon Lord Frost CMG  
Minister of State at the Cabinet Office

Policy Exchange have performed a huge public service in publishing today Roderick Crawford's meticulous analysis of the so-called "Joint Report" of December 2017.

He has written a piercing analysis which, for as long as the issues raised by the Protocol on Ireland / Northern Ireland are not yet settled, will be of more than purely historical interest. I may differ from Roderick on a few points of detail, but not on the overall assessment: that the Joint Report, so-called because it was an agreed document between the UK and the EU, is arguably the text that has done most to shape the terms of this country's exit from the European Union.

As Special Adviser to Boris Johnson when Foreign Secretary, I was a close observer, rather than a participant, during the period covered by this document. I nevertheless have acute memories of it. As the Report circulated within government that December, it was immediately clear to us that a crucial pass had been sold in agreeing — unless an alternative was agreed with the EU, which it clearly would not be — to "maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all island economy and the protection of the 1998 Agreement" (paragraph 49 of the Joint Report).

Although efforts were made internally to persuade us that "alignment" really meant "equivalence" or "approximation", we could see that that was not so, and that the effect of this commitment would be to keep the UK in the customs union and much of the single market and thus to destroy the prospect of a meaningful Brexit. This indeed turned out to be the outcome in the initial version of the Protocol from November 2018, via the famous "backstop", an agreement which Parliament consistently refused to approve.

As I fielded furious calls from Brexiteers that December week, I had two thoughts in my mind. First, "if I resign over this, how will I ever explain what it is all about?" That was a valid question at that point. When all the politics were about how we got over the "sufficient progress" threshold to further talks, this point on Northern Ireland would seem to many like a technicality. By July 2018, this was no longer the case. The linkage between Ireland, the fanciful "Chequers" proposals, and the inexorable logic on which the then Government was embarked was all too clear. It has been with us ever since.

My second thought was "how did we ever come to agree to this?"

We now know, from Irish and other EU sources, that the EU was asking itself the same question. Close observers could see that the North-South dimensions of the Belfast Agreement had been prioritised over its other dimensions, that the Report would not command any support from the unionist community, and that the British Government's agreement to these provisions was wholly unexpected.

My answer is three-fold. First, we had drifted into accepting the EU's view that the only way to ensure no "hard border, including any physical infrastructure or related checks and controls" (para 43 of the Joint Report) was for the laws on either side of the border to be identical. This ignored the fact that there already was, and is, an international border, an open one, with different currency systems, laws, taxation, and many trading rules on either side.

Second, I do not think we had made the necessary mental shift from being a member of the EU to negotiating exit from the EU. While Olly Robbins was doing his level best to negotiate exit, UK diplomats were trying to participate in EU institutions as if we were a normal member state. Our collaborative instincts from 45 years of membership meant that we were too slow to adopt a robust enough negotiating position. It is very clear that the EU did not make the same mistake, and it was explicitly to reset this psychology on our side too that we withdrew UK diplomats from most EU meetings from August 2019.

Third, it is only fair to point to the extreme weakness of the UK Government after the June 2017 election, both in Parliament and in the lack of consensus amongst its key members about how and perhaps even whether we should be exiting the EU at all. The criticisms made of the Joint Report must be tempered by the difficult circumstances in which the negotiators found themselves, compounded as they were by the EU's desire to maximise their leverage on Northern Ireland.

When Boris Johnson returned, as Prime Minister, in July 2019, and I returned as Chief Negotiator for Brexit, we inherited that Parliamentary weakness too. Nevertheless we were able to re-establish a clear purpose for the Government and to reset the balance on two crucial points, set out in the Prime Minister's letter to Donald Tusk of 19 August. The first was an unequivocal commitment to the Belfast Agreement and a clear statement that the backstop risked undermining the "delicate balance" between its three overlocking strands. The second was an explicit disavowal of the commitment to "alignment" in paragraph 49 of the Joint Report.

Despite this, in the short window of the next two months, we inevitably still operated within the intellectual and political framework set by the Joint Report. Our negotiating leverage had been cut away by the Benn-Burt Act, which made it impossible for us to leave the EU without a deal, and there was even an increasing worry that it might turn out to be impossible to deliver on the referendum result at all. Nevertheless we got a deal that took the whole of the UK, including Northern Ireland, out of the EU. The deal restored genuine agency to us for the future, by removing the backstop, which would have locked the whole country in the customs



union and much of the single market and given the EU the key. But we could not in the end escape the EU's insistence on imposing its customs and goods rules in Northern Ireland. The best we could do was include mitigations and balances in the new Protocol — and, crucially, given all these uncertainties and political novelties, insert the principle that the functioning of the Protocol beyond 2024 required the explicit consent of the Northern Ireland Assembly.

We knew, as did the Irish Government, that this new Protocol would require immensely sensitive handling. We understood that the East-West dimensions of the Northern Irish economy are in any circumstances vastly more important than its “all island” dimensions — and that the former not the latter were the economic lifeblood of the province. We knew, as some in the Irish Government would privately concede, that the balance between the three strands of the Belfast (Good Friday) Agreement had been upset by the approach taken in the Joint Report; and that the risk was that the EU's approach to the Protocol would not be consistent with the explicit commitment to protect the Agreement, in all its dimensions.

Unfortunately the operation of the Protocol has not been adapted to these underpinning realities. It has begun to damage the thing it was designed to protect — the Belfast (Good Friday) Agreement. The insistence of the EU on treating these arrangements as like any other part of its customs and single market rules, without regard to the huge political, economic, and identity sensitivities involved, has destroyed cross-community consent well before the four-year mark. We also have the lived experience of aspects that are simply unsustainable in the long-term for any Government responsible for the lives of its citizens — like having to negotiate with a third party about the distribution of medicines within the NHS. That is why we must return to the Protocol and deliver a more robust, and more balanced, outcome than we could in 2019. I hope the EU will in the end join us in that. And in so doing we will, I hope, finally move beyond the intellectual framing that Roderick Crawford so ably describes.

## Executive Summary

The Joint Report of 8 December 2017 was the key development in the negotiation of the Northern Ireland Protocol. The commitments that were entered into were legal commitments in that they were required to be reflected in the withdrawal agreement itself. The only way out of these legal commitments was a no-deal exit from the EU.

It was in the Joint Report that the core commitment was made that in order to avoid a hard border Northern Ireland would remain aligned with the necessary EU regulations to secure continued and future North-South cooperation, the all-island economy, and to protect the Good Friday Agreement. Though the commitment to alignment encompassed the whole UK this is not what was meant, as the original drafts of the 'backstop', Michel Barnier's statement on the day, and those of others, made clear. When the EU published its draft Withdrawal Agreement at the end of February 2018 it was premised on the alignment of 'the Union and the United Kingdom in respect of Northern Ireland' — in other words, Northern Ireland alone. As for the idea that this was an insurance policy ('backstop'), it was in fact window dressing to allow UK politicians to imagine they still had options and to enable them to sell it as a solution of last resort to their supporters. No one on the EU side could see any prospect for the future partnership to replace it and, though there were alternatives, there were none that could equal the value of what had been agreed to in the Joint Report for the EU and Dublin.

Making this agreement without reciprocal commitments to secure the balance of the Belfast Agreement and accommodate the UK dimension to Northern Ireland was the origin of the core flaw in the Northern Ireland Protocol. The EU deliberately did not sign up to support East-West cooperation or to protect the UK internal market — these were solely UK commitments (paragraphs 48 & 45), albeit commitments acknowledged by the EU and arguably a signal of UK concerns and of EU recognition of those concerns.

This report sets out the story of the dialogue on Northern Ireland/Ireland that produced the Joint Report. It charts the development of the EU's negotiating position and the collapse of that of the UK. In telling the story, largely based on documents, statements and speeches, it is clear that the common assumptions about the talks are only partly true. The main findings from this analysis are as follows.

The UK's February 2017 white paper on its negotiating objectives, produced seven months into May's premiership and eight weeks before the triggering of Article 50, set out twelve negotiating objectives — the

last of which was an orderly withdrawal: it was the EU's first objective. The white paper focused on the Common Travel Area, and bilateral arrangements for easements on the border with Dublin. It put the whole weight of resolving the North/South border into the negotiations for a future relationship. The future relationship strategy was logical but was ruled out by the structure of negotiations set out in the EU's April 2017 guidelines — a structure the EU stuck to. Yet, despite agreeing to the sequencing of the negotiations, the UK never really changed its strategy to reflect this until it was forced to do so just before it signed the Joint Report.

The schedule of the negotiations was not built around the Ireland/Northern Ireland issues. The format chosen to resolve the issues unique to the island of Ireland — the 'dialogue' — was out of sync with the progress of the 'negotiations' on the other issues from the start; the border negotiations were then caught up with interpretations of the Belfast Agreement. There was ambiguity about what was required from the UK; this, combined with the UK's sincere belief that arrangements for the border could only be made in the context of the EU-UK future relationship, made it easy for the UK to understand that its commitment in phase one was limited to political commitments — 'no hard border'/'no physical infrastructure at the border' — rather than a detailed operational solution.

The EU committed early on to a political solution broadly based on Northern Ireland maintaining alignment with the EU single market and customs union. This was based on an Irish interpretation of the Belfast Agreement that Dublin had many months to promote and test with the Commission and the other EU27. This interpretation was all-island, with North-South cooperation — institutional but also political, economic, societal, security, and agricultural — at its heart. To all intents and purposes, this interpretation excluded Northern Ireland's integration in the UK across all these areas: it was one-dimensional and therefore entirely unbalanced and provided a deeply flawed picture of the agreement. This is what the EU was committing to when it pledged in its negotiating directives that:

'Nothing in the Agreement should undermine the objectives and commitments set out in the Good Friday [Belfast] Agreement in all its parts 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'.

The UK and unionists took reassurance from the directives and read the commitment to flexible and imaginative solutions as reinforcing that the EU, like the UK, understood the Belfast Agreement to be complex, balanced, and appropriately ambiguous for very sound reasons. Shared language masking very different understandings of what each side meant and was committing to was a very serious problem throughout the dialogue. In

August 2017, the UK published its Northern Ireland position paper; it was solid on the Belfast Agreement but much less so on how to actually avoid a hard border — its customs proposals and its waivers for small businesses were immediately rejected by Brussels. The EU's response to the UK's interpretation of the Belfast Agreement was to counter it, not respect it, learn from it or engage with it.

The EU countered by publishing its own 'guiding principles' paper a few weeks later, at the beginning of September 2017. This paper translated its broad pledge to protect 'the objectives and commitments' set out in the Belfast Agreement into an extraordinarily narrow commitment:

'The interlocking political institutions established by the Belfast Agreement, which reflect the totality of the relationships on the islands of Great Britain and Ireland, will need to continue to operate, as will the implementing bodies under and outside of the [Good Friday Agreement] GFA'.

This reinterpretation was necessary to limit the EU's commitments in its negotiating directives so that they did not clash with the political solution it had for the border. However, it ignored the obvious and fundamental reality that the Belfast Agreement is about more than the institutions that it established. The power-sharing devolved government in Belfast is primarily East-West, not North-South: that, apart from anything else, is the nature of devolution. The Belfast Agreement adds on to pre-existing 'political, economic, security, societal, and agricultural' areas of activity, it doesn't replace them. The EU paper then made North-South cooperation central — it has every right to be so described but not out of context of UK integration — and claimed that this cooperation was embedded in common EU law and policy; it stated, not unreasonably, that the impact on continued North-South cooperation of the fact that the UK was leaving this common framework would have to be assessed.

Under pressure to get the green light for entering into the phase two talks at the October council, as scheduled in the plan for the negotiations, the Prime Minister made a speech in Florence in which a number of concessions were made to break the deadlock on issues mostly outside of the dialogue on Ireland/Northern Ireland but including a commitment to no physical infrastructure on the border. In the talks a week later, the UK agreed to press ahead with a 'mapping exercise' to evaluate the extent that North-South cooperation relied on common EU legal and policy frameworks. Progress was, however, not deemed sufficient for phase two, and the UK sets its sights on the December council with even more determination to move the talks on.

In October 2017, the UK and the EU agreed the continuation of the Common Travel Area, the UK's initial priority for avoiding a hard border. This had taken several months to achieve despite joint UK and Irish support and months of behind the scenes briefings from Dublin — in a context without serious operational or legal impediments. It was therefore asking a lot to get the border resolved by December 2017 — particularly as the UK believed it had now made the political commitment the Irish wanted.

To move things forward the UK accepted the EU's 'guiding principles' paper without gaining any concessions from the EU to address key UK concerns. In doing so it had, effectively, allowed the Irish interpretation of the Belfast Agreement to prevail in the negotiations, despite not actually accepting that interpretation. As a consequence, with the North-South dimension apparently no longer needing to be balanced by that of the East-West, the EU was free to make its next manoeuvre.

In the talks in early November 2017 the EU presented to the UK a negotiation paper titled simply 'Dialogue on Ireland/Northern Ireland'. It set out an argument that was based on the UK's acceptance of the 'guiding principles' paper, which it subtly but seriously misrepresented, and on assumptions of the results of the then ongoing 'mapping exercise' of North-South cooperation's dependence on common EU law and policy. The argument it put forward was essentially as follows:

*1) all parties are pledged to uphold the Belfast Agreement; 2) North-South cooperation is central to that agreement; 3) that cooperation depends on a common EU legal framework. Therefore, upholding the Belfast Agreement requires Northern Ireland to remain aligned with the rules of the single market and customs union required for North-South cooperation, the all-island economy and the protection of the Belfast Agreement.*

This argument only works once you have removed East-West cooperation from the equation — which is why the interpretation of the Belfast Agreement was crucial.

The conclusion of the EU's negotiation paper would form the basis of the 'backstop'. The UK initially rejected this conclusion and its implications. However, under intense pressure to move to phase two, and faced by an Irish veto backed by the other EU27, the UK looked to mitigate the implications of accepting the text and to make the text more palatable. The UK could have walked away and prepared a detailed counter argument. After all, the argument put forward by the EU was built not only on an incorrect reading of the Belfast Agreement but also on assumptions and exaggerations that misrepresented the scale of North-South cooperation and its dependence on common EU legal and policy frameworks. Time would have afforded the UK the opportunity, now that it knew what was required, to prepare its own solution with balancing commitments for East-West cooperation. Instead, the government took a gamble: it secured the right to try and solve the border problem through a future partnership or through an alternative and as yet unspecified solution. As far as the EU was concerned, the backstop was not a backstop at all, but it was happy to present it as such as this allowed the UK to make its legal commitments in the belief that it would be able to come to an alternative arrangement.

The 2017 negotiations had led to the UK being committed to be legally bound within the Withdrawal Agreement to avoid a hard border through the alignment of Northern Ireland to the EU's single market and customs union.

The EU had conducted its negotiations from a position of strength, and manoeuvred the negotiations very effectively. It had formulated a political solution approximately nine months previously and had agreed it no later than June 2017. The EU's negotiations have been widely seen as a major success for both Brussels and Dublin. This report shows that to be far from the case. The EU 'forced' the UK to accept a solution that worked legally for the EU but worked neither operationally nor politically in the context of Northern Ireland. In imposing its solution it had forced one interpretation of a pre-existing and politically significant international agreement over another; it then populated this interpretation with assumptions and exaggerations to produce the case for alignment. It did all this while turning a blind eye to the complexities and fragilities of Northern Ireland. Its manoeuvres were effective but often little more than manipulative. It was a remarkable failure of politics and it has resulted in an unstable 'solution' to the border problem. The UK's judgement was that the solution could only be finalised in the light of the EU-UK future relationship and that it had to be based on a deep, properly balanced and fully nuanced reading of the Belfast Agreement. Events have proved that judgement right.

## Locating the origins

The problems that the government's White Paper 'Northern Ireland Protocol: the way forward' seeks to address stem from an agreement that was entered into several years ago. I refer not to the 19 October 2019 Withdrawal Agreement and its re-negotiated Northern Ireland Protocol, nor to the previous November 2018 backstop arrangement that it replaced, but to the 8 December 2017 Joint Report. It was agreed then that the commitments signed up to in that report 'shall be reflected in the Withdrawal Agreement in full detail'<sup>1</sup>. Outside of a no deal, the commitments made in December 2017 were binding on the UK and EU<sup>2</sup>. The joint commitments in that report, including for a Northern Ireland backstop arrangement<sup>3</sup>, were subsequently set out 'in full detail' in the February 2018 draft withdrawal agreement and finally in the November 2018 Withdrawal Agreement; it was these arrangements that led to the failure of that agreement to be ratified by the House of Commons in 2019 and the fall of the May government; it was these earlier commitments that limited the scope for renegotiation of the protocol by Boris Johnson in October that same year. Whilst that renegotiation secured Brexit, it ultimately did not succeed in rebalancing the protocol because that balance had been negotiated away by December 2017. Getting these UK concessions was a diplomatic triumph for Ireland and the Commission: failing to secure adequate reciprocal concessions was a staggering failure for the UK. The negotiations that led to this largely occurred behind closed doors between August 2017 and December 2017 when the UK's negotiating position collapsed under pressure to gain EU approval to move onto phase two of the talks. The UK's failures began even earlier. After the Joint Report, the pass had been sold.

1. 'Joint Report from the negotiators of the European Union and the United Kingdom government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union', 8 December 2017. Quoted from Paragraph 5, which also appears on the front page of the report under 'Remarks'.
2. NOTE: The title 'Joint Report' is a little misleading and misled many — not least because some key commitments were not 'joint' commitments at all. The Joint Report is a record of agreement reached in principle on a package of measures during the first phase of negotiations under Article 50 — on citizenship, Ireland/Northern Ireland, financial obligations as well as other matters. The question of whether these commitments were legally binding was raised then and continues to be raised, but the wording of the opening section is clear — and this was repeated on the cover page: 'Under the caveat that nothing is agreed until everything is agreed, the joint commitments set out below in this joint report shall be reflected in the Withdrawal Agreement in full detail'. 'Nothing is agreed until everything is agreed' does not mean that a party to the negotiations could tear up commitments already made, but rather that these commitments will have legal standing as part of the final agreement but not apart from it. For example, had there been 'no deal', the commitments agreed to in the Joint Report would have no standing independent of the final withdrawal agreement; the current Protocol 'recalls' the commitments reflected in the Joint Report in its preamble because phase two of the negotiations concluded in a withdrawal agreement.
3. NOTE: The 'backstop' is set out in paragraph 49 of the Joint Report.

## Developing opening positions

Theresa May became Prime Minister on 13 July 2016. She had set out her policy in her leadership speech on 30 June 2016 — ‘Brexit means Brexit’. Much mocked, it is one of the most memorable phrases of the Brexit era; it meant no going back to the EU for a renegotiated membership, much expected by European elites, or a second referendum; it was a commitment to a meaningful Brexit. She stated that no decision to invoke Article 50 should be made before the end of the year and then set out two negotiating principles:

“First, nobody should fool themselves that this process will be brief or straightforward. Regardless of the time it takes to negotiate the initial deal, it is going to take a period lasting several years to disentangle our laws, rules and processes from the Brussels machinery. That means it is going to require significant expertise and a consistent approach. I will therefore create a new government department responsible for conducting Britain’s negotiation with the EU and for supporting the rest of Whitehall in its European work. That department will be led by a senior Secretary of State — and I will make sure that the position is taken by a Member of Parliament who campaigned for Britain to leave the EU.

“The second point is while the ability to trade with EU member states is vital to our prosperity, there is clearly no mandate for a deal that involves accepting the free movement of people as it has worked hitherto. Now is not the time for me to set out my full negotiating principles — that will come later. But I want to be clear that as we conduct our negotiations, it must be a priority to allow British companies to trade with the single market in goods and services — but also to regain more control of the numbers of people who come here from Europe. Any attempt to wriggle out of that — especially from leadership candidates who campaigned to leave the EU by focusing on immigration — will be unacceptable to the public.”<sup>4</sup>

Before the referendum had taken place, all parties in Northern Ireland, in the UK parliament, Dublin and the Commission were aware that in the event of a ‘Leave’ vote Northern Ireland was going to present a unique challenge that would require special arrangements. Theresa May went to Belfast on 25 July 2016 and met with First Minister Arlene Foster and deputy First Minister Martin McGuinness to discuss the implications for Northern Ireland; she said ‘nobody wants to return to the borders of the past’ and that she wanted practical solutions to the border that work for everyone. Following her visit, Foster and McGuinness wrote a joint letter to the Prime Minister. They were ‘reassured by your commitment that we will be fully involved and represented in the negotiations on the terms of

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4. Theresa May’s leadership launch statement, 30 June 2016.



our future relationship with the EU and other countries. We regard this as a fundamental prerequisite of a meaningful and inclusive negotiation'. They went on to say, as regards the border, that they 'appreciate your stated determination that the border will not become an impediment to the movement of people, goods or services...It is equally important that the border does not create an incentive for those who wish to undermine the peace process and / or the political settlement...We have had constructive initial discussions with the Irish Government through the NSMC [North South Ministerial Council], and wish to play our part in the engagement between the two Governments on the unique aspects of negotiations that arise from the border, recognising the possibility that it cannot be guaranteed that outcomes that suit our common interests are ultimately deliverable. We wish to have full access to that intergovernmental process as the border issues affecting trade, employment, energy and potential criminality are of such high significance for us.'<sup>5</sup> May replied, inviting them both to the Joint Ministerial Committee<sup>6</sup> on the 24 October 2016. This agreed to establish a Joint Ministerial Committee on European Negotiations, known as JMC(EN) to be chaired by David Davis as Secretary of State DExEU. This committee had plenty of potential<sup>7</sup>, but the deep divisions between devolved and national government made it an uneasy forum for establishing joint policy<sup>8</sup>.

May attempted a diplomatic offensive across European capitals but it ground to a halt in the face of a united commitment to a joint EU negotiation. She first met with President Juncker in Brussels in October and he reaffirmed that there would be no discussions on Brexit until the negotiations began following the invocation of Article 50; he conceded that May's European Adviser, Olly Robbins, could meet Martin Selmayr, his head of cabinet, every six weeks. British-Irish efforts to find answers to their unique Brexit-related problems came under pressure from Michel Barnier shortly after he took up post as the European Commission's chief negotiator on 1 October 2016<sup>9</sup>.

## The Party Conference and Lancaster House Speeches

On the first day of the October Conservative Party Conference Theresa May made a speech solely on Brexit: "First, everything we do as we leave the EU will be consistent with the law and our treaty obligations, and we must give as much certainty as possible to employers and investors. That means there can be no sudden and unilateral withdrawal: we must leave in the way agreed in law by Britain and other member states, and that means invoking Article 50 of the Lisbon Treaty...There will be no unnecessary delays in invoking Article 50. We will invoke it when we are ready. And we will be ready soon. We will invoke Article 50 no later than the end of March next year."<sup>10</sup>

This position was fleshed out by her at Lancaster House on 17 January 2017<sup>11</sup>: "...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. That means maintaining the necessary common

5. Joint letter from the First Minister and deputy First Minister to Theresa May, 10 August 2016. Theresa May replied on 14 October 2016.

6. NOTE. The Joint Ministerial Committee (JMC), chaired by the Prime Minister, brings together the leaders of the devolved administrations of Scotland, Wales and Northern Ireland.

7. NOTE. The terms of reference were: 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 Government, the Scottish Government, the Welsh Government or the Northern Ireland Executive.

8. NOTE. The Joint Ministerial Committee on European Negotiations, JMC(EN), began with meetings in November and December 2016, but after suspension of the Executive, there would no longer be political representation at the committee for NI. The JMC(EN) was not regarded as effective by other devolved governments and meetings ceased between February and October 2017.

9. NOTE. The 27 Heads of state or government invited the Council to nominate the Commission as Union chief negotiator on 15 December 2016, confirmed by Council decision on 22 May 2017.

10. Theresa May's party conference speech on Brexit, Sunday, 2 October 2016.

11. 'The government's negotiating objectives for exiting the EU': PM speech, Lancaster House, 17 January 2017.

standards and frameworks for our own domestic market, empowering the UK as an open, trading nation to strike the best trade deals around the world, and protecting the common resources of our islands.”

When she spoke of the land border on the island of Ireland, her focus was on citizens, not goods: “We cannot forget that, as we leave, the United Kingdom will share a land border with the EU, and maintaining that Common Travel Area with the Republic of Ireland will be an important priority for the UK in the talks ahead. There has been a Common Travel Area between the UK and the Republic of Ireland for many years. Indeed, it was formed before either of our two countries were members of the European Union. And the family ties and bonds of affection that unite our two countries mean that there will always be a special relationship between us. So 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. Nobody wants to return to the borders of the past, so we will make it a priority to deliver a practical solution as soon as we can.”

So, in January 2017 the Prime Minister’s position regarding Northern Ireland/Ireland was still phrased as ‘nobody wants to return to the borders of the past’, as she had said in July 2016 in Belfast and was to repeat in Dublin at the end of the month<sup>12</sup>. The key issue she was focussed on was the Common Travel Area — the free movement of people was her concern, but no mention of the movement of goods.

### The collapse of the Northern Ireland Executive

The day before her speech, the Northern Ireland Executive had collapsed. Despite hopes that it could be brought back quickly, it would not be restored for almost three years<sup>13</sup>. As a consequence, the Executive was unable to engage with the negotiations, and the work of the North-South Ministerial Council — including on Brexit — ceased. This would weaken Northern Ireland’s voice in the process and make consultation with the parties in Northern Ireland much harder. When the time came for assessment of the impact of Brexit on North-South cooperation and the remedial policies those impacts necessitated, the Northern institutions were absent. The interests and insights of Northern Ireland — especially its unionists — had no institutional channel of their own to engage with London, Dublin or Brussels. The requirement for the North South Ministerial Council to have its ‘views taken into account and represented appropriately at relevant EU meetings’, as set out in the Belfast Agreement,<sup>14</sup> could have helped inform all the negotiators, balanced the influence of Dublin, and held London to account. This may be one of the most overlooked events of the entire period — the original democratic deficit.

### The UK Government’s February 2017 white paper<sup>15</sup>

Published more than six months into Theresa May’s premiership, this paper set out the UK’s initial negotiating priorities prior to the triggering of Article 50. The UK view on the trade negotiations was that the UK and

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12. PM statement after talks with Enda Kenny, 30 January 2017.

13. NOTE. It was restored on 11 January 2020.

14. Paragraph 17, under Strand Two: North South Ministerial Council, Belfast Agreement, 10 April 1998.

15. ‘The United Kingdom’s exit from and new partnership with the European Union’, 2 February 2017.

EU have a shared interest in maintaining free trade based on mutually-recognised standards: after all, the UK had a goods trade deficit of £86 billion, including in agricultural products, with the EU and was starting with fully-aligned regulations and processes. Securing this trade would be addressed by ‘a wide reaching, bold and ambitious free trade agreement, and [we] will seek a mutually beneficial new customs agreement with the EU’<sup>16</sup>. ‘It is in the interests of both the UK and the EU to have a mutually beneficial customs arrangement to ensure goods trade between the UK and EU can continue as much as possible as it does now. This will form a key part of our ambition for a new strategic partnership with the EU’.<sup>17</sup>

This was the core of the UK strategy — a new partnership based on mutual self-interest that would enable trade in goods and services to continue pretty much as normal. Everything else would find its place within this context. Unfortunately, this was not on offer, a point that would be reinforced at the ‘disastrous Brexit dinner’ at the end of April. ‘Delivering a smooth and orderly exit from the EU’ was the last of the 12 priorities listed — it would be the EU’s first priority.

The fourth priority was: ‘Protecting our strong and historic ties with Ireland and maintaining the Common Travel Area — We will work to deliver a practical solution that allows for the maintenance of the Common Travel Area, whilst protecting the integrity of our immigration system and which protects our strong ties with Ireland.’<sup>18</sup>

‘We will work with the Irish Government and the Northern Ireland Executive to find a practical solution that recognises the unique economic, social and political context of the land border between Northern Ireland and Ireland. An explicit objective of the UK Government’s work on EU exit is to ensure that full account is taken for the particular circumstances of Northern Ireland. We will seek to safeguard business interests in the exit negotiations. We will maintain close operational collaboration between UK and Irish law enforcement and security agencies and their judicial counterparts’.<sup>19</sup>

‘We are also aware of the specific circumstances faced by businesses in Northern Ireland. We are committed to negotiating a deal that works for the whole of the UK. As with the Common Travel Area, we are committed to working with the Irish Government and the Northern Ireland Executive to minimise 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. We will want to work closely together with the Irish Government to ensure that, as the UK leaves the EU, we find shared solutions to the challenges and maximise the opportunities for both the UK and Ireland’.<sup>20</sup>

There appeared to be no consideration of what was meant by a border that would be ‘as seamless and frictionless as possible’; this imprecise phrase contributes to the UK’s inability to face and work out what this meant for the border in both its North-South and UK-EU dimensions. Putting the EU dimension into the future special partnership, the UK

16. Ibid. Chapter 8.45; page 48.

17. Ibid. Chapter 8.46; page 48.

18. Ibid. Contents, page 7.

19. Ibid. Chapter 4.10, page 23.

20. Ibid. Section 8.49 & 50, page 49.

disabled itself from having to face the border problem and find a solution to that problem in what would be phase one of the negotiations. There was no special partnership that would do away with the need for checks on the border, yet the issue was never properly faced nor was a solution put forward.

It made sense to work closely with the Irish government to look at how the frictions on the border could be managed practically, but though the paper highlights the importance of EU customs arrangements, pointing ahead to later proposals on this subject, it failed to recognise the limited scope for UK-Irish actions on the EU's external border nor did it properly acknowledge Irish priorities. For Enda Kenny: "It is a matter of vital national interest for Ireland that we do not return to the days of a hard border that we knew only too well. Or indeed create a new one in the future. This is a political matter, not a legal or technical matter"<sup>21</sup>. By not problem solving in the first six months the UK lost its best, but not last, opportunity for working with Ireland to find shared solutions and to maximise facilitations for such solutions from the EU. This represents an early lost opportunity to grasp the nettle in the negotiations. It is largely the consequences of that failure that the UK is now engaged in correcting.

By February 2017, Ireland was already moving on from bilateral planning and negotiations on issues affecting the island of Ireland. With the UK failing to recognise the trade-offs that flowed from leaving the single market and customs union and therefore failing to provide any answers, they were looking to the EU. Barnier had been to Dublin shortly after his appointment as the Commission's Chief Negotiator in October 2016 and met with the leading members of the government: he had listened carefully to their concerns over the peace process, Brexit's impact on the Irish economy and a hard border which seemed likely following May's speech at the Conservative Party conference. Despite their close and historic relationship with the UK, they were committed to a future in the EU. A lack of realism and engagement from the UK ended any potential for joint work. With this, and the pressure to leave all negotiations to the EU, Ireland committed the resolution of the unique circumstances of the island of Ireland to the negotiating power of the 27. They had already invested in extensive briefings to member states and the Commission on issues unique to Ireland — and these would be incorporated into the EU's negotiating guidelines. The UK white paper had missed the point and was speaking into a negotiating environment that was shifting rapidly away from any bilateralism.

When it became clear that there were no answers coming from the UK on how to square the circle of leaving the single market and customs union whilst maintaining an open border, the EU produced a memo in February 2017 on keeping Northern Ireland in the single market and customs union — the legal answer to this Irish question, but one that the Irish warned would be anathema to unionists<sup>22</sup>.

Not surprisingly, in its report on the white paper, the House of Commons Exiting the European Union Committee found little confidence in Dublin

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21. Taoiseach Enda Kenny's speech 'Ireland at the heart of a Changing European Union', Institute of International and European Affairs, 15 February 2017.

22. Tom McTague, 'How the UK lost the Brexit battle', *Politico*, 27 March 2019.

for the UK government's approach: 'The UK Government's aspiration for a "seamless and frictionless" border was welcomed<sup>23</sup>, 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'.<sup>24</sup> Those the committee met in Dublin<sup>25</sup> outlined just what an impact a "no deal" would have on the dairy and meat industries: highly integrated between North and South, they would face tariffs of between 30-40%.

The committee found Irish political opinion was clear that 'The EU has a good understanding of the implications of Brexit for the peace process. The UK and Ireland must work together to identify possible solutions, although a bilateral agreement between the UK and Ireland is unlikely to be acceptable to the EU Commission'.<sup>26</sup> Unlike the UK, the Irish had been able to engage extensively with the Commission and the other 27 to raise their concerns on the future of the Common Travel Area (CTA) where it aligned with the UK position (helping pave the way for a later agreement that secured its continued operation) and on the border (where its interests were somewhat different). Dublin had been able to dialogue with the Commission, floating ideas that could be tested out and abandoned or developed further; the idea of a UK-Irish agricultural agreement was floated only to be dropped when it was clear that it would breach EU law. Rapid learning curves were made much harder for the UK due to the terms of the negotiations set by the European Council.

## Invocation of Article 50

The UK government expressed its desire to avoid a hard border in Theresa May's letter of 29 March 2017 notifying the UK's triggering of Article 50, in the fifth of her 'principles for discussion': 'In particular, we must pay attention to the UK's unique relationship with the Republic of Ireland and the importance of the peace process in Northern Ireland. The Republic of Ireland is the only EU member state with a land border with the United Kingdom. We want to avoid a return to a hard border between our two countries, to be able to maintain the Common Travel Area between us, and to make sure that the UK's withdrawal from the EU does not harm the Republic of Ireland. We also have an important responsibility to make sure that nothing is done to jeopardise the peace process in Northern Ireland, and to continue to uphold the Belfast Agreement.'<sup>27</sup>

The UK avoided making a formal commitment to avoiding a hard border at this stage but had moved on from the even less defined statement about not wanting to return to the borders of the past. The letter also states that 'the United Kingdom does not seek membership of the single market: we understand and respect your position that the four freedoms of the single market are indivisible and there can be no "cherry picking". We also understand that there will be consequences for the UK of leaving the EU:

23. NOTE. Such an aspiration for the border was not quite what the UK white paper put forward: the border was to be 'as seamless and frictionless as possible'.

24. Exiting the European Union Committee 'The Government's negotiating objectives: the White Paper': Third Report of Session 2016-17; House of Commons, 29 March 2017. Paragraph 89, page 36.

25. NOTE. The committee met with members of the Oireachtas Committees for Foreign Affairs, European Affairs and Implementation of the Good Friday Agreement; business representatives; Frances Fitzgerald, Tánaiste and Minister for Justice and Equalities; Dara Murphy, Minister of State for European Affairs and Data Protection and officials; and with Michael Creed, Minister for Agriculture, Food and the Marine and officials.

26. Ibid. Annex 6: Note of meetings in Dublin, Republic of Ireland, 23 February 2017, page 110.

27. Prime Minister's letter to Donald Tusk triggering Article 50, 29 March 2017.

we know that we will lose influence over the rules that affect the European economy. We also know that UK companies will, as they trade within the EU, have to align with rules agreed by institutions of which we are no longer a part — just as UK companies do in other overseas markets’.<sup>28</sup> However, the UK did not seem to acknowledge that leaving the single market would result in new barriers to trade: the hope and intent was that these could be prevented through ‘the deep and special partnership’ at the heart of which would be a bold and ambitious free trade agreement. The UK wanted to agree the terms of this partnership alongside negotiating its withdrawal from the EU.

With the letter of invocation, the EU finalised its guidelines for the negotiation: unity was at the core of the strategy and Irish issues had been grafted into the heart of the EU27’s objectives.

### The calling of a UK general election — and a dinner with President Juncker

On 18 April 2017, three weeks after triggering Article 50, Theresa May called a general election for 8 June 2017, beginning sixty-one days of campaigning, uncertainty and distraction from the most important negotiations in recent British political history. It was during this campaign that the EU finalised and published its agreed guidelines and directives for the negotiations. When the election came, eleven days before the first round of talks in Brussels, she had gained votes but had lost 13 seats and thus her majority in parliament. The result defied all expectations: even after her lacklustre campaign she was still expected, at worst, to gain seats. Her premiership was left diminished at home and abroad. She subsequently lost her key advisers and was forced to rely on a confidence and supply arrangement with the DUP to keep the Conservatives in power. Her gamble to win an unassailable majority in order to give her a strong hand in the negotiations and create political space to manage the Brexit process had failed dramatically. The threat of ‘no deal’ would never have real credibility again.

Early in the campaign there was a dinner in Downing Street with President Jean-Claude Juncker and his team. The ‘disastrous Brexit dinner’ as it became known, showed up a key weakness in the UK’s understanding of the forthcoming negotiations. May expressed the pragmatic British view that leaving the EU and single market should not interfere with the EU-UK trading terms and that everything should, sensibly, continue pretty much as normal for everyone’s benefit.

May brought up her experience of negotiating with the EU over Protocol 36 as an example of how easily things could proceed. Protocol 36 contained provisions that allowed the UK and Ireland to opt out of approximately 130 previously agreed EU police and criminal justice measures before they came under the jurisdiction of the ECJ and under the enforcement of the Commission on 1 December 2014; the UK could then opt back into those measures it wanted, subject to negotiation with

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28. Ibid. Page 4, paragraph i.



the Commission<sup>29</sup>. As Home Secretary, May exercised the right to opt-out in July 2013 and then negotiated opting back into those that suited the UK — initially 35 such measures were identified. The idea that May could compare the negotiations under Protocol 36 with withdrawal from the European Union left Juncker incredulous. After explaining that the UK would be a ‘third country’ after leaving the EU, and the consequences of that, he left the dinner declaring “I am leaving Downing Street ten times more sceptical than I was before”<sup>30</sup>. On the plane home he said to Barnier that the negotiation was never going to work and if he wanted to do another job, then that was fine<sup>31</sup>. He communicated his concerns to Angela Merkel early the next morning — wanting her to reinforce his message to London. Merkel was speaking in the Bundestag that morning in an EU-related debate that covered amongst other things, Brexit; so she took the opportunity to re-emphasise what Juncker had spelled out the night before: that a third country — and that is what Britain will be — cannot have the same rights or be better off than a member state. This might be obvious, but unfortunately I have to spell it out here, because I have a feeling that some are delusional about this, and that would be to waste time<sup>32</sup>.

## The Irish Government's approach to Brexit

As the Irish position paper, *‘Ireland and the negotiations on the UK withdrawal from the European Union: the government's approach’*<sup>33</sup> states in its introduction: ‘In these negotiations, Ireland will be negotiating from a position of strength as part of the EU Team of 27 Member States. In recent months the Irish Government has undertaken an extensive programme of dialogue with our EU partners and with the EU institutions. There have been over 400 discussions to date at either political or senior official level, and this interaction will continue as the negotiations begin in Brussels. The EU's chief negotiator, Michel Barnier, the EU institutions and our fellow Member States have shown great understanding and support for the significant challenges we face and for Ireland's unique position and concerns. Ireland's specific priorities are a central element of the EU's overall negotiating objectives.’<sup>34</sup>

Issues unique to Ireland ‘have been identified as matters to be addressed as part of the Article 50 process and in the withdrawal agreement between the EU and the UK’<sup>35</sup>. The EU's role in supporting the peace process was set out in the paper: ‘The EU provides fundamental support to the deepening of peace and reconciliation which is relied upon and supported by people, North and South, and across all communities. 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

29. NOTE: Lisbon Treaty, Protocol 36, Article 10 (4) and (5). The UK was required to exercise its opt-out by 31 May 2014.

30. ‘The Disastrous Brexit dinner’, Thomas Gutschker, *Frankfurter Allgemeine Zeitung*, 3 May 2017.

31. Anthony Seldon, ‘May at 10’, (2019), page 146: interview with Martin Selmayr.

32. Chancellor Merkel, Bundestag, 27 April 2017: motion ahead of the European Council of 29 April 2017.

33. Ireland and the negotiations on the UK's withdrawal from the European Union: The Government's Approach, May 2017. NOTE: This paper built on both the ‘Brexit: Ireland's Priorities’ paper of March 2017 as well as the work and consultative programmes carried out by the Irish government.

34. Ibid. Page 4, May 2017.

35. Ibid. Chapter 3, page 19.

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.<sup>36</sup>

The importance of the EU's role in the eyes of Dublin, Brussels and the other 27 member states would grow during the autumn, and would become one of the key determiners of the negotiations.

The Irish diplomatic effort was a success — in stark contrast to that of the UK. The paper goes on to say that the negotiations 'are among the most important in the history of the State' and that its own 'key priorities and positions are clear'. The Irish government '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'<sup>37</sup>. It commits to the continuation of the Common Travel Area as well as other bilateral arrangements with the UK. The 'invisible border on the island of Ireland is essential to the continuing normalisation of relationships'<sup>38</sup>. The focus is on the free movement of people across the island and the normalisation of their daily lives, but 'avoiding a hard border' is the first-listed objective of the Irish government: 'As the most tangible symbol of the Peace Process, the invisible border on the island of Ireland is essential to the continuing normalisation of relationships. This is a horizontal issue involving multiple aspects of the withdrawal negotiation process and will require a multifaceted approach in the negotiations. At the heart of this objective are the daily lives of the people who share this island. The withdrawal agreement should create no impediment to the free movement of people on the island and should create no circumstance where the normalisation of people's lives that has come with the Peace Process is undermined. The avoidance of a hard border will require flexibility and creativity on the part of both the UK and the EU. Within the EU, Ireland will make clear its expectation that there will need to be a political and not just a technical solution and a recognition that this issue of the land border represents a unique and unprecedented set of circumstances...The closer the trading relationship between the UK and the EU, including Ireland, the less challenging the task of avoiding a hard border should be. All possible avenues in the EU acquis will have to be explored to facilitate free movement of people, goods and services on the island and it may be necessary to consider additional measures.'<sup>39</sup>

Whether the invisible border is the most tangible gain of the peace process is never really questioned. In truth, the most tangible gain of the peace process is the end of sectarian killing: peace, not borders. The invisible border is the most tangible benefit of the development of the EU's single market and customs union. For years the Irish government urged

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36. Ibid.

37. Ibid. Page 7.

38. Ibid.

39. Ibid. Page 22.



the British to focus not on the border areas but on addressing the sectarian killing in mid-Ulster. This in no way suggests that a hard border should not be avoided, but that it has been positioned in regards the peace process to maximise the importance of North-South relationships and trade over those East-West and in terms of the nationalist community's interest. This is a perfectly understandable line of argument by Dublin, but one that had the effect of eclipsing the importance of East-West connections. So too was the exclusive focus in the paper on relations on the island of Ireland, without reference to Northern Ireland's place in the UK.

## The European Council Guidelines and Commission's Negotiating Directives

The European Council published its negotiating guidelines<sup>40</sup> on 29 April 2017 defining the framework for negotiations under Article 50 and setting out the overall positions and principles that the EU would pursue throughout the negotiation, to be updated in the course of the negotiations as necessary.

It set out: (I) the core principles of the negotiations for an agreement with the UK — balance of rights and responsibilities and the indivisibility of the four freedoms, and '...So as not to undercut the position of the Union, there will be no separate negotiations between individual Member States and the United Kingdom on matters pertaining to the withdrawal of the United Kingdom from the Union'<sup>41</sup>; (II) a phased approach to negotiations to provide 'clarity and legal certainty on the immediate effects' of Brexit and to 'settle the disentanglement' of the UK from its commitments as a member state. The European Council would determine when sufficient progress had been achieved to allow negotiations to proceed to the next phase that would include negotiating the framework of the future EU-UK relationship; (III) Agreement on arrangements for an orderly withdrawal — citizens rights, legal arrangements to cover contracts post-Brexit, the financial settlement, Ireland and Northern Ireland, and other separation issues (Cyprus, dispute resolution and enforcement etc); (IV) Preliminary and preparatory discussions on a framework for the Union-United Kingdom future relationship; (V) Principle of sincere cooperation from the UK while it remains a member; (VI) Procedural arrangements for negotiations under Article 50 — restating the European Council statement of 15 December 2016.

Under section III, 'Arrangements for an orderly withdrawal', its guidelines for negotiations regarding the situation in Northern Ireland were stated: '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

40. European Council's 'Guidelines following the United Kingdom's notification under Article 50 TEU', 29 April 2017.

41. Ibid. I Core Principles, end of paragraph 2; 29 April 2017.

this context, the Union should also recognise existing bilateral agreements and arrangements between the United Kingdom and Ireland which are compatible with EU law.’<sup>42</sup>

On 22 May 2017, the European Council issued directives for the negotiations to the Commission<sup>43</sup> based on its earlier guidelines. The wording on Northern Ireland is: ‘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 in all its parts 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 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.’<sup>44</sup>

After months of preparatory work two negotiating documents had been published within three weeks of each other. Some additional detail and focus — and perhaps some positioning of the EU regarding their role in the peace process — can be gleaned from the change of wording between these documents. The directives were firmer on the Belfast Agreement than the guidelines; they stated that: ‘Nothing in the Agreement should undermine the objectives and commitments set out in the Good Friday Agreement in all its parts and its related implementing agreements’. The directives provided greater focus for the negotiations on the border: ‘the negotiations should in particular aim to avoid the creation of a hard border’. The EU would find reconciling these two aims with its formula for solving the problem of the border highly problematic; much of the manoeuvring the EU engaged in from the summer was in order to accomplish this.

There was very little development on the detail of the Northern Ireland/Ireland issues compared to those of the other issues: citizens rights were defined and ready for negotiation, the basis for establishing the UK’s financial obligations were detailed, and there was detail on the certainty for goods placed on the market and ongoing judicial co-operation. This again marks the treatment of Ireland/Northern Ireland as distinct from the other matters being dealt with under the first phase of the negotiations.

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42. Ibid. Section III: Arrangements for an orderly withdrawal, Paragraph 11.

43. ‘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’; General Secretariat of the European Council, 22 May 2017.

44. Ibid. Section III: Purpose and Scope of these negotiations; paragraph 14; General Secretariat of the European Council; 22 May 2017.

# Sequencing of the negotiations

Sequencing was set out in the European Council guidelines for the negotiations of 29 April 2017. This formed the only issue Donald Tusk outlined in his invitation letter to the first European Council of 27<sup>45</sup>. In many respects this provided for the first misunderstanding of the EU and the UK over Ireland/Northern Ireland. The main part of his letter is reprinted below:

‘Let me highlight one element of our proposed guidelines, which I believe is key for the success of these negotiations, and therefore needs to be precisely understood and fully accepted. I am referring to the idea of a phased approach, which means that we will not discuss our future relations with the UK until we have achieved sufficient progress on the main issues relating to the UK’s withdrawal from the EU. This is not only a matter of tactics, but — given the limited time frame we have to conclude the talks — it is the only possible approach.

‘In other words, before discussing our future, we must first sort out our past. We need to secure the best guarantees for our citizens and their families. Guarantees that are effective, enforceable, non-discriminatory and comprehensive, and which should be accompanied by simple and smooth administrative procedures. We should also agree with the UK that all financial obligations undertaken by the EU of 28 will be honoured also by the UK. Finally, in order to protect the peace and reconciliation process described by the Good Friday Agreement, we should aim to avoid a hard border between the Republic of Ireland and Northern Ireland.’

In the European Council guidelines, it stated:

‘...The main purpose of the negotiations will be to ensure the United Kingdom’s orderly withdrawal so as to reduce uncertainty and, to the extent possible, minimise disruption caused by this abrupt change.

‘To that effect, the first phase of negotiations will aim to:

- provide as much clarity and legal certainty as possible to citizens, businesses, stakeholders and international partners on the immediate effects of the United Kingdom’s withdrawal from the Union;
- settle the disentanglement of the United Kingdom from the Union and from all the rights and obligations the United Kingdom derives from commitments undertaken as Member State.

‘The European Council will monitor progress closely and determine when sufficient progress has been achieved to allow negotiations to proceed to the next phase’<sup>46</sup>.

Specifically on Ireland/Northern Ireland, the guidelines stated: ‘While an agreement on a future relationship between the Union and the United Kingdom as such can only be finalised and concluded once the United Kingdom has become a third country, Article 50 TEU requires to take account of the framework for its future relationship with the Union in

45. Letter from President Tusk, European Council, 28 April 2017.

46. The European Council’s ‘Guidelines following the United Kingdom’s notification under Article 50 TEU’, 29 April 2017; Section II: A Phased Approach to Negotiations; Paragraph 4.

the arrangements for withdrawal. To this end, an overall understanding on the framework for the future relationship should be identified during a second phase of the negotiations under Article 50 TEU. We stand ready to engage in preliminary and preparatory discussions to this end in the context of negotiations under Article 50 TEU, as soon as the European Council decides that sufficient progress has been made in the first phase towards reaching a satisfactory agreement on the arrangements for an orderly withdrawal.’<sup>47</sup>

This position was in stark contrast to that of the UK as set out in the Prime Minister’s letter triggering Article 50. The Conservative manifesto published in May 2017 also stated: ‘We want fair, orderly negotiations, minimising disruption and giving as much certainty as possible — so both sides benefit. We believe it is necessary to agree the terms of our future partnership alongside our withdrawal, reaching agreement on both within the two years allowed by Article 50 of the Treaty on European Union.’<sup>48</sup>

In his interview with Peston on Sunday, 14 May 2017, David Davis had set out his views on the sequencing, arguing that Article 50 TEU requires the withdrawal agreement to take into account the ongoing relationship between the EU and UK — “but how can you take into account an ongoing relationship that does not exist yet”. The EU’s sequencing proposal puts pressure — and is designed to put pressure — on the UK to agree the hard bits — finance and the border — by withholding negotiations on the very ambitious free trade agreement that the UK wants to get on with. However, “how on earth can you resolve the issue of the border between the Republic of Ireland and Northern Ireland unless you know what our general borders policy is? What the customs agreement is? What the free trade agreement is? Whether you need to charge tariffs at the border or not? You cannot decide one without the other. It is wholly illogical and we happen to think the wrong interpretation of the Treaty [Art 50 TEU]. That will be the row of the summer...We want to see the whole deal together. They love to say ‘nothing is agreed until everything is agreed’ that is our view on this, with the single exception of the detail on European citizens and British citizens outside their own countries. We want to see everything packaged up together and that is what we are going to do”.<sup>49</sup>

The problem with this argument is that while a future partnership can shape what is done at the border, it cannot remove the need for a border. An answer as to how to avoid a hard border on the island of Ireland was required by the EU’s guidelines in phase one — even though it was logical to resolve the border within the overall customs and trading relationship, at least from a UK perspective. Once sequencing was accepted the UK’s strategy was compromised. Refusing to accept this prevented the UK from thinking through the problem and developing a solution of its own; instead, after making a series of commitments on the border to satisfy the political demands of Dublin it was incapable of meeting the requirements of the EU for protecting the border of the single market. In the absence of UK policy, an EU-designed formula on the border was, in effect, imposed on the UK when it was under the greatest pressure.

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47. Ibid. ‘II: A Phased Approach to Negotiations’, paragraph 5; page 4.

48. The Conservative and Unionist Party manifesto, 18 May 2017; p 36.

49. David Davis, Peston on Sunday, 14 May 2017. <https://www.youtube.com/watch?t=3s&v=RotUXuOlaac&app=desktop>

## Compromised: The first round of talks, 19 June 2017

David Davis, Secretary of State for Exiting the European Union, and Michel Barnier, the Commission's chief negotiator, agreed the terms of reference for the negotiations, including the Commission's principle of sequencing — without the promised 'row of the summer' taking place. It seems that No.10 had concluded the week before that the EU would not concede on sequencing and that fighting it would simply cost time and yield no advantage<sup>50</sup>. The EU had succeeded in setting the framework for the negotiations. Davis's justification appears to have been that once 'Michel' gave the nod that there had been sufficient progress, the two strands of divorce and future relationship would come together anyway<sup>51</sup>. Davis argued that getting clarity for citizens of both the EU and UK as soon as possible was a moral matter and was the UK's biggest priority; such clarity included the rights of UK and Irish citizens under the Common Travel Area.

Giving evidence before the House of Lords in July 2017, Davis said: "As you well know from your own history, the favourite phrase of the European Union is that 'nothing is agreed until everything is agreed'. That is its stance. We rather agree with that, because we do not see the separation being agreed without the ongoing arrangement. We point to Article 50's wording for that reason. That said, on an issue such as citizens' rights, where confidence is quite important early on, I do not expect that we will get to a treaty in the immediate future, but I hope we get very substantive, detailed heads of agreement, which we can, as it were, initial and say that is what we want at the end game. I think that will give people a degree of confidence in their own lives."<sup>52</sup> A month after sequencing had been agreed there was no agreement about what level of 'certainty' or 'settlement' was to be achieved for phase one negotiations — nor did London have a clear understanding of the legal standing phase one negotiations would have.

The UK and EU were clearly at odds on their understanding of what was required in the phased approach to talks. The European Council's guidelines of 29 April 2017 set out the aim of the negotiations as 'providing as much clarity and legal certainty as possible' for citizens, businesses and international partners, as well as to 'settle the disentanglement of the United Kingdom from the Union...' The first suggests 'progress towards', the second 'finality'; lastly, 'sufficient progress' is subjective and in the eyes of one party alone. It left plenty of room for misunderstanding.

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50. Anthony Seldon, 'May at 10', (2019), page 310.

51. David Davis's evidence to the House of Lords European Union Committee, 11 July 2017.

52. Ibid.

Whilst it was against the sequencing, the UK accepted it; Davis certainly believed that on the Irish border there were de facto limits on what could be provided before the final relationship was clear — border arrangements are part of the future relationship. This confusion aided the UK in putting off the difficult decision/s it needed to make on the border.

The first round also addressed the structure of the talks. Three negotiating teams of officials would address citizens' rights, the financial settlement, and other separation issues; in addition, 'a higher-level dialogue' was launched under the authority of the Co-ordinators<sup>53</sup> (Sabine Weyand and Olly Robbins) to discuss issues relating to Ireland/Northern Ireland. According to Davis, "As regards the circumstances of Northern Ireland, there was some sensitivity from the Government of the Republic of Ireland about treating that simply as another subject category, so we decided to treat it as a rather special dialogue."<sup>54</sup> This is not an entirely satisfactory explanation, though it is repeated elsewhere and clearly was the public explanation. In the opening dialogue on Ireland/Northern Ireland that ran alongside the second round of negotiations in July 2017 it was agreed that each party to the dialogue should put together and publish its position on the border.

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53. Terms of Reference for the Article 50 TEU Negotiations, 19 June 2017, paragraph 3.

54. David Davis's evidence to House of Lords European Union Committee, 11 July 2017; page 2.

## Presentations: The Second Negotiating Round, 17-20 July 2017

The Coordinators Sabine Weyand and Olly Robbins discussed (rather than negotiated) Ireland/Northern Ireland in the second round of talks that began on 17 June 2017. According to Davis: “The negotiation team explored a number of Northern Ireland/Ireland issues, including the operation of both the Belfast (‘Good Friday’) Agreement and the Common Travel Area and associated rights on the basis of UK expert presentations. More detailed discussions are planned for the next round of negotiations, including in relation to the Common Travel Area and North-South and East-West co-operation under the Belfast Agreement. Of course the key issues in relation to cross-border economic co-operation and energy will need to form an integral part of discussions on the UK’s future relationship with the EU”.<sup>55</sup>

Michel Barnier led the summing up at the press conference on the last day: “On Ireland, we had a first discussion on the impact of Brexit on two key subjects: the Good Friday Agreement and the Common Travel Area. We agree that the important issue of the Good Friday Agreement, in all its dimensions, requires more detailed discussions. In particular, more work needs to be done to protect North-South cooperation between Ireland and Northern Ireland. Today, that cooperation is embedded in the common framework of EU law and EU policies. We need to better understand how the UK intends on ensuring the continuation of this cooperation after Brexit. We also agreed that the UK should clarify in the next session how it intends on maintaining the Common Travel Area after leaving the EU.”<sup>56</sup> More generally he summarised round one as addressing “organisation” and round two as “presentation”. He looked to round three for “clarification”: on citizens rights (on which both sides had produced papers), financial obligations (on which the EU had published its initial position and for which the UK was now accepting it had post-withdrawal obligations), and Ireland/Northern Ireland (where clarity was wanted on two key points — the Good Friday Agreement and the Common Travel Area). We make better progress where our respective positions are clear, Barnier said<sup>57</sup>.

This round of talks led on to the publication of the UK position paper on Northern Ireland. For Davis, the second round of negotiations “have however only served to reinforce my view that we cannot negotiate the UK’s exit properly without addressing what our future relationship looks like.”<sup>58</sup>

55. Letter to Lord Jay of Ewelme, Chair of the Committee on Exiting the European Union, 9 August 2017; Parliament was in recess.

56. Speaking points by Michel Barnier following the close of the second round, 20 July 2017.

57. Ibid.

58. Letter to Lord Jay of Ewelme, 9 August 2017.



## A foreshadowing of the clashes to come

Meanwhile, outside the negotiations, the Irish government's position had developed rapidly since its paper of May 2017. Taoiseach Enda Kenny had resigned on 13 June 2017 and was replaced by Leo Varadkar following Fine Gael's leadership contest. Simon Coveney replaced Charlie Flanagan as Minister of Foreign Affairs and Trade. Just over a week after his appointment, at the launch of an Oireachtas committee report on the impact of Brexit<sup>59</sup>, he made revealing statements about Irish expectations for future border solutions. As the *Belfast Telegraph* reported: 'Mr Coveney said Dublin will be pushing for a special deal — "unique status" — for Northern Ireland to ensure the border remains as close as possible to the current arrangement. That could see the province retaining a link to the Customs Union, he said, adding that Michel Barnier, Europe's chief Brexit negotiator, is on board [he had met Barnier two days previously]. A scenario that would see a customs barrier, even an "e-border" using technology, would be a non-runner, the minister added. "We're not going to stand for that," he added. "If we get to that point, we're not where we want to be...Ireland's staying in the Customs Union. So if we're going to avoid a hard border between Northern Ireland and Ireland, there needs to be some relationship with the Customs Union and common market that allows Northern Ireland to be able to operate the way that it does today," the minister said. He said that if we think in terms of Northern Ireland being simply in, or out of the Customs Union or single market, then it's "almost impossible to see a solution".<sup>60</sup> The *Times* reported Coveney as saying: ' "What we are insisting on achieving is a special status for Northern Ireland that allows the interaction on this island, as is currently the case, to be maintained," he said. "It is not so much about a soft or hard border, it is about an invisible border effectively. To achieve that, we need to draw up a political solution here as well as a technical and practical one, which doesn't really have any precedent in the European Union. This is not going to be a straightforward problem to solve." Mr Coveney said the solution would have to respect the territorial integrity of Northern Ireland but that the government would not countenance customs checks of any kind. "I've heard talk of ensuring we don't have a hard border and some people seem to be talking in the context of using technology to ensure that is not the case. For me that misses the point totally. This is not about finding a way of avoiding queues on roads through the use of cameras or permits," he said'.<sup>61</sup>

59. 'The Implications of Brexit for the Good Friday Agreement: Key Findings', Houses of the Oireachtas, Joint Committee on the Implementation of the Good Friday Agreement, June 2017.

60. 'Irish government demands special status for Northern Ireland after Brexit and invisible border'; Colm Kelpie, *Belfast Telegraph*, 23 June 2017.

61. 'Border is a special case, Coveney tells Europe'; Niamh Lyons, *The Times*, 23 June 2017.



He came under immediate attack from unionists and later that day clarified his position: ‘ “We need to find a way of trying to maintain the status quo as best we can in the context of that very significant change...I will of course talk to and liaise with all parties in Northern Ireland, the Republic and London to explain our position and why it is important and hopefully find a solution everyone can live with,” he said.’<sup>62</sup>

Six weeks later, Leo Varadkar set out his own views in a media briefing on 28 July 2017, demanding no economic border on the island of Ireland. This is how the *Irish Times* reported it: ‘Abandoning the collaborative language that has marked the two governments’ statements on Brexit since the referendum last year, Mr Varadkar expressed clear frustration and indicated that Dublin would not come up with solutions to a problem created by the UK. “What we’re not going to do is to design a border for the Brexiteers because they’re the ones who want a border. It’s up to them to say what it is, say how it would work and first of all convince their own people, their own voters that this is actually a good idea.” Mr Varadkar said there was a political border between the Republic and Northern Ireland, but not an economic one. “As far as this Government is concerned, there shouldn’t be an economic border. We don’t want one,” he said. “It’s the UK, it’s Britain that has decided to leave and if they want to put forward smart solutions, technological solutions for borders of the future and all of that, that’s up to them. That is our position. It is our position in negotiations with the British government and it’s the very clear position that we have when we engage with the task force that is negotiating on our behalf with the UK.”’<sup>63</sup>

The DUP hit back that weekend. As reported in *The Times*, Nigel Dodds said: ‘ “The intemperate outburst by Leo Varadkar expressing anger at the UK’s decision to leave the EU is just the latest in a series of inconsistent and incoherent statements. Statements are made and then reversed, sending mixed messages. Then we had the demand for the Irish Sea to become the border after Brexit. There already is an economic border between Northern Ireland and the Irish Republic. For instance, does the Irish government not realise that every time you cross the border you need to change currency? Or that each jurisdiction is subject to entirely different taxation and financial regimes?” he said. Any border that restricted trade between the UK and Northern Ireland was “non-negotiable”, Mr Dodds said. “It is good that the UK government swiftly and forcefully debunked any notion of internal borders within the UK. Sensible work to achieve practical and mutually beneficial arrangements for the border after Brexit have been stopped on Mr Varadkar’s orders,” Mr Dodds said’<sup>64</sup>.

Jeffrey Donaldson also responded, saying that the party was keen to outline its position to Mr Varadkar in person. ‘ “We hope to meet the Taoiseach this week and the message we will be giving him is that we want to find a solution to the border post-Brexit. It’s not in the interests of either Northern Ireland or the Republic that we end up in a stand-off that results in a hard border so we need to get beyond the rhetoric and get on with agreeing a solution”. He said that the operation of a border

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62. ‘Government clarifies Brexit position after unionist concerns’, *Belfast Telegraph*, 23 June 2017.

63. ‘Frustrated Leo Varadkar attacks Brexiteers on border issues’, *Irish Times*, 29 July 2017.

64. ‘Border row escalates as DUP attacks Taoiseach’, *The Times*, 31 July 2017.

between Great Britain and Northern Ireland would impact on trade and be detrimental to the economy; there are also the political consequences. “Frankly it would be a breach of the Good Friday agreement if such an arrangement were to be proposed because it is contrary to the principle of consent,” he said.’<sup>65</sup>

The outlines of the dispute about how to avoid a hard border were already there, with Irish government positions and those of unionists and the UK government clearly at odds. A shift had occurred since the early part of the year. Following May’s Lancaster House speech, the Irish government had authorised officials to prepare papers on minimising customs checks on the border — believing that the UK was seeking to remain in the single market in all but name, thus significantly avoiding a hard border. These technical discussions were not prejudging the outcome of the Brexit negotiations.<sup>66</sup> In mid February, Charlie Flanagan had spoken against “special status” for Northern Ireland, “the fact is that such a proposal would unnecessarily distract from work to secure arrangements which reflect the genuine uniqueness of Northern Ireland’s situation, founded in the peace process and the Good Friday Agreement, as well as its geographic status as the only land border between the UK and the EU27. Indeed the provisions of the Government motion clearly support and point to the need for specific, effective, and realisable measures that could address the major issue[s] of concern under Brexit...”<sup>67</sup>

These divisions were not only over solutions to the border but also over their understanding of the key principles which all agreed had to be upheld and supported, the foremost of which was the Belfast Agreement. Two documents published that summer encapsulated this difference: the UK government’s position paper on Northern Ireland and Ireland<sup>68</sup>, and the Irish government’s brief on the Good Friday Agreement and peace process<sup>69</sup> which was produced for the European Commission’s Task Force 50 working group.

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65. Ibid.

66. ‘Taoiseach says work under way to minimise customs checks post-Brexit’, RTÉ News, 19 January 2017.

67. Statement by Minister for Foreign Affairs and Trade Charlie Flanagan on Private Members Motion on Northern Ireland and the UK withdrawal from the EU, 15 February 2017.

68. ‘Northern Ireland and Ireland Position Paper’, DExEU, 16 August 2017.

69. ‘Good Friday Agreement and Peace Process’: Information Note from Ireland to the Article 50 Working Party, published by the General Secretariat of the European Council, 7 September 2021.

# The UK shows its hand, August 2017

## The ‘Northern Ireland and Ireland Position Paper’

DExEU published the UK’s position paper on Northern Ireland and Ireland on 16 August 2017, ahead of the third round of talks scheduled to start on 28 August 2017; it was accompanied by two additional papers covering data on trade and movement of people<sup>70</sup>. It provided a good overview of many of the issues involved but failed to set out any solutions for the border — just two months before the October 2017 European Council meeting where it was hoped that negotiations would have progressed sufficiently to enter into phase two. It was preceded by the publication of the *Future customs arrangements* proposal for facilitating UK-EU customs arrangements<sup>71</sup>. It is worth considering the position paper at some length.

### Overview: the dialogue

The paper states that the dialogue ‘should be substantial and detailed, and seek to address the unique circumstances of Northern Ireland and Ireland in a comprehensive and flexible way’<sup>72</sup>. This wording was itself a challenge to the more one-dimensional framing of the overall issue that needed to be addressed as ‘the unique circumstances on the island of Ireland’ found in the Irish government’s paper and the European Council’s guidelines and directives for the negotiations — wording that made it easier to ignore the United Kingdom dimension of Northern Ireland.

It identified four broad areas for specific focus in the initial phases of the dialogue and set out the UK proposals for them. They are: upholding the Belfast (Good Friday) Agreement in all its parts; maintaining the Common Travel Area and associated rights; avoiding a hard border for the movement of goods; and, aiming to preserve North-South and East-West co-operation, including on energy.<sup>73</sup> On these, it saw ‘significant overlap in the objectives set out by the UK Government, the Irish Government and the EU. In particular, it is clear that our high level objectives are wholly aligned... The UK therefore welcomes the opportunity to discuss how best to deliver these shared objectives’<sup>74</sup>. There is little difference between these ‘high level objectives’ and the aims of the protocol set out in article 1.3 of 2018 and 2019<sup>75</sup>. Then as now, shared objectives — or the shared language of objectives — mask deep differences in understanding of what those objectives were, where the trade offs were, and what the appropriate means were of achieving these objectives.

70. ‘Additional Data Paper: Northern Ireland Trade Data and Statistics’ and ‘Additional Data Paper: Common Travel Area Data and Statistics’, 16 August 2017.

71. ‘Future customs arrangements: a future partnership paper’, HMG, 15 August 2017.

72. Northern Ireland and Ireland Position Paper; paragraph 1, page 1.

73. Ibid. paragraph 2, page 1.

74. Ibid. paragraph 4, page 2.

75. NOTE: Protocol on Ireland/Northern Ireland Art 1.3: ‘This Protocol sets out arrangements necessary to address the unique circumstances on the island of Ireland, maintain the necessary conditions for continued North-South cooperation, avoid a hard border and protect the 1998 Agreement in all its dimensions’. Wording is the same in the protocol of 25 November 2018 and 19 October 2019.

The paper then set out its expectations of what could be agreed in phase one. ‘The UK believes that swift progress should be made in agreeing the way forward on the Common Travel Area and associated rights and some of the specific issues arising from the Belfast (“Good Friday”) Agreement by October. The UK also believes it is possible in this phase to establish working principles for the movement of goods, energy and wider cross-border cooperation that will underpin the development of technical solutions as part of the negotiations on the future relationship between the UK and the EU. Given the complete alignment between the UK, Ireland and the EU on high level objectives for these crucial issues, and our strong support for the peace process in Northern Ireland, these solutions should be agreed at the earliest opportunity. To facilitate progress, the UK proposes to discuss in forthcoming negotiating rounds the high level principles and criteria that could be agreed and used to test potential future models for border arrangements’<sup>76</sup>. There was no UK expectation that more than this could be achieved or required of the UK before entering phase two. There is little evidence in the paper of the different and contrary understandings and objectives that hide behind ‘complete alignment’ of the objectives of the different parties.

EU understanding of the core issues had already been shaped by a concerted Irish diplomatic effort from the second half of 2016; that effort’s most obvious success was in making Ireland’s perspective and concerns into those of the EU and getting them included into the guidelines/directives documents for the Article 50 negotiations for addressing in phase one. Less obvious at this point is that its effort had helped shape the EU’s end objective for resolving the border and other North-South issues; this was almost certainly achieved as an agreed solution by June 2017, though floated as an idea much earlier. In many ways therefore, the position paper had come far too late to make the impact the UK hoped for — but then it was severely restricted in its ability to engage with the Commission and member states by the rules set by the other 27 member states<sup>77</sup>.

### The Belfast Agreement

The Belfast Agreement ‘represents the bedrock of the peace process’ — establishing devolution, providing structures to foster strong relationships between the devolved government and those of the UK and Ireland and London and Dublin; it confirms Northern Ireland’s position as part of the UK in accordance with the principle of consent and the permanent birthright of all of the people of Northern Ireland to hold both British and Irish citizenship<sup>78</sup>.

The Belfast Agreement is not predicated on EU membership but the Belfast Agreement ‘must be considered and safeguarded throughout the exit process, as a whole and in all its parts. There are some important themes flowing from the Agreement that the UK and the EU need to be particularly mindful of in the context of UK exit, including the constitutional context and the framework for North-South and East-West

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76. Northern Ireland and Ireland Position Paper, paragraph 5, page 2.

77. Statement following the informal meeting of the 27, Brussels, 29 June 2016; paragraph 2.

78. Northern Ireland and Ireland Position Paper, paragraph 6, page 3.

cooperation; the border; citizenship rights; and the Northern Ireland economy in recognition of the importance of economic prosperity to sustaining the peace process'<sup>79</sup>. The focus placed in the Irish paper of May 2017 on the EU is entirely absent.

In its 'Proposal for the dialogue', given that the UK, EU and Ireland 'share a strong desire to continue to safeguard the Belfast Agreement and that they should therefore 'be mindful of the full breadth of the commitments made in the Belfast (Good Friday) Agreement. Ensuring that nothing is done to undermine it will require detailed and close engagement between the UK and the EU throughout the negotiations'<sup>80</sup>. This of course is the very problem that the UK failed to get across — or accepted. The UK was perhaps being too subtle in highlighting the danger of the EU adopting a solution to a problem that had the complexity stripped out of it to facilitate a simple and yet apparently complete solution.

### The Common Travel Area and associated rights

The Common Travel Area (CTA) had been the lead issue in UK policy to this point — focused as it had been on citizens' rights and interests rather than goods<sup>81</sup>. It was one on which both the British and Irish were in agreement and the EU was willing to recognise, so long as its continuation could be shown to be in accordance with EU law. (It was already recognised in EU law<sup>82</sup>.) The UK paper put it in context of Strand Three: East-West co-operation and as part of the rights citizens enjoy across the islands beyond those of other EU citizens. The UK's 'Proposal for the dialogue' was for a legal text to be agreed for the Withdrawal Agreement 'that recognises the ongoing status of the CTA and associated reciprocal arrangements' after the UK's exit from the EU. To do so, the UK set out the assurances that the EU requested at the end of the second round of negotiations in July 2017 to ensure that the CTA would not discriminate against other EEA nationals.<sup>83</sup> The Irish had undertaken extensive lobbying and briefings.<sup>84</sup> The basic reason the CTA arrangements could continue to work was that there would continue to be passport checks between Ireland and the rest of the Schengen Area on the movement of people. It would be precisely the opposite for movement of goods.

### Avoiding a hard border for the movement of goods

The 'shared objective' of 'a land border that would be as seamless and frictionless as possible' could not be delivered solely through preserving the CTA. 'It is also important to ensure that there is no return to a hard border as a result of any new controls placed on the movement of goods between the UK and the EU. This will require detailed engagement on customs, agriculture, and other relevant economic matters as negotiations progress. As a first step [i.e. in phase one] the UK proposes agreeing principles and criteria against which to test potential models for the land border'<sup>85</sup>. This was a big step forward from the February 2017 white paper, but also an indicator of what a missed opportunity not starting the process of addressing this key issue six months earlier was.

79. Ibid. paragraph 9, page 4.

80. Ibid. paragraph 11, page 4.

81. NOTE: See, for instance, the UK February white paper and Davis's evidence to the House of Lords, 11 July 2017.

82. NOTE: Protocol 20 of the Lisbon Treaty.

83. Northern Ireland and Ireland Position Paper, paragraph 31-33, page 11.

84. NOTE: An example is the 'Common Travel Area: Information Note from Ireland to the Article 50 Working Group', 7 September 2017.

85. Northern Ireland and Ireland Position Paper. Paragraph 34, page 12.

The paper highlighted the importance of economic prosperity to building support for the peace process, quoting the Belfast Agreement's recognition for the importance of 'sustained economic growth and stability'. 'Internal trade between Northern Ireland and Great Britain is of critical importance to Northern Ireland's economy'; using the then latest figures from 2015, there were £10.7bn of sales from NI to GB as against £2.7bn sales to the Republic of Ireland — its largest export market and 36% of its total export sales<sup>86</sup>. 'The United Kingdom (UK) remains the most significant market for businesses in Northern Ireland — sales to Great Britain were worth one and a half times the value of all Northern Ireland exports and nearly four times the value of exports to Ireland in 2015. Nevertheless, the sale of finished products to Great Britain relies upon cross-border trade in raw materials and components within integrated supply chains, meaning trade with both Great Britain and Ireland are vital to Northern Ireland's economy<sup>87</sup>. Interestingly, in light of the current problem of the protocol that is centred on Great Britain to Northern Ireland trade, there was no information and no mention of Northern Ireland's imports from Great Britain, and no analysis of the dependence of Northern Ireland's economy — or society — on those imports in either the position paper or the additional paper on trade data. A serious omission, but also certainly a sign of how little the prospect of an East-West 'border' solution appeared at this stage of the negotiation as well as a failure to foresee the push Dublin would make on the importance of the 'all-island economy'.

In its *Proposal for the dialogue* on avoiding a hard border and movement of goods, the UK 'welcomes the clear commitment from the European Council and Commission to work on 'flexible and imaginative' solutions to avoid a hard border'<sup>88</sup> — but the EU made no such commitment, only that they would be needed: a great deal of hope is invested in this much-misunderstood phrase. The paper notes examples where 'the EU has set aside the normal regulations and codes set out in EU law in order to recognise the circumstances of certain border areas' — Cyprus, the Croatian-Bosnian border are quoted<sup>89</sup> — though the EU was not offering exemptions but rather requiring avoidance of a hard border whilst respecting the integrity of the Union legal order'<sup>90</sup>. The EU's guidelines and directives were ambiguous on this point, as on so much of Ireland/Northern Ireland issues.

However, 'delivering our shared objective will require detailed work that can only be properly finalised in the context of the new, deep and special partnership that the UK wishes to build with the EU'<sup>91</sup>. This includes 'the issues most critical to delivering as frictionless and seamless a border as possible: customs arrangements, and checks and processes on particular goods such as sanitary and phytosanitary measures for agri-food.

For this phase, the UK proposed nine key principles and criteria for the development of models for the land border. They were:

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86. Ibid. Paragraph 38; page 13.

87. Additional Data Paper: Northern Ireland Trade Data and Statistics, paragraph 1.

88. Northern Ireland and Ireland Position Paper, paragraph 41, page 14.

89. Ibid. Paragraph 42, page 14.

90. EU Negotiating Directives, paragraph 14, 22 May 2017.

91. Northern Ireland and Ireland Position Paper, paragraph 43, page 14.

- Aiming to avoid any physical border infrastructure in either the UK or Ireland;
- Respect the three-stranded approach of the Belfast Agreement including the need to respect and treat equally the identity, ethos and aspirations of both communities; and sustained economic growth in Northern Ireland.
- Cross-border movements of small traders, farmers and individuals; the need to protect everyday movement of goods; the integrated nature of the agri-food industry.
- Prevent the creation of new barriers to doing business within the UK, including between NI and GB.
- Address other regulatory and customs-related barriers necessary to deliver as frictionless a border as possible including waivers for security and safety declarations and ensuring no requirement for product standards checks or intellectual property rights checks at the border.
- Address the transit of goods from Ireland to the rest of the EU via the UK.
- Consider how best to protect the integrity of both the EU Customs Union, Single Market and trade policy, and the new independent UK customs regime, internal market and trade policy in the context of finding flexible and imaginative solutions.
- Take into account trade between Ireland and the UK and aim to avoid economic harm to Ireland as an EU state.
- Agree at an early stage a time-limited interim period, linked to the speed at which the implementation of new arrangements could take place.<sup>92</sup>

The first of the nine principles — ‘Aiming to avoid any physical border infrastructure in either the UK or Ireland’ — made UK proposals for border management incredible. Even the smartest borders have infrastructure. These principles and criteria didn’t seem to have been worked through and tested. It was a further sign that the actual possible choices facing the UK were being masked.

### **Future Customs Arrangements**

For the UK, the key to maintaining as seamless and frictionless a border as possible was to ensure that UK-EU arrangements were streamlined. The position paper *Future customs arrangements: a future partnership paper* which the UK had published on 15 August 2017 set out two broad approaches to a future customs relationship<sup>93</sup>:

- ‘a highly streamlined customs arrangement between the UK and EU leaving as few checks on UK-EU trade as possible. This would aim to continue some of the existing arrangements between the UK and the EU, put in place new negotiated facilitations to reduce and remove barriers to trade, and implement technology-based solutions to make it easier to comply with customs procedures’;

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92. Ibid. Paragraph 45, pages 15 & 16.

93. NOTE: These two approaches came to reflect distinct views on the future relationship favoured by different camps within the Conservative Party and Cabinet. A future customs partnership was favoured by those wanting a closer relationship with the EU whilst the customs arrangement was favoured those wanting looser ties.



- ‘a new customs partnership with the EU, aligning our approach to the customs border in a way that removes the need for a UK-EU customs border. One potential approach would involve the UK mirroring the EU’s requirements for imports from the rest of the world where their final destination is the EU. This is of course unprecedented as an approach and could be challenging to implement so we will look to explore the principles of this with business and the EU’<sup>94</sup>. This is not a line that could have inspired much confidence in the UK’s negotiating partners in Brussels or in Dublin.

‘Some of the specific facilitations set out in *Future customs arrangements: a future partnership paper*, and reflected in the principles above, would be essential to enable a Northern Ireland border under the model of a highly streamlined customs arrangement that is as seamless as possible. In particular, the following measure would be particularly important in relation to Northern Ireland and Ireland.

- Negotiating a continued waiver from the requirement to submit entry and exit summary declarations for goods being moved between the UK and the EU, removing a time-sensitive administrative requirement. Pre-notification of travel by businesses on either side of the land border, through entry and exit summary declarations, would clearly not be consistent with the objectives shared by the UK and the EU’.<sup>95</sup>

Even under this arrangement the UK believed it would still need to go further to agree ‘specific facilitations that recognise the unique circumstances of the Northern Ireland border’. The UK proposed ‘a cross-border trade exemption’ for smaller traders whose trade cannot be categorised and treated as economically significant international trade — allowing no change in the way smaller traders operate — 80% of cross-border trade is carried out by micro, small and medium-sized businesses<sup>96</sup>. Streamlining of customs requirements would be explored for larger businesses, including the use of mutually recognised Authorised Economic Operator arrangements for larger traders. The UK acknowledges that this is innovative and untested. All approaches would be tested against the nine criteria, especially ‘the essential aim of no physical infrastructure at the border’<sup>97</sup>.

The customs paper set out the importance of an interim period linked to the implementation of the arrangements to allow a smooth and orderly transition and avoid a ‘cliff-edge’, arguing that a model of close association with the EU Customs Union for a time-limited interim period would achieve this. Proposal for the dialogue included the need for an early agreement on an interim period as it was seen as key to delivering solutions to avoid a hard border<sup>98</sup>.

The UK had expectations for a post-Brexit customs arrangement and future trade agreement to address the border that were not shared; the logic of a close and ambitious trade agreement was compelling but

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94. Northern Ireland and Ireland Position Paper, paragraph 46, page 16.

95. Ibid. Paragraph 47, page 16.

96. Ibid. Paragraph 48, page 17.

97. Ibid. Paragraph 49, page 17.

98. Ibid. Paragraph 54, page 18.



political and legal considerations made it impossible for the EU to provide the trade facilitations the UK sought. The EU was looking to ramp up the pressure to get realisable commitments under phase one. UK and EU aims for the border were not aligned: ‘frictionless as possible’ was not what Ireland wanted politically nor what the EU could accept for securing the single market.

The hostile reaction in Brussels to the customs paper was also due to the apparent coupling of proposed future UK-EU customs arrangements to the border issue in the ‘Future Customs Arrangements’. The customs paper states: ‘In assessing the options for the UK’s future outside the EU Customs Union, the Government will be guided by what delivers the greatest economic advantage to the UK, and by three strategic objectives:

- ensuring UK-EU trade is as frictionless as possible;
- avoiding a ‘hard border’ between Ireland and Northern Ireland; and
- establishing an independent international trade policy’.<sup>99</sup>

It goes on, ‘The proposals set out above for new customs approaches are first steps to meet our objective of trade across that land border being as seamless and frictionless as possible, but further steps will be necessary’.<sup>100</sup>

### **No barriers to trade within the UK**

The UK refuted the suggestion of ‘some commentators’ of a customs border across the Irish Sea to avoid a hard land border. The answer as to how to avoid a hard land border ‘cannot be to impose a customs border between Northern Ireland and Great Britain’ and the UK believed that its position was widely shared<sup>101</sup> — it wasn’t; ‘some commentators’ certainly included the Irish government, the Irish political parties, nationalist and republican parties in Northern Ireland and, whether they knew it or not, the EU’s chief negotiator and his team and the key players at the top of the Commission and European Council.

‘Throughout this paper the UK has stressed the importance of respecting the Belfast Agreement in all its parts’, including promoting sustained economic growth, the consent principle that Northern Ireland’s constitutional future is for the people of Northern Ireland alone to determine; and a guarantee of respect for the identity, ethos and aspirations of both the nationalist and unionist side of the community in Northern Ireland. Imposing new customs barriers within the UK would clearly have constitutional implications and could not be accepted by the UK government. Such an approach would also have significant implications for the Northern Ireland economy.<sup>102</sup> David Davis would return to this argument and language in November 2017, but in the meantime the UK had made no progress in rebalancing the EU’s understanding of the East-West dimension or its willingness to accept it any more than the EU has managed to enlighten the UK as to the consequences of leaving the single market and the customs union for its border management.

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99. Future Customs Arrangements, 15 August 2017; paragraph 23, page 6.

100. Ibid. Paragraph 44, page 10.

101. Northern Ireland and Ireland Position Paper, paragraph 52, page 18.

102. Ibid. Paragraph 53 (last two sentences), page 18.

### **Potential approaches to Sanitary and Phytosanitary measures**

The ‘extent and complexity of third country SPS and related checks is a major impediment to avoiding a hard border for the movement of goods and facilitating ongoing North-South cooperation on agriculture. The paper proposes regulatory equivalence on agri-food measures, with the UK and the EU agreeing to achieve the same outcome and high standards, with scope for flexibility in relation to the method for achieving this’<sup>103</sup>.

This was asking a lot from the EU. The Swiss have an equivalence agreement on SPS, but it is based on Switzerland maintaining full alignment with the EU’s rules — so not really equivalence at all.

### **Aiming to preserve North-South and East-West cooperation**

On this key issue, the UK position paper reaffirms the centrality of the Belfast Agreement: ‘...the Belfast (‘Good Friday’) Agreement provides the unique constitutional framework for the North-South and East-West cooperation that is so significant from an economic, political and social perspective to Northern Ireland. It is therefore important that the negotiations achieve our shared objective of upholding the Agreement itself, and also that, crucially, the UK and the EU do not do anything to obstruct the wide range of cooperation between Northern Ireland, Ireland and Great Britain in the future partnership. This section considers North-South and East-West cooperation consistent with the Belfast (‘Good Friday’) Agreement following the UK’s withdrawal from the EU’<sup>104</sup>.

Strand 2 sets out details of the North-South co-operation, including the North South Ministerial Council and the six areas of co-operation (agriculture, education, environment, health, tourism and transport), as well as the implementation bodies (overseeing waterways, and seaways and lochs, language, trade, food safety, and funding from EU programmes including PEACE). Additional North-South co-operation outside of North South Ministerial Council auspices includes the Single Electricity Market<sup>105</sup>.

Strand 3 of the Belfast Agreement deals with East-West co-operation, recognising the importance of the strong relationship between the UK and Irish governments, and between their various jurisdictions. ‘This in addition to the internal UK links between Northern Ireland and Great Britain that are part of Northern Ireland’s status as an integral part of the UK’<sup>106</sup>. This is where the Irish interpretation — and thus the EU interpretation — differs so much from the UK’s.

The UK government proposed that the UK and EU should focus in the initial phases of the dialogue on reaching a common understanding of the principles of North-South and East-West cooperation. The cooperation outlined in the position paper will need to be recognised and considered in the negotiations covering the future relationship between the UK and the EU<sup>107</sup>. When a common understanding of principles was agreed in October 2017 it would reflect little of this position paper.

‘The UK recognises, however, that the full range of cross-border cooperation goes wider than this, and it will be important to consider the full breadth of issues. Ensuring that the full spectrum of North-South

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103. Ibid. Paragraphs 55 & 57, page 19.

104. Ibid. Paragraph 58, page 20.

105. Ibid. Paragraph 59 & 60, page 20.

106. Ibid. Paragraph 61, page 20.

107. Ibid. Paragraph 64, page 21.

and East-West co-operation can continue will require the type of bold and ambitious Free Trade Agreement that the UK has committed to, and will need a sustained focus on the interests of Northern Ireland and Ireland throughout the negotiations'<sup>108</sup>. Pushing this argument was not well received in Brussels; the full spectrum of East-West cooperation was not something the EU wanted to consider and Northern Ireland was not to be a wedge to open up favourable EU-UK arrangements.

Lastly, the paper proposed that the single electricity market (SEM) should continue: that continuation was successfully negotiated. It is worth pointing out that the SEM relies on East-West cooperation.

### Next steps in Northern Ireland and Ireland dialogue

The position paper then put forward the UK view on the next steps for the dialogue, setting out a distinct schedule for progress on the issues covered by the dialogue — one that differed markedly from that envisaged by the EU. 'The UK proposes that it should work intensively with the EU over the coming months to address the issues set out in this paper. Our view is that the UK and the EU start this process with complete alignment on our high level objectives and our strong support for the peace process in Northern Ireland.

'The themes set out in this paper will require focused engagement throughout the course of the UK's exit negotiations and not simply in the initial phases of discussions. Given the strong links to the future relationship it would not make sense to seek to use October as a cut-off point for work on the unique issues relating to Northern Ireland and Ireland. Nonetheless, the UK supports making as much progress as we can on these issues in the coming months and believes that the UK and EU could aim by October to have:

- agreed that the Common Travel Area and associated rights should be preserved and acknowledged in the Withdrawal Agreement;
- reached agreement on the scope of the issues arising from the Belfast ('Good Friday') Agreement, and specifically agreed to affirm our continued support for the Agreement, upholding the identity and citizenship rights of the people of Northern Ireland, and considered the key principles for the continuation of the PEACE IV programme and a potential future PEACE programme;
- considered, and if possible, agreed to the principle of a time-limited interim period linked to the speed at which the implementation of new arrangements could take place, including considerations relating to the unique circumstances of Northern Ireland and Ireland, as set out in *Future Customs Arrangements: a future partnership paper*.
- considered the key principles and criteria for avoiding a hard border for the movement of goods; and
- discussed the preservation of the North-South and East-West cooperation envisaged in the Belfast ('Good Friday') Agreement, and if possible agreed specifically on key principles for the energy market in Northern Ireland and Ireland.

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108. Ibid. Paragraph 65, page 21.

## Rejection of the UK position, August 2017

Immediate responses came through unnamed EU officials. ‘ “We are concerned by the linkages created in the UK paper on Ireland between the preservation of the peace process, including the invisible border [between Northern Ireland and the Irish Republic], and the future of the EU-UK trade relationship,” said a senior EU official. “The peace process must not be a bargaining chip in these negotiations”...EU negotiators were particularly annoyed by the UK position paper on Ireland, which suggested resolving the issues surrounding Northern Ireland through a UK-EU trade deal on areas like agriculture that effectively replicated the benefits of the EU single market Britain wanted to leave. “The decision to leave the EU is the UK’s decision,” added the EU official. “It was not the decision of Ireland, it was not the decision of the EU. So the UK has to take responsibility for the implications of that.” Added the official: “If you look at the Ireland paper, it is very good on aspirations...but it is short on workable solutions”<sup>109</sup>.

The British ideas to maintain ‘frictionless’ trade across the Northern Irish border had been met with incredulity in Brussels. ‘ “The technical cannot outpace the political. We are not yet there in terms of the political debate and the full realisation of the implications of [Brexit] on Northern Ireland,” said the senior EU official. “This is not the moment to talk about technical, let alone technological solutions...what we see in the UK paper is a lot of magical thinking about how an invisible border could work in the future”.’<sup>110</sup> A European Commission spokesperson appeared sceptical on Wednesday, saying: “Frictionless trade is not possible outside the single market and customs union.” The position paper was met with similar scepticism from the Irish government and business organisations.’<sup>111</sup>

‘With continuing strong pressure from the UK to move discussions on to the second phase future-relationship talks, Mr Coveney said that he had a “very strong sense” that the task force believes more progress can be made on phase-one issues ahead of the move. On the Border issue, Mr Coveney said it was clear that UK aspirations to a frictionless border “were not credible answers” to the problem, without threatening the integrity of the single market. He welcomed the progress made on safeguarding the Common Travel Area in the third round of talks last week, and said that apart from some detail he was not aware of significant blockages to agreement on the issue. Some progress continued to be needed to flesh out how the Belfast Agreement North-South cooperation, embedded as it was in EU legislation, would survive Brexit. The challenge, he said, was

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109. ‘EU warns UK against using Irish peace as Brexit ‘bargaining chip’, the *Financial Times*, 26 August 2017.

110. Ibid.

111. ‘UK position paper on Irish border ‘throws up even more questions’, the *Financial Times*, 16 August 2017.

“how do we maintain what a peace process has delivered on the island of Ireland which is effectively an invisible border 500 km long with 260 road crossings and has nearly two million cars crossing it every month”.<sup>112</sup>

This last comment represents the key disagreement as to priority between Ireland, and thus the Commission, and the UK. For Ireland, the open border — which they perceived as the real gain of the peace process — is the priority: for the UK, the Belfast Agreement — the bedrock of that peace process — is the top priority. One is all-island, the other balances North-South with the UK dimension.

Michel Barnier gave his public comment at the launch of the Commission’s paper on Ireland/Northern Ireland: “What I see in the UK’s paper on Ireland and Northern Ireland worries me. The UK wants the EU to suspend the application of its laws, its Customs Union, and its Single Market at what will be a new external border of the EU. And the UK wants to use Ireland as a kind of test case for the future EU-UK customs relations. This will not happen. Creativity and flexibility cannot be at the expense of the integrity of the Single Market and the Customs Union. This would not be fair for Ireland and it would not be fair for the European Union”. He went on to say that, “We need first to agree on political principles. Discussing technical solutions would be premature in the political context of Northern Ireland”.<sup>113</sup>

The UK’s expectations for a post-Brexit customs arrangement and future trade agreement to address the border were not shared; the logic of a close and ambitious trade agreement was compelling for the UK but political and legal considerations made it impossible for the EU, as they had made clear as far back as the ‘disastrous Brexit dinner’ of 26 April 2017; a customs arrangement does not remove the need for customs and goods checks at the border. The EU was looking for realisable commitments to a border solution in phase one.

Juncker had given his appraisal too: having attentively read all the UK’s Future Partnership papers he regarded none as really satisfactory, leaving a lot of questions that need to be addressed, including the serious border issues between the Republic of Ireland and Northern Ireland. He made it very clear that there would be no negotiations on future relations before all questions relating to Article 50 were resolved. Whilst accepting that there were partial intersections between the two dimensions of divorce and future relations, he stated that the European Council, following the Commission’s proposal, was ultra-clear: first to settle the past before considering the future.<sup>114</sup>

So not only were UK customs proposals for the EU-UK and thus for the land border rejected, but so too was the UK argument that agreement on the border would have to be based on the completion of the trading relationship between the UK and the EU. Since the UK position paper and *Future Customs Arrangements* was based on work over the previous twelve months, the UK negotiating strategy was in serious trouble. It never really recovered. Its other key failure — and it was where it was playing to its strengths as regards the quality of its case and its authority — was that it

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112. ‘EU stands with Ireland in Brexit talks, Barnier assures Coveney’; the *Irish Times*, 4 September 2017.

113. Statement by Michel Barnier on the publication of the Guiding Principles for the Dialogue on Ireland and Northern Ireland, 7 September 2017.

114. President Jean-Claude Juncker speech to EU Ambassadors, 29 August 2017: ‘Et dans la mesure où le gouvernement britannique hésite à annoncer toutes ses couleurs, pourquoi est-ce que j’annoncerai les nôtres pour inspirer les leurs?’

made no impact on the EU's understanding of the Belfast Agreement, in particular the centrality of East-West co-operation.

This last failure is not surprising as it was now clear that the EU had its own concept of a solution for avoiding a hard border post-Brexit — and every interest in avoiding having to test it against the complexities of the Belfast Agreement as set out in the UK paper. Jean-Claude Juncker had alluded to this solution earlier in his speech quoted above; he said that as the UK was not showing all its positions so why should he show all the EU's as that would only invigorate the UK's position; (it is highly unlikely that he was referring to the negotiations on citizenship or financial obligation or other separation issues as the EU has revealed its hand on these points). This concept for avoiding a hard border was the political rather than technical solution that the Irish argued for in their May 2017 paper and which Simon Coveney had set out on 23 June 2017 and which Barnier had already accepted. They were not yet ready to set it out formally in public but they had understood it and seen that it would work practically, at least for them. Given their understanding of the Belfast Agreement — all-island/ North-South — it seemed to work politically too. They had agreed it as their preferred solution; it was just a question of getting it agreed by the UK, who were required to put forward the solution.

## Progress in the midst of deadlock: The third round, 28-31 August 2017

This round was billed as the ‘clarification’ round by Michel Barnier as he looked ahead to it after July’s negotiations. What clarification there was showed that both sides were at odds over how to approach the UK’s financial obligations — with Barnier accusing the UK of backtracking on commitments already made — and that they were running out of time. “In July, the UK recognised it had obligations beyond the Brexit date but this week the UK explained it felt its obligation were limited to the last payment of the current EU Budget...After this week, it is clear that the UK does not feel legally obliged to honour these obligations after its departure.” Mr Davis retorted: “The commission set out its position and we have a duty to our taxpayers to interrogate it vigorously”. Mr Barnier was in no mood for détente: “There has been no decisive progress on any of the principle subjects,” he said in the packed press room.<sup>115</sup>

Finance was the chief cause of a bad tempered end to the third round. Davis explained that: “These rounds are not at this stage about establishing jointly agreed legal text; they are about reaching a detailed understanding of each other’s position, understanding where there might be room for compromise and beginning to drill down into technical detail on a number of issues”.<sup>116</sup>

Where Davis was more upbeat, though not complacent, was that there had been progress on citizenship in line with the aims of the third round. Barnier was now very concerned about timing, and even more so given lack of progress on finance, but of course, the price of arguing your point is time. “When I welcomed David here on Monday, I said that I was concerned. Time is passing quickly and with each day that goes by, we are getting closer to the United Kingdom’s withdrawal, on 29 March 2019 at midnight. The fundamental question for which we need an answer is whether on this day, the United Kingdom will leave the European Union in an orderly manner, with an agreement, or whether the United Kingdom will leave the European Union with no deal, the consequences of which we have already explained. From our side, we believe that an agreement is the best outcome, as it is in our best common interest... At the current speed, we are far from being able to recommend to the European Council that there has been sufficient progress in order to start discussions on the future relationship, while we are finalising the withdrawal agreement throughout 2018. That is what I can say, from our side, about this round.”<sup>117</sup>

Given the structure of the talks, he was perhaps being a little unrealistic to have expected ‘decisive progress’ — round three was about clarification

115. ‘Michel Barnier accuses Britain of ‘nostalgia’ for benefits of EU membership in frosty press conference, the *Daily Telegraph*, 31 August 2017.

116. David Davis’s statement to the House of Commons, 5 September 2017: Hansard, column 44.

117. Michel Barnier’s opening comments at the 31 August 2017 press conference.



— with the dialogue on Northern Ireland running behind those of citizenship and finance yet parcelled with them for the recommendation that sufficient progress had been made for phase two to begin. This was another flaw in the structure of the talks. Whatever the degree of progress or clarification that had been achieved on the three main areas of negotiation, certainly as far as Northern Ireland was concerned progress appeared to have been made — as acknowledged by both sides. Barnier regarded the discussions as “fruitful”<sup>118</sup>: “On this subject — which I continue to follow personally, as all other areas — we made real progress on the question of the Common Travel Area, on the basis of guarantees by the United Kingdom, and we clarified, in a constructive manner, what remains to be done, particularly with regards to North-South cooperation in the Good Friday Agreement”.<sup>119</sup>

Davis spoke briefly on specific progress “On Ireland and Northern Ireland, Michel gave credit to this, our coordinators have met again to build on discussions in July. We had a good discussion on maintaining the Common Travel Area and on safeguarding the Good Friday Agreement, on the basis of the UK paper. We think there is a high degree of convergence on these key issues, and we agreed to work up shared principles on the Common Travel Area. We also agreed to carry out further joint technical work on cross-border co-operation under the Good Friday Agreement.”<sup>120</sup> The outcome of the last point would be the mapping exercise.

As Davis put it to the House of Commons: “I am pleased to report that there has been significant, concrete progress in the vital area of Northern Ireland and Ireland. The negotiation co-ordinators explored a number of issues, including both the Belfast or Good Friday agreement and the common travel area. In August, the group also held detailed discussions on the basis of the UK position paper... Of course, as I said all along, the key issues in relation to cross-border economic co-operation and energy will need to form an integral part of discussions on the UK’s future relationship with the EU”.<sup>121</sup>

Davis enlarged on the key progress achieved in the third round on Ireland/Northern Ireland: “The biggest single issue that came up at the previous negotiating round in July was concern by the European Union that our intention to continue with the common travel area would impinge on the rights of European citizens. We managed to achieve an understanding on its part that that was not the case and that the CTA was therefore well worth preserving”.<sup>122</sup>

Davis continued to highlight the importance of the future relationship to finding a solution on the border issue: “Alongside the negotiations, we have also published a number of papers which set out our thinking regarding our future special partnership with the EU. These future partnership papers are different from our papers that set out the position for the negotiations under our withdrawal agreement. Our future partnership papers are part of a concerted effort to pragmatically drive the progress we all want to see. All along, we have argued that talks around our withdrawal cannot be treated in isolation from the future partnership that we want.

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118. Michel Barnier speaking at the 31 August 2017 press conference.

119. Ibid.

120. David Davis’s statement at the 31 August 2017 press conference.

121. David Davis’s statement to the House of Commons, 5 September 2017; Hansard, Column 44.

122. David Davis, House of Commons, 5 September 2017; Hansard, column 59.

We can only resolve some of these issues with an eye on how the new partnership will work in the future. For example, on Northern Ireland it would be helpful to our shared objectives on avoiding a hard border to be able to begin discussions on how future customs arrangements will work. Furthermore, if we agree the comprehensive free trade agreement we are seeking as part of our future partnership, solutions in Northern Ireland are, of course, easier to deliver”.<sup>123</sup>

This point was supported by Keir Starmer, then Shadow DExEU Secretary, in his response: “I understand the Secretary of State’s frustration at points with the process and sympathise with the view that some phase 1 issues cannot fully be resolved until we get to phase 2. Northern Ireland is a classic example of that”.<sup>124</sup> He immediately went on to express his deep concern at the progress being made so far: “However, the current state of affairs and the slow progress are a real cause for concern. The parties appear to be getting further apart, rather than closer together. Round 3 of the five in phase 1 is gone, and we would now expect agreement to be emerging on the key issues. The last round is in October, and that should involve formal agreement. There is now huge pressure on the negotiating round in September. If phase 2 is pushed back, there will be very serious consequences for Britain, and the concept of no deal, which I hoped had died a death since the election, could yet rise from the ashes.”<sup>125</sup> The ‘clock was ticking’ and the UK was under pressure — as the EU was not, despite its own self interest in a negotiated outcome — to get a deal done in time.

For all the talk of progress, what had been achieved was on issues agreed in principle: the Common Travel Area, for instance, which had full Irish backing. The Irish had issued a paper on the CTA in March 2017 which in its final paragraph said: ‘Analysis by the Irish authorities has not identified any legal barrier to the arrangements as outlined above being maintained in a manner fully consistent with Ireland’s EU obligations’<sup>126</sup>. The Irish had gained EU approval subject to technical approvals of UK assurances and these had been made in the August position paper. This was a significant gain for the UK and Ireland, necessary but not sufficient to allow an open border. The technical work on North-South cooperation — ‘the mapping exercise’ — was going ahead; this would later redefine this strand of cooperation from a marginal activity to a central one. However, discussions on the UK position paper led nowhere: there was no convergence on the UK’s detailed and balanced exposition of the Belfast Agreement — that it is East-West as well as North-South cooperation — nor recognition of the importance of the UK internal market to Northern Ireland’s economic stability. There had been no progress on the border with the dismissing of the customs proposals. The UK approach of leaving solutions to phase two and beyond was rejected by the EU, but the UK continued to push for it, locked in to the arguments of why it was a prerequisite to a solution and to its interpretation of Article 50 on the withdrawal agreement taking into account the future relationship. The UK strategy was in ruins — but had anyone in London noticed?

123. Ibid. Hansard, column 45. One of the papers he refers to is the ‘Future Customs Arrangements’ paper of 15 August 2017.

124. Keir Starmer response to Davis’s statement, 5 September 2017; Hansard, column 46.

125. Ibid.

126. ‘Common Travel Area: Information Note from Ireland to the Article 50 Working Group’, page 3. Circulated in March 2017 and published on 7 September 2017.

## The EU Counterstroke, September 2017

The clock was ticking and the EU was about to bring forward its own ‘principles’ on Ireland/Northern Ireland in preparation for the fourth round of talks. This was accompanied by a new Irish-EU move countering the UK presentation of the Belfast Agreement that was set out in the August position paper.

### The Good Friday Agreement and Peace Process: the Irish Note<sup>127</sup>

The contents of an Irish information note on ‘The Good Friday Agreement and Peace Process’ provided background to the new Irish and EU emphasis on North-South co-operation and the centrality of the EU to it. A small cloud, no larger than a man’s hand had appeared — it was later to break over the negotiations in a storm.

The Irish government had fully briefed the Commission and the other EU27 on the Belfast Agreement in late 2016 and early 2017; these briefings informed the EU’s negotiating guidelines. The EU therefore had a good idea of the impact of Brexit on the Belfast Agreement based on Irish perspectives. This document, of just over three pages, plus three annexes, was a new briefing with a new focus: North-South cooperation.

In its introduction, the Irish paper agreed with the UK on the central role of the Belfast Agreement for the peace process. It is the ‘overarching framework for deepening peace, political stability and reconciliation in Northern Ireland. It is the foundation of the peace process (the UK says it is the ‘bedrock of the peace process’). Its overview of the Agreement was accurate and an eight-page summary was included as an annex with the note; the peace process is an ‘ongoing process’ requiring ‘continued active oversight and the involvement of the two governments’, and it benefits from the support and facilitation of the EU.

It then really departed from the UK understanding, setting out at length the ‘Role of the EU’. The negotiation and implementation of the agreement, and the realisation of its goals and wider peace gains, had strongly benefited from the EU membership of both governments, and from consistent and strong support from EU members and institutions. It set out the gains of the peace in this section — suggesting a direct connection between normalisation of relationships and absence of violence and the EU, and the invisible border and North-South co-

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127. ‘The Good Friday Agreement and Peace Process’: Information Note from Ireland to the Article 50 Working Group, published by General Secretariat of the European Council, 7 September 2017.

operation. It was, of course, just what the EU wanted to hear and the connection was not explicitly stated so couldn't be refuted. 'The common EU legal framework, including non-discrimination and other rights set down in EU law, economic development within the European Union, and the wider European political, civic, economic and social perspective that EU citizens enjoy, have also facilitated societal normalisation in Northern Ireland through the peace process'. Whilst the Agreement does not require continued membership of the EU it clearly assumes it, quoting the preamble to the British-Irish intergovernmental agreement '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' — this rather overstated the case. Further evidence it cited was that the North South Ministerial Council (NSMC) was 'to consider the European Union dimension of relevant matters' and to 'ensure that the views of the Council are taken into account and represented appropriately at relevant EU meetings'; this has the irony that on this matter of the negotiations over Northern Ireland, the views of the NSMC and the Northern Ireland Assembly were not formally taken account of: with the suspension of the Executive and Assembly, it was Dublin alone that spoke.

North-South cooperation was covered next and has its own two-page annex (II). There is no mention of East-West co-operation in the note (bar three paragraphs in the summary of the Agreement, under East-West, one of which includes 'recognition of the Irish government's special interest in Northern Ireland'. North-South is 'a central part of the GFA'. It introduced the North South Ministerial Council and its role, whilst stressing its interdependency with the Northern Ireland Assembly. Its main point was that 'The UK's withdrawal from the EU presents a major challenge to North/South Cooperation because much of this cooperation is embedded in the common framework of EU law and EU policies that applies across the island of Ireland at present'. This was a new argument that was not set out in the Irish government's Brexit paper of May 2017, where the relationship of the EU to the Belfast Agreement and peace process was laid out in detail<sup>128</sup>. It then pointed to annex II where it covers the areas of cooperation and highlights in particular health and the environment, as well as judicial and police cooperation and the single electricity market. It is worth pointing out that East-West cooperation in health is of a magnitude greater than North-South, centred in central government funding, the NHS and the associated training, research, and regulatory frameworks that support healthcare provision. The examples of North-South cooperation in annex II would make for a local newspaper story, but hardly the stuff to tip the balance on an international agreement — or so you would think.

The paper covered 'Rights', briefly: The European Convention on Human Rights is central to the agreement but this was not mentioned in the document perhaps because it is not only outside the EU framework but because the EU has failed thus far to sign up to it. Its section on rights

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128. Ireland and the negotiations on the UK's withdrawal from the European Union: The Government's Approach, May 2017. Chapter 3: Issues unique to Ireland; page 19.

looks at EU law on employment, for instance, and the EU Charter of Fundamental Rights; the next section, on citizenship, was equally brief.

On the border, the paper states: ‘The disappearance of physical border crossings and checkpoints is both a symbol of and a dividend from the success of the Peace Process. People’s daily lives in Northern Ireland and in the border region have been transformed. Any reversal of this transformation would have considerable adverse economic, social, political, security and psychological impacts on people both in border communities and on the island as a whole’.

In summary the paper exaggerated the role of the EU, of North-South cooperation and ignored entirely Northern Ireland’s integration into and dependence on the UK, including across some of the policy areas it listed under North-South cooperation. The word ‘consent’ did not appear in the document or its annexes. This Irish paper did not appear to be well prepared and may have been produced for internal use and published at short notice to coincide with the publication of the EU’s own paper (*see below*). It was certainly published in order to support the argument that North-South cooperation relied on common EU law and policy and to reaffirm North-South cooperation as central rather than ‘balancing’ East-West realities; in ignoring East-West cooperation it was an attempt to neutralise the UK challenge to the Irish interpretation of the Belfast Agreement.

### The EU’s Guiding Principles on the Dialogue on Ireland/Northern Ireland

The Commission transmitted its ‘Guiding principles’ document<sup>129</sup> on 6 September 2017 for the Council working party (Art. 50) which approved them the next day. Barnier then gave a speech that laid out his priorities. His first priority expressed a subtle difference to the EU’s original directives on Northern Ireland: ‘First, the responsibility to preserve the peace process and the gains of the Good Friday Agreement, in all its parts’<sup>130</sup>. The ‘gains of the peace process’ are subjective — they don’t have to include East-West cooperation but do have to include North-South. He then stated that “On the Good Friday Agreement, the UK, as co-guarantor, will also need to put solutions forward. In particular: The interlocking political institutions created by the Good Friday Agreement will need to continue operating effectively. We need to avoid the return of a hard border between Ireland and Northern Ireland while respecting Ireland’s place in the Single Market. North-South cooperation will need to be preserved in all policy areas”<sup>131</sup>. Again, a subtle difference — the Belfast Agreement was reduced to its parts, interpreted as continued operation of the interlocking institutions. The EU’s commitment to the Belfast Agreement had been shorn of any reference to the wider ‘objectives and commitments set out in the Belfast Agreement’ that were at the core of the EU’s negotiating directives of May 2017. In contrast, North-South had to be preserved in all policy areas, not just at its actual level of activity.

129. ‘Guiding principles transmitted to EU27 for the Dialogue on Ireland/Northern Ireland’, 6/7 September 2017. Communicated to the UK as ‘Guiding principles for the Dialogue on Ireland/Northern Ireland’, 21 September 2017, in view of the 4<sup>th</sup> negotiating round.

130. Statement by Michel Barnier on the publication of the Guiding Principles for the Dialogue on Ireland and Northern Ireland, 7 September 2017.

131. Statement by Michel Barnier on the publication of the Guiding Principles for the Dialogue on Ireland and Northern Ireland, 7 September 2017.

The guiding principles paper covered less than three and a half pages of text plus its cover sheet. It contained a number of important and interesting points, but first note the timing: one month before the October European Council at which sufficient progress should have been made in order to move forward to phase two. The paper stated that the UK had to find the solution to the problems faced on the island of Ireland by UK withdrawal from the EU, the single market and the customs union, and then set out the conditions that this solution should meet.

First, the paper recounts the ‘issues unique to Ireland’: ‘the protection of the gains of the peace process and of the Good Friday Agreement in all its parts, the maintenance of the existing bilateral agreements and arrangements between the United Kingdom and Ireland including the Common Travel Area, and specific issues arising from Ireland’s unique geographical position, including the aim of avoiding a hard border between Ireland and Northern Ireland. The invisible border on the island of Ireland is ‘one of the major achievements and societal benefits of the Peace Process’<sup>132</sup>.

This paper, which was ‘in line with the processes established related to the discussions on Ireland/Northern Ireland’, did not propose solutions for the Irish border — the onus for that is on the UK. However, that solution would have to take into account ‘the interwoven political, security, societal and agricultural context and frameworks on the island of Ireland’ (but not, apparently, those of Northern Ireland and the United Kingdom). This solution ‘cannot serve to preconfigure solutions in the context of the wider discussions on the future relationship between the European Union and the United Kingdom’<sup>133</sup> — a red line that the proposals in the UK’s Future Customs Arrangements crossed.

It then set out essential elements of the withdrawal process: the need for a political commitment to protecting the Good Friday Agreement in all its parts and the gains of the peace process — ‘and [a political commitment] to the practical application of this on the island of Ireland’. Flexible and imaginative solutions would be required, including ‘the aim of avoiding a hard border’ but these solutions would have to ‘respect the proper functioning of the internal market and of the Customs Union as well as the integrity and effectiveness of the Union legal order’<sup>134</sup>. This left little room for the EU to be flexible or imaginative — the onus for being imaginative and flexible was placed entirely on the UK. With ‘practical application’ precluding future EU-UK trade and customs agreement, and with no technology-based solutions in hand, the UK’s choice of solutions was being pushed towards the EU’s ‘political solution’.

The paper then listed the principles underpinning the EU’s approach to finding a solution under two headings: six principles under ‘Good Friday Agreement and Peace Process’ and two under ‘Common Travel Area’.

### **Good Friday Agreement and Peace Process**

First, the paper set out the grounds for the EU’s involvement in the dialogue on Ireland/Northern Ireland. This built on the Commission’s

132. ‘Guiding principles transmitted to EU27 for the Dialogue on Ireland/Northern Ireland’, transmitted to the Council’s Art. 50 working party on 6 September 2017, approved on 7 September 2017; page 2.

133. Ibid. Page 2.

134. Ibid. Page 3.

negotiating guidelines and directives of April and May 2017. The EU and UK should continue to support peace, stability and reconciliation on the island of Ireland. ‘The Good Friday Agreement was concluded on 10 April 1998 against the background of membership of the European Union by Ireland and the United Kingdom and the common framework of European Union law and policies underpins the operation of many of its institutions. The gains and benefits of peace which have been achieved through the Good Friday Agreement and facilitated and supported by the European Union should continue to be protected and strengthened. They include societal benefits and the normalisation of relations between communities in Northern Ireland and between North and South’<sup>135</sup>.

The paper then set out the guiding principles.

1. ‘The interlocking political institutions established by the Belfast Agreement, which reflect the totality of the relationships on the islands of Great Britain and Ireland, will need to continue to operate, as will the implementing bodies under and outside of the GFA.
2. Ensuring the avoidance of a hard border is central to protecting the gains of the Peace Process underpinned by the Belfast Agreement. Flexible and imaginative solutions will be required to avoid a hard border, including any physical border infrastructure. This must be achieved in a way that ensures that Ireland’s place within the Internal Market and Customs Union is unaffected.
3. It will be necessary for the EU and the UK to examine whether, and if so how, the fact that European Union law ceases to apply in the United Kingdom might impact on continued North-South cooperation and whether specific provisions need to be inserted in the Withdrawal Agreement’<sup>136</sup>.

The last three principles covered citizens’ rights and EU funding<sup>137</sup>.

The principles set out here support North-South aspects of the Belfast Agreement and the avoidance of a hard border, but ignore the bedrock of the Belfast Agreement — that Northern Ireland remains a full part of the United Kingdom until its people say otherwise. In the Belfast Agreement, power-sharing devolution and North-South co-operation compensate for the fact that Northern Ireland remains a full part of the UK. The problem with the Commission’s principles was that the East-West institutional architecture of the Belfast Agreement is not a mirror of those set out in detail under North-South co-operation: the main East-West architecture is Northern Ireland’s integration into the UK state. This basic and determining reality was ignored in favour of an emphasis on an architecture whose function and meaning is much more limited. The third listed of the principles would open the door to the ‘alignment’ of Northern Ireland with the EU.

The final section related to the Common Travel Area — the first set out its relationship to the Peace Process, the second contained a recommendation

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135. Ibid. Page 3.

136. NOTE: This refers to what would be known as the ‘Mapping Exercise’, which would be carried out by civil servants from the UK as well as Ireland and the EU and was agreed to in the August dialogue.

137. NOTE: These were: 4) No diminution of rights, ‘for which European Union law and practice has provided a supporting framework’, as UK leaves the EU; 5) the Withdrawal Agreement should respect and be without prejudice to the rights, opportunities and identity that come with EU citizenship; 6) UK and EU to honour funding for PEACE and INTERREG programmes under current funding period.



to recognise the Common Travel Area based on UK commitments to ensure it did not compromise Ireland's obligations under EU law. Ireland could manage the border between the EU and the UK for people based on UK assurances because it imposes passport controls at its border with the rest of the EU. This prepares the way for the final agreement on the continuation of the CTA post-Brexit.

There was little press comment or serious analysis of this paper or its principles. How can you uphold the Belfast Agreement in all its parts — East-West as well as North-South — and avoid a hard border on the island of Ireland without any flexibility from the European Union and without Ireland playing a role? There was no comment that the principles might have saved everyone's time had they been set out months earlier, before the UK crafted more detailed and apparently pointless border proposals. Nor was it pointed out that the commitment that 'Nothing in the Agreement should undermine the objectives and commitments set out in the Good Friday Agreement in all its parts and its related implementing agreements'<sup>138</sup> had been reduced to ensuring that institutions established by the Belfast Agreement could continue to operate; nobody seems to have questioned the statement that these institutions alone 'reflect the totality of relationships on the island of Great Britain and Ireland' — a statement that is entirely absurd. The Belfast Agreement established additional institutions to allow for devolved power-sharing and to give institutional structure to North-South co-operation and for coordinating these new structures alongside the pre-existing institutions of the United Kingdom. It is hard to interpret this development as anything other than an intentional attempt to redefine the Belfast Agreement to avoid obligations and commitments that the EU were either not expecting when they bought into the Irish interpretation of the Belfast Agreement or which had become barriers to a solution that was oriented to the North-South/all-island dimension.

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138. Paragraph 14, EU negotiating directives, 22 May 2017.

## Breaking the deadlock — but at what price? The Fourth Round of Negotiations, 25-28 September 2017

Originally scheduled to start on 18 September 2017, the talks were delayed one week to allow more time for consultations — or perhaps to accommodate a Prime Ministerial intervention. This was the date when it was announced that Olly Robbins would leave DExEU where he had been permanent secretary and move to head up the Europe Unit at the Cabinet Office. He would continue as the PM's Europe Adviser (Sherpa) and as the UK's Coordinator of the negotiations.

### The Florence Speech

On the same day as the Irish and EU documents were released, a small group of Cabinet members assembled to read a draft of a speech, written by Olly Robbins, that had been crafted for the Prime Minister following the upsets at the August round. The original draft suggested an end-state relationship with the EU akin to that of Norway. It caused a major political row between Leavers and Remainers<sup>139</sup>. Boris Johnson, who had not been present at the private reading, wrote a lengthy comment piece in the *Daily Telegraph*<sup>140</sup>. May rowed back to her Lancaster House position, but it was clear that a position once held with determination and articulated with clarity was now very shaky.

On 22 September 2017, ahead of the fourth round of talks, Theresa May made her revised speech in Florence to help move the talks forward<sup>141</sup> by making some concessions towards EU positions and clarifications — most notably in a commitment that the UK would meet its 2014-20 budget obligations, with some caveats subsequently added by David Davis. The speech helped shift relations between the two sides back towards cordiality and away from the bad temperedness of the third round at the end of August. On Northern Ireland, she said, 'we and the EU have committed to protecting the Belfast Agreement and the Common Travel Area and, looking ahead, we have both stated explicitly that we will not accept any physical infrastructure at the border'. In this, May went further than her government's August paper which had set as its first principle/criteria for ensuring 'as frictionless and seamless a border as possible' that: 'This must mean aiming to avoid any physical border infrastructure in either

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139. Tim Shipman, 'Fall Out: a year of political mayhem', (2017); pages 481-82.

140. 'Boris Johnson: my vision for a bold thriving Britain enabled by Brexit', the *Daily Telegraph*, 15 September 2017.

141. Statement to the House of Commons, 9 October 2017, Hansard, column 43.

the United Kingdom or Ireland, for any purpose (including customs or agri-food checks)<sup>142</sup>; this aim was based on future agreements being in place that would make infrastructure unnecessary — unrealistic though that may have been. In her speech, the Prime Minister appears to have given an assurance that there would be no physical infrastructure at the border regardless of whether agreements that allow for this were reached or not. This was a substantial shift beyond the rather aspirational statement of the August paper and had huge implications for the possible solutions available to the UK for solving the Irish border problem.

A few days later Michel Barnier described the speech as constructive in spirit and looked to see ‘that the UK government translates Mrs. May’s statements into clear negotiating positions’ to be discussed in detail around the negotiating table. “We are therefore at a moment of clarity, particularly regarding citizens’ rights and the financial settlement. And we need to advance on finding a unique solution for Ireland. On all of these subjects, and on a few others, this is the moment of clarity”.<sup>143</sup> The key point of clarity provided by May was that the UK would not accept any physical infrastructure at the border.

## The Fourth Round

The Prime Minister and David Davis both hoped that the concessions in the speech and the new mood it had created would break the deadlock and allow negotiations to make ‘sufficient progress’ to move to phase two. As this round began, Davis said: “We expect this to be a busy week. One that will set us on the important path towards our future partnership. The Prime Minister’s speech on Friday set out clearly the leadership and flexibility needed to make a success of these negotiations. This round, for me, will be about building on the technical work done in previous rounds and the concrete proposals provided by the speech in Florence. It will be now for our teams to work through those details this week... On Northern Ireland and Ireland we made good progress at the last round with a common desire to maintain the Common Travel Area and protect the Good Friday Agreement. This week will now be about crunching through the technical detail of how we, together, make that happen”.<sup>144</sup> No mention of the border and an expectation that he was close to meeting the criteria for sufficient progress suggests he still did not expect a ‘solution’ to the border would be required of, or could be delivered by, the UK in this phase of the negotiations.

At the close of the talks it was clear that there had been considerable progress on citizens rights and further progress on finance. On Ireland/Northern Ireland, Barnier concluded “once again, we had a constructive discussion and we made progress in some areas. As David just said, both the EU and the UK recognise that Ireland is in a unique situation. Any solution will need to be fully informed by the special circumstances on the island of Ireland. As I mentioned several times, such solutions must respect both the integrity of the Union’s legal order, and the Good Friday Agreement in all its parts. We also confirmed our commitment towards

142. Northern Ireland and Ireland Position Paper, paragraph 45, page 15; 16 August 2017.

143. Introductory remarks by Michel Barnier at the press conference following the General Affairs Council (Article 50), Brussels, 25 September 2017.

144. ‘David Davis’s opening remarks at the start of the fourth round of EU exit negotiations’, DExEU, 25 September 2017.

maintaining the Common Travel Area, and started drafting common principles”<sup>145</sup>.

David Davis provided a more detailed overview of progress: “On the issues that arise from the UK’s withdrawal from the EU in relation to Northern Ireland and Ireland, we have had a constructive discussion and made progress in some areas... We welcome the EU’s recent guiding principles paper which reaffirms the high degree of alignment between us on this vital strand. Specifically, this week, we have begun drafting joint principles on preserving the Common Travel Area and associated rights. We have both agreed that the Good Friday Agreement citizenship rights must be upheld and we are working together on how this commitment is best codified. The joint work which we agreed in the August negotiating round on preserving the North-South cooperation strand is moving along at pace. We are addressing complex issues here but both are resolved to finding imaginative solutions”.<sup>146</sup> He later told the House of Commons: “I have set out before our shared determination to tackle the unique circumstances of Northern Ireland by focusing on creative solutions, and we have begun to do so. But we cannot fully resolve the issues without also addressing our future relationship”.<sup>147</sup>

So at the conclusion of the penultimate scheduled round, despite progress ‘in some areas’ and the ‘drafting of joint [or common] principles’ there appeared to be no progress on the border, though clearly the commitment on no physical infrastructure had huge implications. Davis’s assessment of the EU’s guiding principles paper glossed over the key difference between these principles and the UK’s position, namely that they were based on the ‘special circumstances on the island of Ireland’ without taking into account the unique relationship between Northern Ireland and the rest of the UK; it was this balance that the UK paper had been at pains to point out. Reframing the Northern Ireland issue as purely North-South turned a complex problem-solving exercise into a simple one that fitted the simplistic solution that the EU had to hand — one that apparently met the aims that would be set out in Article 1.3 of the Protocol a year later, but which rested on a failure to understand the nature of Northern Ireland and the core reality and balance of the Belfast Agreement. Saying that the EU’s guiding principles ‘reaffirms the high degree of alignment between us on this vital strand’ missed the point that the EU was shifting away from the UK’s position. The UK had failed to see that it was being out manoeuvred.

The following week, the European Parliament agreed a resolution on the negotiations that made the implications of May’s Florence speech clear. On Ireland/Northern Ireland, the resolution: ‘Stresses that the unique position and special circumstances confronting the island of Ireland must be addressed in the withdrawal agreement and this in a manner fully consistent with the Good Friday Agreement in all its parts, the agreed areas of cooperation, and with European Union law in order to ensure the continuity and stability of the Northern Ireland peace process;

‘Strongly believes that it is the responsibility of the UK Government

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145. Press statement by Michel Barnier following the fourth round of Article 50 negotiations with the United Kingdom, 28 September 2017.

146. ‘David Davis’s closing remarks at the end of the fourth round of EU exit negotiations in Brussels’, 28 September 2017.

147. David Davis’s statement to House of Commons, 17 October 2017: Hansard Col.732.

to provide a unique, effective and workable solution that prevents a “hardening” of the border, ensures full compliance with the Good Friday Agreement in all its parts, is in line with European Union law and fully ensures the integrity of the internal market and customs union; believes also that the United Kingdom must continue to contribute its fair share to the financial assistance supporting Northern Ireland/Ireland; regrets that the United Kingdom’s proposals, set out in its position paper on “Northern Ireland and Ireland”, fall short in that regard; notes on the other hand that in her speech of 22 September 2017 the Prime Minister of the United Kingdom excluded any physical infrastructure at the border, which presumes that the United Kingdom stays in the internal market and customs union or that Northern Ireland stays in some form in the internal market and customs union;

‘Reiterates that any solution found for the island of Ireland cannot serve to predetermine solutions in the context of the discussions relating to the future relationship between the European Union and the United Kingdom’.<sup>148</sup>

This was another clear rejection of the UK’s August 2017 proposals on both Northern Ireland and customs arrangements. Its presumption on the UK or Northern Ireland remaining in the internal market and customs union was a political rather than a technical solution to the border problem: there was no alignment here between the UK and EU — and another missed signal that this was the only solution that the EU could conceive of and the Irish would accept.

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148. ‘European Parliament resolution of 3 October 2017 on the state of play of negotiations with the United Kingdom’; paragraphs 8-10.

## The Collapse: The Fifth Round of Negotiations, 9-12 October 2017

At the press conference closing this round, Barnier spoke of clarifications on certain points but no great steps forward. It may be significant that he placed Ireland/Northern Ireland second in the three areas that needed progress, rather than third as had been the case since the start of talks, in both his overview and his detailed account of the negotiating round.

In his overview, Barnier set out the goal to be achieved on Northern Ireland/Ireland as “To preserve the peace process in Northern Ireland and cooperation on the island of Ireland”.<sup>149</sup> He went on to say, “This week we advanced on the joint principles on the continuation of the Common Travel Area and I welcome this. We continued our intensive work on mapping out areas of cooperation that operate on a North South basis on the island of Ireland. There is more work to do in order to build a full picture of the challenges to North-South cooperation resulting from the UK, and therefore Northern Ireland, leaving the EU legal framework. This is necessary in order to identify the solutions. This week, we agreed that the six principles proposed by the EU in September would guide our work on protecting the Good Friday Agreement in all its dimensions”.<sup>150</sup>

David Davis, in his closing remarks on 12 October 2017 said, “I welcome the advances too that we have made on the discussions on Northern Ireland and Ireland. This week we developed the joint principles on the continuation of the Common Travel Area. Our teams have also mapped out areas of cooperation that operate on a North South basis. As Michel said, there is more work to do here in order to build a fuller picture of how we overcome the challenges to North-South cooperation once the UK has left the European Union. But I’m pleased to say we have made further progress here. We have also agreed, based on critical guiding principles which both sides recognise, [that] we will start working on a common understanding on possible commitments and undertakings necessary to effectively protect the Good Friday (Belfast) Agreement in all its dimensions. I said last time that we were determined to tackle the unique circumstances of Northern Ireland by focusing creatively on specific solutions and we have begun to do so”.<sup>151</sup>

In his conclusion, Davis made a strong pitch for moving onto phase two “I make no secret of the fact that to provide certainty we must talk about the future... As we look to the October European Council next week, I

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149. Press statement by Michel Barnier following the fifth round of Article 50 negotiations with the United Kingdom, 12 October 2017.

150. Ibid.

151. ‘David Davis’s closing remarks at the end of the fifth round of EU exit negotiations in Brussels’, 12 October 2017.

hope the Member States will recognise the progress we have made, and take a step forward in the spirit of the Prime Minister's Florence speech. Doing so will allow us to best achieve our joint objectives by turning the ideas we have explored into concrete shared proposals. That's the way that we'll move towards a deal that works for both the United Kingdom and the European Union".<sup>152</sup>

The key development in this round of negotiations was the commitment by both parties to the six guiding principles set out in the EU's paper of September 2017. By accepting them without amendment and without getting EU agreement on any of the specifically UK principles, the UK effectively put an end to its insistence on the balance of the Belfast Agreement being upheld in all its parts: East-West (including NI-GB) and North-South in particular and taking account of their depth and complexity. Commitments to 'the Belfast Agreement in all its parts' were reduced in the EU paper to ensuring that the institutions established by the Belfast Agreement would be able to continue to operate; that is far from the same thing and far less than the EU negotiating directives stated. It is worth reiterating that the EU's first of six guiding principles 'upholding of the 'interlocking political institutions established by the Belfast Agreement which reflect the totality of the relationships on the islands of Great Britain and Ireland' excluded the obvious point that the UK parliament and government could not be excluded from that equation, a point the Belfast Agreement clearly affirmed.

Other UK principles, such as the need to protect both of the EU and UK customs regimes, internal markets and trade policies, preventing the creation of new barriers to doing business between Northern Ireland and Great Britain (and, by implication, *vice versa*) whilst avoiding a hard border North-South, acknowledgement of the dependence of Northern Ireland's economy on the UK not just the significance of the 'all-island economy' were excluded. This whole attempt by the UK to balance the North-South and East-West elements of the Belfast Agreement and the complex realities of Northern Ireland was abandoned — presumably under pressure to get approval from the European Council to move into phase two talks at October's European Council summit, as had been planned when the structure of the negotiating rounds was set out.

There had been two very different views of the Belfast Agreement and of what 'our shared objectives' were and the roles each party had to play in order to realise them. The purpose of the detailed and reasoned case put forward at length in the UK position paper was to challenge the one-dimensional (North-South) understanding held by the EU. In this round, Davis had accepted the reduction of the Belfast Agreement to a selection of its parts: institutions, North-South cooperation, rights and citizenship — and lost the whole. On top of this, the UK has conceded that it might be necessary that 'specific provisions need to be inserted in the Withdrawal Agreement' to protect North-South cooperation, which 'should be protected across all relevant sectors'. This opened the way in November 2017 for a decisive political move by the EU. This round was

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152. Ibid.



a major defeat — not the success that Davis had pointed to. This became apparent in the next round of negotiations, but by 12 October 2017, the close of the fifth round, the UK negotiating position had collapsed.

In the wider context, threats of no deal had re-emerged: ‘the government is planning for all eventualities’ and this was driving divisions in the UK — in parliament and in the country, especially with business. Pressure was building for a deal, especially from the business lobby. Davis was hoping — against the evidence — that Michel Barnier would advise the European Council that the criteria set for phase two of the negotiations had been met. However, Barnier wouldn’t give the light to move forward to phase two in order to find solutions on citizens’ rights, finance or Ireland; he would require solutions as a requirement for phase two, just as President Juncker had stated at the end of August.

Press comment was far more negative about the October round of talks than the negotiators themselves. The *Financial Times* stated: ‘Brexit talks are at a virtual political standstill, with no substantial advances made in the fifth round of negotiations, according to several diplomats briefed on the discussions. Expectations were low for the final UK-EU negotiating round before a crucial summit next week, where EU27 leaders are almost certain to declare there has been insufficient progress to move from divorce to trade talks. Negotiators were still surprised, however, at the lack of movement in any areas this week, most notably on the big outstanding questions over citizen rights. One official directly involved in the process said: “There was nothing, zero, no progress”’.<sup>153</sup>

On the subject of Ireland/Northern Ireland, the *Financial Times* story added: ‘Technical talks on Northern Ireland, the third main issue in separation talks, are continuing on a rolling basis. Although extremely complex and challenging issues are arising, senior diplomats do not see the Irish question as being an obstacle to making ‘sufficient progress’’.<sup>154</sup> That may have been because the UK negotiating position had collapsed or because of the comparative lack of transparency in the ‘dialogue’ on Ireland/Northern Ireland compared to the ‘negotiations’.

It was the practical application of a solution to the border alone of the three main issues that would cause the crisis and which would still prove problematic long after the others have been laid to rest.

The 19-20 October 2017 European Council conclusions on Ireland — again the second of the three main issues dealt with — stated that it: ‘acknowledges that, as regards Ireland, there has been some progress on convergence on principles and objectives regarding protection of the Good Friday Agreement and maintenance of the Common Travel Area, and invites the Union negotiator to pursue further refinement of these principles, taking into account the major challenge that the UK’s withdrawal represents, including as regards avoidance of a hard border, and therefore expecting the UK to present and commit to flexible and imaginative solutions called for by the unique situation of Ireland’.<sup>155</sup> Those unique circumstances are Northern Ireland vis-à-vis Ireland but without reference to the rest of the UK. Those solutions are political, not

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153. ‘Brexit talks are at a standstill, warn diplomats’, Alex Barker, *Financial Times*, 12 October 2017.

154. Ibid.

155. Conclusions, European Council (Art. 50) meeting, 20 October 2017; paragraph 1.

technical, and exclude reference to the future relationship. And it is the UK that is to be flexible and imaginative. Note here too the contrast with the UK's August paper welcoming 'the clear commitment from the European Council and Commission to work on 'flexible and imaginative solutions' to avoid a hard border'<sup>156</sup>. There was no such commitment — another example of the ambiguity of the language of the EU guidelines and directives on Ireland/Northern Ireland.

The Council called for work to continue with a view to consolidating the convergence achieved and pursue negotiations in order to be able to move to the second phase of the negotiations as soon as possible. Progress would be reassessed at the European Council in December 2017. The Council authorised preparatory work on new guidelines for phase two to begin.

In a Q&A session with media at the Council, Leo Varadkar set out his views on the answer to the border issue: "A political arrangement that allows us to have much the same trading relationship as we have now. A very deep partnership/agreement around trading and customs that allows us to trade between Britain and Ireland as we do now, or if that is not possible at the very least on the island of Ireland. I have always said that this is more of a political question than a technical one and that is very much what we are working towards".<sup>157</sup>

This contrasted with the UK view, wedded to a limited view of what could be expected on the border in phase one and committed to a view of Article 50 that acknowledged that withdrawal arrangements should be made in the light of the future relationship. The EU had specified that this was for phase two, not phase one, and to phase two Davis was determined to go. A few days before the start of the sixth round, Davis again gave evidence before the House of Lords on the question of the border: In his evidence to the House of Lords European Union Committee on 31 October 2017, Davis acknowledged the importance of reassurance on the border in the interests of the peace process but it was clear that he did not see agreement on the practicalities as possible before a final trade agreement between the UK and the EU. "With respect to Northern Ireland, there are some fundamentals. I suppose the pre-eminent one is to preserve the basis of the peace process. That comes at the beginning and that is what we are trying to do. The preservation of an invisible border — not 'no border' but 'an invisible border' — is a major part of that and we have committed to that, pretty much absolutely. However, what that looks like/what that consists of rests fundamentally on the final outcome on trade, particularly trade in goods.

"At the moment there is a border there because there are different excise regimes north and south but it is invisible. If we achieve an outcome, as we hope to, which maintains tariff-free trade, maintaining an invisible border will be relatively easy — I nearly said 'very easy'; that would be completely wrong, but it will be comparatively easy. If we end up with a tariff arrangement, then we have a real problem and dealing with that will be difficult.

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156. Northern Ireland and Ireland position paper, paragraph 41, page 14.

157. Questions and answers during the national briefing by Leo Varadkar, Taoiseach of Ireland, following the European Council, 20 October 2017.

“One of the delicacies or the ways in which we have to tread carefully in this is that the European Union is terribly suspicious that we are trying to use the Irish border as a way of leveraging an outcome somewhere else. We are not. We are just concerned that the outcome we get somewhere else, on free trade, will have a direct impact there. If we get a free trade arrangement which is tariff-free across all goods and a regulatory arrangement on agriculture — probably the biggest single issue on that border — on phytosanitary standards and so on, this becomes a relatively straightforwardly solvable problem. If we do not have those, we have much bigger problems to deal with. So you are right: one follows from the other, not the other way round. We cannot solve the problem until we know.”<sup>158</sup>

This was a hugely complacent view. The UK had committed to an invisible border but without any idea how that could be delivered. No UK-EU trade deal where the UK is outside of the single market and customs union could deliver an invisible border without any physical infrastructure of any kind. Therefore, if the border couldn’t be placed North-South then checks would need to be conducted on the Irish Sea. The kind of checks that would be required would depend on the final UK-EU deal on trade and customs, including SPS and any mitigation of that for the unique circumstances of Northern Ireland, but it would not affect the need for checks, however light, and the use of physical infrastructure to allow for those checks to take place.

The negotiations were now in extra time, with just one additional, sixth, round scheduled in. Sometime after the Florence speech, probably in November 2017, a meeting of the Cabinet sub-committee with responsibility for the Brexit negotiations had met and, according to Gavin Barwell, David Davis had ‘forcefully argued that we had to achieve sufficient progress at the December council. None of the issues would get any easier if we left it to March’. Boris Johnson was less enthusiastic about doing the deal and ‘he questioned how we could address the Irish problem until we knew what future relationship we wanted. But everyone else agreed that we had to try to get over the hurdle in December’ — though for some that agreement came with caveats<sup>159</sup>.

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158. David Davis giving evidence to the House of Lords Committee on the European Union, 31 October 2017, speaking in response to questions from Lord Whitty. (The quote is very slightly edited for readability.)

159. Gavin Barwell, ‘Chief of Staff’, (2021), page 259. NOTE: The Cabinet committee Barwell refers to was formerly the EU Exit and Trade (Negotiations) sub-Committee but was extended as the EU Exit and Trade (Strategy and Negotiations) sub-committee — known as EUXT(SN) — on 31 October 2017. It oversaw the negotiations on the UK’s withdrawal from, and future relationship with, the European Union. So this meeting of the sub-committee would have occurred in November 2017 if the designation given by Gavin Barwell is correct, rather than, as he says, after the Florence speech of 22 September 2017.

## The EU's manoeuvre: The Sixth Round of Negotiations, 9-10 November 2017

On Ireland/Northern Ireland this was the point of crisis — and led directly to the backstop set out in the December 2017 Joint Report.

Following the sixth round, Barnier said: “We will continue our dialogue on Ireland and Northern Ireland. We have to ensure a common reading, the same reading, of the conditions, consequences and implications of Brexit on the Good Friday Agreement and the Common Travel Area. This should lead us to identify the technical and regulatory solutions necessary to prevent a hard border, while preserving the integrity of the Single Market”.<sup>160</sup> It was the first time that Barnier had raised the need for ‘a common reading’ of Brexit’s impact on the Belfast Agreement. Presumably, he meant the UK conforming to the North-South reading that fitted the solution the EU had in mind.

Davis responded with a statement that at first sounded like a repeat from round five, though the Northern Ireland issues were the first he addressed: “On Northern Ireland we have continued to have good, technical discussions. We have drafted joint principles on the continuation of the Common Travel Area and associated rights. We have continued to explore how best we preserve North-South cooperation. And we are drafting joint principles and commitments which will guide the solutions drawn up in the second phase”<sup>161</sup>.

Then he addressed the EU’s border move: “We have also had frank discussions about some of the big challenges around the border. We remain firmly committed to avoiding any physical infrastructure and we have been clear about that this week. These discussions will of course continue in the run-up to the December Council but let’s be under no illusion: we will only be able to conclude them finally in the context of the future relationship. We respect the European Union desire to protect the legal order of the single market and Customs Union but that cannot come at cost to the constitutional and economic integrity of the United Kingdom. As I have said before, we recognise the need for specific solutions for the unique circumstances of Northern Ireland, but let me be clear: this cannot amount to creating a new border inside our United Kingdom. Now in this process, we are resolutely committed to upholding the Belfast/Good Friday Agreement, in all its parts. We need to approach the challenging issues that arise as part of this process in a spirit of pragmatism, creativity and with a high degree of political sensitivity. We owe it to the people of Northern Ireland and of Ireland to do so”.<sup>162</sup>

160. Speech by Michel Barnier following the sixth round of Article 50 negotiations with the United Kingdom, 10 November 2017.

161. ‘David Davis’ closing remarks after EU exit negotiations on 9-10 November’ 2017.

162. Ibid.

Davis's statement was a response to a new EU argument based in part on the ongoing mapping exercise but having its origins much earlier<sup>163</sup>. In order to avoid a hard border, the EU put forward its position to David Davis that Northern Ireland had to stay in the European customs union and single market after UK withdrawal. It was the first time that this position had been formally set out by the EU. The European Commission circulated a six point negotiations paper entitled simply *Dialogue on Ireland/Northern Ireland* on 8 November, the day before the sixth round began. The *Financial Times* reported that this paper concluded that the avoidance of regulatory divergence on the island of Ireland is essential to protect the peace process.<sup>164</sup> It was one of the key documents of the negotiations and is set out in full below (bold text as in original document).

### **The Dialogue on Ireland/Northern Ireland**

At the last round, agreement was reached in principle on **joint principles on the Common Travel Area** which aim to recognise an existing bilateral arrangement between the UK and Ireland (currently done in Protocol 20 of the [Lisbon] Treaty). These recall the background and context of the Common Travel Area Arrangements and take the new situation after withdrawal into account by stating that

- the United Kingdom and Ireland may continue to make arrangements between themselves relating to the movement of persons between their territories ('the Common Travel Area'), while fully respecting the rights of natural persons conferred by Union law.
- the United Kingdom has provided a clear reassurance that the Common Travel Area and associated rights and privileges can continue to operate without affecting Ireland's obligations under Union law, in particular with respect to free movement for EU citizens.
- Since the last round, intensive work has been carried out with the objective of **mapping the potential impact of UK withdrawal on ongoing North South cooperation on the island of Ireland**. North South cooperation is a central part of the Good Friday Agreement. Both sides agree that such cooperation should be protected across all the relevant sectors, and that to arrive at a common understanding of the potential risks resulting from UK withdrawal for this cooperation, this joint exercise has been useful.
- In the context of this mapping exercise, the six North-South Implementation Bodies, the six areas for cooperation and implementation agreed by the North-South Ministerial Council (NSMC) as well as a first set of the seven priority areas agreed by the NSMC at its last meeting in November 2016 are under continuing examination. (These include environment, health, agriculture, transport, education/higher education, tourism,

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163. NOTE: Barnier had raised this issue in his closing remarks on 20 July 2017 after the second round of negotiations.

164. 'Keep Northern Ireland in customs union, says EU'; the *Financial Times*, 9 November 2017.

energy, telecommunications/broadcasting, inland fisheries, justice and security, and sport.)

- Conclusions and recommendations from this exercise will be elaborated and shared once we have worked through all policy areas. Already prior to undertaking this exercise, the **EU's guiding principles<sup>165</sup> underlined that an important part of political, economic, security, societal and agricultural activity on the island of Ireland currently operates on a cross-border basis, underpinned by joint EU membership of the UK and Ireland.**
- The EU and the UK have committed to protecting and supporting the continuation and development of this cooperation and of the functioning of the institutions established by the Good Friday Agreement in the context of the Withdrawal Agreement. Achieving this must be done in a way that respects the integrity of the internal market and the Customs Union of which Ireland will remain a full member.
- It consequently seems essential for the **UK to commit to ensuring that a hard border on the island of Ireland is avoided, including by ensuring no emergence of regulatory divergence from those rules of the internal market and the Customs Union which are (or may be in the future) necessary for meaningful North South cooperation, the all-island economy and the protection of the Good Friday Agreement'.<sup>166</sup>**

The logic of this document was based partly on the UK having accepted the arguments set out previously in the EU's guiding principles — and those were in turn based on already flawed and disputable arguments. The argument may sound convincing, but it falls apart under examination (see, in particular, 'The Mapping Exercise' below). The paper itself is not even accurate: bullet point four (above) states that 'the **EU's guiding principles<sup>167</sup> underlined that an important part of political, economic, security, societal and agricultural activity on the island of Ireland currently operates on a cross-border basis, underpinned by joint EU membership of the UK and Ireland**'. This statement misrepresents the guiding principles which only say: 'It is the responsibility of the United Kingdom to ensure that its approach to the challenges of the Irish border in the context of its withdrawal from the European Union takes into account and protects the very specific and interwoven political, economic, security, societal and agricultural context and frameworks on the island of Ireland<sup>168</sup>'. The guiding principles do not say that 'an important part of political, economic...on the island of Ireland operates on a cross-border basis'<sup>169</sup>, not least because it was and is evidently not true. Nor does it say that these are 'underpinned by joint EU membership of the UK and Ireland'<sup>170</sup> — that reference is to twelve specific areas of cooperation set out in the Good Friday Agreement. Many of these are very limited and have far greater underpinning within the context of the UK — social security and education for instance. It is in this confusing of issues set out

165. Guiding principles for the Dialogue on Ireland/Northern Ireland', European Commission Task Force 50; issued to the 27 on 6 September 2017 and formally communicated to the UK on 21 September 2017.

166. Paper entitled 'Dialogue on Ireland/Northern Ireland' issued by General Secretariat European Council to Ad hoc working party on Article 50, 8 November 2017.

167. Guiding principles for the Dialogue on Ireland/Northern Ireland', European Commission Task Force 50; issued to the 27 on 6 September 2017 and formally communicated to the UK on 21 September 2017.

168. Guiding principles for the Dialogue on Ireland/Northern Ireland', introduction, para. five, page 2.

169. Bullet point four, 'Dialogue on Ireland/Northern Ireland, 8 November 2017.

170. Ibid.

in the Belfast Agreement with others, like ‘economic’, that the ‘all-island economy’ is introduced despite the responsibility for Northern Ireland’s economic stability being a UK government matter and NI-GB trade being around four-times greater than North-South.

The EU guiding principles state that ‘A thorough understanding of the other issues beyond customs arrangements which are relevant to the border is also required to move forward to discussing solutions in the context of the dialogue with the United Kingdom’<sup>171</sup>. Yet in this negotiating document the guidelines are being presented as containing findings to questions it was only asking — findings that go well beyond the unsubstantiated statements of cooperation being embedded in EU law. The dependence of North-South cooperation on Irish and UK joint EU membership was untested even at this point — the mapping exercise was not yet completed and therefore not assessed. Despite the stricture in the guiding principles ‘to examine whether and if so, how, the fact that European Union law ceases to apply in the United Kingdom after withdrawal might impact on continued cooperation and whether specific provisions need to be inserted in the Withdrawal Agreement’<sup>172</sup>, this exercise was never properly begun.

Without a commitment to support East-West cooperation, there was no need to count the cost of EU alignment against East-West co-operation. It was a clever negotiating argument — though fundamentally wrong — capping some extraordinary negotiating manoeuvres; the argument, however, was and remains fundamentally unsound — and the politics far, far from clever. It is on this argument that today’s Protocol ultimately rests. This is why it was essential for the EU to refuse to accept that the East-West realities of the UK state, internal market and trade or the legal and policy dependency of Northern Ireland within the UK had any claim to be associated with the Belfast Agreement. Refuting such an association is what the EU guiding principles paper set out to do in its first principle. In accepting the guiding principles in the October round, the UK opened the way for the presentation of the argument in this negotiating paper.

The last paragraph of the EU negotiating paper became the basis for Paragraph 49 of the Joint Report. Gavin Barwell stated that ‘just a few days before the prime minister was due to meet President Juncker, the EU negotiating team presented our team with revised text on Northern Ireland that went much further than we were expecting’<sup>173</sup>; this was clearly not the case as the essential argument had been presented three weeks earlier. Simon Coveney said just over a week later in the Dáil, “To be clear, the Government’s position is consistent with that of the task force. Specifically, in order for North-South co-operation to function in the future, consistent with the Good Friday Agreement, we need to ensure there is no regulatory divergence on one part of the island versus the other.... Anybody who sees the positioning of the EU task force will see in that the Irish Government position, which is very clear and firm on the Border issues”.<sup>174</sup> ‘One senior EU official said the Irish felt they were reaching a point of “maximum leverage” and were “really worried” by

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171. Guiding principles for the Dialogue on Ireland/Northern Ireland, introduction, para. four, page 2.

172. ‘Ibid. third principle, pages 3 & 4.

173. Gavin Barwell, ‘Chief of Staff’, (2021), page 261.

174. Dáil Éireann Debate, Thursday, 16 November 2017.



the UK position, which insisted the Irish border questions could only be fully addressed through a UK-EU trade deal. Another negotiator involved in talks noted Ireland's firm stance was becoming a "wild card" factor in the efforts to make "sufficient progress" in divorce talks by December so that talks on UK-EU future relations can begin'<sup>175</sup>

Tony Connelly, who is viewed as one of the most well-informed sources in Brussels on Irish issues, put this EU policy shift squarely at the door of the mapping exercise. When the exercise began in September 2017 officials from the UK, Ireland and the EU began going through the North-South implementation bodies and the six priority areas established by the North-South Ministerial Council. "For each policy area we looked at", says one Task Force official, "we went through the relevant body of EU law. We then looked at what happens if this law no longer applies on one side of the border". It soon became clear. "From day one of this mapping exercise, we identified that regulatory divergence [between Northern Ireland and the Republic] was the biggest single risk to its continuation. It's barn door obvious once you start to look at it".<sup>176</sup>

Connelly quotes another EU official "If you take the health area alone, it's easy to explain the single market dimension. Not only do you have all the equality of rights, but things like single standards for medical devices, the approval of medicines, mutual recognition of qualifications, ambulance services, etc. All this is completely aligned at the moment". Connelly's analysis went on: 'The mapping exercise brought clarity to the Task Force and the Irish government. There was no piecemeal, sector-by-sector way of preserving the cross-border arrangements in a situation where the UK no longer played by the rules of the single market and the customs union. Hence the necessity of no regulatory divergence'.<sup>177</sup> An Irish diplomat quoted by Connelly states that acceptance by the UK of the EU's guiding principles opened the way for this paper.

The Commission's new negotiating paper was circulated to the 27 and then presented to Davis's team at the start of the sixth round of talks on 9 November 2017. He rejected it completely: whilst recognising "the need for specific solutions for the unique circumstances of Northern Ireland, let me be clear: this cannot amount to creating a new border inside our United Kingdom"<sup>178</sup>.

The EU had created a case, built on UK commitments, both real and manipulated, to push the UK to accept/propose the EU's solution. To sum up, the argument was as follows: North-South cooperation is 'a central part of the Good Friday Agreement', both sides agreed 'that such cooperation should be protected across all the relevant sectors', the EU's guiding principles — accepted by the UK — underlined that an important part of this cooperation 'currently operates on a cross-border basis, underpinned by joint EU membership of the UK and Ireland': 'It consequently seems essential for the UK to commit to ensuring that a hard border on the island of Ireland is avoided, including by ensuring no emergence of regulatory divergence from those rules of the internal market and the Customs Union which are (or may be in the future) necessary for meaningful North South

175. Alex Barker, 'Keep Northern Ireland in customs union, says EU', the *Financial Times*, 9 November 2017.

176. Tony Connelly, 'Brexit & Ireland', (2018); page 352.

177. Ibid. page 352-353.

178. 'David Davis' closing remarks after EU exit negotiations on 9-10 November 2017.

cooperation, the all-island economy and the protection of the Good Friday Agreement'<sup>179</sup>.

The argument was only possible because of a series of EU manoeuvres. First, the EU's interpretation and its subsequent reinterpretation of the Belfast Agreement in order to keep it centred on North-South institutions and cooperation and to exclude Northern Ireland's integration in the United Kingdom from it; second, its exaggeration of the scale of North-South cooperation as well as the broadening of North-South cooperation to include amongst other things, the 'all-island economy'; third, its claim, untested despite its own stricture to do so, of the necessity of a common EU legal and policy basis to the continuation of North-South cooperation. This paper has already examined the distortion of the Belfast Agreement to allow it to fulfil its part in this series of manoeuvres; the next section of this paper looks at how North-South cooperation became vastly exaggerated in its importance and how the relationship between this cooperation and the common EU legal framework was misrepresented.

### The Mapping Exercise

The mapping exercise had a decisive impact on the negotiations immediately leading up to the Joint Report and through the Joint Report it supported the statement in both the Withdrawal Agreements of 2018 and 2019 'that North South cooperation relies to a significant extent on a common Union legal and policy framework'.<sup>180</sup>

The EU report on the mapping exercise released after the Withdrawal Agreement, stated: 'Customs and regulatory issues specifically related to the border on the island of Ireland were not discussed directly as part of the mapping exercise. However, it was consistently recognised that virtually all areas of North-South cooperation are predicated on the avoidance of a hard border, including related customs or regulatory checks and controls.... The mapping exercise demonstrated the interconnectedness of the areas of cooperation and the work of the North-South Implementation Bodies. In many cases, areas of cooperation which rely heavily on the EU acquis are in turn connected to and support areas which are less reliant on the EU acquis. In numerous instances, projects or initiatives between North and South are realisable because they provide economies of scale that would not be possible were they to be pursued in parallel. This exercise also demonstrated clearly that many areas of North-South cooperation have either expressly relied upon or have been significantly enabled by the overarching EU legal and policy framework and the implicit assumption that both Ireland and the UK would remain EU Member States. North-South regulatory alignment supports the effective operation of all of the Implementation Bodies'<sup>181</sup>.

However, there is a very serious problem with this argument. The mapping exercise itself had no exposure to public scrutiny until it was released in June 2019, following the rejection of several UK freedom of information requests<sup>182</sup>. When the mapping exercise was finally published, the claim that North-South cooperation required a common

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179. Quotes from the 'Dialogue on Ireland/Northern Ireland' paper from the Commission's Task Force 50, 8 November 2017.

180. The Withdrawal Agreement, 2018 and 2019, page 294.

181. 'Mapping of North-South cooperation & Implementation Bodies Report and key findings of the exercise', European Commission Task Force 50, 21 June 2019; page 5.

182. 'North-South cooperation: scoping exercise' published by the Committee on Exiting the European Union, 20 June 2019.

legal and policy framework was critiqued by non-Brexiteer commentators like Newton Emerson<sup>183</sup>. Writing in the *Irish Times*,<sup>184</sup> Newton Emerson showed that: ‘Of the 142 policy areas identified, only seven related to the cross-Border bodies established under the agreement, covering topics such as inland waterways, food safety promotion and languages. The next 44 are “priority” or “potential” interests of the agreement’s North-South Ministerial Council (NSMC), covering topics such as health, education and benefit fraud. The next 70 areas are “co-operation beyond NSMC” — and therefore beyond the agreement. This includes the all-Ireland electricity market. The final 19 are described as “avoiding a hard border” and include all customs union and single-market issues. This is again beyond the agreement, which says nothing about trade or the nature of the Border. Despite widespread repetition of the 142 figure in public and media debate, the mapping exercise did not find all these areas to be affected: 46 policy areas are described as “not underpinned or linked” to EU membership, with no EU legal or policy base. Another 42 are only “partially underpinned or linked”. Of the 40 areas actually covered by cross-Border bodies or considered a priority by NSMC, just 16 are described as “directly underpinned or linked”.’<sup>185</sup>

Newton Emerson argued that ‘lost underpinning or linkage does not prevent co-operation, let alone breach the agreement. The entire purpose of the agreement’s architecture of North-South co-operation is to identify these kind of problems and work through them. A common EU legal and regulatory regime may have been assumed but there is nothing in the agreement to require it, or even to harmonise what laws and regulations exist. Co-operation is to be about “action within the island of Ireland on matters of mutual interest and within the competence of the administrations, North and South”. That can and has been delivered regardless of EU jurisdiction’.<sup>186</sup> Indeed, David Trimble had stated that North-South cooperation purposely avoided concepts and commitments to ‘harmonisation’ (see below).

Andy Pollak, former director of the Centre for Cross Border Studies, was equally dismissive of the claims made for North-South co-operation. He wrote in response to Newton Emerson’s article: ‘Sir, — Newton Emerson is right to wonder about the accuracy and utility of the list of 142 policy areas of North-South co-operation identified by the British and Irish governments, Northern Ireland civil servants and the European Commission in 2017. The impression has been given to the public that this is a very important sector initiated by the Belfast Agreement which is now imperilled by Brexit...this is an erroneous impression. Such co-operation is a tiny element in the governmental activities of both administrations in Dublin and Belfast. The seven North-South bodies and companies set up by the 1998 agreement had a total budget of €64 million in 2016 — this compares to total Irish government budget expenditure in that year of over €55 billion (thus around 0.11 per cent of total government spending). Many of the items listed are mere technical mechanisms to allow for the passage and monitoring of goods across the Border. Very

183. NOTE: Newton Emerson is a Northern Irish commentator and regular contributor to papers like the *Irish Times* and *Sunday Times*.

184. Newton Emerson ‘Mapping of Belfast accord veers off-course’, *Irish Times*, 27 June 2019.

185. Ibid.

186. Ibid. The quote from the Belfast Agreement is Strand Two, North-South Cooperation, paragraph 1.

few are major cross-Border initiatives or programmes.... In my experience, North-South co-operation over the past 21 years has largely been, in Seamus Mallon's words, "grossly underdeveloped". One can't blame Brexit for these North-South cooperation failures; they pre-date the fateful June 2016 vote. However Brexit will make even the limited cooperation that continues to exist doubly or trebly difficult in the future.<sup>187</sup>

Nevertheless, the point of North-South cooperation is to manage intra-jurisdictional challenges. When EU cross-border initiatives lapsed after the UK left the EU, replacement schemes were set up North and South of the border in January and July this year respectively to help reduce waiting lists — currently 900,000 long in the Republic<sup>188</sup> — mostly for orthopaedic treatment but also for other treatments like cataracts. The cross-border reimbursement arrangements will benefit a few thousand patients this year based on current data. Currently, the schemes are only funded to the end of the year with their future awaits departmental decisions. At an approximate cost of 7.5 million euros for the Republic, this is a useful means of sharing resources, and it shows that it is quite possible for it to continue as needed without joint membership of the EU. It also shows that it is not the case that an 'important part' of healthcare on the island of Ireland 'currently operates on a cross-border basis, underpinned by joint EU membership of the UK and Ireland' as the negotiating paper implies<sup>189</sup>. Nor does it suggest that it is a high priority for either administration.

Though North-South cooperation isn't substantial, the number of areas listed seemed to suggest otherwise, but many are of little substance. There is an aspiration to set up an all-Ireland invasive species group; this public body (80) would, of course be 'underpinned or linked' to the EU and this entered the blue column, despite not actually existing. It is difficult to read the account of North-South activity in areas ranging from transport (21), child protection (12) to waste management (25) to air quality, without thinking that either the cooperation itself is rather slight or that the EU dimension is not in any sense integral to the cooperation which actually goes on. Words like 'directly underpinned by or linked' are employed simply to indicate that there are related EU laws in an area; some of these areas of cooperation pre-existed EU membership, such as transport and lough management. Everything leads into an unusual use of the word 'significant' in the final text of the Joint Report<sup>190</sup>.

The vast majority of the work on the mapping exercise was done by UK civil servants, working without reference to the end purpose of the exercise. When complete, it was neither assessed for the use it was to be put to nor edited accordingly nor put into context, nor assessed against East-West equivalents — the legal, policy, operational and funding arrangements within the UK. The 'mapping exercise' did not properly assess 'how' the lack of shared EU law would impact cooperation on these areas as required by the EU guidelines. The mapping exercise was really a scoping exercise, not a full assessment. Had the Northern Ireland Assembly been in place and been able to assess it, as would surely have been the case, the mapping exercise would have been a very different creature. Had it been made public

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187. Andy Pollak, Letter in the *Irish Times*, 3 July 2019.

188. 'HSE and private hospitals in talks over tackling 900,000 waiting list', *Irish Times*, 10 October 2021.

189. This example is drawn from Ciaran O'Neill, 'Panic kicks in amid fears over future of "Belfast or Blind" service', the *Sunday Independent*, 10 October 2021.

190. 'Joint Report from the Negotiators of the European Union and the United Kingdom Government', 8 December 2017; page 8, paragraph 47.

at the time, it would have had then the kind of critical assessment provided above. This is another example of the failures that dogged the UK's negotiation, and very much an own goal; this allowed Barnier to actually believe that 'There are in fact nearly 142 points of cooperation between Northern Ireland and Ireland in all areas — trade in goods, agriculture, health, education, prevention of animal disease — which are governed by EU law and supported by EU policies and by the EU budget. The UK's withdrawal de facto calls into question or undermines most of these points of cooperation'<sup>191</sup>. Whether Barnier believed it or not, it was simply not true. The main argument for alignment of Northern Ireland with the EU was based on exaggeration of the scale and importance of North-South cooperation; to this was added a misrepresentation of the necessity of EU law in securing continuation of that cooperation. This misrepresentation was itself based on an incomplete mapping exercise that was only the first stage in making the assessment that had been proposed in the EU guiding principles of September 2017.

The damage was done: the EU now argued that the *sine qua non* of North South co-operation was acceptance of its legal framework — in reality the *sine qua non* of North South co-operation was Unionist consent, a consent now in danger of being withdrawn. As David Trimble, who was awarded the Nobel Peace Prize for his role in negotiating and agreeing the Belfast Agreement, put it in his 2019 paper for Policy Exchange: 'It [consent] is the same for Strand Two regarding cross-border arrangements — which are created and limited by the 1998 Agreement: the consent principle underpins these. The North South Ministerial Council was created to deal with cross-border co-operation. Six North-South bodies were created on the authority of the Northern Ireland Assembly and the Oireachtas. Each North-South body has a six-person board with two from the largest and one from the second-largest party of each community appointed by the political parties. All decisions are made by agreement between the two sides in accordance with the rules of democratic authority and accountability in force in both legislatures. It is highly political and was purposely designed to be so, with the usual rules governing appointments in the UK set aside. This ensured that all the board members fully understand the political constraints on the cross-border bodies and are accountable directly to the political parties. This is what makes it work. The cross-border bodies are not autonomous'.<sup>192</sup>

David Trimble went on to explain in his paper that an attempt to put into North-South co-operation concepts based on language like 'harmonising', 'dynamic' and 'executive' (that had been in the earlier 1995 Framework Documents) was specifically prevented from being included in the Belfast Agreement. It was to be practical and, most of all, consensual and specifically not part of a political agenda to further unity through imposition — however well intentioned<sup>193</sup>.

Back in the mid-1990s, the key problem for the British government was the creation of a model of North-South intergovernmental activity which would be stable and politically acceptable to traditionally suspicious

191. Michel Barnier, 'My Secret Brexit Diary', (2021), page 95.

192. 'The Backstop would wreck the Good Friday Agreement', Lord Trimble, Policy Exchange, 2019.

193. Ibid.

unionists. Unionists were increasingly relaxed about power sharing but what about the Irish dimension? This required a gentle and thoughtful approach. The permanent under secretary of the Northern Ireland Office, Sir John Chilcot, discovered an academic article by Dr John Whyte, professor of Irish Politics at Queen's University, Belfast. The article drew attention to the large number of voluntary associations — 151 in his tally — which had an all-Ireland identity in which Unionists participated freely.<sup>194</sup> He noted that the secretary of the local Unionist association was also the secretary of one of those all-Ireland bodies. The implication was clear: North-South bodies already played a significant role and they might have a part to play in any historic compromise. It is important, however, to note the ethos here — the compromise was based on consent and to be based also on freely given mutual cooperation. It was not to be an intergovernmental imposition.

The production of the 1995 Framework Documents — a forerunner of the Belfast Agreement but on which agreement was not reached — was preceded by a substantial period of negotiation between teams of senior officials on both sides. The idea was to produce credible and significant areas of cross-border cooperation which Unionists could accept and nationalists would see as a new respect for their identity. But it is important to note that both sides accepted that schemes had to be based in reality. There was no talk of an island economy as actually existing — though no doubt Irish officials hoped, even expected, to see it come into existence; instead there was an explicit acknowledgement that this involved the establishment of connections between two distinct economies. Again and again, the realities of economic and social life on the island of Ireland intervened to curb the negotiating possibilities of the Irish side. The outer limit of the Irish objective was to have institutions in place which could then work harmoniously with an 'island economy' if that came into place.

Both governments accepted there were 'two economies' on the island not a single economy; the Irish government hoped for the growth of greater all Ireland integration and, as a consequence, a greater role for the North South Ministerial Council. In fact, there was in the next two decades or so — outside the formation of an all-Ireland electricity partnership and in agri-food — little movement in this direction. Over twenty years later, Dan O'Brien, Chief Economist at the Institute of International and European Affairs (IIEA) and Ireland's leading public economist, described the all-island economy in 2019 as tiny: 'There is very little all-island economy. Between 1998 and now there has been almost no growth in cross-border trade...It's tiny. It's actually gone from 2.7pc of our goods trade to just 1.5 per cent; 1.5 per cent of our goods trade goes North-South. This contrasts with our huge British and overseas trade which accounts for 98.5 per cent of our business'.<sup>195</sup> This 1.5 per cent of goods trade was described by the *Dialogue on Ireland/Northern Ireland* paper as 'an important part of...economic...activity on the island of Ireland currently operates on a cross-border basis, underpinned by joint EU membership of the UK and Ireland'<sup>196</sup>.

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194. 'The Permeability of the United Kingdom – Irish border', *Administration*, December 1983; Paul Bew, 'A Good Break for the Assembly', the *Observer*, 8 February 1998.

195. Eamon Dumphy interview with Dan O'Brien, on *The Stand*, podcast 503 'Brexit crisis – Our backstop consensus is wrong', 16 September 2019.

196. Fourth bullet point, 'Dialogue on Ireland/Northern Ireland', 8 November 2017.



## Skewered: The political negotiations, November 2017

By this point, the UK government, and Theresa May in particular, were under immense pressure to move to phase two, particularly after the failure to move ahead at October's European Council. Internal discussions had been underway in the EU in preparation for phase two and the prize was before them. The Cabinet sub-committee had committed to push for completion by December 2017. Of the three core issues, agreement on settlement of financial obligations and Northern Ireland/Ireland were the main blockages, with the latter the most complex. Going into the political talks that followed the sixth round, the UK was still rejecting the proposal of leaving Northern Ireland in the EU's customs union and single market.

Following the crisis over the EU negotiation paper on 9 and 10 November 2017, the two sides met again on 15 November 2017, this time with an Irish delegation included. The UK would not accept 'no regulatory divergence' and no progress was made. Theresa May and Leo Varadkar met on the fringes of an EU social affairs summit in Gothenburg on 17 November 2017, with Varadkar stating clearly his need for concrete assurances on avoiding a hard border. As he later told Sky News: "It is very difficult for us to accept anything short of a written commitment that the British government means what it has said — the British government has said that there will be no hard border on the island of Ireland, that we won't go back to the borders of the past, that there won't be any physical infrastructure. We welcome those commitments, but 18 months after the referendum we have yet to see anything written down in black and white, in law, that honours that promise Britain has made."<sup>197</sup>

He later reported on his summit exchanges in a written reply to a parliamentary question: 'On Brexit, I reiterated the position of the EU27 that greater clarity and confidence on how a hard border is to be avoided was needed before we could say that sufficient progress had been made to allow negotiations to move to Phase two... Given that the UK Government has said that the UK should leave the Single Market and the Customs Union, the onus is on it to indicate how the commitment to avoiding a hard border is to be realised in that context'.<sup>198</sup> According to Connelly's account, the British heard Varadkar's need for 'assurances' but did not connect it with the 'no regulatory divergence' point and thought he had agreed to find other language instead: "'We'd come back to talking about outcomes not methodology'" recalls a senior British source. "We don't need to be prescriptive about 'divergence' or 'convergence' as per the Task

197. Lewis Goodall, Sky News, interview with Leo Varadkar, 17 November 2017.

198. Leo Varadkar, written answer to questions on the Gothenburg summit from Micheál Martin, 22 November 2017.



Force bullet point. It's about the outcomes".<sup>199</sup> The Irish felt they were not being heard and that their concerns were being dismissed.

The same day that May and Varadkar had their early morning bilateral in Gothenburg, Boris Johnson was in Dublin meeting Simon Coveney. At their press conference they set out their different positions on moving into phase two. Johnson said, "The issues of the Northern Irish border and how it works are, intellectually, intimately bound up with the questions of the custom union, single-market, Britain's relationship with those; those questions have been reserved by the commission for study in stage two of the negotiations and I think logically now is the time to proceed with stage two of the negotiations, get those issues really teased out. Develop a vision for how it is going to work, not just the Northern Irish border — Dover, Calais, everywhere the UK has a border with the EU and sort it out that way. I share Simon's view that we need to get on with this, but our view is you can only crack the problem in the context of a wider understanding of how the new customs union arrangements are going to work across the board". Coveney disagreed with Johnson and said that talks were not yet at that point. "The EU taskforce has said that there are parameters around which we need to find solutions, and the details of that will be in phase two, I am sure. But those parameters need to be a lot clearer before we can move on to phase two," he said'.<sup>200</sup>

When Theresa May, with the Brexit negotiations Cabinet sub-committee's<sup>201</sup> support, increased the UK's offer to cover its financial obligations in order to open the way for a deal at December's European Council meeting<sup>202</sup>, the Irish government pushed their requirements on the border publicly. In an interview with the *Evening Standard*, Simon Coveney said that 'trade talks will not be allowed to begin until the UK also agrees to maintain the open border between the Republic and Northern Ireland. He said: "Anybody who thinks that just because the financial settlement issue gets resolved... that somehow Ireland will have a hand put on the shoulder and be told, 'Look, it's time to move on.' Well, we're not going to move on." He said there was "a lot of solidarity" around the EU table for Ireland's position. "It's hard to know", Mr Coveney said of the December deadline. "There are a lot of things that Britain aspires to, in the context of Brexit, which I don't believe to be compatible with the realities of the situation we're facing." British officials said the border can only be solved as part of an overall trade deal. Mr Coveney said leaving it until later in the talks would be "a leap into the dark". Ireland wanted assurances now that there will not be a visible border after Brexit. Mr Coveney said: "This is a much bigger issue than trade. This is about division on the island of Ireland.... I will not be an Irish foreign minister that presides over a negotiation which is not prioritising peace on the island of Ireland".'<sup>203</sup>

Senior Department of Foreign Affairs official Rory Montgomery said 'the British surprise' to the recent EU paper indicating that the North may have to stay within the European Union single market and customs union post-Brexit showed UK politicians had missed the Irish messages about the importance of the Border. "If I were frank, I would say that maybe

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199. Tony Connelly, 'Brexit & Ireland', (2018); page 355.

200. 'Boris Johnson and Simon Coveney weren't singing from the same hymn sheet in Dublin this morning', *The Journal.ie.*, 17 November 2017.

201. NOTE: The sub-committee was the EU Exit and Trade (Strategy and Negotiations) — EU-XT(SN). It met on 20 November 2017.

202. Anushka Asthana, 'Theresa May's cabinet agrees to pay more to break Brexit deadlock', the *Guardian*, 20 November 2017.

203. 'Ireland warns Theresa May that increased £40 billion Brexit deal 'can't buy you trade talks', the *Evening Standard*, 21 November 2017.

British politicians haven't necessarily been as careful in listening to these messages as they should have been," said Mr Montgomery, whose official title is second secretary general at the department with responsibility for official-level co-ordination on Brexit talks. Since the leaking of the paper two weeks ago, there had been "very good dialogue" between the sides. "I think now the message has got through that these are serious issues from an Irish point of view," he said'.<sup>204</sup>

However, the UK side had still not grasped where the talks were heading. The *Guardian* reported that 'Whitehall sources said the UK would not countenance giving in to requests for Northern Ireland to stay in the customs union or single market — but that ministers believed some language could be agreed with the EU to guarantee no return to a hard border'.<sup>205</sup>

In an exchange at PMQs on Wednesday 22 November 2017 with Jeremy Corbyn, the Prime Minister's replies to his questions on the issue of the border spelled out not only how little her view had apparently shifted over the summer but also how little she understood or admitted about the state of the negotiations: "The Right Hon. Gentleman asked me to outline our policy in relation to the border between Northern Ireland and the Republic of Ireland. I am very happy to do so; I have done so on a number of occasions. We are very clear that in relation to the movement of people, the common travel area will continue to operate, as it has done since 1923. On trade, and the movement of goods and services across the border, we will not see the introduction of a hard border. We have been very clear that we will not put physical infrastructure at the border...we have been engaging fully in the negotiations in relation to Northern Ireland and other issues, and indeed significant progress has been made... He says that we have not put out any ideas about the border, but I have to say to him that we published a paper back in the summer on possible customs arrangements. We are very happy to move to further detailed discussions of the customs and trading relationship that will exist not just between Northern Ireland and the Republic, but between the United Kingdom and the European Union. That does mean moving on to phase 2...We want to get on to deal with the question of our future trading relationship with the European Union. I am optimistic about the opportunities that will be available to this country and about the deal that we can get from the negotiations".<sup>206</sup>

Two days later, May went to Brussels for the Eastern Partnership Summit where she argued for a move on to phase two in return for UK concessions, largely focused around the UK's financial obligations. She met with Donald Tusk on the sidelines of the summit. According to sources quoted by Tony Connelly, 'he repeatedly asked May how she was going to solve the Irish question, warning that Ireland was now the hardest issue. When the Prime Minister responded with stock answers about creative solutions, Tusk politely but firmly said: "You must sort out your problems with Ireland. When Ireland is satisfied, they will tell Barnier. And then Barnier will tell me there has been sufficient progress". He warned that the EU27

204. "UK politicians missed Irish message on Border", Brexit negotiator says, the *Irish Times*, 22 November 2017.

205. 'UK confident Irish border will not stop progress of Brexit talks', the *Guardian*, 21 November 2017.

206. PMQs, 22 November 2017; Hansard, column 1035 & 1036.

would back Ireland and the whole process would be delayed, if necessary, until February 2018. May responded to the effect that ‘one country cannot hold up progress’. The UK, she said, was a “much bigger and much more important country than Ireland”.<sup>207</sup> Donald Tusk later tweeted: ‘Sufficient progress in #Brexit talks at December #EUCO is possible. But still a huge challenge. We need to see progress from UK within 10 days on all issues, including on Ireland’<sup>208</sup> — setting 4 December 2017 as the deadline.

In his political memoir, Gavin Barwell relates a conversation at this summit with the secretary general of the Council who ‘was blunt: our “imaginative solutions” on customs hadn’t convinced the EU or the Irish’<sup>209</sup> — but that was news in August, not the end of November 2017. Perhaps he was blunt because the Prime Minister had mentioned the proposals on customs just two days earlier in the House of Commons as if they still had currency and yet they didn’t. If Gavin Barwell, the PM’s Chief of Staff, didn’t know the state of play with UK proposals, then the Prime Minister was running a very tight ship indeed.

Meanwhile, the Irish government had hit a crisis of its own, preventing Varadkar attending the Summit. For a while it looked like there could be an early election after a motion of no confidence in Tanáiste (Deputy Prime Minister) Frances Fitzgerald was tabled on 23 November 2017 and set for debate on 29 November. She resigned on 28 November to save the government from collapse. The prospect of a hard fought election against Fianna Fáil and Sinn Féin may have added to the Irish government’s need for a clear commitment on the border or stirred them in their determination to get one.

With the border the chief barrier to ‘sufficient progress’, the UK and EU teams worked further on their own proposals. A second meeting took place between the UK, EU and the Irish teams on 30 November 2017. The discussion was around the ‘no regulatory divergence’ text that had been presented to the UK on 9 November 2017. It was clearly unacceptable. The Irish proposed a fix for the UK, to give them the ability to say that it could be solved by the future relationship. The UK team wanted ‘no regulatory divergence’ to be removed. A final text was arrived at and Olly Robbins briefed May, who was appalled<sup>210</sup>. According to RTE’s Tony Connelly, the draft text read: ‘In the absence of agreed solutions, the UK will ensure that there continues to be no divergence from those rules of the internal market and customs union which, now or in the future, support North-South cooperation and the protection of the Good Friday Agreement’.<sup>211</sup> According to Gavin Barwell, May was ‘exacerbated at being asked to make commitments about what we would do if we couldn’t reach an agreement about our future relationship before we’d even had a chance to talk about it...Nevertheless, it was clear that if we rejected the text outright, we would not be able to achieve “sufficient progress”. What, then, should we do? We were the one under time pressure; the EU could stick to its position, safe in the knowledge that a parliamentary majority was opposed to no deal, so the UK would have to compromise sooner or later. The prime minister began to think about whether we could live with the text

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207. Tony Connelly, ‘Brexit & Ireland’, (2018). Page 359.

208. Tweet from President Tusk, @eucopresident, 24 November 2017.

209. Gavin Barwell, ‘Chief of Staff’, (2021) page 260.

210. Ibid. Page 360.

211. RTE, ‘Brexit and the Irish border: How the deal was salvaged’, Tony Connelly, 9 December 2017.

and deal with the problem in the next phase of the negotiations. She spoke to David Davis, who was also coming round to the idea that we could sort things out down the line<sup>212</sup>.

On 1 December 2017 Donald Tusk went to Dublin to meet with Varadkar. Following his meeting he said: “It is the UK that started Brexit and now it is their responsibility to propose a credible commitment to do what is necessary to avoid a hard border. It is clear that we cannot reach a full agreement on every single detail at this stage, especially that the final outcome will be linked to the future relations between the EU as a whole and the UK...we have agreed today that before proposing guidelines on transition and future relations to the leaders, I will consult the Taoiseach if the UK’s offer is sufficient for the Irish government. Let me say very clearly: if the UK’s offer is unacceptable for Ireland, it will also be unacceptable for the EU”.<sup>213</sup>

212. Gavin Barwell, ‘Chief of Staff’ (2021), page 262.

213. Remarks by President Donald Tusk after his meeting with Taoiseach Leo Varadkar, 1 December 2017.

## The Gamble: Agreeing the ‘backstop’, December 2017

Unlike the issues of finance and citizenship, both of which had involved detailed negotiations that resulted in a full exploration of the issues that needed to be addressed and where the gaps had been largely bridged, the border question had received no equivalent detailed consideration. The border had been a matter for ‘dialogue’ with EU guidelines and directives which were, on balance, ambiguous and where there had been significant movement of goal posts around the meaning of the Belfast Agreement, or the application of ‘flexible and imaginative’ solutions from a general requirement for all parties to applying solely to the UK. The UK had been focused on a political commitment to a guaranteed outcome that firmed up from ‘no return to the borders of the past’, to ‘avoid a hard border’ and the beginning of a definition of what that meant — an ‘invisible border’ and finally ‘no physical border infrastructure’ without apparently realising that every concession to Ireland made its obligations to the EU that much harder to fulfil. The UK’s negotiating strategy was that the details had to be left to phase two and beyond where it would be settled in the context of an ambitious future UK-EU partnership. But this strategy had been compromised when the EU had published its negotiating guidelines in April and when the UK agreed to the sequencing in June 2017. It then became increasingly clear that the Irish wanted more than a political commitment to no hard border, however clearly worded.

The EU27 were standing firm with Ireland and were committed to the logic set out in the conclusion of the EU’s negotiating paper of 8 November 2017 — that North-South co-operation required ‘no regulatory divergence’; as that was a central part of the Belfast Agreement, upholding the Agreement could only be fulfilled by preventing regulatory divergence between Northern Ireland and the EU and the UK, as a guarantor of the Belfast Agreement, was required to so act.

There was no time for the UK to come up with a solution of its own in time for the December European Council. The Common Travel Area had been subjected to focused discussions from at least the second round of talks in July 2017 and had been agreed in October 2017 after four rounds — and that was with clarity of the outcome to be achieved, Irish support and continued exclusion from Schengen that ensured that agreement was achievable. In contrast, the resolution of the border had remained hidden within the issue of the Belfast Agreement and had been caught up with the future relationship; it was the subject of deep divisions between Dublin and London.

Caught up with the detail of the wider negotiations, particularly on the UK’s financial obligations and future citizenship rights — and

distracted by its focus on the future partnership — the UK had failed to see the determination of the Irish government, perhaps with their resolve increased by the latest political crisis, to win a guarantee that would gain them all they needed. They had fought for this guarantee for months — and had the EU's support since at least the new Irish leadership under Varadkar in June 2017, probably before. According to Tony Connelly: 'Key to Ireland's strategy would be to ensure that the Commission, Michel Barnier and the Task Force were all on board in the political/technical sequencing in pushing the problem back across the table to London. There would be two steps: fully apprising the EU of the complexities of the Northern Irish peace process and then turning the Irish position into the European position.'<sup>214</sup> This account may overstate the Irish influence in terms of design. The solution was, after all, an EU one and close to that identified in the February 2017 memo and the European Parliament's 3 October 2017 resolution.

The UK had entirely misunderstood what the Irish government had meant in their May 2017 paper that avoiding a hard border would require 'a political and not just a technical solution'<sup>215</sup>. The UK was looking at technical/legal issues that needed solving for which special allowance should be given for political reasons, not a political solution that addressed those issues. The UK ignored that the Irish-EU aim of a border that would be seamless and frictionless — the status quo — was not the same as a border that would be 'as seamless and frictionless as possible'. There was no shared objective here. Slowly and surely the UK had given up the ability to manage a border credibly by ruling out the use of infrastructure that border management required, leaving it nothing it could offer as a credible alternative to the EU, even if that was not acceptable to the Irish. Neither had it worked on political solutions of its own that could have provided the framework for more acceptable, if still difficult, arrangements.

16 months into the new government, six months since the February white paper, three months since the August position paper the UK had nothing of its own on the table. It had no substantive response to the 'no divergence' paper of 8 November 2017, though one could have been made, based on the actual activity levels of cooperation and the reasons for the absence of 'harmonisation' under strand two of the Belfast Agreement for North-South cooperation. At this point, the North-South mapping exercise was not even completed, never mind assessed as it should have been. The UK could have conducted an examination of the importance of the shared EU legal framework for each area of cooperation, looked at potential alternatives to it, and insisted on a role for the devolved institutions as regards any required alignment. It could have mapped the East-West integration of some of these policy areas — health for instance — against which to weigh the costs of North-South alignment with the acquis. It did not challenge the Irish push on the 'all-island economy', nor did it commission a study of the dependence of Northern Ireland's businesses for purchases from the UK internal market or of the implications for retail.

Given that it was for the UK to provide solutions, not the EU, the UK

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214. Tony Connelly, 'Brexit & Ireland' (2018), pages 180-186. The quotation is from page 182.

215. Ireland and the negotiations on the UK's withdrawal from the European Union: The Government's Approach, May 2017: executive summary, page 7; first objective, issues unique to Ireland, page 24. Also quotes, page 55, Enda Kenny's 15 February 2017 speech: 'This is a political matter, not a legal or technical matter'.

could have taken time to reassess its options and argue back. This after all was its moment of clarity<sup>216</sup>. No one could really have complained, but it didn't do so. Just as in October it conceded on the EU's guiding principles and a very narrow interpretation of the Belfast Agreement in the hope of moving into phase two, so it conceded again, but this time it made concessions that not only reduced its options even further but which gave the EU binding legal text<sup>217</sup>. This text bound the UK to a border solution that gave no commitments to protect the Northern Ireland-Great Britain trade and internal market. The North-South interpretation of the Belfast Agreement had swept all before it because it was allowed to by the UK.

The decision, taken by May but agreed by others, that we could live with the text and resolve the problem in the next round was the last mistake in a long series: how would it make it easier to resolve in the next phase when you had provided the other side with a legal commitment to a backstop solution that you could not better — and in circumstances when they are completely open that an EU-UK partnership could not make the backstop redundant? Time had not run out — but the pressure was very great and May's premiership, enormously weakened by the 2017 election, was being battered yet again; it was Barnier's understanding that she thought that without a deal in December her government would fall<sup>218</sup>. Instead of creating new negotiating space, challenging the EU negotiating paper of 8 November 2017, and working on alternative models focused on the level of political and legal commitment that was now being required, the UK team moved to secure language that would provide political cover to get them into phase two where they hoped that all could be made well through a special partnership — a hope that the EU did not share. British officials were now working to make the unpalatable language palatable. In place of 'no regulatory divergence' the document would read 'the UK will ensure that there continues to be continued regulatory alignment'. There was an argument that this sounded more positive and perhaps less stringent without weakening the guarantee for Ireland.<sup>219</sup> 'In Dublin they could not believe the U.K. had agreed, one senior EU27 official said. "I remember being in a taxi that Sunday night [3 December 2017]. We just could not believe the British had accepted the text. We knew it would not be acceptable to the unionists".'<sup>220</sup>

The final text changes were still being agreed by officials on the morning of 4 December 2017 when Theresa May was already in Brussels to formally agree the text of the Joint Report; this would allow Michel Barnier to recommend that 'sufficient progress' had been made for the European Council to move talks onto phase two, the opening she and her team were banking on. The final text read:

'The United Kingdom remains committed to protecting North-South cooperation and to its guarantee of avoiding a hard border. Any future arrangements must be compatible with these overarching requirements. The United Kingdom's intention is to achieve these objectives through the overall EU-UK relationship. Should this not be possible, the United Kingdom will propose specific solutions to address the unique circumstances of the

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216. Barnier had declared his moment of clarity after Theresa May's 22 September 2017 Florence Speech. On Northern Ireland, it can be argued that the UK's moment of clarity did not come until November 2017.

217. The nature of the 'binding legal text' is set out in footnote 2 on page 1 of this report.

218. Michel Barnier, 'La grande illusion: Journal secret du Brexit (2016-2020)'; (2021); page 140.

219. Tony Connelly, 'Brexit & Ireland' (2018), pages 362-363.

220. Tom McTague, 'How the UK lost the Brexit battle', *Politico*, 27 March 2019.



island of Ireland. In the absence of agreed solutions, the United Kingdom will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement'<sup>221</sup>

However, as news of the agreed text leaked, alarm bells went off with the DUP. May was at lunch with President Juncker when she received a call from her chief whip Julian Smith, informing her that DUP and backbench hostility was such that it was too dangerous to proceed<sup>222</sup>. May called Arlene Foster who was clear that the text was completely unacceptable: the DUP could not accept any form of regulatory divergence. So lunch was over, no deal was signed, and May was on her way back to London. As she travelled back to London the DUP issued a statement: 'We have been very clear. Northern Ireland must leave the EU on the same terms as the rest of the United Kingdom. We will not accept any form of regulatory divergence which separates Northern Ireland economically or politically from the rest of the United Kingdom. The economic and constitutional integrity of the United Kingdom will not be compromised in any way'<sup>223</sup>.

There was surprise that the DUP had not been kept informed. After all, the DUP were faced with what had been an extraordinary last minute shift in position that had crossed their key red line of no divergence from the rest of the UK. The DUP had been asking to see the text for weeks — even the night before May went to Brussels to sign the deal, the DUP had only been given a verbal briefing; "it was a big shock", claimed Foster, speaking to RTÉ<sup>224</sup>. They were not the only ones: according to Jonathan Caine, the then Secretary of State's special adviser at the Northern Ireland Office, no-one in his department had seen the text before Mrs May headed for Brussels on Monday 4 December 2017<sup>225</sup>. Texts were drafted, and discussed over the following days with DUP MPs in Westminster and with Arlene Foster in Belfast. An attempt was made in the first day or so to renegotiate the paragraph on continued regulatory alignment but Dublin was, unsurprisingly, firmly against any change to this paragraph. With Dublin, supported by the EU, holding the line against changes, the conversation shifted to agreeing new text on Northern Ireland, including guaranteeing continued alignment between Northern Ireland and the rest of the UK<sup>226</sup>.

The DUP had managed to get what appeared to be key amendments but they were not happy with the agreement. They wanted further changes but time had run out and in the face of May's determination to press ahead with the amended Joint Report, they confirmed they would continue to support the government. In a statement the following day, Foster said: 'We cautioned the Prime Minister about proceeding with this agreement in its present form given the issues which still need to be resolved and the views expressed to us by many of her own party colleagues. However, it was ultimately a matter for the Prime Minister to decide how she chose to proceed'<sup>227</sup>. May could now go forward, confident that her government was secure with DUP support, and enter into phase two of the talks.

221. The text of what would be paragraph 49 of the 'Joint Report from the negotiators of the European Union and the United Kingdom government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union', 8 December 2017.

222. Gavin Barwell, 'Chief of Staff', (2021), page 263.

223. 'We will not accept any form of regulatory divergence', DUP statement, 2pm, 4 December 2017.

224. 'Arlene Foster: Brexit deal paper was a "big shock" for DUP', BBC News, 5 December 2017.

225. Lord Caine, House of Lords, debate on Ireland/Northern Ireland Protocol (EUC) report, 13 September 2021, Hansard, column 251GC.

226. NOTE: This would include paragraph 50 of the Joint Report.

227. DUP Statement, 8 December 2017.

Theresa May headed back to Brussels in the early hours of Friday, 8 December 2017 to complete the deal that had fallen apart at the beginning of the week. She appeared with Jean-Claude Juncker at an early morning press conference to confirm that a deal had been agreed. Juncker spoke of the long road and difficult compromises to reach a deal for both parties. On Wednesday, the College of Commissioners had given him a mandate to conclude the negotiation of the Joint Report: “On the basis of that mandate, the Commission has just formally decided to recommend to the European Council that sufficient progress has now been made on the strict terms of the divorce. The UK has made significant commitments on the avoidance of a hard border after its withdrawal from the European Union. All of the EU27 stand firmly behind Ireland and behind the peace process”. He went on to confirm the status of the Joint Report, “The Joint Report is not the withdrawal agreement. That agreement still needs to be drafted by the negotiators on the basis we have agreed yesterday and today, and then approved by the Council and ratified by the UK Parliament and the European Parliament”.<sup>228</sup>

Theresa May said: “On Monday we said a deal was within reach. What we have arrived at today represents a significant improvement... In Northern Ireland we will guarantee there will be no hard border and we will uphold the Belfast Agreement and in doing so we will continue to preserve the constitutional and economic integrity of the United Kingdom. We have taken time this week to strengthen and clarify this part of the agreement following discussions with unionists in Northern Ireland and across the UK. The Taoiseach and I spoke yesterday and we both committed that there should be no barriers either North-South or East-West and I believe this agreement delivers that”.

When asked by the BBC’s Adam Fleming what the greatest compromise the other side had made to get to this point and the UK to agree today, she replied: “Crucially, to deliver, in relation to Northern Ireland, that agreement on ‘no hard border’ but also respecting the constitutional and economic integrity of the United Kingdom. That is what we have been working to and that is what I believe this Joint Report sets out”.<sup>229</sup>

Michel Barnier spoke later in the morning on what had been agreed. On Ireland and Northern Ireland, he said: “The UK has committed itself to proposing a solution. We both remain determined to avoid a hard border on the island of Ireland. The UK’s commitment today gives us an effective guarantee to avoid such a hard border. Unless another solution is found, the UK firmly agreed that Northern Ireland will maintain full alignment with EU internal market and Customs Union rules which support North-South cooperation, the all-island economy, and the protection of the Good Friday Agreement. The Good Friday Agreement in all its dimensions and North-South cooperation under that Agreement will be protected. Residents of Northern Ireland who are Irish citizens will continue to enjoy their rights as EU citizens. The UK has also given the necessary assurances to allow for the continuation of the Common Travel Area. Ladies and gentlemen, as you can imagine, the agreed text is the result of difficult

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228. ‘Remarks by President Juncker at the joint press conference with Theresa May, Prime Minister of the United Kingdom’, 8 December 2017.

229. Transcript of part of Theresa May’s statement at her press conference in Brussels, 8 December 2017.

work that we have done together. Together with the UK, Irish and all EU governments, we will now need to develop creative solutions that work. Nobody should underestimate the difficulties that we will face on this issue. To succeed, we not only need to be flexible and imaginative — two famous words — but we also need to show a collective sense of responsibility. For this, it is important that we agreed also to maintain a distinct strand of negotiations on Ireland and Northern Ireland in the second phase of talks. And in any case, any solution will need to respect the integrity of the Single Market and the Customs Union — which are the core of our Union”.<sup>230</sup>

It is worth pointing out that Barnier said that it was Northern Ireland that would maintain alignment, not the United Kingdom. This of course is the logic of the solution. When the European Commission published its draft Withdrawal Agreement on 28 February 2018, it was premised on alignment of Northern Ireland not on that of the whole of the UK. The draft set out the establishment of a ‘common regulatory area’ between the EU and the UK in respect of Northern Ireland<sup>231</sup>. UK-wide alignment was window dressing put in to secure the sale.

Taoiseach Leo Varadkar made a statement the same day, in which he said, “We have achieved all we set out to achieve in Phase One of these negotiations. We have the assurances and guarantees we need from the United Kingdom and support for them from the European Union... The parameters have been set and they are good... The United Kingdom has committed to avoiding a hard border as an ‘over-arching requirement’ with which ‘any future arrangements must be compatible’. There will be no physical infrastructure or related checks or control... So there is a backstop arrangement in which Northern Ireland and perhaps all of the United Kingdom will maintain full alignment with rules of the Internal Market and Customs Union which are relevant to the avoidance of a border, north-south co-operation and the all-island economy.”<sup>232</sup> Again, notice the emphasis on Northern Ireland’s alignment.

Following Friday’s agreement on the Joint Report, Theresa May made a statement in the House of Commons on Monday, 11 December 2017. “Mr Speaker, as the Joint Report makes clear, our intention is to deliver against these commitments through the new, deep and special partnership that we are going to build with the European Union. Should this not prove possible, we have also been clear that we will seek specific solutions to address the unique circumstances of the island of Ireland. And because we recognise the concerns felt by either side of the border and we want to guarantee that we will honour the commitments we have made, we have also agreed one further fall-back option of last resort. So if we cannot find specific solutions then the UK will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South co-operation, economic co-operation across the island of Ireland and the protection of the Belfast Agreement. The Joint Report clearly sets out that cross community safeguards and consent are required from the Northern Ireland Executive and Assembly for distinct

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230. Remarks by Michel Barnier, the European Commission’s Chief Negotiator, at the press conference on the Joint Report from the Negotiators of the European Union and the United Kingdom Government’, 8 December 2017.

231. ‘European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community’, 28 February 2018; Protocol on Ireland/Northern Ireland, Chapter III: Common regulatory area, articles 3 and 4, page 100.

232. ‘Statement on Brexit negotiations by Taoiseach Leo Varadkar’, Merrion Street, 8 December 2017.

arrangements in this scenario. And that in all circumstances Northern Irish businesses must continue to have full and unfettered access to the markets in the rest of the United Kingdom on which they rely. So, Mr Speaker, there can be no question about our commitment to avoiding barriers both North-South and East-West”.<sup>233</sup>

In the debate that followed, the Prime Minister stated, “We are leaving the European Union, and therefore we will be leaving the European single market and the European customs union. What we will negotiate is a separate trade deal, which we want to be as tariff-free and frictionless as possible”.<sup>234</sup> On regulatory alignment, she said that “Full alignment means that we will be achieving the same objectives. I set out in my Florence speech that there are a number of ways in which we can approach this. There will be some areas where we want to achieve the same objectives by the same means. In others we will want to achieve the same objectives by different means”.<sup>235</sup>

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233. PM statement on EU negotiations; Hansard, column. 26 & 27; 11 December 2017.

234. Ibid. Column 37.

235. Ibid. Column 38.

# Conclusion

The Prime Minister's summing up demonstrates that she still did not understand what she had signed up to on the nature of the border. The Joint Report included language that soothed unionists, but the commitments made were UK only, not joint commitments. The EU was not guaranteeing the UK's internal market<sup>236</sup> and it was not committed to support East-West — that is, Great Britain to Northern Ireland — cooperation<sup>237</sup>. She had not pulled off a deal that secured no borders North-South or East-West. As regards the withdrawal agreement, the only paragraph that mattered really was paragraph 49 — the so-called backstop.

The UK had committed to a border solution it did not want but which it could not equal for Ireland or the EU, whilst putting its hope in negotiating a future partnership the EU simply did not believe to be possible in order to make the EU solution of 'alignment' redundant. In its communication to the European Council, the Commission summed up the Joint Report and noted the UK intention to achieve the protection of North-South cooperation through 'the overall EU-United Kingdom relationship: This intention seems hard to reconcile with the United Kingdom's communicated desire to leave the internal market and Customs Union'<sup>238</sup>. The officials working on the Irish and EU side were convinced that there were no alternatives. According to Tony Connelly, the text on alternative solutions to 'no divergence' that was agreed at the end of November 2017 was only agreed in order to provide political room for the UK to agree the backstop itself<sup>239</sup>. Rory Montgomery confirms that no one on the EU side could envisage what other arrangements with the same effect would be<sup>240</sup>. It was not a backstop at all — just an illusion of one.

Gavin Barwell, writing about this last episode, says: 'It appeared that the gamble had paid off, but appearances can be deceptive. Our hopes that there might be some flexibility in the language were ultimately dashed, and the DUP were never really reconciled to what we had signed up to. If the EU's legal inability to agree the future relationship until after we left had made the backstop inevitable, paragraph 49 of the joint report was key to its development — and to our eventual failure to secure parliamentary support for the deal Theresa May had negotiated.'<sup>241</sup>

The experience of 2018-19 demonstrates that there was no EU-UK future relationship available that could make the 'backstop' solution redundant and no alternative arrangements that could equal or better the protection provided by that solution for Irish and EU interests as they stood. The EU was convinced of this and the UK was never able to persuade them otherwise. By December 2017 the EU and Ireland had what they

236. The Joint Report, paragraph 45.

237. Ibid. Paragraph 48.

238. 'Communication from the Commission to the European Council (Article 50) on the state of progress of the negotiations with the United Kingdom under Article 50 of the TEU', 8 December 2017.

239. Tony Connelly, 'Brexit & Ireland' (2018), page 360.

240. Ibid.

241. Gavin Barwell, 'Chief of Staff' (2021), page 266.

wanted. The only option of avoiding it was a damaging no deal and this lacked credibility economically or politically, especially since the 2017 election. This makes the negotiations to the December 2017 Joint Report the origins of the current crisis.

As Rory Montgomery, who was at the heart of Ireland's negotiations, has made clear in his April 2021 *Fortnight* article, Dublin was remarkably successful in getting its analysis accepted and its priorities adopted by the rest of the EU; in the early months of the negotiations Ireland was able to present itself as the primary guardian of the Belfast Agreement; its interpretation of the Agreement, including the centrality of the North-South dimension, was not successfully challenged by the UK, and the UK's agreement to the backstop 'created the dynamic which inexorably led to the Protocol'<sup>242</sup> It is certainly true that Ireland was able to present itself as the guardian of the Belfast Agreement — but the UK was not able to present itself before it invoked Article 50, so the field was clear. When the UK did present a serious challenge to the Irish interpretation of the Belfast Agreement in its August 2017 position paper the EU wilfully ignored the UK because it was wholly inconvenient for it to listen; the EU then redefined the Belfast Agreement in its guiding principles in order to eliminate the complex realities that would have upset its planned solution for the border. The evidence base put forward to justify the need to maintain Northern Ireland's alignment with the EU was hugely exaggerated and never tested or assessed against the far deeper integration of Northern Ireland in the UK. This failure to accept the balance of the Belfast Agreement and the complex realities of Northern Ireland is at the heart of the current trouble with the protocol, and the fault for that lies in part in Dublin, even if the responsibility must ultimately lie in the negotiating 'success' of Brussels and the UK's failure to successfully challenge already existing assumptions. The defence of the UK government is that it was on the ropes. Despite this, May had at least fought back on the union, albeit too late in the day. The 'UK commitments' on maintaining East-West cooperation and the UK's internal market into the Joint Report failed to either shape the protocol or balance it, but at the very least their inclusion must constitute acknowledgement by the EU of serious unionist concerns for these issues and the right of the UK to continue to promote and defend them, not least in continuing to challenge Dublin's North-South dominant interpretation of the Belfast Agreement.

In his critique of the negotiations, David Davis said 'By giving way on the sequencing right at the start we broke the linkage with the future relationship that was vital. From December 2017 onward it went from a standard, fairly tough negotiation to a struggle to escape from the positions [May] fell into'<sup>243</sup>. The UK's main argument and the cornerstone of its strategy was that the solution to the Irish border was dependent on the outcome of the EU-UK future relationship. This argument retains merit. Given UK promises on the border and its decision to leave the single market and customs union there would — surely — have had to be checks on the Irish Sea to protect the single market. However, that didn't need

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242. Rory Montgomery, 'Protocol problems for both parts of Ireland: North and South', *Fortnight*, Issue 481, April 2021.

243. Tom McTague, 'How the UK lost the Brexit battle', *Politico*, 27 March 2019.

to mean a border — either in theory or in practice. Take Article 5 of the protocol, a substantial section that covers *Customs and Movement of Goods*; as a consequence of the Trade and Cooperation Agreement, it is for all practical purposes redundant because there are no tariffs on goods. Had the border arrangements been finalized after the framework of the future relationship was clear, Article 5 would have made no sense unless ‘goods not at risk’ had been made meaningful by extending tariff exemptions to include non-tariff barriers. The distortion of the Belfast Agreement and North-South cooperation during the negotiations in order to minimize East-West realities and exaggerate North-South ones had already made a lasting solution unlikely; the insistence on finalizing the border solution before the future relationship was clear put another hurdle in the way of creating a politically and operationally sustainable solution to the Irish border and Irish Sea checks. The border issue represented both a matter of the past — preserving the status quo — but also of the future — the new arrangements. Over-reliance on the logic of leaving the details of the border to the end hindered the UK from finding a solution in phase one, but refusing to leave the final design until the EU-UK relationship was clear vastly reduced the prospects of getting the solution right.

In 2017, the Irish and the EU both identified the solution as first a political one: technical facilitation would follow from that. The EU failed to heed UK warnings about their interpretation of the Belfast Agreement, as this account shows. Instead, the EU redefined their commitments to the Belfast Agreement to fit a pre-prepared simplistic solution that ignored the centrality of East-West integration and cooperation. The UK failed to challenge this when it ought to have done, in November 2017. The EU’s ‘success’ in the negotiations leading up to December 2017 Joint Report put in place the contours of the flawed political solution that was finally agreed in 2019. That political flaw is at the heart of the current problem. In 2017 it was the UK that was unable to see that the solution had to be political and that it needed to make the necessary concessions through a solution of its own; now it appears to be the EU that cannot see the political flaw at the heart of the Protocol.



## ANNEX

### The Joint Report – Ireland and Northern Ireland <sup>244</sup>

42. Both Parties affirm that the achievements, benefits and commitments of the peace process will remain of paramount importance to peace, stability and reconciliation. They agree that the Good Friday or Belfast Agreement reached on 10 April 1998 by the United Kingdom Government, the Irish Government and the other participants in the multi-party negotiations (the ‘1998 Agreement’) must be protected in all its parts, and that this extends to the practical application of the 1998 Agreement on the island of Ireland and to the totality of the relationships set out in the Agreement.

43. The United Kingdom’s withdrawal from the European Union presents a significant and unique challenge in relation to the island of Ireland. The United Kingdom recalls its commitment to protecting the operation of the 1998 Agreement, including its subsequent implementation agreements and arrangements, and to the effective operation of each of the institutions and bodies established under them. The United Kingdom also recalls its commitment to the avoidance of a hard border, including any physical infrastructure or related checks and controls.

44. Both Parties recognise the need to respect the provisions of the 1998 Agreement regarding the constitutional status of Northern Ireland and the principle of consent. The commitments set out in this joint report are and must remain fully consistent with these provisions. The United Kingdom continues to respect and support fully Northern Ireland’s position as an integral part of the United Kingdom, consistent with the principle of consent.

45. The United Kingdom respects Ireland’s ongoing membership of the European Union and all of the corresponding rights and obligations that entails, in particular Ireland’s place in the Internal Market and the Customs Union. The United Kingdom also recalls its commitment to preserving the integrity of its internal market and Northern Ireland’s place within it, as the United Kingdom leaves the European Union’s Internal Market and Customs Union.

46. The commitments and principles outlined in this joint report will not pre-determine the outcome of wider discussions on the future relationship between the European Union and the United Kingdom and are, as necessary, specific to the unique circumstances on the island of Ireland. They are made and must be upheld in all circumstances, irrespective of the nature of any future agreement between the European Union and United Kingdom.

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244. ‘Joint Report from the negotiators of the European Union and the United Kingdom government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom’s orderly withdrawal from the European Union’, 8 December 2017.

47. Cooperation between Ireland and Northern Ireland is a central part of the 1998 Agreement and is essential for achieving reconciliation and the normalisation of relationships on the island of Ireland. In this regard, both Parties recall the roles, functions and safeguards of the Northern Ireland Executive, the Northern Ireland Assembly, and the North-South Ministerial Council (including its cross community provisions) as set out in the 1998 Agreement. The two Parties have carried out a mapping exercise, which shows that North-South cooperation relies to a significant extent on a common European Union legal and policy framework. Therefore, the United Kingdom's departure from the European Union gives rise to substantial challenges to the maintenance and development of North South cooperation.

48. The United Kingdom remains committed to protecting and supporting continued North-South and East-West cooperation across the full range of political, economic, security, societal and agricultural contexts and frameworks of cooperation, including the continued operation of the North-South implementation bodies.

49. The United Kingdom remains committed to protecting North-South cooperation and to its guarantee of avoiding a hard border. Any future arrangements must be compatible with these overarching requirements. The United Kingdom's intention is to achieve these objectives through the overall EU-UK relationship. Should this not be possible, the United Kingdom will propose specific solutions to address the unique circumstances of the island of Ireland. In the absence of agreed solutions, the United Kingdom will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement.

50. In the absence of agreed solutions, as set out in the previous paragraph, the United Kingdom will ensure that no new regulatory barriers develop between Northern Ireland and the rest of the United Kingdom, unless, consistent with the 1998 Agreement, the Northern Ireland Executive and Assembly agree that distinct arrangements are appropriate for Northern Ireland. In all circumstances, the United Kingdom will continue to ensure the same unfettered access for Northern Ireland's businesses to the whole of the United Kingdom internal market.

51. Both Parties will establish mechanisms to ensure the implementation and oversight of any specific arrangement to safeguard the integrity of the EU Internal Market and the Customs Union.

52. Both Parties acknowledge that the 1998 Agreement recognises the birth right of all the people of Northern Ireland to choose to be Irish or British or both and be accepted as such. The people of Northern Ireland who are Irish citizens will continue to enjoy rights as EU citizens, including where they reside in Northern Ireland. Both Parties therefore agree that the Withdrawal Agreement should respect and be without prejudice to the rights, opportunities and identity that come with European Union citizenship for such people and, in the next phase of negotiations, will

examine arrangements required to give effect to the ongoing exercise of, and access to, their EU rights, opportunities and benefits.

53. The 1998 Agreement also includes important provisions on Rights, Safeguards and Equality of Opportunity for which EU law and practice has provided a supporting framework in Northern Ireland and across the island of Ireland. The United Kingdom commits to ensuring that no diminution of rights is caused by its departure from the European Union, including in the area of protection against forms of discrimination enshrined in EU law. The United Kingdom commits to facilitating the related work of the institutions and bodies, established by the 1998 Agreement, in upholding human rights and equality standards.

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

55. Both Parties will honour their commitments to the PEACE and INTERREG funding programmes under the current multi-annual financial framework. Possibilities for future support will be examined favourably.

56. Given the specific nature of issues related to Ireland and Northern Ireland, and on the basis of the principles and commitments set out above, both Parties agree that in the next phase work will continue in a distinct strand of the negotiations on the detailed arrangements required to give them effect. Such work will also address issues arising from Ireland's unique geographic situation, including the transit of goods (to and from Ireland via the United Kingdom), in line with the approach established by the European Council Guidelines of 29 April 2017.

## The ‘Dialogue on Ireland/Northern Ireland’<sup>245</sup>

At the last round, agreement was reached in principle on **joint principles on the Common Travel Area** which aim to recognise an existing bilateral arrangement between the UK and Ireland (currently done in Protocol 20 of the [Lisbon] Treaty). These recall the background and context of the Common Travel Area Arrangements and take the new situation after withdrawal into account by stating that

- the United Kingdom and Ireland may continue to make arrangements between themselves relating to the movement of persons between their territories (‘the Common Travel Area’), while fully respecting the rights of natural persons conferred by Union law.
- the United Kingdom has provided a clear reassurance that the Common Travel Area and associated rights and privileges can continue to operate without affecting Ireland’s obligations under Union law, in particular with respect to free movement for EU citizens.
  - Since the last round, intensive work has been carried out with the objective of **mapping the potential impact of UK withdrawal on ongoing North South cooperation on the island of Ireland**. North South cooperation is a central part of the Good Friday Agreement. Both sides agree that such cooperation should be protected across all the relevant sectors, and that to arrive at a common understanding of the potential risks resulting from UK withdrawal for this cooperation, this joint exercise has been useful.
  - In the context of this mapping exercise, the six North-South Implementation Bodies, the six areas for cooperation and implementation agreed by the North-South Ministerial Council (NSMC) as well as a first set of the seven priority areas agreed by the NSMC at its last meeting in November 2016 are under continuing examination. (These include environment, health, agriculture, transport, education/higher education, tourism, energy, telecommunications/broadcasting, inland fisheries, justice and security, and sport.)
  - Conclusions and recommendations from this exercise will be elaborated and shared once we have worked through all policy areas. Already prior to undertaking this exercise, the **EU’s guiding principles<sup>246</sup> underlined that an important part of political, economic, security, societal and agricultural activity on the island of Ireland currently operates on a cross-border basis, underpinned by joint EU membership of the UK and Ireland.**
  - The EU and the UK have committed to protecting and supporting the continuation and development of this cooperation and of the functioning of the institutions

245. The EU negotiating paper of 8 November 2017, communicated to the UK on 9 November 2017.

246. Guiding principles for the Dialogue on Ireland/Northern Ireland’, European Commission Task Force 50; issued to the UK on 6 September 2017 and formally communicated to the UK on 21 September 2017.

established by the Good Friday Agreement in the context of the Withdrawal Agreement. Achieving this must be done in a way that respects the integrity of the internal market and the Customs Union of which Ireland will remain a full member.

It consequently seems essential for the **UK to commit to ensuring that a hard border on the island of Ireland is avoided, including by ensuring no emergence of regulatory divergence from those rules of the internal market and the Customs Union which are (or may be in the future) necessary for meaningful North South cooperation, the all-island economy and the protection of the Good Friday Agreement’.**

6 September 2017

TF50 (2017) 15 – Commission to EU 27

**Subject:** Guiding principles transmitted to EU27 for the **Dialogue on Ireland/Northern Ireland**

**Origin:** European Commission, Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU

**Objective:** For discussion at the Council Working party (Art. 50) of 7 September 2017

**Remarks:** The attached paper for the Dialogue on Ireland/Northern Ireland contains the guiding principles of the EU position in this regard, to be presented to the UK in the context of the dialogue on Ireland/Northern Ireland.

## Guiding Principles for the dialogue on Ireland/Northern Ireland

The European Council Guidelines following the United Kingdom's notification under Article 50 TEU and the subsequent directives for the negotiation of an agreement with the United Kingdom on its withdrawal from the European Union include specific provisions relating to the unique circumstances on the island of Ireland (paragraphs 11 and 14 respectively). In its resolution of 5 April 2017, the European Parliament also recognises the unique position of and the special circumstances confronting the island of Ireland.

Issues unique to Ireland include the protection of the gains of the peace process and of the Good Friday Agreement ('Belfast Agreement')<sup>1</sup> in all its parts, the maintenance of existing bilateral agreements and arrangements between the United Kingdom and Ireland including the Common Travel Area, and specific issues arising from Ireland's unique geographic situation, including the aim of avoiding a hard border between Ireland and Northern Ireland. The invisible border on the island of Ireland is one of the major achievements and societal benefits of the Peace Process. Border issues are broader than economic questions. The physical border itself was a symbol of division and conflict.

This paper is different from the other papers in preparation of a European Union position to be presented to the United Kingdom in the context of negotiations under Art. 50, in line with the process established related to the discussions on Ireland/Northern Ireland. The present paper does not put forward solutions for the Irish border. The onus to propose solutions which overcome the challenges created on the island of Ireland by the United Kingdom's withdrawal from the European Union and its decision to leave the customs union and the internal market remains on the United Kingdom.

A thorough understanding of the other issues beyond customs arrangements which are relevant to the border is also required in order to move forward to discussing solutions in the context of the dialogue with the United Kingdom.

It is the responsibility of the United Kingdom to ensure that its approach to the challenges of the Irish border in the context of its withdrawal from the European Union takes into account and protects the very specific and interwoven political, economic, security, societal and agricultural context

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1. The Good Friday Agreement was concluded as a Multi-Party Agreement that forms an annex to a bilateral international agreement between Ireland and the United Kingdom (the 'British-Irish Agreement'). A number of related implementing agreements have also been entered into, including the Agreements establishing the North-South Ministerial Council and the North-South Implementation Bodies. Through the British-Irish Agreement, the two Governments solemnly committed to support and implement the provisions of the Good Friday Agreement. Hereafter, references to the 'Good Friday Agreement' include the Multi-Party Agreement, the British-Irish Agreement and related implementing agreements.



and frameworks on the island of Ireland. These challenges will require a unique solution which cannot serve to preconfigure solutions in the context of the wider discussions on the future relationship between the European Union and the United Kingdom.

As an essential element of the withdrawal process, there needs to be a political commitment to protecting the Good Friday Agreement in all its parts, to protecting the gains of the peace process, and to the practical application of this on the island of Ireland. As stated in the Guidelines, in view of the unique circumstances on the island of Ireland, and in order to protect the Good Friday Agreement in all its parts, flexible and imaginative solutions will be required, including with the aim of avoiding a hard border. These solutions must respect the proper functioning of the internal market and of the Customs Union as well the integrity and effectiveness of the Union legal order.

The principles underpinning this approach are set out below. Agreement on these principles will form the basis for the subsequent negotiation of solutions.

## Good Friday Agreement and Peace Process

The European Union and the United Kingdom, as a co-guarantor with Ireland of the Good Friday Agreement, should continue to support peace, stability and reconciliation on the island of Ireland.

The Good Friday Agreement was concluded on 10 April 1998 against the background of membership of the European Union by Ireland and the United Kingdom and the common framework of European Union law and Union policies underpins the operation of many of its institutions. The gains and benefits of peace which have been achieved through the Good Friday Agreement and facilitated and supported by the European Union should continue to be protected and strengthened. They include societal benefits and the normalisation of relations between communities in Northern Ireland and between North and South.

1. The Good Friday Agreement established interlocking political institutions which reflect the totality of the relationships on the islands of Great Britain and Ireland.<sup>2</sup> The institutions, which provide frameworks for cooperation between both parts of the island and between Ireland and Great Britain, will need to continue to operate effectively.<sup>3</sup>
2. Ensuring the avoidance of a hard border on the island of Ireland is central to protecting the gains of the Peace Process underpinned by the Good Friday Agreement. In view of the unique circumstances on the island of Ireland, flexible and imaginative solutions will be required to avoid a hard border, including any physical border infrastructure. This must be achieved in a way which ensures that Ireland's place within the Internal Market and Customs Union is unaffected.

2. British-Irish Agreement: Annex 1 'The Agreement Reached on the Multi-Party Talks': Strand One, Strand Two and Strand Three.

3. This includes preserving the effective operation of the Implementation Bodies established under the Good Friday Agreement, and other bodies that give effect to North South cooperation.

3. North South cooperation between Ireland and Northern Ireland is a central part of the Good Friday Agreement and should be protected across all of the relevant sectors.<sup>4</sup> This cooperation is embedded in the common framework of European Union law policies. It will be necessary for the European Union and the United Kingdom to examine whether, and if so how, the fact that European Union law ceases to apply in the United Kingdom after withdrawal might impact on continued cooperation and whether specific provisions need to be inserted in the Withdrawal Agreement.
4. The Good Friday Agreement includes provisions on Rights, Safeguards and Equality of Opportunity<sup>5</sup>, for which European Union law and practice has provided a supporting framework in Northern Ireland and across the island. The Good Friday Agreement requires equivalent standards of protection of rights in Ireland and Northern Ireland. The United Kingdom should ensure that no diminution of rights is caused by the United Kingdom's departure from the European Union, including in the area of protection against forms of discrimination currently enshrined in Union law.
  - As regards citizenship, the Good Friday Agreement recognises the birthright of all of the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose. Further, it confirms that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland. Full account should be taken of the fact that Irish citizens residing in Northern Ireland will continue to enjoy rights as EU citizens. To this end, the Withdrawal Agreement should respect and be without prejudice to the rights, opportunities and identity that come with European Union citizenship for the people of Northern Ireland who choose to assert their right to Irish citizenship<sup>6</sup>.

The Union has provided significant support to the Peace Process including through programmes such as PEACE and INTERREG. The United Kingdom and the Union need to honour their commitments under the current Multi-annual Financial Framework and examine how to ensure implementation in line with applicable European Union rules, including as regards the role and location of the Special European Union Programmes Body.

### Common Travel Area

The Common Travel Area is a long-standing arrangement between Ireland and the United Kingdom, predating either country's accession to the Union, which enables Irish and British citizens to travel and reside in either jurisdiction without restriction and provides for associated rights and privileges in both jurisdictions.

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4. The Good Friday Agreement sets out twelve specific areas for cooperation and implementation. These are agriculture; education; transport; environment; waterways; social security/social welfare; tourism; relevant EU programmes; inland fisheries; aquaculture and marine matters; health; and urban and rural development. Cooperation is not limited to these twelve areas and includes for example the Single Electricity Market. North South cooperation on Justice and Security issues is also an integral part of the Peace Process and of governance on the island of Ireland.

5. British-Irish Agreement: Annex 1 'The Agreement Reached on the Multi-Party Talks': Rights, Safeguards and Equality of Opportunity.

6. As defined in British-Irish Agreement: Annex 2 'Declaration on the Provisions of Paragraph (vi) of Article 1 in Relation to Citizenship'.

1. The continued operation of the Common Travel Area is fundamental to facilitating the interaction of people in Ireland and the United Kingdom. Furthermore, it underpins the peace process and the provisions of the Good Friday Agreement, in particular the citizenship and identity provisions, by facilitating the movement of people across the island of Ireland.
2. Continuation of the Common Travel Area arrangements, in conformity with European Union law, should be recognised. The United Kingdom has expressed its readiness to ensure that the Common Travel Area can continue to operate without compromising Ireland's ability to honour its obligations as a European Union Member State, including in relation to free movement for European Economic Area nationals to and from Ireland.



£10.00  
ISBN: 978-1-913459-51-2

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