A HONG KONG IN IRELAND: NORTHERN IRELAND’S BREXIT OPPORTUNITY.
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“The all-Ireland market is an important market for many of our businesses, large and small.”

Arlene Foster, leader of the Democratic Unionist Party

As reflected in the draft EU UK Withdrawal Agreement (parts of which have been formally agreed by both sides) and the Joint Report of 7th December 2018, that allowed the UK and EU to proceed to discussions about the future EU UK relationship, avoiding a no-deal Brexit is predicated on a solution being found that avoids a hard border in Northern Ireland.

Both sides agree that the erection of a hard border — that is, one that requires physical infrastructure at which inspections could
be conducted — would pose an unacceptable risk to peace in Northern Ireland, and that “regulatory alignment” is needed to prevent this happening.

The EU has made any withdrawal agreement, and thus the avoidance of a cliff-edge, chaotic Brexit, conditional on the UK accepting regulatory alignment in Northern Ireland sufficient to eliminate the need for inspections, and therefore the erection of physical infrastructure, which could become a target for terrorism and lesser forms of political violence.

The EU would be willing to accept full membership of the Single Market and Customs Union for the UK. It is not, however, disposed to accept à la carte regulatory alignment for the whole UK, as it believes this would amount to the UK gaining too many of the benefits of membership of the Single Market without accepting the responsibilities of EU membership — including commitment to the free movement of people, or making an EU budgetary contribution. Brussels is willing to make an exception for Northern Ireland on freedom of movement, but not for the entire UK.

It is doubtful, whether the plan proposed by the UK Prime Minister, Theresa May, at Chequers on 6th July 2018 and developed in detail in the UK Government’s White Paper of the following 12th July, based around the idea of a “common rulebook” for goods regulation, including agricultural goods (but not services) while simultaneously maintaining the UK Government’s red lines on ending both freedom of movement and the jurisdiction of the CJEU will therefore be sufficient to be acceptable by the EU. The best that can realistically be expected is that it is welcomed as a step towards a situation the EU could find acceptable.

Theresa May, however has limited flexibility domestically and faces strong opposition from pro-Brexit backbenchers who have promised (metaphorical) “guerilla war,” and in particular have introduced an amendment to forthcoming legislation that would prevent the UK negotiating an outcome where Northern Ireland
and the island of Great Britain would end up part of different customs territories. This should be seen as a wrecking amendment, designed to ensure the “No Deal” outcome hardline Brexiteers want. At a time when political violence is returning to northern Ireland’s streets and dissident Irish Republicans have begun to target Sinn Fein with violence, this is irresponsible in the extreme.

The reality is that rather than something to be avoided even at the cost of endangering the results of the peace process, allowing Northern Ireland to stay in the Customs Union and as much as possible of the Internal Market is actually a great economic opportunity that I believe Northern Ireland should seize with both hands.

Paragraph 50 of the Joint Report records the UK government’s separate promise to Northern Ireland that Northern Irish institutions may give permission to Great Britain to leave the Single Market and Customs Union but for the Province in effect to stay within both while remaining sovereign territory of the UK (a range of outcomes is possible, from the minimum alignment required by the EU’s draft Withdrawal Agreement Protocol on Ireland – “the backstop” – to full application of the parts of EU law necessary for the Single Market to operate in its entirety including services).

While I agree with the four pro-Remain Northern Irish signatories of a letter calling for an all-UK solution that avoids a hard border on the island of Ireland, as does the UK Government White Paper of 12th July, I hope that England (and also Wales and Scotland, whose devolved governments are more sympathetic to this aim but are from different parties from the national one in London) can also be convinced to remain in the EU Single Market (known by the EU as the Internal Market) and effectively the EU Customs Union. Even if it cannot, the case for the Northern Irish institutions constituting themselves and ensuring that they stay in effect inside both is to me incontestable — for reasons of prosperity, as well as peace and security.
There is at least a minor precedent for this arrangement. The British Sovereign Base Areas (SBAs) of Akrotiri and Dhekelia in Cyprus, although technically not part of the United Kingdom, were part of an accession protocol when the UK joined the EU in 1973. The areas aligned their economic status fully with that of the Republic of Cyprus, as required under the Treaty of Guarantee 1960. As a result of this, when Cyprus joined the EU in 2004, they became fully part of the EU Customs Union, and eventually even the single currency despite Britain’s opt-out from the Euro, in order to maintain full alignment with Cyprus. It is clear from discussions with members of the negotiating team that the SBAs will remain fully part of the EU Single Market and Customs Union post-Brexit, irrespective of what deal is agreed by the UK and EU. It is an interesting example of British territory remaining in the EU Single Market and Customs Union.

The analogy of Hong Kong in the title of this report reflects Beijing’s One Country, Two Systems policy, where a single country nevertheless has two economic systems. Hong Kong, an extremely successful economy both when British and since decolonisation in 1997, although fully part of the People’s Republic of China in terms of flag and sovereignty in international law, enjoys a large degree of political devolution and both fiscal and legal autonomy — as well as separate trade arrangements — under the name of “Hong Kong, China” as a WTO termed “non-sovereign autonomous entity” (alongside Macau) and Hong Kong has been a full WTO member since 1995 when still a Crown Dependency (and before in the GATT since 1986), as it has its own Customs Territory and is able to conduct its own external commercial relations. In the same way that EU member states are full members of WTO under the common EU umbrella, it is conceivable that Northern Ireland could negotiate observer status at the WTO, working with the Irish Permanent Representative to raise Northern Ireland-specific trade issues within the EU Customs Union.

Were Northern Ireland to remain in the Single Market and Customs Union of the EU, it would have the best of both worlds: part of a
trading bloc of 440 million people, and avoiding a hard border on the island of Ireland while at the same time staying within the UK, with the Queen as head of state.

Instead of having to choose between political identity and economic prosperity, Northern Ireland would become a magnet for investment because of its integration into the Single Market. Should an economic equivalent of full EU membership be achieved whereby services as well as goods would all be included this would mean Financial services based in Belfast would have full passporting rights, attracting business that was being drawn away from the City of London. It is even possible that this would allow Northern Ireland, for the first time in decades, to survive without subsidy from the UK central government.

At a time when public opinion in Northern Ireland is moving towards unification with the Republic of Ireland, moderate opinion in the Protestant community is considering whether it might not, in fact, be better to accept a united Ireland now, while Unionists are still strong enough to negotiate favourable terms, rather than wait for it to be imposed upon them by a growing Irish Nationalist population. Innovative thinking is needed to secure the UK’s future as a Union of four nations. Embracing the EU’s offer to allow Northern Ireland to stay in effect within the EU’s Customs territory and Single Market (and go beyond the backstop required to avoid a hard border) is just such a measure.

I would go further still. To act as a symbol of Northern Ireland’s bond with Great Britain, I also propose that a fixed link (bridge and/or tunnel) be constructed across the Irish Sea, which at its shortest point is only 21 miles (34 km). This tangible and practical proof of the ties between Great Britain and Ulster is important to reassure Unionists.

Indeed, Unionists conception of their identity has historically been a lot more flexible than the current leadership of the Democratic Unionist Party would have us believe. This report will show that the DUP’s claims of opposition to any economic divergence within
the United Kingdom between Northern Ireland and Great Britain are false. Although they assert that they are against economic divergence from the rest of the UK, in some areas, including corporation tax, VAT and air passenger duty this is far from being the case. Far from weakening the Union between Great Britain and Northern Ireland, keeping Northern Ireland effectively in the Single Market and Customs Union and allowing the Unionists to remain in the United Kingdom but also retain necessary economic ties with the Republic and the EU would actually strengthen it.

It has not escaped notice that if Northern Ireland were completely identical to the rest of the UK, the first question that would need to be asked is: why does the DUP not run candidates in the rest of the UK? The second question would be: why does it continue to insist on maintaining separate electoral legislation, under which campaign donors’ identity are not published? In March 2018, the DUP ensured via the UK government that Conservative MPs were whipped to oppose a UK parliamentary resolution that would have required the DUP to disclose its Brexit Referendum donations. That these donations are currently kept secret is a matter of public concern following reports of close Russian involvement with the Leave.EU referendum campaign group.

In fact, when in office in Northern Ireland, DUP politicians including their current leader, Arlene Foster, have argued in favour of Northern Ireland’s position within the EU, and in particular in the Single Market. It is time they made this case again. If they did, they would win popular support. Polling suggests that a majority of Unionist voters in particular would accept the introduction of low-friction border controls in the Irish Sea, if they allowed Northern Ireland to remain effectively in the EU Customs Union and Single Market. I strongly encourage the DUP to take up this option, which I believe to be in the economic and security interests of all the people of Northern Ireland, and of the Protestant majority communities the DUP represents. Demographics suggest that this historical majority may not last for much longer.

Even if they cannot, this party, which only received 36 per cent of
the votes in Northern Ireland in the last general election, should not stand in the way of a solution that is in the interests of, and supported by, the people of the region, merely because Sinn Fein’s failure to take the Westminster seats to which it is entitled has allowed the DUP to conclude a confidence-and-supply deal (at the cost of £1 billion to the UK taxpayer) with the Conservative Party, and thus the UK government. According to research by led by Fergal Cochrane, Professor of International Conflict Analysis at the University of Kent, when asked to judge trade-offs between different outcomes 58% supported “intrusive checks” on trade between Northern Ireland and Great Britain in order to prevent No Deal. The level of support was similar across both of Northern Ireland’s communities. Brexiteers who prefer No Deal to putting such checks in place are out of touch with the people of Northern Ireland. Although a Northern Ireland Executive has not currently been formed, the Northern Ireland elected assembly could itself use the powers available to it under Paragraph 50 of the Joint Report to allow the rest of the United Kingdom to diverge more fully from regulatory alignment with Dublin than Northern Ireland. Should the Northern Ireland Assembly be unable to come to a decision, I believe the question should be put to the Northern Irish people, and decided in a referendum.
Key Recommendations

- Northern Ireland should stay in the EU’s Single Market and Customs Union (and if this cannot be achieved in full, come as close to full membership as possible)

- A fixed link (tunnel or bridge/tunnel combination) between Northern Ireland and Great Britain should be built to reinforce the UK Union

- Northern Ireland as a whole, not the DUP alone, should decide whether Great Britain should be allowed to diverge from regulatory alignment with the EU in a different way from the Province. If Northern Ireland’s institutions cannot do this themselves in the absence of a Stormont Executive, a special convention, or a referendum within Northern Ireland, should be held to make the decision.
CONTENTS

Executive Summary 3
Key Recommendations 11
Contents 12
Introduction 13
Brexit Negotiations and Phase 1 Alignment 16
The Joint Report and its consequences 19
The Good Friday Agreement and the European Union 29
    Strand 1 30
    Strand 2: 31
    Strand 3: 32
Northern Ireland’s Behaviour Cooperating with the EU 34
Conclusions 41
Annex: Historical Background 46
“The Troubles” and the Good Friday Agreement 46
The Role of the European Union in the Northern Irish Peace Process 49
Introduction

The June 23rd 2016 EU referendum upended a Northern Irish politics focused predominantly on sectarian issues of identity, culture and constitutional position of religious origin. While these problems have not disappeared, Brexit has made the border on the island of Ireland an international issue affecting both the United Kingdom’s and the European Union’s positions in the current Phase 2 Withdrawal Agreement and long term trade negotiations. With the UK’s exit date set at 29th March 2019, problems that have previously generated decades of conflict must now be solved in a matter of months.

Their intractability imperils the survival of the UK’s Union and fresh thinking is now needed to secure it. The Joint Report of 8th December 2017 and the draft protocol to the EU UK Withdrawal Agreement on Ireland and Northern Ireland commit the UK to avoiding a border involving physical infrastructure on the island of Ireland. They set out three options for achieving the regulatory and customs alignment necessary:

A. as part of the agreement on the future UK-EU relationship
B. through the use of technology
C. through the so-called “backstop mechanism”

The first is impossible unless the UK changes its red lines and agrees to remain inside the EU Customs Union and Single Market, or unless the EU changes its red lines and agrees to soften its determination to protect the integrity of the Single Market. The second is not practically feasible: technology may be able in the near future to reduce the need for border checks to what might be termed a low friction border, but it cannot, at least for now, eliminate them entirely so as to become frictionless. It will not in any event be ready in time and will require cameras and visible infrastructure, which is a redline from a security perspective.

That leaves the backstop mechanism, by which Northern Ireland
would maintain such alignment as necessary to avoid border infrastructure. It requires membership of the EU Customs Union and major elements of the Single Market.

There is some ambiguity about the enforcement of the application of the backstop in the draft Withdrawal Agreement. Its preamble suggests nothing is agreed till everything is agreed and thus appears to include that Paragraph 49 and 50 would be void in the absenc of an agreement. However, the Joint Report also states, in Paragraph 46 that the UK government will avoid a hard border in all circumstances, even presumably if there is no Withdrawal Agreement, or if the future framework for relations is not sufficient to avoid a hard border in Ireland on its own. In such circumstances, the agreement appears to commit the UK to asking Northern Irish institutions to permit the rest of the UK to diverge from alignment with the EU (or, as proposed in the White Paper of 12th July deriving from the Chequers meeting, alignment applying to the whole UK in the guise of a “backstop”).

While the White Paper has not proved acceptable to the EU, and domestic UK political considerations currently preclude there being a Northern Ireland only backstop, it appears that a withdrawal agreement cannot be concluded. Though “in all circumstances” (Paragraph 46) would suggest that a backstop would still apply, in the absence of an agreement there would be no way to enforce this obligation that the EU believes would be binding on the UK, but the UK did not accept.

The implementation of the backstop in Northern Ireland alone is currently being blocked by hard Brexiteers and, of course, the DUP itself. They believe they are doing so to save the Union, but may instead destroy it in the process. The pressure they are putting on the Prime Minister could cause her to fail to reach an agreement with the EU 27, including the government of Ireland, at either the June 2018 or more likely the October 2018 summit. At present the UK Government’s White Paper suggests that it hopes to mix elements from Option A and Option B (via what it terms a ‘Facilitated Customs Arrangement’) and the use of a ‘common
rulebook’ to approach regulatory alignment for goods. This is not likely to be enough (e.g. without CJEU justification) to avoid a hard border or satisfy British industry. The EU27 have rejected it as cherry-picking. It is likely that they will continue to insist the UK chooses between a Norway Plus (an EEA-like arrangement plus membership of the Customs Union) or an arrangement (probably an Art217 Association Agreement) where only Northern Ireland get special treatment through the ‘backstop’ (or Option C). As there is no majority in the House of Commons for such a no-deal Brexit, it is hard to see how the UK Government could survive failure to put a Withdrawal Agreement to Parliament. Fighting an election in such circumstances would be difficult and dispiriting to say the least. The likelihood of the election putting Labour opposition leader Jeremy Corbyn into Number 10 — which would make him the most anti-Unionist Prime Minister the UK has ever had, and someone who called the IRA his “friends” — ought to give the DUP pause for thought. The consequences of the hard line they have adopted since the referendum (at the time in June 2016 they were only marginally for Brexit) could easily be perverse. Instead of sticking to the position under which they had campaigned, to “on balance, recommend a vote to leave the EU,” they have adopted a maximalist position of total divorce. This is at odds with the history of Unionism itself, as well as the DUP’s own pragmatic behaviour in Northern Ireland’s government, which tolerated — and indeed advocated — economic differentiation within the UK between Northern Ireland and the island of Great Britain. It prevents them from fully embracing the opportunity the Brexit negotiations have offered Northern Ireland: of staying effectively inside the Single Market and the Customs Union, while remaining fully part of the United Kingdom.

This would give Northern Ireland a uniquely advantageous status in the UK. Companies based there would have full membership of a trading bloc of 440 million people. Northern Ireland would become a magnet for investment, and would perhaps even be able to wean itself off state subsidies for the first time in many years. There is no better way of cementing Northern Ireland’s place in the
UK Union than by making it a great economic success. Inevitably more prosperity will generate more electoral support.

Readers unfamiliar with the history of Northern Ireland are invited to consult the Historical Background Annex (starting on p. 32)

**Brexit Negotiations and Phase 1 Alignment**

The 8th December 2017 “Joint Report” of the UK and EU negotiating teams (hereafter the “Phase 1 Agreement”) allowed negotiations to proceed to the second phase, where the future long-term trade relationship between the EU and UK will be discussed. It is anticipated this will eventually be done as part of a political declaration annexed to the formal Withdrawal Agreement, and in time for ratification of this Agreement by the European and British parliaments, which in practice probably means at the latest October 2018 given the two-year time constraint imposed by Article 50. It covers points of agreement on the future of EU citizens in the UK and of UK citizens in the EU, outstanding UK budget contributions, and the Northern Irish Border question. However, ostensible agreement on the section about the Northern Irish border concealed very different UK and EU interpretation of its meaning. These disagreements were not resolved in the draft Withdrawal Agreement submitted to the EU27 Council on 19th March 2018, and they continue to bedevil the UK/EU talks at the time of writing of this report.

The EU position, reiterated by Irish Deputy Prime Minister (Tánaiste) and Foreign Minister Simon Coveney on 12th May 2018,\(^{10}\) is that the UK agreed to take whatever measures are necessary to ensure that regulatory alignment sufficient to avoid a hard border is in place following the UK’s decision to leave the EU. UK Prime Minister Theresa May, in a letter to Donald Tusk on 19th March 2018, stated her full commitment to this aim.
“I am committed to agreeing in the Withdrawal Agreement operational legal text for at least the so-called ‘backstop option’ set out in the Joint Report.”

However, as, at the time of writing, expressed in the July 12th 2018 White Paper, she continues to insist that it could in principle be met by a “facilitated customs arrangement” – itself a combination of a “customs partnership” (under option A) or “maximum facilitation” (under option B) models, both of which have been rejected separately by the EU as insufficient, and together when presented in the White Paper of 12th July. The EU’s position, strongly in solidarity with Dublin, is that the Brexit negotiations cannot continue, and may perhaps be unable to continue past the October 2018 summit, unless the UK accepts that a post-Brexit regulatory alignment must be in place, at least comprising in Northern Ireland’s membership of the Customs Union and significant elements of the Single Market (as specified in the protocol to the draft Withdrawal Agreement that was adopted by the EU Council on 19th March 2018).

The UK’s position is made difficult by internal political considerations and splits in the British cabinet which have led to the resignations of the Foreign Secretary Boris Johnson and the Brexit Secretary David Davis who are now campaigning against Government policy. Mrs May’s Government depends on the support of both “hard Brexiteers,” organised by the “European Research Group,” (ERG) who oppose the UK staying in the Customs Union on the grounds that Brexit must signify the UK having its own independent trade policy, and the Democratic Unionist Party, which opposes divergence between Northern Ireland and the rest of the UK. These conflicting demands are seemingly incompatible with what the government agreed to in December 2017, and which the Prime Minister reiterated in her letter to Donald Tusk in March 2018. Either the DUP, the ERG, or the EU is going to be unable to have its demands met fully.

I argue in this paper that the DUP is making an enormous mistake. The Joint Report agreed in December is not a threat to Northern
Ireland’s status within the UK Union, but a huge opportunity for Northern Ireland and its people. It allows Northern Ireland to leave the EU, but in a way that limits the absolute economic damage that Brexiteers are inflicting on the rest of the country. Instead of rejecting the EU’s offer, they should enthusiastically embrace it, and keep Northern Ireland effectively inside the EU Single Market and Customs Union — and, of course, inside the United Kingdom, but outside the EU. This would make Northern Ireland the most attractive place in the UK to invest, and help wean it off dependence on state subsidies. Should they be unable to agree to that themselves, they should put the question to Northern Ireland’s devolved institutions, as specified in Paragraph 50 of the Joint Report. Failing that, the UK government should have the matter settled by a special referendum in the Province.
The Joint Report of 8th December 2018 was based on a common acceptance of the principle that an UK/EU Withdrawal Agreement would be conditional on there not being a border on the island of Ireland that required the erection of physical infrastructure.

Both the UK and EU agreed in Paragraph 49 of the Joint Report that this could, in principle, be solved in three ways:

A: through a trade agreement between the UK and EU that was sufficiently comprehensive to avoid the installation of such infrastructure.

B: through technological advances that enabled necessary checks to be made without the erection of infrastructure.

C: through the UK maintaining “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 50 of the Joint Report allows Northern Ireland to permit the rest of the UK to diverge from the alignment required by Option C. This would permit the island of Great Britain not to have to align with the regulations applying in Dublin, provided Northern Irish institutions allowed it to and Northern Ireland itself remained aligned. Option C would involve effectively remaining in the EU Single (or Internal) Market for goods but not services.

The draft EU UK Withdrawal Agreement presented to the EU27 Council on 19th March 2018 includes a Protocol on Ireland/Northern Ireland that refines “Option C.” In this document the EU’s position has evolved slightly from that which was held in December 2017. On the one hand, the EU27 now accepts that, contrary to statements made by its Head of EU Commission Article 50 Taskforce (Chief Brexit negotiator) Michel Barnier on Irish radio on 8th December 2017, avoiding a hard border does not require Northern Ireland to be within all aspects of the Single Market. The protocol specifies the areas in which Northern Ireland would need to be aligned in order to obviate a hard border. Northern Ireland could maintain an intermediate status that would place it inside the EU’s customs territory, VAT regime, and most of the Single Market for goods trade, and state aid, but exempt it most importantly from an obligation to uphold the free movement of people, and other aspects of the Single Market in services. On the other hand, the EU27 consider this concession an exceptional status — not a “cake and eat it” solution craved by the Brexiteers, which would destabilise the EU project — and which has to be limited to Northern Ireland in order not to compromise the integrity of the Single Market. It understandably does not accept the proposal (suggested in the UK in late May 2018) that this so-called “backstop” should be on offer to the UK as a whole.
The UK Government white paper of 12th July 2018 has suggested a “Facilitated Customs Arrangement” and “common rulebook” (which replaces its previous “temporary customs arrangement” that, it argues, would allow sufficient regulatory alignment to allow trade in goods, including agriculture and fisheries to continue between the EU and the UK without needing border infrastructure on the island of Ireland. This proposal is an attempt to secure something close to the “backstop” required by Option C (above) while at the same time avoiding the jurisdiction of the CJEU and bringing freedom of movement between the EU27 and the UK to an end. It appears to have fallen between two stools: with Brussels perceiving it as cherry picking and Brexiteers seeing it as “Brexit in Name Only”.

**BOX 1:**

Key Paragraphs of the Joint Report (emphasis added):

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.

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. …

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.”

**BOX 2:**

Key elements of the Protocol on Northern Ireland/Ireland submitted by Task Force 50 to the EU27 Council.

**Article 3:** A common regulatory area comprising the Union and the United Kingdom in respect of Northern Ireland is hereby established. The common regulatory area shall constitute an area without internal borders in which the free movement of goods is ensured and North-South cooperation protected in accordance with this Chapter.

**Article 4(2):** The territory of Northern Ireland, excluding the territorial waters of the United Kingdom (the “territory of Northern Ireland”), shall be considered to be part of the customs territory of the Union.

Annexes to the protocol (as yet unpublished) will govern the following areas of regulation:
Annex 1 in relation to protection against discrimination

Annex 2 in relation to the common regulatory area for ensuring the free movement of goods and protecting North-South cooperation

Annex 2.1 in relation to free movement of goods

Annex 2.2 in relation to customs controls of specific goods or for specific purposes Annex 2.3 in relation to value added tax

Annex 2.4 in relation to excise duties

Annex 2.5 in relation to sanitary and phytosanitary rules

Annex 2.6 in relation to production and marketing of agricultural and fisheries products Annex 2.7 in relation to wholesale electricity markets

Annex 2.8 in relation to environmental protection concerning the control of the import into, release into, or transport within the Union of substances or material, or plant or animal species

Annex 2.9 in relation to State aid

Annex 3 in relation to procedures and dispute settlement arrangements applicable to safeguard and rebalancing measures

“Option C,” also known as the “backstop,” is the minimum necessary to avoid a hard border on the island of Ireland, but an alternative suggestion is that some sort of special status would be negotiated for Northern Ireland, leaving it fully in the EU Single Market and Customs Union, while the rest of the UK withdrew. Such a policy would essentially move the customs posts away from the Irish border and to British ports. However, this appears to be precluded by the current UK Parliamentary arithmetic (the UK’s “Facilitated Customs Arrangement” proposed in the 12th
July 2018 White Paper attempts to square this circle, probably without success). The Conservative Government holds office thanks to a confidence-and-supply arrangement with Northern Ireland’s Democratic Unionist Party (DUP). It is DUP stated policy to avoid creating any borders between Northern Ireland and the rest of the United Kingdom. Unionists’ central principle would seem to be that the United Kingdom should be a single country — a unitary state and indivisible economic space — rather than four separate devolved ones (known as “Nations” in UK parlance) sharing only flag, monarch, and Armed Forces.

These ideological constraints are not as inviolable as they first appear from DUP rhetoric. The DUP’s record in office in Northern Ireland shows that they have in the past been more amenable to elements of economic differentiation from Great Britain than they currently assert. For example, DUP leader Arlene Foster said that any Brexit deal should recognise the “situation of Northern Ireland and its history and geography” and push towards the “maximum possible access to the Single Market” without creating a hard border. Secondly, the DUP have previously argued for changes to taxation that would create significant differences between Northern Ireland and the rest of the UK mainland. For instance, in the cases of air passenger duty, VAT and corporation tax, the DUP have shown that they want to diverge from the rest of the UK so that Northern Ireland is capable of competing with Dublin Airport and the lower corporate taxes of the Republic. DUP MP Gregory Campbell stated that “We need a level playing pitch with the Republic… although we’ve achieved substantial growth, much more is achievable if APD was jettisoned and VAT rates on tourism reduced to competitive levels.” Likewise, Arlene Foster has said she is “open to” reductions in corporation tax to 10 per cent, much lower than the proposed UK wide level of 18 per cent. Though these positions have led some to label the DUP as “British when it suits them,” they are in fact consistent with a conception of Unionism loyal to an intangible British historical identity constructed around monarchy, Protestantism and to an extent the Armed Forces — not literal loyalty to the government.
of the day’s economic policies at Westminster. On 5th June 2018, BBC2’s “Newsnight” programme exposed the fact that, at present, all agricultural machinery landed in Northern Ireland from Scotland is subject to rigorous local inspection for phytosanitary contamination. Tractors in any violation of phytosanitary standards can be returned to Stranraer in Scotland. The hardline DUP Brexiteer Sammy Wilson MP was asked to respond to this on air. He argued that this situation is justified because the rules were agreed internally within the UK, and claimed that any EU external border equivalent would impede travel. This is clearly not the case, as this is part of the Anglo-Irish Common Travel Area (CTA), which dates back to 1923 and would remain unchanged. Interestingly, again, the CTA was suspended in 1939 during World War II, with ID checks carried out and only fully relaxed in 1952.

Northern Ireland has enjoyed a greatly devolved government from the rest of the UK since 1922; its criminal and family law, for instance, differ substantially from Great Britain. Northern Ireland is the only part of western Europe to prohibit same-sex marriage, and it is the only part of the UK in which abortion remains illegal in almost all cases.

The May 28th 2018 referendum in the Republic of Ireland, in which a large majority voted to remove the Irish constitutional ban on abortion, has focused the minds of Westminster MPs on extending the same reproductive rights enjoyed by women across the rest of the UK to Northern Ireland. The protests by the DUP leadership claiming this is a devolved Northern Irish matter fly in the face of their insistence on alignment with Great Britain on all other economic matters affected by Brexit.

At the time of writing of this report, Prime Minister May is under pressure to change Northern Irish abortion and equal marriage law by statute directly from Westminster. This would put her confidence-and-supply agreement with the DUP at risk, as they have threatened to withdraw from it.

Clearly, the concept of a United Kingdom run centrally as a unitary
state from Westminster has not kept up with current devolved constitutional practice. As mentioned above, it was not even past Unionist practice, as the Unionists were happy to enjoy devolution to their own Home Rule Government in Northern Ireland headed by a “Prime Minister” until 1972. Indeed, it is reasonable to argue that devolution, particularly to Scotland, Wales and to a certain extent London, has changed the nature of the United Kingdom and the Act of Union by moving power away from a centralised point at Westminster. In any event, the legislative union of Great Britain with Ireland of 1801 itself did not translate into unified administrative government. Ireland post-1801 was entitled to pursue many of its own policies while still remaining an integral part of the UK. The administration of the island of Ireland between 1801 to 1922 was carried out, within the United Kingdom, through a Viceroy or Lord Lieutenant, with a Chief Secretary acting as de facto Chief Minister who possessed direct patronage and powers of governance. Notwithstanding this, there are obstacles in the path of this argument. The DUP feel themselves constrained by the fact that unionist communities largely voted in favour of Brexit, and that they could face electoral punishment if they not only visibly fail to remove Northern Ireland from the EU, but are also seen to create new barriers between Northern Ireland and the island of Great Britain, which could be seen to undermine the Union and British identity within the province.

Fortunately, most DUP voters are more pragmatic. Sixty-four per cent of Leave voters in Northern Ireland would accept East-West border controls if they were agreed to by the British government. Nevertheless, it would be advisable for any special economic status for Northern Ireland to include levels of “constructive ambiguity” similar to those contained within the Good Friday Agreement, to allow the DUP to sell such an agreement to their members and to the Unionist community as a whole. This would of course increase the possibility of demands from the Scottish (who voted Remain like Northern Ireland) and even Welsh (who voted Leave, but recent polls have suggested a real change there to Remain) for their devolved regional governments to be accorded a similar
status to Northern Ireland. Such further devolution may well be the price to be paid if Theresa May’s Government in London is to proceed with its British exceptionalist, but effectively England-centric, hard Brexit policy.

Meanwhile, the EU’s position is determined by two factors. It is primarily driven by a desire to keep the Single Market intact, and to ensure the UK cannot cherry-pick the bits it likes without committing to other obligations, including the four freedoms of the Single Market — including, vitally, freedom of movement of people. Secondly, there is a need to accommodate the Republic of Ireland — which remains in the EU, and whose citizens strongly (at more than 90 per cent in recent polls) support continued EU membership, whose economy is in part entangled with Northern Ireland, and which also trades extensively with the rest of the UK. In pursuit of these objectives, the EU extracted what it considers to be a concession by the UK that in the event of a no-deal Brexit, a hard border with the Republic of Ireland must be avoided. In the EU’s interpretation, this means that there cannot be tariffs or regulatory checks between Northern Ireland and the Republic of Ireland, and that the UK has accepted that, in the absence of a withdrawal deal, Northern Ireland would remain within the Customs Union and significant elements of the Single Market.

Were Northern Ireland to remain effectively within the Customs Union and Single Market, the territory’s relationship to the EU would partly resemble Norway’s as far as regulatory union is concerned — though the parallels are not exact. Norway is not in the EU Customs Union (but Northern Ireland would be). Conversely, Northern Ireland could not accede to the EEA or EFTA as it is not a state.

Instead, this level of integration would be achieved by clauses, initially annexed as declaratory to the Withdrawal Agreement, and subsequently incorporated into the permanent EU-UK agreement on the future relationship concluded during the 21 months transitional or implementation period after Brexit (April
2019-December 2020) that would allow the application of relevant parts of EU law solely to the territory of Northern Ireland. The permanent agreement could take the form either of a Deep and Comprehensive Free Trade Agreement, using only Art 218 of the Treaty For the Functioning of the EU (TFEU) procedure or in addition a more broad ranging Association Agreement under Article 217 TFEU as proposed by the European Parliament.

Such an arrangement need not preclude UK membership of the European Free Trade Association (EFTA). Though a new EFTA member is required to apply to join EFTA’s free trade agreements, it does not have to be accepted on those terms, and, indeed EFTA members have different trading relationships, including two, Norway and Switzerland that have extremely close relationships with the EU.

The stated preference of the UK Government as expressed in its 12th July 2018 White Paper is to place the entire UK into a “Facilitated Customs Arrangement” with the EU, and subject trade in goods to a “common rulebook”. This is its attempt to reconcile the need to avoid a hard border with its promises to leave the jurisdiction of the CJEU and end freedom of movement. It is likely to be too little for the EU27, but too much for the Brexiteers in the Conservative Party.
The Good Friday Agreement is split into three strands, each of which details different aspects of how Northern Ireland is to be governed. Although the European Union is explicitly mentioned in only a few cases, these limited references “should not be read as implying only a marginal role of the EU in its implementation. It is clear that the Agreement was drawn up in the context of shared UK and Irish membership of the EU and on the unspoken and perfectly reasonable at the time assumption that both the UK and Ireland would remain members [indefinitely].”

Since the Agreement is predicated on both countries retaining their membership of the EU, the underlying role of European institutions remains important, and impending withdrawal has the potential to undermine its effectiveness.
Strand 1

Strand 1 outlines the structural details and composition of the Northern Ireland Assembly and Executive. Under provisions within the Good Friday Agreement, the structures of these institutions and the laws that they pass must operate within the 1950 European Convention on Human Rights (ECHR). The UK government has stated that it will not withdraw from the ECHR and the Council of Europe for the duration of this Parliament i.e. 2022, but has not given long-term assurances. This is because many of the UK public’s objections to “Europe” stem from ECHR judgements — for instance, regarding prisoners’ voting rights, and the prevention of deportation of terrorist suspect to countries where they might be tortured. This aspect of UK membership of the Convention may return to public consciousness after Brexit has happened, as the subject of further anti-European agitation. Alongside procedural rules which help to ensure balance within the power-sharing model, the ECHR’s role is to guarantee that the rights of both communities are respected and that the government of Northern Ireland does not return to sectarian domination by the current majority (mainly Protestant) Unionist community.

The role of Europe here is to create trust in institutions which were previously solely overseen by the British, by subjecting them to the oversight of the wider European community. This acts to reassure the Nationalist (mainly Catholic) community that judgements involving the law will be fair to them. The memory of systematic discrimination that occurred within Northern Ireland, and technically under the oversight of the British, is still within the lifetime of many in Northern Ireland. Therefore, (Republican) Nationalists have good reason to want the guarantees provided by European institutions to remain in place. At this time, withdrawal from the EU is further complicated (as already mentioned) by the fact that there had been repeated calls from British politicians even before Brexit — including the current Prime Minister (then Home Secretary), Theresa May — to withdraw from the ECHR.29 Although in all likelihood this would have been replaced by a British Bill of Rights, again it is the supranational guarantees, not the simple
codification of rights, that has served to reassure the Nationalist population. Had the UK left the Council of Europe and the ECHR before Brexit, this would not necessarily have left the Nationalist population without separate EU judicial protection by the Court of Justice of the EU (CJEU; also frequently also referred to in lay usage as the ECJ). Britain’s membership of the EU also included obligations to comply with its Charter of Fundamental Rights as far as EU legislation is concerned; and, in principle, to allow those who considered themselves to be exclusively Irish citizens living in the Province to be deemed to be EU citizens living in another member state and therefore subject to the CJEU’s oversight (though the CJEU May 2011 McCarthy appeal case shows its limitation). Now that the UK is leaving the EU, its membership of the ECHR takes on vital importance. In reality, divisions within the Conservative Party as well as the electorate as a whole have so far stalled UK efforts to replace the Human Rights Act (which incorporates the ECHR into UK law)30 with a British Bill of Rights. But perceptions matter. The Leave campaign’s British exceptionalist desire to free the UK from “foreign courts,”31 and the previous advocacy of withdrawal from the ECHR by much of the Conservative leadership, have led many Nationalists to see the abandoning of the CJEU (and possibly eventually the ECHR) as part of a process that could lead to the return of discriminatory practices, particularly against the Catholic minority, unchecked by any supranational bodies within Northern Ireland’s institutions.

**Strand 2:**

Strand 2 details the arrangements for intergovernmental institutions between Northern Ireland and the Republic. The North-South Ministerial Council (NSMC) is designed to “develop consultation, cooperation and action within the island of Ireland — including through implementation on an all-island and cross-border basis — on matters of mutual interest within the competence of the Administrations, North and South.”32 The NSMC has responsibility “to consider institutional or cross-sectoral matters (including in
relation to the EU) and to resolve disagreement.” In order to do so, the NSMC works across 12 areas of cooperation, six of which must be “through agreed implementation bodies on a cross-border or all-island level.” These bodies are Waterways Ireland, the Food Safety Promotion Board, InterTrade Ireland, the Special European Union Programmes Body, the Language Body, and the Foyle, Carlingford and Irish Lights Commission. Of greatest importance is the fact that, through the Single Market, the European Union makes the co-ordination of inter-trade policies easier, as both countries must already comply with EU product regulations. The NSMC is also used to oversee those EU projects that jointly affect Northern Ireland and the Republic and are funded through the European PEACE and INTERREG IVA funding streams. Given the economic boost that access to this funding has brought to the entire island, if Brexit leaves Northern Ireland without access to EU funds or a replacement from the UK Treasury, this could have severe consequences for investment into the Province.

Strand 3:
Strand 3 deals with issues pertaining to the relationship between the United Kingdom and the Republic of Ireland. Its chief purpose is to recognise that the independent sovereign Republic of Ireland has a special interest in Northern Ireland, and therefore alignment between the British and Irish governments is mutually beneficial. As academics Phinnemore and Haywood note, “to understand the significance of the Good Friday Agreement, it is vitally important to note that the Agreement is premised on a definition of the Northern Ireland conflict as being a border conflict.” By creating a solid relationship between the two states of the Republic of Ireland and the United Kingdom, and turning the border into a point of cooperation, the peace process can develop through a spirit of amity and aligned policy. Again, while the EU does not feature explicitly in this, the 1998 Agreement is predicated on both countries being members of the EU and assumes that cooperation is not only coordinated on a cross-border basis, but that bilateral relations are aligned on all levels including European. Creating
this sense that the border ceased to matter was important in persuading the Republic to change its constitution and give up its formal legal claim to Northern Ireland. Brexit upsets this as the aims of the two nations potentially begin once again to diverge.
To understand the EU’s position, the relevant question is: in the possible event of a no-deal Brexit, what alignment is necessary 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?” The behaviour of Northern Ireland’s administrations provides a guide to existing practice in this area. It has been nearly 20 years since the Good Friday Agreement (also known as the Belfast Agreement) was signed, and over 25 since Northern Ireland’s entry into the EU Single (or Internal) Market. As has been highlighted in this report, over this time the economy between Northern Ireland and the Republic has gradually become
more entangled with some 30% of Northern Irish exports headed south for the Republic but a much smaller proportion heading the other way to Northern Ireland. As a result, a yet-unreleased civil service report has identified 142 agreements of cross-border cooperation that are at risk should there be a no-deal. Here, I highlight areas in which the devolved Northern Irish Executive and Stormont Assembly have encouraged cooperation with EU institutions, increasing the entanglement between economies.

This was at the time viewed positively by the DUP, who currently purport to be the main opponents of the EU’s continued presence in any capacity in Northern Ireland. My aim is to demonstrate how their political objectives can also be met if Northern Ireland remains fully aligned with the EU, in the event of a no-deal Brexit.

First, electricity. Since 2007 there has been a single electricity market across Ireland. This “has been hailed as an exemplar of cross international border regional cooperation by the EU,” as economies of scale have helped to drive down consumer costs on both sides of the border. This market is currently in the process of being upgraded to the Integrated-Single Electricity Market (I-SEM), which will not only link Northern Ireland and the Republic of Ireland, but will connect the Irish electricity network with the rest of Europe. This has included the approval of a new £200 million interconnector, which will connect Counties Tyrone and Armagh to Cavan, Monaghan and Meath. Access to this electricity market is important. Since 2014 Northern Ireland has imported more electricity from its neighbour than it exported. Withdrawal from the whole island of Ireland by I-SEM could see electricity prices rise due to lack of economy of scale. This could be highly damaging for people on low incomes, and it has been shown that 42% of Northern Ireland’s households already live in fuel poverty. Continued access is also popular politically. As the DUP’s deputy leader and strong Brexit supporter Nigel Dodds MP has said, “there are particular areas like energy because our energy market is too small in Northern Ireland and the Republic of Ireland where it makes sense to cooperate: that should continue.” However, since the I-SEM has largely been driven forward by EU regulation
without new bilateral deals, in order to retain access Northern Ireland would require continued effective participation in the EU Single Market. The White Paper fully endorses the importance of maintaining I-SEM.

The importance of agriculture to the Northern Irish economy has already been discussed in this paper. In order for it to function in its current form, farmers are not only financially dependent on the EU Common Agricultural Policy (CAP), subventions, but on tariff- and customs-free trade, without regulatory barriers, with both the Republic to the South and Great Britain to the East. As the Joint Parliamentary Report points out, “Great Britain is the largest market for food and drinks in Northern Ireland and the UK is the largest export market for the Republic.”43 On top of this, the supply chain itself is interconnected. Within dairy farming, for instance, much of the processing is done in the Republic: imports amount to 594 million litres of milk annually. “This imported milk is equivalent to nine per cent of domestic Republic supplies and 26 per cent of Northern Ireland’s annual milk supplies in 2015.”44 Given that the milk industry is already subject to extreme volatility, and Northern Ireland’s dairy farmers are the lowest-paid in the UK, additional rises in costs could put many farms out of business.45 The interconnectedness of the supply chain and the border is highlighted by the fact that over 1,000 cattle and 10,000 pigs cross the border each week.46 Animals are reared and slaughtered for meat across the international border, and it is clear that both the EU and the Dublin government largely treat the Island of Ireland as one single space for agriculture. Moreover, around 60 per cent of people employed within the food-processing sector are migrants.47 Without the Single Market, which includes free movement of EU citizens and the Customs Union, the costs of farming would increase significantly. These costs would be compounded by the loss of CAP subsidies. Agriculture is a politically sensitive topic for the DUP; many of their MPs and MLAs represent rural areas and the party itself claims to be “A friend of the farmer and natural heritage.”48 Further evidence of the importance of farming to the DUP can be found in their confidence-and-supply deal with
the Conservatives, which states that “agriculture will be a critical policy in the EU exit negotiations.” 49 DUP leader Arlene Foster MP herself recognises that “the all-Ireland market is an important market for many of our businesses, large and small.” 50 As can be seen, if the DUP are to support the farming community in the event of a no-deal Brexit, continued effective membership of the EU Single Market and Customs Union must be maintained to avoid considerable disruption and significant new, avoidable, costs to the UK taxpayer.

A third area of cooperation between Northern Ireland and the EU is healthcare. Despite the fact that “health is not a key area of EU competence,” 51 the EU has helped to facilitate the integration of cross-border healthcare in a number of ways. Firstly, through the mutual recognition of professional qualifications the EU has helped to increase medical and nursing staffing levels in the Northern Irish NHS, helping overall provision of services. Alongside any changes to freedom of movement, any divergence in regulations may inhibit health practitioners from being able to easily practice. This is significant as “8.8 per cent of doctors in Northern Ireland have qualified in the EU… which rises to 11 per cent for GPs, where Northern Ireland faces a serious shortage.” 52 Considering that the Northern Irish NHS is currently facing both a funding and staffing crisis, making changes at this juncture may only compound the problem by adding additional strain at a time at which the system nears breaking point. 53

Changes to EU freedom of movement rules will also affect the delivery of health services. Northern Ireland currently suffers from the fact that it has too many hospitals to deliver an adequate range of healthcare across them all. 54 At the same time, the populations of both Northern Ireland and the Republic are reluctant to close hospitals for fear that those who live in isolated communities will suffer. In response to this the NI Executive and the Irish government have worked together to create new cross-border services, including a cancer unit at Altnagelvin and a children’s heart surgery ward in Dublin. While these services
are not funded by the EU, the ability for patients, and, crucially, healthcare workers, to travel to them unimpeded, is critical. This goes alongside the ability to seek healthcare in other European countries, under EU Directives which give rights of free access to health care outside of your country of origin (if not readily available locally with your country of origin), and fully reimbursing medical costs to the receiving EU state.\(^5^5\) A no-deal Brexit scenario will therefore cause disruption to the service, potentially placing patients’ lives in danger. Access to the European Health Insurance Card (EHIC), which would cover emergency care for a day-tripper from Belfast to Dublin, is also not guaranteed if there is no Brexit deal. A situation in which border controls were erected would also probably entail the re-closing of many border crossings that were closed in the past. This would slow travel times and endanger acutely ill patients.

The EU funds a number of cross-border healthcare initiatives called Cooperating and Working Together (CAWT), through the EU INTERREG IVA fund. These are largely preventative or supportive services helping patients to make lifestyle changes, which help to alleviate pressure on existing services.\(^5^6\) A review of the programme has shown it has “for the most part, delivered economies of scale and have provided the critical mass of population on either side of the border which can justify provision of certain services.”\(^5^7\) For this reason, DUP Health Minister Simon Hamilton said: “It is absolutely not the case in health that we are doing things just for the sake of it or to say that we are doing them on a cross-border basis. There are lots of positive and practical examples of both jurisdictions working together to identify and meet need in a way that is mutually beneficial.”\(^5^8\) Thus, despite any ideological objections, the DUP are aware that economies of scale in healthcare will often require things to be done cross-border in order to be both cost-efficient and effective. As these provisions are facilitated by membership of the EU, it is prudent to recognise that in order to maintain these services with minimal disruption, Northern Ireland will need to remain aligned with the EU Single Market.
A further problem recently identified is the availability of radioisotopes for cancer treatment and imaging, when the UK leaves Euratom. The imposition of border checks before the effects of the UK leaving Euratom can be mitigated would make access to these more problematic.

A final example comes in the area of policing. Currently there is extensive cooperation between the Police Service of Northern Ireland (PSNI) and An Garda Síochána (the Gardaí) in matters of intelligence and crime prevention. Membership of the EU has given both organisations membership of several EU Justice and Home Affairs internal security arrangements — including intergovernmental bodies such as Europol and Eurojust; databases such as the Schengen Information System, Prum Convention, and ECRIS for criminal records; and the Passenger Named Records (PNR) system, which helps them to track suspects and coordinate operations across jurisdictions. Membership of the EU has also given both parties access to the European Arrest Warrant (EAW) and the European Investigation Order. The EAW has helped to streamline the process of extraditing suspects from other countries and, unlike other extradition measures, creates an automatic obligation to arrest and extradite once received. Historically, the Republic of Ireland could not extradite suspects to the UK on suspicion of IRA terrorist charges, since they successfully claimed protection under Irish law as having been accused of political, rather than criminal, offences. This however was rendered obsolete by the EU's EAW regulations. The EAW has also become useful in stopping cross-border common law crime: “In 2014, the Republic surrendered 21 wanted persons to the UK on the basis of EAWs, of whom 6 were surrendered to the PSNI.” The DUP have always been supportive of increasing the operational efficiency of the PSNI and have pushed to increase cooperation with the Gardaí. In 2007, the DUP pushed for the introduction of new laws that would allow both the PSNI and Gardaí to continue travelling over the border when in hot pursuit of a suspect. Similarly, in 2010, the DUP were part of the Northern Ireland Executive that oversaw a new cooperation agreement between the Gardaí and the PSNI,
formalising cross-border structures to help prevent crime.\textsuperscript{64} In 2014, the DUP were also concerned about the potential loss of the EAW after the UK opted out of a hundred block European Justice and Home Affairs measures, citing its “significant operational benefits”\textsuperscript{65} for Northern Ireland. Then UK Home Secretary, now Prime Minister, Theresa May, pragmatically opted back into many of these — including, unsurprisingly, the EAW. The PSNI Chief Constable George Hamilton, has confirmed that there would be “very real operational consequences”\textsuperscript{66} if the EU Justice and Home Affairs structures were not replicated or replaced, while also indicating that he had seen no efforts to do so at this time.

The DUP has always positioned itself as a supporter of the police. As in the other areas discussed, justice has become an area in which cross-border cooperation is now the norm and that previous agreements have entangled the UK with the EU. Consequently, if the PSNI are effectively to carry out their duty in the event of a no-deal Brexit, Northern Ireland must as a priority remain aligned on internal security instruments and access to criminal and internal security databases with Europe.
Under the Phase 1 Agreement, the UK agreed that in the event of a no-deal Brexit, they would 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.” Throughout this report it has been argued that, in order to comply with this agreement, Northern Ireland should effectively remain within the Single Market and Customs Union if there is no deal. The reasons for this are twofold: firstly, there is a need to recognise that the Good Friday Agreement and the institutions that it created are underpinned by the alignment created by the EU between the UK and the Republic of Ireland. A hard Brexit negates such alignment. Alongside this, the funding the EU has provided for Northern Ireland to invest in regional and cross-border partnerships has been
vital in the modernisation of its economy in the post-“Troubles” era. Secondly, there is a purely economic element. While it is true that Northern Ireland trades much more with Great Britain than the Republic of Ireland (Northern Ireland exported 31% of its exports or about £4 billion worth of goods and services to the Republic of Ireland in 2016), many of its key industries and their supply chains are dependent on the seamless access to the Republic that the Single Market guarantees. Losing such access could be devastating to these industries and to the Northern Irish economy as a whole. The Single Market also has the political upside of creating a soft border between Northern Ireland and the Republic. This has helped to reduce the political friction between the two communities, and it is feared that a hardening of the border, with customs posts, could create new and obvious targets for political violence. Overall Northern Ireland is in trade surplus with the whole of the EU which is accountable for more than half of its overall exports and also meaning that Northern Ireland even more so than the rest of the UK needs to have continued tariff free access to EU markets post Brexit.

Despite Northern Ireland voting by 55%-45% in favour of remaining within the European Union, the main block to Northern Ireland’s continuing alignment with the EU Single Market in the event of a no-deal Brexit is the DUP. This is partly due to the party campaigning for a Leave vote and because, according to the voter patterns contained within the 2016 referendum, attitudes towards the EU could largely be ascribed by community background — with Nationalists being largely in favour and Unionists largely against. Despite this, Unionist parties including the DUP have (as has been shown by examining their record in office over recent years) operated in the spirit of pragmatism to increase cross-border cooperation in order to boost the Northern Irish economy and thus have perhaps unintentionally increased the entanglement between the EU (including the Republic of Ireland) and Northern Ireland. This has resulted in cooperative partnerships across many areas, which the DUP perhaps reluctantly, but pragmatically, recognise as beneficial to Northern Ireland, and which it is in their political
interest to protect. Indeed, there is evidence that Leave voters in particular would support having border controls between Northern Ireland and Great Britain if this allowed them to stay simultaneously in both the Single Market and the UK.\textsuperscript{67} This will require large amounts of political capital to sell to their voters, especially in the face of any compromises necessary to restore power-sharing at Stormont; but the economic benefit and institutional stability for Northern Ireland both suggest that remaining in the Single Market in the event of a no-deal Brexit is the most viable long term option for Northern Ireland.

Convincing the DUP’s senior opinion-formers, particularly their hard-line MPs in the House of Commons compared to the more pragmatic Assembly Members, is key in all this. One way to maintain the connection between Northern Ireland and the rest of the UK is literally to build one. The British government could offer to carry out a serious preparatory feasibility study for constructing a fixed link, via tunnel or a combination of tunnel and bridge (to avoid the very deep and unexploded ordnance-filled Beaufort trench in the Irish sea). The shortest distances are considerably less than the Channel Tunnel. This is a major infrastructure project that would excite and unite all Ireland and provide great comfort to the Unionist community in the north.

It would ideally involve a high-speed rail link to Glasgow, Dublin and the future High Speed 2 project. Experience of long-bridge building in China (for example, the Danyang-Kunshan bridge, which is over 150km long and cost around USD 8.5 billion) means that both the engineering and — with sufficient joint UK, EU and ideally EIB loan finance — costs are containable. UK has significant tunneling expertise and resources, with the successful construction of Crossrail (and has as a consequence even opened a tunneling school for apprentices); the expected completion of that project in 2019 will leave many skilled tunnelers seeking employment.

The fixed link would be complemented by the unique advantages this special economic status would give Northern Ireland, as effectively remaining in the economic area of the EU while also fully
in the United Kingdom. This could, if properly marketed, act as a magnet for investment for firms seeking to take advantage both of the UK’s business-friendly common law legal system environment and Northern Ireland’s regulatory alignment with the EU.

Conversely, the risk of the return of a hard border compounds the serious challenge to stability in Northern Ireland posed by the DUP and Sinn Fein’s failure to agree to form a power-sharing Executive (the dispute is currently over an Irish Language law proposed by Sinn Fein, to which the DUP are strongly opposed). Karen Bradley, the UK Northern Ireland Secretary, has faced calls to impose direct rule from London, but unlike during past episodes, the government in London is now dependent on the support of one of the main northern Irish parties — the DUP — which compromises UK government neutrality and impartiality from the Nationalist standpoint. Given the high stakes involved in the Brexit negotiating process, the imposition of conventional, UK-only direct rule risks fatally undermining the confidence in which the Nationalist, mainly Catholic, community holds the devolved northern Irish institutions. This could prove a propaganda coup for extremist Nationalist Republicans opposed to preserving the peace process. There are even rumours (albeit forcefully denied by official sources) that joint British-Irish direct rule is being considered in Dublin, though this is not explicitly provided for by the 1998 Agreement, notwithstanding Dublin’s position as the Agreement’s co-guarantor. However understandable such a step might be from the Nationalist community’s perspective, it would nonetheless be perceived as an institutional shift away from the balance achieved by the 1998 Agreement, and something it would be in the DUP’s very best interests to avoid.

If Northern Ireland power-sharing government and legislative institutions cannot be established, alternative means of resolving the economic, but not the constitutional, status of Northern Ireland may need to be considered. (The constitutional status would remain unchanged, unless the people of Northern Ireland decided otherwise.) This could include the election of a special
convention in Northern Ireland to decide on whether to allow only Great Britain to diverge from the regulatory alignment required, as provided for in Paragraph 50 of the Joint Report, in order to avoid a hard border on the island of Ireland, or even, if necessary, a referendum on the subject.
Annex: Historical Background

“The Troubles” and the Good Friday Agreement

The Northern Irish conflict colloquially known as “the Troubles” is formally described as an ethno-nationalist conflict fought between Unionists (those who want to remain part of the United Kingdom, sometimes referred to as loyalists), Irish Nationalists (those who wanted to create a united Ireland), and British security forces (comprising the police, army and intelligence services). Its roots can be traced back to the sixteenth century. Historical narratives of colonisation and religious division have shaped present day identities. During the Reformation, beginning in the reign of King Henry VIII of England, and culminating in William of Orange’s victory at the Battle of the Boyne in 1690, attempts were made to displace the Irish-Norman nobility (seen from London as pro-Catholic and unreliable) and plant in their territories Protestant settlers, often from Scotland. This process was carried out with most success in the “Plantation” of the northern province of Ulster, when lands were systematically confiscated between 1609-90 and given to settlers.

However, for our purposes, it is sufficient to begin in the early 20th century when, following an armed insurgency, Ireland was partitioned into the Irish Free State (at first an independent Dominion of the British Empire in 1922 after a brief civil war of independence from the UK, and after 1949 a fully sovereign independent Republic) and Northern Ireland, which remained part of the United Kingdom but with “Home Rule.” This autonomy was originally anticipated to apply to the whole of Ireland, but Protestants in Ulster, afraid of being subjected to Catholic-majority “Rome Rule,” conducted a campaign of extra-parliamentary resistance that even included the declaration of a Provisional Government of Ulster in 1913, and obtained separate devolution for their province under the Government of Ireland Act of 1920.
Though the Irish insurgents’ achievement of the Irish Free State rendered fears of “Rome Rule” moot, six counties of Ulster (the Province has nine counties, three of which were allotted to the Free State in the 1921 peace treaty) retained their Home Rule, with a Parliament, Cabinet and even a “Prime Minister” between 1921 and 1972. This was decades before devolved regional autonomy was considered for other parts of the UK such as Scotland and Wales. The partition that resulted was designed territorially, such that Northern Ireland would have a majority Protestant population, as opposed to the majority Catholic population on the island as a whole. This created what its defenders at the time called the “Orange State”, or “a protestant parliament and a protestant state;” but there was widespread discrimination against the minority Catholic population who continued to live in the North.

The border has been a fraught issue ever since. In 1923, following the establishment of the Irish Free State in 1922, Customs borders and checks were established between the 6 counties of the UK Northern Ireland and the 26 counties of the Republic of Ireland (Eire). These lasted until both countries entered the EU in 1973, and in fact regulatory checks persisted until the Single Market was fully established. Concurrently, at the start of the “Troubles” in 1969, military checkpoints were set up to carry out identity checks (notwithstanding the inherent rights under the Common Travel Area); these were only abolished in 2005, seven years after the Good Friday Agreement. In 2008 a memorandum of understanding between Ireland and the UK, both out of Schengen but in the CTA, agreed to a single visa for non-EU visitors to avoid travelers to Ireland circumventing UK immigration controls by using the Common Travel Area.

In the 1960s, the Northern Ireland sectarian administration, always led by the Ulster (or “Official”) Unionist Party, eventually led to the growth of a civil rights movement to oppose electoral gerrymandering and sectarian bias in social housing allocation. While the Northern Ireland government implemented limited reforms in response, the civil rights marches were often met with
counter-protests and police brutality by the then Protestant-dominated Royal Ulster Constabulary, which sparked increasing unrest.74 When the British Government resorted to deploying the British Army in 1969 in order to keep the peace, even the Catholic/Nationalist populations initially welcomed the soldiers as protection against loyalist paramilitaries and a hostile Royal Ulster Constabulary.75 However, amid continuing disagreement over the future constitutional position of Northern Ireland within the Union, IRA and Loyalist terrorism escalated. The controversial introduction of internment without trial by the central government in London and the killing of 45 Catholics taking part in a civil rights march in Derry/Londonderry (an event known as “Bloody Sunday”) turned nationalist sentiment strongly against the British Army. The subsequent campaign conducted by Irish Republican terrorists against the British Army (the activity of Loyalist paramilitary groups also playing a further destabilising and violent role) has come to be known as “the Troubles.”

It would take until 1998 to draw the Northern Irish conflict to its end. By this time, more than 3500 people had died.76 There had been millions of pounds of damage to infrastructure, both military and civilian, both in the Province and on the mainland. How the leadership of Sinn Fein, the Republican political party and its paramilitary wing, the Provisional Irish Republican Army set-up in 1969, (IRA or “Provos”), were convinced to come to the negotiating table remains a subject of dispute. Some, such as William Matchett, claim that the IRA had been so successfully infiltrated by MI5, British Army intelligence, and Special Branch that it was no longer able to operate effectively and was thus forced to the negotiating table.77 Others counter that, after decades of conflict, the leadership finally realised that the British would not withdraw from Northern Ireland despite continuing casualties, and therefore the only way to ever achieve a united Ireland would be through peaceful political means.78 There is a strong element of truth in both accounts: the peace process that emerged from this stalemate really began in earnest in the early 1990s. In 1993, then UK Conservative Prime Minister John Major and Fianna
Fail Taoiseach (Irish Prime Minister) Albert Reynolds agreed the Downing Street Declaration, in which both governments stated for the first time that Northern Ireland’s position within the UK should be decided by the democratic principle of self-determination.\textsuperscript{79} The declaration helped to bring the IRA to declare a ceasefire in 1994, during which the British and Irish governments (the latter led by then Taoiseach John Bruton of Fine Gael) pushed forward with the “Frameworks for the Future” document, which set the parameters for the subsequent Good Friday Agreement.\textsuperscript{80} While the 1994 ceasefire did not last, the landslide election of Tony Blair, the new UK Labour Prime Minister, helped bring new impetus to the talks. Blair was able to draw Sinn Fein back into negotiations and, in 1997, the IRA agreed to another ceasefire during which to negotiate a permanent peace deal with representatives of the British and Irish governments, as well as figures from across the political spectrum in Northern Ireland. The Belfast Agreement, better known as the Good Friday Agreement, was signed on 10th April 1998, and then ratified by referendum in both the Republic of Ireland and Northern Ireland and deposited with the UN as an International Treaty. Notwithstanding some further political violence, most notably the Omagh bomb in August 1998, the Good Friday Agreement is widely considered to signal the end of the Troubles and the beginning of a new chapter in Northern Ireland’s history.

The Role of the European Union in the Northern Irish Peace Process

While there were interventions throughout the “Troubles” by individual MEPs from within the European Parliament, it is important not to overstate the role of the EU in the creation of the Good Friday agreement itself. As Mary Murphy of the University of Cork notes, “neither Irish nor UK authorities viewed accession to the EU [in 1973 and at the same time] as having any significant
direct impact on the Northern Ireland conflict”81 — and within Northern Ireland itself at the time of accession “both Republicans and Paisleyite [loyalist Unionist] were ardently opposed to EU membership, viewing it as at variance with their respective political ideals."82

Despite these Eurosceptic forces in Northern Ireland’s political class, the indirect role the EU has played in the peace process has been significant. Firstly, the EU created a space in which the UK and the Republic of Ireland were required in meetings to speak to each other both regularly and as equals, around the EU Council of Ministers tables in Brussels. While the Republic of Ireland’s entry was largely a consequence of their economic need to continue trading freely with the UK, membership of the EU has allowed it to diversify its economy and make it much less dependent on trade across the Irish Sea. Alongside this, its participation in the European Council, with the appointment of highly regarded EU Commissioners including Peter Sutherland and Charlie McCreevy, has enhanced Dublin’s diplomatic prestige at the top table and, through the operation of EU institutional mechanisms, has reduced the substantive power gap between the Irish and the British as well. This has meant that the UK government was forced to take the concerns of the Irish government throughout the conflict seriously.83 The net result of this is that Brussels European forums offered a chance for both governments to discuss the Northern Ireland conflict, while frequent contact between officials helped build a working relationship that would later facilitate the negotiation of the Good Friday Agreement.84

Secondly, the Good Friday Agreement was able to establish peace by addressing a number of issues to do with identity. It acknowledged and enshrined into law the diversity of nationalities within Northern Ireland by allowing citizens to hold British or Irish passports and to become dual-nationals, although this was merely a formal statement of what was de jure the case already in the eyes of the Irish Republic. At the same time, the Agreement also removed the irredentist clauses in the Irish constitution advancing
unification, and acknowledged that Northern Ireland would remain part of the United Kingdom unless the people of Northern Ireland determined otherwise. The compromise preserved Irish identity within Northern Ireland, while simultaneously helping to alleviate Unionist fears that the Irish government was constantly plotting to reunify the island. Since “collective identity is also by definition about the construction of an ‘other’,” the Agreement has allowed space where communities are able to interact and build new, more inclusive and multi-layered identities. Much like the European project itself which implicitly assumes that “integration would gradually produce a convergence of beliefs, values and aspirations,” the peace process has slowly helped the development of a new non-sectarian Northern Irish identity that overlaps with both communities’ identities. This is enhanced by both the UK and the Republic of Ireland being members of the EU, as both communities can consider themselves to be EU citizens, creating a new point of identity convergence.

However, the greatest role the EU has played has been economic. In the early twentieth century, the Northern Irish economy had prospered in comparison to that of its southern neighbour, but the decline in shipbuilding and other manufacturing industries (Harland and Woolf built their last ship in Northern Ireland in 2003), coupled with the prolonged internal conflict, led to a period of continuous economic decline. As a result of the peace process, new investment began to enter Northern Ireland after 1998. This has included major structural funding from the EU, which has been used to invest in “infrastructure, promotion of economic development and competitiveness, job creation, support for the rural economy (including agriculture and fisheries) and environmental improvements.” Likewise, Northern Ireland’s membership of the EU Single Market has also helped it to attract new businesses that want to establish integrated business operations in both the United Kingdom and the Republic of Ireland. This has helped to regrow the private sector and reduce Northern Ireland’s dependence on public sector employment. Most important of all has been the role of the Single Market in
eliminating the economic border between the two countries. While it is true that elements of such an arrangement did exist through the Common Travel Area before entry into the EU, that freedom of movement agreement only applied to people, not goods. Before joining the EU Customs Union with the UK in 1973, and subsequently for more than a decade before the creation of a true European Single Market, considerable customs and regulatory compliance checks were still required at the border. Given that the military structures of the major paramilitary groups still exist in Northern Ireland, it is rightly feared by security experts that if customs checks are again required, due to tariffs and country of origin as well as regulatory checks, these points would be vulnerable (and easy targets) to terrorist attacks. For example, the high technology border (“maximum facilitation” model) proposed by the UK government would involve a significant amount of precision high-resolution CCTV and computer hardware, vulnerable to sniper attacks. This in turn would lead to checkpoints being protected by an armed force, which would result in a militarised “hard” border, itself a target for further terrorism against military personnel. This cycle of escalation could lead perilously close to a return to the “Troubles,” as the withdrawal of troops from Northern Ireland was a key step taken by the British government — both as part of the peace process and as a symbol of its success. To reiterate: the EU Single Market, combined with the Customs Union which eliminates the need for customs or border checks, is integral to keeping the peace in Northern Ireland.

Finally, the EU’s CAP has had a large impact on Northern Ireland. “Agriculture is more significant in Northern Ireland than any other part of the UK in terms of employment and economic contribution” and CAP payments make up a large percentage of annual farm income. Although there is variation depending on the revenue a farm generates during a year, it is “estimated that for every pound earned by Northern Irish farmers, some 87 pence came from the EU’s Single Farm Payment.” The second pillar of CAP also allows investment in rural development, which has allowed for much needed modernisation of Northern Irish
farms alongside the development of basic rural services such as broadband, and the encouragement of rural tourism.93

Long-term matched funding to the current CAP payments by the British government post-Brexit or a devolved Stormont government is not yet assured.
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[8] UK Prime Minister Theresa May has proposed a compromise “Customs Partnership,” but so far has failed to get either the full British Cabinet’s endorsement or the agreement of the EU27.

[9] Arlene Foster, quoted in Alex Kane: “Successful Brexit is bigger challenge for Foster than going into government with Sinn Fein was for Paisley,” Belfast Telegraph, 14 May 2018.

[10] Simon Coveney: “Andrew Marr Show”, BBC One, 12 May 2018


[12] Michel Barnier: RTE Morning Ireland, 8 December 2017


[32] Belfast Agreement, p14

[33] It is difficult to quantify precisely how much of an impact the EU has had on the island’s economy, but in funding alone EU figures suggest that the Republic of Ireland’s net gain from EU budgets has been €44.6 billion since 1976, https://ec.europa.eu/ireland/about-us/impact-of-EU-membership-on-Ireland_en

[34] Phinnemore & Haywood, p21


[37] ibid., p69


[39] North/South Inter-Parliamentary Association 2017, p66

[40] i. ibid., p67

[41] Blackman, David: “Ireland’s cooperation on energy should continue after Brexit”, https://utilityweek.co.uk/irelands-cooperation-on-energy-should-continue-after-brexit/ (accessed: 01/02/2018)

[44] ibid., p54
[45] ibid., p16
[46] ibid., p23
[47] ibid., p23
[49] “EU Referendum Update”, 2017, p43
[50] Foster, Arlene: “Official Report: Tuesday 14 April 2015”, http://aims.niassembly.gov.uk/officialreport/reports-searchresultsreport.aspx?&eveDate=2015/04/14&ld=29889&hwclid=1183923&m=40&c=0&\p=0&s=4&m=mv=131&\o=0&\av=0&\cv=1&p\v=0&\sv=17&\mi=Foster,%20Arlene&\pi=All%20Parties&si=2014-2015&\k=Jzlt0Rrua-38mkJrlOLAFg==&fd=&td=&\pg=1&pm=0#1183923
[56] ibid., p15
[57] ibid., p16
[59] North/South Inter-Parliamentary Association, p36, 2016
[60] ibid., p36
[61] ibid., p37
References


[68] The term “Republican” is also used to refer to the Nationalist, mainly Catholic side, usually the more extreme and violent parts of it. The term “Loyalist” has a similar function on the Unionist, mainly Protestant side.

[69] William of Orange, Stadtholder of the United Provinces since 1672, was invited to rule Britain in 1688 by a faction of English noblemen opposed to the accession of the Catholic James II, brother of Charles II, to the English throne. The ensuing power struggle, remembered in English historiography as a peaceful “Glorious Revolution,” and in Dutch historiography as the military invasion of England, culminated in William’s victory of at the Battle of the Boyne in 1690.

[70] The sole surviving copy of the Proclamation is now on display at the Ulster Museum, http://www.bbc.co.uk/news/uk-northern-ireland-19662652


It is worth noting that at the time the Belfast Agreement was signed, Article 50 had not been written and there was no formal process for leaving the EU.


[85] ibid., p106


[88] Murphy, p49


