

UK Withdrawal (‘Brexit’) and the Good Friday Agreement

Constitutional Affairs



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT FOR CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

CONSTITUTIONAL AFFAIRS

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Friday Agreement**

STUDY

Abstract

Upon request by the AFCO Committee, the Policy Department for Citizens' Rights and Constitutional Affairs commissioned this study on UK withdrawal and the Good Friday Agreement (the 'Agreement'). It provides an overview of the Agreement and an assessment of the potential challenges posed to its implementation by 'Brexit'. In particular, it examines ways in which – through differentiation and 'flexible and imaginative solutions' – the Agreement can be upheld and the context for its effective implementation maintained.

ABOUT THE PUBLICATION

This research paper was requested by the European Parliament's Committee on Constitutional Affairs and was commissioned, overseen and published by the Policy Department for Citizens' Rights and Constitutional Affairs.

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LINGUISTIC VERSIONS

Original: EN

Manuscript completed in November 2017

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This document is available on the internet at:

<http://www.europarl.europa.eu/supporting-analyses>

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LIST OF ABBREVIATIONS

BIC	British-Irish Council
BIIGC	British-Irish Intergovernmental Conference
CFR	Charter of Fundamental Rights
CJEU	Court of Justice of the European Union
CTA	Common Travel Area
DUP	Democratic Unionist Party
ECHR	European Convention on Human Rights
EEC	European Economic Community
EIB	European Investment Bank
EMU	European Monetary Union
EP	European Parliament
EU	European Union
GB	Great Britain
GFA	Good Friday Agreement
NI	Northern Ireland
NSMC	North/South Ministerial Council
OFMDFM	Office of the First Minister and Deputy First Minister
PEACE	Special EU Programme for Peace and Reconciliation
SDLP	Social Democratic and Labour Party
SEA	Single European Act
SEUPB	Special EU Programmes Body
UK	United Kingdom

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TABLE 1

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Destination of exports and external sales from Northern Ireland and Republic of Ireland (%).

TABLE 2

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Destination and Origin of Northern Ireland Imports and Exports (£m) for Year Ending. 2015.

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MAP 1

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The counties eligible for funding under the PEACE programme, Northern Ireland and the Irish Border Region.

EXECUTIVE SUMMARY

EU membership for the UK and Ireland has provided an essential context for the conception and implementation of the 1998 Good Friday (Belfast) Agreement. UK withdrawal from the EU at least compromises – and could disrupt significantly – that shared context and in so doing undermine both the Agreement *per se* and its effective implementation.

With the UK government leaving the EU customs union and the single market, a hardening of the Irish border becomes inevitable. This will not only affect movement on the island, but symbolically and psychologically represent for many a major step backwards in the peace process and a profound impairment of the Agreement.

UK withdrawal from the EU means that the trajectories of the UK and Ireland will now diverge. The divergence will be wide-ranging and will happen in law, trade, security, rights, policies and politics. Brexit therefore puts the Good Friday Agreement – which was premised on the assumption of common policies and interests across a wide range of policy areas – at risk of deep fissures.

Such fissures, however, are not inevitable. Public statements by the UK government and from the EU-27 reveal a strong and repeated commitment to upholding the Good Friday Agreement in all its parts. Present in all statements from each negotiating side so far is a willingness to show flexibility and to seek out creative and imaginative solutions to the challenges that Brexit poses for Northern Ireland and the island of Ireland as a whole.

It should be noted that all main political parties in Northern Ireland are also party[?]to the Agreement/its successors and its institutions and that all have requested that the specific needs of Northern Ireland (particularly arising from the land border) be addressed in the withdrawal process.

To minimize the threat that Brexit poses to the future of the Good Friday Agreement, minimal disruption to the context for its effective implementation is imperative. This means maintaining as much of the status quo as possible in terms, for example, of the free movement of goods, services, capital and people, and ensuring that every effort is made to avoid any hardening of the border. The Agreement recognises the interrelated nature of 'economic, social and cultural issues' and the UK Government has explicitly acknowledged that the economic prosperity of Northern Ireland is a vital underpinning of the peace process.

It is possible to keep to an absolute minimum the disruption that UK withdrawal will have on the valuable shared context of EU-based integration in which the Good Friday Agreement is implemented. The precedent of differentiated integration within the EU – coupled with the precedent of territorial differentiation within the UK evidenced in the Good Friday Agreement and devolution – provides a valuable departure point for enabling the type of arrangements that would best reflect and protect the unique needs of Northern Ireland in the Brexit process.

There are a range of options for maintaining elements of the status quo; all such options require high-level agreements that recognise the very particular status of the territory of

Northern Ireland but that need not compromise in any way the principles of self-determination and consent that underwrite the Good Friday Agreement. It is possible to retain the free movement of goods, services, capital and people on the island of Ireland; based on (properly secured) regulatory equivalence, it is possible to enable the continued operation of all-island markets and of cross-border supply chains; it is possible for access to different forms of EU cooperation to be maintained for the both jurisdictions on the island of Ireland to uphold levels of cross-border movement in key areas. An opportunity also exists to ensure that the institutions of the Good Friday Agreement, especially the North-South Ministerial Council, are fit for purpose for the post-Brexit environment.

Establishing the post-Brexit arrangements for the island of Ireland will be a process of negotiation. It is imperative that communication from the UK Government and EU in this process is as detailed and transparent as possible, given the risks that uncertainty over the position of Northern Ireland poses to the stability of the peace process.

Both sides need to be flexible and approach issues and solutions from the perspective of what can best ensure the Agreement's unimpeded implementation, in highly practical as well as symbolic ways. For the EU, respecting the integrity of its legal order is of fundamental importance. This should not, however, provide an insuperable obstacle to the EU contributing to solutions addressing the challenges that UK withdrawal poses for the Good Friday Agreement and its implementation. Much of the history of the European integration is one of devising innovative solutions to problems. Precedents and frameworks exist to be exploited to the benefit of Northern Ireland, the peace process and the island of Ireland more generally.

Given the commitment to addressing the 'unique circumstances on the island of Ireland', the language of 'flexible and imaginative solutions' and precedents for differentiation, there is no reason to doubt that the challenges can be addressed. This process is entirely dependent not on technical solutions but on political will. The best way to find this is to consider Northern Ireland not as place of division but as a place of deep connection and integration between the UK and Ireland. This is the fundamental principle upon which the Good Friday Agreement is founded and upon which it stands or falls.

KEY FINDINGS

- EU membership for the UK and Ireland has provided an essential context for the model and implementation of the Good Friday Agreement ('the Agreement'). UK withdrawal from the EU constitutes a significant alteration to that shared context. As such it has the potential to disrupt the effective implementation of the Good Friday Agreement and, with it, the stability of the peace process.

The British-Irish relationship is key

- The Agreement can only be understood as a collaborative achievement, centring on a strong relationship of trust and communication between the British and Irish governments. Maintaining close bilateral cooperation is essential to the effective operation of the Agreement and political stability in Northern Ireland.
- The success of the Agreement has centred on viewing the Irish border, and Northern Ireland more broadly, as a point of contact between the UK and Ireland, not a dividing line between them.

The border conflict is not resolved but managed through multilevel governance

- Ireland's acceptance of the continuation of Northern Ireland's place in the United Kingdom stands alongside British acceptance of the legitimacy of Irish nationalists' wish for future change in Northern Ireland's constitutional status.
- The Agreement is premised on the principles of consent and self-determination for the people on of the island of Ireland alone, North and South, 'without external impediment'.
- The Agreement created conditions that enable multilevel governance, sectoral-specific and territorially-differentiated arrangements within the UK as well as across the island of Ireland.

Shared commitment to upholding the Agreement is essential

- Public statements by the UK government and from the EU-27 reveal a strong and repeated commitment to upholding the Good Friday Agreement in all its parts.
- Present in all parties' statements is a willingness to show flexibility and to seek out creative and imaginative solutions to the challenges that Brexit poses for Northern Ireland and the island of Ireland as a whole. The underpinning rationale is safeguarding the Good Friday Agreement, its continued implementation and the future of the peace process.

The impact of Brexit on the Agreement will be decided even at this early stage

- The nature and effect of Brexit on the Agreement will largely depend on: (i) how the processes of withdrawal and transition are managed; (ii) what arrangements are put in place to govern the future of relations between the EU and the UK; and (iii) the way in which parties to the Agreement are involved in and respond to the changes brought about through Brexit.
- UK withdrawal from the EU means that the trajectories of the UK and Ireland will now diverge. The divergence will be wide-ranging and will be manifest not just in trade and economic policy but also in law, political institutions, security, rights and their safeguards – all areas that reach to the core of the Agreement.

The effects of Brexit on the Irish border are not just economic but social, political, cultural and psychological

- With the UK government leaving the EU customs union and the single market, a 'hardening' of the Irish border becomes inevitable. This will not only affect movement on the island, but symbolically and psychologically represent for many a reversal of the peace process and failure of the Good Friday Agreement.

Maintaining the context for effective implementation of the Agreement

- To minimize the threat that Brexit poses to the future of the Good Friday Agreement, the aim of all parties should be to minimize disruption to the context for its effective implementation.
- This means: (i) maintaining as much of the status quo as possible in terms, for example, of free movement, and ensuring that every effort is made to avoid any hardening of the border; (ii) maintaining the shared regulatory context that has facilitated increased economic integration and interdependence on the island of Ireland, and thus the economic prosperity of Northern Ireland that is a vital underpinning of the peace process; (iii) ensuring continued access to EU programmes and funding that support the implementation of the Good Friday Agreement; (iv) ensuring that there is no diminution or disparity of citizenship rights for citizens born and residing in Northern Ireland.

A specific solution for Northern Ireland requires differentiated arrangements

- The precedent of differentiated integration within the EU – coupled with the precedent of territorial differentiation within the UK evidenced in the Agreement – provides a valuable departure point for enabling the type of arrangements that would best reflect and protect the unique needs of Northern Ireland.
- Respecting the integrity of its legal order is of fundamental importance to the EU but much of the history of European integration entails devising innovative solutions to cross-border problems. Precedents and frameworks can be exploited to the benefit of Northern Ireland, the peace process and the island of Ireland more generally.

Compromise

- Establishing the post-Brexit arrangements for the island of Ireland will be a process of negotiation that must include all sections of the community; prolonged uncertainty and polarisation of political positions is only harmful to the peace process.
- An opportunity exists to breathe new life into the institutions of the Good Friday Agreement, including the North-South Ministerial Council and British-Irish Council, as well as to utilise the potential of some of its as-yet-unrealised precepts.
- The quest for specific solutions will require upholding the language and principles of the Agreement itself; that is to say, avoiding a zero-sum definition of unionist and nationalist interests but instead focusing on the areas of common interest, including where they cross the land border and the sea border.
- Given the commitment to address the 'unique circumstances on the island of Ireland', the language of 'flexible and imaginative solutions' and precedents for differentiation, there is no reason to doubt that the challenges can be addressed.

1. INTRODUCTION

The withdrawal of the United Kingdom (UK) from the European Union (EU) poses important questions for the ongoing operation and future implementation of the 1998 Belfast 'Good Friday' Agreement.¹ This stems as much from the *indirect effects* of fundamentally changing the context within which such an imaginative and ambitious Agreement was made possible as from the *direct effects* that the UK's withdrawal from the EU may have on: (a) Northern Ireland; (b) UK-Ireland relations; and (c) UK-EU relations.

1.1 The 1998 Good Friday (Belfast) Agreement

The Agreement can only be understood as a collaborative achievement, centring on a strong relationship of trust and communication between the British and Irish governments. This relationship was sealed in the compromises that the UK and Irish states made regarding the principle of self-determination for the people of Northern Ireland, i.e. for Northern Ireland to remain in the United Kingdom until such a time as there was a majority referendum vote in both Northern Ireland and the Republic of Ireland for a 'united Ireland'. The multiparty talks that led to the Agreement thus worked from the presumption that, although major change to the constitutional status of Northern Ireland would be provided for in British and Irish legislation, there would be no such change for some considerable time.

In the meantime, the Agreement set out to create political and social conditions that were stable, practical and 'exclusively democratic and peaceful'. In terms of a framework for peace, the Agreement established three strands of institutional governance, formalising power-sharing arrangements between unionists and nationalists in Northern Ireland, extensive North-South cooperation on the island of Ireland and increased East-West cooperation between governments. In terms of the conditions for peace, the Agreement provided principles, policy frameworks and, in some cases institutions, for: human rights, safeguards and equality of opportunity; economic, cultural and social protections; policing and justice reform; and the decommissioning of weapons and de-securitisation.

The Agreement was approved by concurrent referendums in Northern Ireland and Ireland in May 1998 and was subsequently incorporated into British and Irish constitutional law and other areas of legislation. The devolution of powers from Westminster to the new Northern Ireland Assembly and Executive in June 1998 marked the formal start of the implementation of the Agreement. Since then, the Assembly has had a somewhat rocky existence (being suspended for around six years in total) and the implementation of the Agreement remains incomplete. However, although there are critics of the Agreement from all sides, it is indisputable that it remains the bedrock of the peace process and that the institutions and principles it established are essential to finding common grounds for cooperation across all three strands.

¹ The Agreement is also often referred to as the 'Belfast Agreement'. There is sometimes an implicit assumption of unionist or nationalist preference according to the descriptor used. The authors wish to make it clear that none should be accorded in this case. We refer throughout this report to the 'Good Friday Agreement' according to the terms of reference provided from the European Parliament.

1.2. The UK Withdrawal and the Agreement

The UK's withdrawal from the EU – 'Brexit' – has direct implications for the effective implementation of the Good Friday Agreement; the nature and effect of these implications largely depend on three things: (i) how the processes of withdrawal and transition are managed; (ii) what arrangements are put in place to govern the future of relations between the EU and the UK; and (iii) the way in which parties to the Agreement are involved in and respond to the changes brought through Brexit. Essentially, the 'harder' the Brexit the greater the implications for the Agreement and by implication the peace process in Northern Ireland.

If the UK leaves the customs union and single market, with it goes the free movement of goods, services, capital and people across the Irish border. Customs controls and regulatory divergence would lead to an undoubted hardening of the Irish border. More generally, stepping outside the common framework of EU membership would immediately pose some difficulties in sustaining the various forms of cross-border and all-island cooperation that have been hallmarks of the Agreement's success. Moreover, the harder the Brexit, the greater the disruption to the economic and social livelihoods of people across the island of Ireland, especially in the border region. Such disruption would represent a substantive and highly symbolic disruption to the foundation of the peace process.

1.3 The Present Challenge

The fact that UK withdrawal from the EU poses challenges for the Good Friday Agreement, the island of Ireland and the peace process has been acknowledged by the EU response to the UK government's decision to trigger Article 50 of the Treaty on European Union (TEU). The commitment is clear: the Good Friday Agreement 'in all its parts' and the peace process should be protected (European Council, 2017: 11). The UK government has also signalled that the Good Friday Agreement is the 'bedrock of the peace process' and that it must be 'considered and safeguarded' throughout the withdrawal process (UK Government, 2017a). Political stability in Northern Ireland depends on the continued implementation of the Good Friday Agreement.

The challenge for all parties involved in determining the terms of the UK's withdrawal from the EU and the nature and content of the UK's future relationship with the EU is ensuring that neither has a detrimental impact on the functioning of the Good Friday Agreement and so the peace process more generally. The aim of all parties should therefore be to minimize the economic, political, regulatory and social disruption that UK withdrawal will cause for Northern Ireland specifically and for relations between Ireland and the UK more generally.

It follows that a key objective of the Article 50 negotiations and the negotiations on the future UK-EU relationship, at least as far as they concern Northern Ireland, should be to maintain as much of the status quo as possible. To do so would help ensure minimal disruption to the economic, political and legal context for the implementation of the Good Friday Agreement. A second objective should be to ensure that opportunities for the future implementation of the Agreement are not only sustained but ideally enhanced. UK withdrawal from the EU should be used as an opportunity to strengthen the Good Friday Agreement.

The paper argues that these aims and objectives can be achieved, at least to a significant extent, through imagination and flexibility on the part of the UK and the EU. The scale of the challenge will be determined by the nature of the UK's withdrawal. If the UK government persists with its intention to leave the single market, the customs union and the jurisdiction of the Court of Justice of the EU (CJEU), the challenge will be considerable. Opportunities exist, however, through differentiated treatment of Northern Ireland and the further exploitation of the potential for structured cooperation contained in the Good Friday Agreement to address the challenge.

2. THE GOOD FRIDAY AGREEMENT AND THE EU

The Good Friday Agreement was concluded on 10 April 1998 and subsequently approved in referenda in Northern Ireland and Ireland. As the UK government acknowledges, it provides the bedrock of the peace process in Northern Ireland. To appreciate the challenge that Brexit poses to the Agreement and the peace process, it is important to understand the key elements of the Agreement and their role in the peace process, the role that the EU has played in facilitating the Agreement's implementation, and what in practical terms the effects of implementation in a context of shared Irish and UK membership of the EU have been.

2.1. The Agreement: Overview

The adoption and popular approval of the Good Friday Agreement represented a major development in the Northern Ireland peace process. The Agreement comprises two inter-related documents: a multi-party agreement by most of Northern Ireland's political parties (the Multi-Party Agreement); and an international agreement between the British and Irish governments (the British-Irish Agreement) (The Agreement, 1998).

The key elements of the Good Friday Agreement most relevant to the present challenges relating to the UK's withdrawal from the EU are as follows:

2.1.1 Declaration of Support

This statement commits the parties to the agreement to 'the achievement of reconciliation, tolerance and mutual trust and to the protection and vindication of the human rights of all' (2).² It notes that the political aspirations of the parties are 'equally legitimate' although there are substantial differences between them. The parties say that they will 'endeavour to strive in every practical way towards reconciliation and rapprochement' within the democratic arrangements provided (5). The text also notes that all the institutional and constitutional arrangements provided for in the Agreement are interlocking and interdependent. It also recognises that the success of the Assembly and the North/South Council 'depends on that of the other' (5).

2.1.2 Constitutional Issues

The principles of consent and self-determination are central to the Agreement. The signatories:

recognise that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given (1.ii)

² Quotations from text in the Agreement here are referenced according to the number given to the paragraph in the published text of the Agreement, under the relevant heading, e.g. Declaration of Support.

On consent, the Agreement states any change to the status of Northern Ireland from being part of the United Kingdom to bringing about a united Ireland would be wrong without the consent of a majority of the people of Northern Ireland (1.iii). On self-determination, the key provision relates to the possibility of a united island following separate and concurrent votes in Northern Ireland and Ireland. It states that the British and Irish Governments would be under a binding obligation to give effect to the wish for a united Ireland if these referendums found a majority in favour in both jurisdictions.

The Agreement also asserts that no change to the status of Northern Ireland should affect the birthright of 'all the people of Northern Ireland' to 'identify themselves and be accept as Irish or British, or both' (1.iv).

The Agreement also provides for institutions that have unique competence to operate on a genuinely all-island (not just cross-border) basis. The amendment to Article 29 of the Irish Constitution states:

Any institution established by or under the Agreement may exercise the powers and functions conferred on it in respect of all or any part of the island of Ireland.

2.1.3 Strand One: Democratic Institutions in Northern Ireland

The Northern Ireland Assembly is the prime source of authority in respect of all devolved responsibilities. In this section, it is established that the European Convention on Human Rights (ECHR) and any Bill of Rights for Northern Ireland (anticipated then but as yet unrealised) are to stand as:

safeguards to ensure that all sections of the community can participate and work together successful in the operation of these [devolved] institutions and that all sections of the community are protected (5.b).

There is a statutory obligation to promote 'equality of opportunity' in specified areas and 'parity of esteem between the two main communities', monitored by the Equality Commission (5.d).

The duties of the First Minister and Deputy First Minister will include co-ordinating 'the response of the Northern Ireland administration to external relationships' (18).

There is an option of the Assembly seeking to include Northern Ireland provisions in UK-wide legislation, especially (but not, therefore, exclusively) on devolved issues (26e). Article 27 in this section states: 'The Assembly will have authority to legislate in reserved areas with approval of the Secretary of State and subject to Parliamentary control.'

Finally, this section anticipates the establishment of a consultative Civic Forum for 'social, economic and cultural issues', comprising representatives of business, trade union and voluntary sectors among others (34).

2.1.4 Strand Two: North/South Ministerial Council

The North/South Ministerial Council (NSMC) is intended to exchange information, develop consultation, cooperation and action within the island of Ireland. The goal here is to 'reach agreement on the adoption of common policies' where relevant, or alternatively to decide on policies for separate implementation (5). This includes through 'implementation on an all-island and cross-border basis' on 'matters of mutual interest' within the competence of the Northern Ireland Executive and Irish Government (1). It is also charged with considering the EU dimension of such policies and of ensuring that its common NSMC views 'are taken into account and represented appropriately at relevant EU meetings' (17). Either the Northern Ireland Executive or the Irish Government can propose any matter for consideration or action by the NSMC.

Powers with legislative authority have been transferred from the Governments to the North/South Implementation bodies. The Agreement contained an Annex for this section which suggested a wide range of areas for North/South cooperation and implementation (see 2.2 below). It was also envisaged that there would be a Joint Parliamentary Forum and an Independent consultative forum to accompany the work of the NSMC; as with the Civic Forum in Strand One, these measures have not been implemented.

2.1.5 Strand Three: British-Irish Council

The British-Irish Council (BIC) is to 'promote the harmonious and mutually beneficial development of the totality of relationships among the peoples of these islands' (1). It incorporates both Governments, the Executives/Governments of the devolved nations and regions, plus representatives of the Isle of Man and Channel Islands. The BIC remit is similar to the NSMC but working on an East/West basis. It is suggested that issues for discussion would include transport, environment, agriculture, cultural issues and 'approaches to EU issues' (5). It was envisaged that the BIC would produce 'practical cooperation on agreed policies' (5). In addition, the Agreement allowed that two or more members of the BIC could develop bilateral or multilateral arrangements between them. These could include:

mechanisms to enable consultation, co-operation and joint decision-making on matters of mutual interest; and mechanisms to implement joint decisions they may reach. These arrangements will not require the prior approval of the BIC as a whole and will operate independently of it (11).

For the British-Irish Intergovernmental Conference (BIIGC) – the forum for bilateral cooperation between the two Governments – there was intended to be 'regular and frequent meetings' regarding non-devolved matters on which the Irish Government 'may put forward views and proposals'. This is:

In recognition of the Irish Government's special interest in Northern Ireland and of the extent to which issues of mutual concern arise in relation to Northern Ireland (5).

The BIIGC was also intended to facilitate cooperation in security matters.

Both the BIC and the BIIGC were, according to the text of the Agreement, to contribute to any review of the overall political agreement' (12).

2.1.6 Rights, Safeguards and Equality of Opportunity

The parties to the Agreement affirmed their commitment 'to the mutual respect, the civil rights, and the religious liberties of everyone in the community', this included 'the right to seek constitutional change by peaceful and legitimate means' and 'the right to pursue democratically national and political aspirations' (1). The British Government committed itself to complete incorporation of the European Convention on Human Rights (ECHR) 'with direct access to the courts, and remedies for breach of the Convention' into Northern Ireland law (2). The Irish Government similarly committed to bringing forward measures that would 'ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland' (9). In addition to the Northern Ireland institutions, a joint committee of representatives from the Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission was envisaged 'as a forum for consideration of human rights issues in the island of Ireland' (10).³

This part of the Agreement decreed that an 'essential aspect of the reconciliation process' is 'the promotion of a culture of tolerance at every level of society' (13). It is interesting that it is under this heading that policies for sustained economic growth and stability in Northern Ireland are incorporated. The connection between economic prosperity and tackling division is evident in the proposition for a regional development strategy 'tackling the problems of a divided society and social cohesion in urban, rural and border areas' (2i). In the Agreement, economic, social and cultural issues are seen as closely interlinked.

2.2. The Agreement: Implementation

2.2.1 Incomplete and unsteady implementation

The Agreement was validated through concurrent referendums in Ireland and Northern Ireland in May 1998. Legislation was passed in Westminster and the Oireachtas to bring the Agreement into force in June 1998. As noted, there are a number of tenets of the Agreement that have not been implemented. These are primarily those institutions that are more innovative and that entail closer levels of cross-border cooperation, such as the Civic Forum and the independent north/south consultative forum.

Much of the difficulty in the functioning of the core parts of the Agreement has been related to tensions internal to Northern Ireland. These tensions became particularly acute as the moderate, centrist unionist and nationalist parties of the Ulster Unionist Party and the Social

³ Notably, this joint committee made a statement asserting the risks posed to the Agreement by the Conservative Government's proposals to repeal the Human Rights Act of 1998 and replace it with a British Bill of Rights, diluting the power of the European Court of Human Rights and its jurisprudence in Northern Ireland (see <http://www.nihrc.org/news/detail/joint-statement-of-irish-human-rights-and-equality-commission-and-northern>)

Democratic and Labour Party (SDLP) were steadily overtaken by the Democratic Unionist Party (DUP) and Sinn Féin as the largest parties in the Assembly. The interlocking nature of the institutions has meant that tensions between the main unionist and nationalist parties have effectively prevented progress in the implementation of the Agreement across all three strands. The long period of suspension from October 2002 to March 2007 was only lifted through an additional agreement, the St Andrews Agreement of October 2006⁴, which followed negotiations between the parties. In signing up to this 2006 Agreement, the DUP moved from being an anti-Agreement party to holding the seat of First Minister in the re-established Northern Ireland Executive. The DUP were also key to the Stormont House Agreement (23 December 2014) and the Fresh Start Agreement⁵⁶ (17 November 2015), both of which built on the 1998 Agreement in efforts to deal with outstanding difficulties in the peace process. All successor agreements to the Good Friday Agreement include strong cross-border dimensions and clear roles of leadership for the Irish government alongside that of the UK.⁷

The last two decades have not been without their difficulties for the implementation of the Good Friday Agreement. Power-sharing in Northern Ireland has been suspended on a number of occasions and indeed negotiations are currently [November 2017] ongoing on the formation of a power-sharing executive following the elections to the Northern Ireland Assembly in March 2017. The absence of a Northern Ireland Executive also means that the NSMC has not met since November 2016. It has nevertheless been established and has met on over twenty occasions since its inaugural meeting in 1999. Sectoral and meetings take place in the twelve areas of cooperation already noted and there are also institutional meetings to consider cross-sectoral issues.

Progress has also been achieved under Strand Three of the Agreement on the East-West dimension of cooperation. Structures have been established through the BIC, although activity has not been as great as anticipated and the BIIGC has not met since 2007.

2.2.2. The Agreement and cross-border connections

The institutions established by the Good Friday Agreement fundamentally altered the nature of cross-border working on the island of Ireland. The administrative cooperation precipitated by the Agreement was no longer restricted to a few civil servants involved in specific policy areas as in the early 1990s (Tannam, 2006: 11). Under the terms of the Agreement, Irish and Northern Irish ministers are responsible for designated areas of cross-border co-operation thus necessitating dedicated teams in each civil service department overseeing policy relevant to the activities of the NSMC (Tannam, 2006: 12). The Agreement therefore catalysed support for cross-border cooperation at the highest level and strengthened the infrastructure to facilitate its effectiveness.

⁴ See <http://cain.ulst.ac.uk/hmsa/nistandrewsact221106.pdf>

⁵ See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/390672/Stormont_House_Agreement.pdf

⁶ See https://www.northernireland.gov.uk/sites/default/files/publications/nigov/a-fresh-start-stormont-agreement_0.pdf

⁷ For example, in the Stormont House Agreement, the Irish government commits to establishing a joint Independent Commission on Information Retrieval with the UK government, to ensuring all relevant Irish bodies cooperate in the investigation of Troubles-related incidents and to engaging in regular review meetings of the Agreement's implementation. And in the Fresh Start Agreement, the Irish government commits to a cross-border Joint Agency Task Force tackling paramilitarism, to significant financial contributions (largely with a view to accessing EU funding for cross-border projects) and to regular review meetings with the Northern Ireland Executive and UK government.

The extent of cross-border and north-south cooperation is evident in the work of the Special EU Programmes Body (SEUPB)⁸ and the EU-27's request in the Article 50 negotiations that the UK government detail how it plans to safeguard cooperation in 142 areas or current activity. The list of areas is as yet unpublished. It is based on, but clearly extends beyond, the twelve specific areas for cooperation and implementation explicitly set out in the Agreement.⁹ Such areas include: agriculture (animal and plant health), education (teacher qualifications and exchanges), transport, environment (protection, pollution, water quality, waste management), social security/welfare (e.g. entitlements of cross border workers and fraud control), aquaculture and marine matters, health (e.g. accident and emergency and other related cross border issues), and urban and rural development. Other notable areas where cooperation has occurred include on energy and the establishment of a Single Electricity Market, and on justice and security issues.

All else aside, the Good Friday Agreement created the conditions that brought an end to nearly three decades of conflict in Northern Ireland. In doing so it paved the way for a sustained period of relative peace which saw a Northern Ireland Assembly elected, a power-sharing Executive established, significantly improved political relations between Northern Ireland and Ireland, the promotion of human rights and equality, a dramatic increase in cross-border cooperation, and significant examples of increased economic integration and interdependence on the island of Ireland.¹⁰

2.3. The EU and the Agreement: Context, model, stimulus

Both the practice and the model of intergovernmental relations in the EU have made the effect of common membership of the EU on the relationship between the UK and Irish governments an important factor for change. The EU has also had a direct impact on the process of normalisation and reconciliation through its economic influence. Yet the most crucial influence the EU has had on the resolution of the conflict in Northern Ireland has been an indirect one, affecting the structures, context and language of conflict resolution in the region. Laffan (2003) outlines four dimensions of the model offered by the EU that made a difference in the peace process in Northern Ireland: the 'adequacy of partial agreement', 'the importance of institutional innovation', 'problem-solving pragmatic politics', and 'the sharing of sovereignty'. This reflects the nature of the EU as a diverse organisation whose substantial effects are determined at the level of the recipient (Hayward, 2007). It is a model that was most appropriate to the conflict in Northern Ireland itself, which is multilevel and has required a peace process that works at all these levels. Ultimately, it appears that it is not so much the actors or structures of the EU but the actual process of European integration itself that has served to facilitate cooperation across ideological, political and territorial borders.

⁸ See <https://www.seupb.eu/>

⁹ 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.

¹⁰ Among other aspects of the Good Friday Agreement to have been implemented are: the decommissioning of weapons by paramilitary groups; a reduction in the size of the British Army presence in Northern Ireland; the removal of security installations, notably at the border; a reform of policing; and the devolution of responsibility for policing and justice.

2.3.1. References to the EU in British-Irish agreements

The preamble to the Anglo-Irish (Hillsborough) Agreement of 1985, which formalised the Irish dimension to the governance of Northern Ireland, acknowledges the importance of the European context to this relationship:

Wishing further to develop the unique relationship between their peoples and the close co-operation between their countries as friendly neighbours and as partners in the European Community (Anglo-Irish Agreement, preamble)¹¹

The strengthening relationship between the British and Irish governments in the peace process was sealed in the 1993 Downing Street Declaration and the 1995 Framework Documents. The earlier of these documents flags the importance of the context of European integration to the new institutions and structures envisaged as means of resolving the conflict:

The British and Irish Governments will seek, along with the Northern Ireland constitutional parties through a process of political dialogue, to create institutions and structures which, while respecting the diversity of the people of Ireland, would enable them to work together in all areas of common interest. This will help over a period to build the trust necessary to end past divisions, leading to an agreed and peaceful future. Such structures would, of course, include *institutional recognition of the special links that exist between the peoples of Britain and Ireland as part of the totality of relationships, while taking account of newly forged links with the rest of Europe*. (Downing Street Declaration, Article 9, emphasis added)¹²

The 1995 Framework Documents went further in outlining one such possible institution – a North/South Council – and considering the importance of the EU dimension to the work of such a body. It is worth noting here that what was anticipated here for the North/South Council was considerably more advanced than that which has eventually unfurled for the NSMC as it became. Nonetheless, it shows the recognition at that time of the importance of an all-island approach to common issues regarding the EU.

Specific arrangements would need to be developed to apply to EU matters. *Any EU matter relevant to the competence of either administration could be raised for consideration in the North/South body*. Across all designated matters and in accordance with the delegated functions, both Governments agree that the body will have an important role, with their support and co-operation and in consultation with them, *in developing on a continuing basis an agreed approach for the whole island in respect of the challenges and opportunities of the European Union*. In respect of matters designated at the executive level, which would include all EC programmes and initiatives to be implemented on a cross-border or island-wide basis in Ireland, *the body itself would be responsible, subject to the Treaty obligations of each Government, for the*

¹¹ See <http://cain.ulst.ac.uk/events/aia/aiadoc.htm>

¹² See <http://cain.ulst.ac.uk/events/peace/docs/dsd151293.htm>

implementation and management of EC policies and programmes on a joint basis. This would include the preparation, in consultation with the two Governments, of joint submissions under EC programmes and initiatives and their joint monitoring and implementation, although individual projects could be implemented either jointly or separately. (Article 26, Framework Documents, emphasis added)

Although the EU is given slightly more prominence in the text of the Good Friday Agreement, the 1995 Framework Documents are slightly less expansive regarding the potential capacity of a North/South body for addressing EU matters.

There are three main mentions of the EU in the text of the Good Friday Agreement. The first is with regard to terms being agreed to 'ensure effective coordination and input by Ministers [from the Northern Ireland Executive] to national [UK] policy-making, including on EU issues' (Strand One, para.32). A second set of references relate to the work of the NSMC and include a commitment to consider 'the European Union dimension of relevant matters, including the implementation of EU policies and programmes and proposals under consideration in the EU framework' (Strand Two, para.17). Related to this is a commitment to 'ensure that the views of the [North-South Ministerial] Council are taken into account and represented appropriately at relevant EU meetings' (ibid). Among the areas for North/South cooperation and discussion are '[r]elevant EU programmes' and matters 'in relation to the EU' (Strand Two, Annex, point 8 and para.3.iii); and among suitable matters of discussion for the BIC are 'approaches to EU issues' (Strand Three, paras.5 and 31). A third reference simply echoes that of the 1985 Agreement, in stating that the UK and Irish governments '[wish] 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' (British-Irish Agreement, preamble).

The limited number of references to the EU in the text of the Good Friday Agreement 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 assumption that both the UK and Ireland would remain members. As is widely argued, that shared membership meant that the EU provided a valuable economic, legal and political context in which the Agreement could – and would – be implemented. Moreover, the EU has been from the outset a vocal and financially generous supporter of the peace process and the Good Friday Agreement's implementation.

2.3.2. Reframing the problem in the EU context

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*. The constitutional amendments, institutions and principles of the agreement embody the assumption that the contested nature of the Irish border is at the heart of the conflict and is reflected in binary opposition between British/Unionist and Irish/Nationalist. As such, there is no reference to 'Protestant' or 'Catholic' in the text of the Agreement; euphemisms of 'both communities and traditions' are used instead.

This is quite deliberate; in so doing, the Agreement could be underpinned by a solid relationship between the British and Irish governments. If the two governments could agree on an approach to the border then the assumption was that this would enable progress within Northern Ireland between communities that would look either to London or to Dublin for guidance. This approach in principle acknowledges the legitimacy of both aspirations for Irish unification and for Northern Ireland remaining in the United Kingdom, even though they directly conflict. Moreover, in practice, it enables the management of the border in a way that emphasises practical benefit and common interest. Thus, the Good Friday Agreement embodied a framing of the conflict that has been present since the early 1980s, but that only became possible as the EU developed.

The institutions of the Agreement sought to *reframe the border as a point for cooperation not conflict*. These institutions were framed by constitutional adjustment in the two states to include Ireland's acceptance of the continuation of the status quo and British acceptance of the possibility of change in Northern Ireland's constitutional status (Hayward 2009). In so doing, *the border conflict was not removed or resolved, but managed differently*. More broadly, the language and convention of EU policymakers created 'an open space for contending parties to talk about solutions to old problems in a new way and to act upon that' (Meehan 2000:96). Most fundamentally, common EU membership has transformed the British-Irish relationship at both a symbolic and practical level (Guelke 2001:259; Laffan 2017).

Ultimately, it appears that it is not so much the actors or structures of the EU but the actual process of European integration itself that has created the external environment and model that made possible the imaginative frameworks for cross-border and intergovernmental cooperation in the Good Friday Agreement.

2.3.3. The EU stimulus for cross-border cooperation and economic development

All-island economic activity up to the early 1990s was characterised by 'fragmentation' (Bradley, 1995: 40) and the poor integration of the economies of Ireland and Northern Ireland meant lost opportunity for growth in each jurisdiction. Even in practical terms, long delays for trucks at the border for customs processing prior to the creation of the single market inhibited and obstructed cross-border trade. In addition, there was the poor quality of road and railway systems connecting the two parts of the island (MacEnroe and Poole, 1995: 120). Based on import and export statistics provided by the Central Statistics Office, total trade between the Ireland and Northern Ireland in 1993 was IR£1,127 million. As Table 1 indicates, trade figures in the early 1990s showed the dominance of Great Britain (GB) as a market for both Northern Ireland and Ireland and low levels of cross-border trade.

	Northern Ireland (1991)	Republic of Ireland (1993)
Great Britain	54.5	24.9
Republic of Ireland	10.6	-
Northern Ireland	-	3.6

	Northern Ireland (1991)	Republic of Ireland (1993)
Rest of EU	19.4	39.8
Rest of world	15.5	31.7
Total	100.0	100.0

Table 1: Destination of exports and external sales from Northern Ireland and Republic of Ireland (%) (MacEnroe and Poole, 1995:112)

Weak cross-border trade figures were matched by low indicators of social connection across the border. According to an analysis in 1989 the number of passengers travelling by rail between Belfast and Dublin was no more than 25% of what would be expected between two such cities of comparable size (Smyth, 1995: 165). And, using the volume of inter-city telephone traffic as an index for inter-city economic links, one commentator recorded the amount of traffic between Dublin and Belfast to be only about two fifths that of the Dublin-Cork route in 1995 (Walsh, 1995: 62).

In the aftermath of the Single European Act (SEA 1987) calls for greater economic co-operation between Irish and Northern Irish markets increased; these were led particularly by business leaders across the island (Tannam, 2006: 4). The advance of localised cross-border cooperation was predominantly a result of EU involvement (Brennan, 1995: 75). The implementation of the first INTERREG programme involved the genesis of joint management structures involving state bodies, agencies and local representatives from both sides of the border required to oversee major infrastructural projects financed under the programme (McAlinden, 1995: 78). Added to this, the European Commission criteria for regional funding led to designation of the Irish border region as of 'objective one' status. Thus, the incentives for the Irish government and Northern Ireland Executive to adhere to Commission requests for partnership and for evidence of subsidiarity increased (Tannam, 2006:11).

In public administration perceived conflicts of interests and a lack of shared priorities between the two civil services limited the impact of EU programmes and integration (Tannam, 1999: 160). Differences in administrative traditions and variation in the treatment of cross-border partners operating in their non-domestic jurisdiction at times led to irresolvable problems in cooperative working (McAlinden, 1995: 79). In short, early cross-border co-operation suffered from a lack of planning and co-ordination by central administration (ibid, 1995: 81). Yet, the case for 'coordinated development' gained momentum in the early 1990s under the influence of the EU programmes and through significant support from the British and Irish governments; such momentum was catalysed further by ceasefires in Northern Ireland in 1994. Thus cross-border cooperation was increasingly viewed as the 'logical and efficient way of exploiting the strength of the island's human and physical resources', for the benefit of all (Bradley, 1995: 48).

Economic cooperation, integration and interdependence has accompanied the growth of cooperation in policy and political fields over the course of the peace process. Cross-border trade on the island of Ireland has grown substantially in the post-Agreement era. In 2015, Ireland accounted for 61% of Northern Ireland's exports to the EU and for 34% of Northern

Ireland's total exports. It also accounted for 49% of imports from the EU and 27% of total imports (House of Commons, May 2016).

Exports		£m	%	Imports		£m	%
Republic of Ireland	of	2,133.4	34.1	Republic of Ireland	of	1,647.1	26.8
USA		1,047.1	16.8	China		1,056.8	17.2
Canada		367.7	5.9	USA		497.6	8.1
Germany		333.8	5.3	Germany		365.1	5.9
France		307.6	4.9	Netherlands		342.3	5.6

Table 2: Destination and Origin of Northern Ireland Imports and Exports (£m) for Year Ending, 2015 (HMRC, 2015: 20)

In sum, in 1995, trade between Northern Ireland and Ireland was valued at €1644.7m; by 2015 this had risen to €2988.3m (InterTrade Ireland, 2017). Through this trend, the value of Northern Ireland exports to Ireland was of consistently higher value than trade in the other direction. Whilst this began from a relatively small differential (€828.7m North to South and €816m South to North in 1995), by 2015 the importance of cross-border trade was disproportionately more significant for Northern Ireland, with North to South trade valued at €1830.3m compared to €1158m for South to North (InterTrade Ireland, 2017). This indicates that cross-border trade is proportionately very significant for Northern Ireland, that it has grown exponentially since the 1998 Agreement, and that the trend is upwards. Exports accounted for 20% of Northern Ireland's Gross Value Added (compared to the UK average of 17%). There was a 15.5% increase in the value of exports to the EU from Northern Ireland between 2015 and 2016 alone (55% of Northern Ireland's exports go to the EU). Ireland also accounted for 49% of imports from the EU and 27% of total imports to Northern Ireland (House of Commons - Northern Ireland Affairs Committee, 2016). The value of cross-border trade itself leapt 66% between 1997 (€2217m) and 2007 (€3799) when the financial crisis hit. Since then it has fallen back to €3000m in 2014 and 2015. We can see that the course of the peace process has been matched by steady growth in trade for Northern Ireland, most especially for trade with Ireland.

The *active* intervention of the EU in Northern Ireland has been essentially conducted through its programmes for economic and regional development. As a central driver and facilitator of economic integration, the European Commission has thus been generally seen as an external and beneficent player in relation to Northern Ireland as a region of the EU (Teague 1996). The funding power of the EU has provided the EU with its most substantial path of influence on those sections of society directly affected by the conflict, i.e. at local and regional levels. Conditions for EU funding in areas such as communications, agriculture and tourism have necessitated cooperation between authorities, organisations, firms and political actors on both sides of the divide, both unionist/nationalist and north/south.

The EU has been particularly successful in forging change in cross-border economic relationships in Ireland through its structural impact on the significance of the border as an

economic and customs divide. The 1990s economic boom in Ireland (with growth rates far exceeding that of the UK) – linked at least in part to 'enthusiastic embracing of EU initiatives' – encouraged individuals and organisations in Northern Ireland to be far from hostile to economic interaction with their 'island neighbours' (Bradley and Hamilton 1999:37; D'Arcy and Dickson 1995: xv) and this has continued. It is reflected in the fact that Ireland's share of trade from Northern Ireland is steadily growing and that the border region is now effectively a 'dual currency region'.

This has been crucially facilitated by the general context of economic integration. For example, the introduction of EEC regulations on customs declarations in 1987 had an immediately positive effect on the ease with which goods could be transported between Northern Ireland and Ireland. Many further obstacles to cross-border trade and economic development were eroded with the single market project. Bradley's (1995:49) prediction that, '[j]ust as the Single European Market and EMU contain an internal logic of further integration, so too a process of North-South co-ordinated development is likely to lead inexorably to suggestions for further harmonisation and policy convergence' was supported by the straightforward economic necessity for cooperation (Goodman 2000; Tannam 1996).

3. THE AGREEMENT AND THE CHALLENGES OF BREXIT

There are some that dismiss arguments that the implementation of the Good Friday Agreement will be affected by Brexit. After all, as noted, the text of the Agreement contains few explicit references to the EU. However, as most informed commentators note, when the Agreement was concluded it was simply not contemplated that either Ireland or the UK would leave the EU. This is a view endorsed by the UK Supreme Court in its *Miller* ruling (McCrudden, 2017).

The UK decision to withdraw from the EU has therefore led to justifiable concerns for the future implementation of the Agreement and for the future of the peace process in Northern Ireland. For many commentators and observers UK withdrawal and especially the prospect of a hardening of the Irish border threaten the peace process. For Burke (2017):

Brexit has shaken the foundations of the peace process in Northern Ireland. The majority of Ulster's voters opposed Brexit, and Irish nationalists in the province believe that the constitutional changes it requires will reverse many of the gains of the Good Friday Agreement.

For Doyle and Connolly (2017):

the vote has the potential to destabilise the idea of incremental progress embodied in the Good Friday Agreement. The potential also exists for increased instability to be deepened by the worsening economic situation for Northern Ireland in a post Brexit world.

For the *Financial Times* (2017a):

Far too little attention is being paid to the most difficult question: how to avoid a "hard" border between Northern Ireland and the Irish Republic.

It is hard to overstate how important this is. Northern Ireland is far from free of sectarian tension, but in the 20 years since the Good Friday Agreement, life in the province has improved immeasurably. Anglo-Irish relations have also been transformed. The invisible land border has been crucial to economic development, with supply chains and small traders criss-crossing it. It is also of huge symbolic importance

Brexit could be profoundly destabilising.

The concerns focus on the disruptive effects that Brexit could have, depending on the terms of withdrawal, the future UK-EU relationship and domestic UK handling of the withdrawal process, on the Agreement's implementation. Much attention rightly focuses on the border and the challenges that UK withdrawal from the customs union in particular pose. It is important to note, however, that there are concerns beyond the border that need to be addressed if the Good Friday Agreement is to be upheld, its implementation assured and the peace process sustained. Concerns fall into three broad and in some cases overlapping categories: (i) the stability of the peace process; (ii) the nature of the border and cross-border cooperation; and (iii) equality and rights.

3.1. The stability of the peace process

The desire of all parties within Northern Ireland is to retain the very open border that has been institutionalized in the Good Friday Agreement. As discussed above, the EU has provided a vital context and model for the institutions, cross-border cooperation, rights and safeguards necessary for enabling this flexibility. Above all, the Good Friday Agreement is premised on the fact that sovereignty can be shared and that national power is enhanced through transnational cooperation. Accordingly, the power-sharing arrangements only work if there is some form of compromise on the part of all concerned in order to bolster the positions of the other parties as a means of securing their own. In this sense, it is in accordance with the logic of European integration, collective action etc. This relies on a sense of all parties wanting the same outcome and on both countries concerned heading in the same direction.

Remove one of these states from the EU and immediately there are problems, not just economically and legally but also in terms of heightened political sensitivities as to the diverging trajectories of the two guarantors of the Good Friday Agreement. Divergence between the UK and Ireland automatically has a polarizing effect on the two main political communities in Northern Ireland. Furthermore, that the UK and Irish governments find themselves on opposite sides of the negotiating table in Brussels makes it almost impossible for them to facilitate agreement between the political parties, as has been essential for all major steps of progression in the peace process to date.

The March 2017 Assembly elections and June 2017 snap Westminster election demonstrated how polarisation around Brexit has deepened since the referendum result in June 2016. In

the referendum, 56% had opted, on a 63% turnout, to remain in the EU. There was a strong ethno-national basis to voting, with around 85% of Catholic/Irish/nationalist voters supporting 'Remain' and some 38% Protestant/British/Unionist voters supporting 'Leave'. In a direct conflation of Brexit with the so-called constitutional question, the ending of the unionist majority in Stormont has intensified calls for a border poll. At the same time, the DUP's 'deal' with the Conservative government has given the impression that they are happy to see Westminster as the sole hub of decision-making for Northern Ireland – something which contravenes both the spirit and the tenets of the Good Friday Agreement. As things stand, therefore, the two largest parties appear propelled towards London and Dublin respectively, rather than towards compromise.

In addition to the conditions of polarization and stalemate at the level of Northern Ireland politics, there are two other direct concerns for the stability of the peace process. The first is that uncertainty regarding the future status of the border and lack of a functioning power-sharing institution – not to mention the fact that Northern Ireland's majority 'Remain' vote has been overridden by the UK-wide majority – serve to create the conditions in which dissident republicanism can gain traction. On the other side, spurred in part by talk of a border poll and thus the prospect of change to the constitutional status of Northern Ireland, some loyalists have also expressed a determination to ensure that there is no weakening of the UK, including a willingness to use violence to 'defend' the union. The UK government has to date acknowledged the challenge posed by the still-existing paramilitary groups on both sides in two ways, both of which centre on the question of the future border. The first is to state repeatedly that there will be no physical infrastructure for controls at the border (not least because such infrastructures will be a target for as well as an affront to hardline republicans). The second is to assert that there will be no weakening of the constitutional or economic integrity of the UK by putting barriers within the UK.¹³

As yet however we are still to get beyond a focus on the idea that there is one border and that there is a clear either/or choice as to whether it be a land or sea border. The Good Friday Agreement institutionalised a concept of the border that recognized the fact that: (i) there are layers of borders for different types of purposes (i.e. a border for customs may be different to the border for passport controls); and (ii) there can be common interests across borders that can be met through cross-border cooperation for the mutual benefit of all. This progressive view of borders is essential to the Agreement and institutionalised in the bodies and practices at its three strands. As long as the discussion around the UK withdrawal is framed in a zero-sum view of 'the border', it will provoke a response that automatically juxtaposes Ireland against GB thus polarizing opinion within Northern Ireland.

Finally, there is also the fact that the legacy of the conflict remains a live and sharp political, social and cultural reality. Particularly but by no means exclusively in the border region, the psychological and emotional response of individuals from all communities to the prospect of Brexit is deeply affected by their experience of the conflict. A recent study of local communities in the Central Border Region revealed that the very prospect of Brexit is already having a profound effect, not least by raising 'the border' again as a prominent issue for political (and contentious) debate (Hayward, 2017). Even though, as noted above, much of what enables the land border to be quite so porous is due to common EU membership, people

¹³ See David Davis's comments at the press conference following the sixth round of Article 50 negotiations on 10 November 2017 (Davis, 2017).

tend to view the open border primarily as a sign of the success of the Agreement and the peace process. Any hardening of the border will thus be seen as a reversal of the peace process and by many as a 'reopening of the wound' of the conflict.

3.2. The nature of the border and cross-border cooperation

3.2.1. The impact of EU membership on the border

There are four main areas in which common EU membership has changed the experience of this border between the UK and Ireland. First, it has above all else, enabled the depoliticisation and normalisation of cross-border cooperation on the island – a condition that has been critical to enabling the stability of the peace process. Second, it has facilitated trade through common membership of the customs union and single market. This has meant the removal of customs posts and tariffs and the vast reduction of non-tariff barriers to trade. The harmonised regulatory system in relation to safety standards and some harmonisation of indirect taxation has further facilitated the growth of cross-border trade. As Northern Ireland has carried historical legacies of underdevelopment, the opening of the 'southern' market to its goods has brought a particular boost to the region and been a useful step-ladder for the growth of an export market into the wider EU and beyond.

This has been accompanied, of course, by the freedom of movement of persons in the single market, with its add-on measures for the protection and welfare of EU citizens around the EU. People who work on one side of the border and live on the other are particular beneficiaries of the EU protections and initiatives to prevent disadvantage coming to those who choose or need to relocate for work or study. Finally, of course, the long-term infrastructural and cultural changes that have been wrought by EU membership are strikingly apparent in the Irish border region. Whether this be through improved road links or through use of the European Arrest Warrant, north/south relations on the island of Ireland are testament to the practical benefits for mutual gain made possible through European integration.

3.2.2. The potential impact of Brexit on the border

The most obvious cause of disruption will be UK withdrawal from the customs union and the single market. This will, through greater administrative requirements, increased restrictions on the movement of goods, especially those imported into Northern Ireland from outside the UK and the EU, and the need for facilities for customs checks, undoubtedly mean a harder border than is currently the case. If the UK does not maintain free trade with the EU (i.e. if there is no free trade agreement between the two) then the need for customs controls will be considerably greater.

At a practical level, moving goods across a customs border will entail additional time, administration, resources and costs. The effects of this could be considerable. Any hardening of the border will disrupt trade and supply chains, with the agri-food industry being particularly affected. Foreign direct investment into Northern Ireland could also be affected as companies lose barrier-free access to the single market. All these economic consequences

will impact on the economic prosperity of Northern Ireland, widely accepted as an important underpinning to the peace process.

Withdrawal from the EU and the single market could also result in restrictions on the movement of capital and on the provision of services and access to public procurement contracts across the border. Each will impact on economic activity and opportunity. The implications regarding services could be far-reaching and prove highly disruptive particularly in localised areas where integrated cross-border service provision has been established. A particularly challenging area is public health where provision is often based on cross-border access and shared resourcing.

3.2.3. Movement of people

There is also the effect of UK withdrawal from the single market on the movement of people and the question of how checks on rights to reside are implemented. Movement of UK and Irish citizens should proceed unhindered provided the Common Travel Area (CTA) is maintained. Much of an annex to the UK government's White Paper on exiting the EU in February 2017 was dedicated to the matter of the CTA, emphasising the special status of Irish citizens in Britain and the importance of free movement for citizens between these islands (UK Government, 2017c).

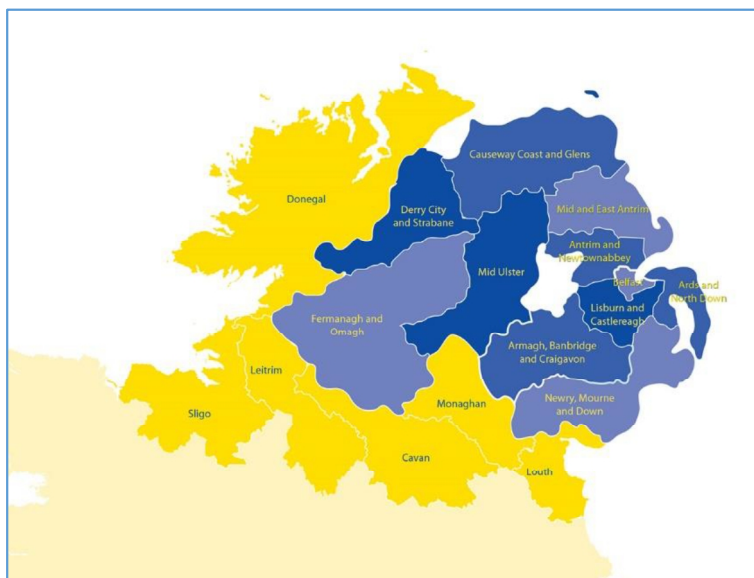
However, if people can move freely between these islands then the question of how a distinction may be made between Irish and British citizens and other EU citizens arises. Given the UK government's commitment not to institute passport controls on the Irish border and to allow EU citizens to continue to enter the EU visa-free, the impact on the geographical border will be negligible.¹⁴ Instead, controls will have to be exercised through the expansion of 'point of contact' controls, with ordinary citizens performing checks on the rights of non-British and non-Irish citizens to work, reside and access key services. As well as being politically sensitive in Northern Ireland – few Irish citizens in Northern Ireland would wish to act as *de facto* border guards for the British state – this will also entail obstacles to the maintenance of the levels of EU skilled and unskilled workers that have been identified by OFMDFM as being essential for the development of the Northern Ireland economy.

3.2.4. Sustaining cross-border cooperation

In terms of cross-border and broader north-south cooperation, a key question has been how will such cooperation will be sustained in a context where one party to the Good Friday Agreement remains in the EU and the other leaves, thus raising the prospect for regulatory divergence? It is worth noting that at the moment cross-border cooperation is placed into one of two categories by the NSMC: those in which policies are agreed together but implemented separately and the other in which policies are agreed and implemented on an all-island basis. The first area sees policies in the fields of agriculture, education, environment, health, tourism and transport coordinated; it allows for joint ventures (such as

¹⁴ A change of UK government policy cannot be ruled out. Further restrictions on immigration could result in passport controls being introduced, either at the Irish border or between Northern Ireland and GB.

the provision of shared specialized health services) but policies are ultimately implemented separately within each jurisdiction.



Map 1. The counties eligible for funding under the PEACE programme, Northern Ireland and the Irish Border Region (Source: SEUPB)

The second area, for cross-border implementation, includes: food safety (*SafeFood*); *InterTrade* Ireland for cross-border trade; Ulster Scots and the Irish language (North/South Language Body); the Lights Commission for Foyle and Carlingford Loughs (both of which the Irish border runs through) and coastal lights; the SEUPB for the PEACE and INTERREG programmes; and *Waterways Ireland* for inland waterways across the island.

In addition to this are the areas in which an all-island regime already effectively exists, largely due to the existence of shared EU regulation. These include the Single Electricity Market and the sanitary-phytosanitary arrangements for animal health on the island.¹⁵ The UK government's recognition (in its position paper on Northern Ireland and Ireland) of the all-island energy market and the island as an epidemiological unit for animal health is a good start towards recognizing the fact that some matters of concern are most effectively addressed on an island rather than UK basis and that this need not be politically or symbolically significant.

The potential for (and likelihood of) increased regulatory divergence across the range of EU competences has the potential to affect not just trade in goods, but also inter alia consumer protection, health and safety.

¹⁵ See <https://www.daera-ni.gov.uk/articles/cattle-imports-qb>

3.3. Rights and equality

On the question of rights, questions have been raised about how the extent and delivery of rights contained in the Good Friday Agreement will be affected, notably where they derive from the EU, and about what remedies will be available to enforce the rights in Northern Ireland once the UK leaves the jurisdiction of the CJEU.

On the rights dimension, McCrudden (2017: 4) notes:¹⁶

The fact of both the UK and Ireland being in the EU also underpins and significantly delivers on the GFA requirement that rights in Northern Ireland will mirror those in Ireland, and vice versa. Ireland and Northern Ireland are both bound by the EU Charter of Fundamental Rights, for example, when government implements EU law. Ireland and Northern Ireland are both subject to the fundamental rights jurisprudence of the Court of Justice of the European Union ('the CJEU'), part of EU law's general principles. General principles are applied by the CJEU and domestic courts, for example, as an aid to interpretation of EU law; examples of general principles include fundamental rights, including equality. Ireland and Northern Ireland have similar employment rights where these are derived from EU law, such as the provisions regarding working time. Ireland and Northern Ireland accord a similar status to EU-derived rights.

Moreover, the principle of supremacy of EU law means that that the UK is obliged to disapply legislation in breach of EU law. EU membership also allows for rights to monitored and enforced. In short, several of the rights and entitlements that are provided for directly or indirectly in the GFA are themselves either directly or indirectly underpinned by EU law and its systems of effective remedies' (ibid, 5).

Unless addressed, for example in the terms of withdrawal or the future UK-EU relationship, a range of rights in Northern Ireland will be affected by Brexit: EU-underpinned rights found in the Good Friday Agreement, fundamental rights deriving from EU membership (e.g. through the Charter of Fundamental Rights; and labour and employment rights derived from EU law. In addition, there is the question, in the absence of access to the CJEU, of how current opportunities for effective judicial remedy will be maintained. A further concern is that withdrawal from the EU removes the obligation on the UK to remain a party to the ECHR. This is of fundamental importance since the protection of human rights in Northern Ireland is predicated on the ECHR. To withdraw from the ECHR would fundamentally undermine the Good Friday Agreement. The position of the EU recognizes this. Domestic UK politics generally does not. Indeed, the UK's constitutional flexibility means that there are no firm guarantees for the future of rights. They remain at the mercy of parliamentary majorities.

¹⁶ The discussion of the rights dimension in this section draws extensively on McCrudden (2017).

What will happen to existing rights and remedies? This is reflected in the position adopted by the EU-27 in the *Guiding Principles for the Dialogue on Ireland-Northern Ireland (See Annex 2)*:¹⁷

The Good Friday Agreement includes provisions on Rights, Safeguards and Equality of Opportunity, 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 (European Commission, 2017: 4, emphasis added).

Such language reflects a clear appreciation of important challenges that Brexit poses to the rights agenda of the Good Friday Agreement. That they need to be addressed in the withdrawal process is not simply a matter of ensuring legal continuity; it also reflects an awareness of the political imperative for every effort to be made to maintain the status quo. For if there is either uncertainty around the future of citizens' rights under the Good Friday Agreement or indeed a perceived or actual loss of rights as a consequence of Brexit, the debate about rights in Northern Ireland will be reopened. The important post-Agreement condition that nationalists could feel themselves to be equal and protected as Irish citizens in Northern Ireland has been in no small part connected to the broader framework of common EU citizenship. Given that fundamental differences exist on the importance of rights, if the debate is reignited, its destabilizing effects could be 'significant' (McCrudden, 2017: 6)

3.4. The commitment to upholding the Agreement

The response of the EU-27, its institutions and the UK government to the prospect of withdrawal has been to stress their commitment to upholding the Good Friday Agreement and supporting for the peace process. The European Council guidelines for the withdrawal negotiations, adopted in April 2017, are clear:

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 (European Council, 2017).

The Council's directives for the withdrawal negotiations, adopted in May 2017, go further:

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

¹⁷ European Commission (2017) *Guiding principles for the Dialogue on Ireland/Northern Ireland*, Brussels, 20 September (https://ec.europa.eu/commission/publications/guiding-principles-dialogue-ireland-northern-ireland_en)

Agreement in all its parts and its related implementing agreements (Council of the European Union, 2017a).

The European Parliament (EP) has also been forthright in its commitment to seeing the Good Friday Agreement upheld. In its resolution of 3 October 2017 the EP:

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 (European Parliament, 2017).

The UK government is also forthright in its commitment to the Good Friday Agreement. In the March 2017 letter notifying the European Council of her government's intention to withdraw from the EU, the UK Prime Minister, Theresa May stated that the UK has:

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 (UK government, 2017b).

The UK government's position paper on Northern Ireland and Ireland, published in August 2017, underlined the importance it attaches to the Good Friday Agreement as 'the bedrock of the peace process' (UK government 2017a: 6). It added:

Although the Belfast ('Good Friday') Agreement is not predicated on EU membership, the UK is clear that it must be considered and safeguarded throughout the exit process, as a whole and in all its parts (ibid: 10)

...

The UK believes that the UK Government, the Irish Government and the EU share a strong desire to continue to safeguard the Belfast ('Good Friday') Agreement, and to ensure that nothing agreed as part of the UK's exit in any way undermines the Agreement (ibid: 10)

Most recently, the Secretary of State for Northern Ireland, James Brokenshire noted:

We want to ensure that the Belfast or Good Friday Agreement is fully protected ... including the constitutional principles that underpin it, the political institutions it establishes and the citizens' rights it guarantees.

...

Within the Northern Ireland-Ireland Dialogue, we have agreed that the Belfast or Good Friday Agreement should be protected in full, including its constitutional arrangements (Brokenshire, 2017).

Such statements are all very welcome, but they reflect only broad commitments and do not provide any detailed assessment of what the key challenges are, let alone how they might be addressed.

The UK government in its position paper on Northern Ireland and Ireland was brief in its coverage of the Good Friday Agreement. It argued for affirmation, alongside the Irish Government and the EU, of ongoing support of the peace process, formal recognition that the citizenship rights set out in the Agreement will continue to be upheld, and continuation of PEACE funding to Northern Ireland and border counties of Ireland to at least 2020 and potentially beyond (UK Government, 2017a). On citizens' rights, this should mean the withdrawal agreement confirming that the current substantive position that Irish Citizenship – a 'permanent birthright of the people of Northern Ireland' – will continue to confer EU citizenship rights on holders post-Brexit.

Reaction to the paper was mixed. The Position Paper clearly recognized the need to uphold the Good Friday Agreement 'in all its parts'. It also acknowledged the fact that measures needed to be taken to: maintain the CTA and associated rights; avoid a hard border for the movement of goods; and preserve North-South and East-West cooperation. However, the discussion of how these goals might be achieved lacked detailed proposals, especially relating to citizens' rights. Also the proposals relating to customs arrangements were seen as 'magical thinking' (*The Guardian*, 2017) and soon presented by the UK Secretary of State for Exiting the EU, David Davis, as 'blue sky thinking' (*Financial Times*, 2017b). Moreover, except on the question of energy, the paper failed to engage with how north-south cooperation on the island of Ireland could be sustained, particularly in so far as where it either flowed from or complemented the achievement of the goals of the Good Friday Agreement.

Disappointment with the lack of detail was reflected in the unpublished list of 142 areas for north-south cooperation that was presented to the UK government in September 2017 to expand on as part of the ongoing 'Dialogue on Ireland/Northern Ireland'. Not that the EU-27 have so far offered views on what the solutions should be. The expectation is that the UK proposes solutions. The *Guiding Principles for the Dialogue on Ireland/Northern Ireland* adopted in September 2017 therefore are limited to principles (see Annex 2). The focus is on not just protecting but also strengthening the 'gains and benefits of peace which have been achieved through the Good Friday Agreement and facilitated and supported by the European Union'. However, of note is the extensive scope of what the EU-27 expect to be protected. The paper states: '[e]nsuring 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' (European Commission, 2017: 3). On the question of the border, it is clear:

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 (ibid, 2).

More recently the EU-27, internally, have gone further arguing that the UK should:

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 (Council of the European Union, 2017b)

4. UPHOLDING THE GOOD FRIDAY AGREEMENT

The challenges that UK withdrawal from the EU poses for the Good Friday Agreement and its implementation are considerable, particularly given the UK government's commitment to leaving the single market, the customs union and the jurisdiction of the CJEU. The challenges cover a wide range of issues that extend well beyond the actual text of the Agreement. The consequences of an unmanaged withdrawal or one that fails to adequately address these challenges could include serious damage to the peace process.

4.1. Recognition of the unique situation in Northern Ireland

The Good Friday Agreement and the peace process have set Northern Ireland apart from the rest of the UK in the context of withdrawal negotiations and the future of the UK-EU relationship. The unique situation on the island of Ireland is recognized by all parties to the withdrawal negotiations and a concerted effort has been made to create space for the challenges that Brexit poses to be addressed. The European Council's guidelines for the Article 50 negotiations are clear:

The Union has consistently supported the goal of peace and reconciliation enshrined in the Good Friday Agreement in all its parts, and continuing to support and protect the achievements, benefits and commitments of the Peace Process will remain of paramount importance. In view of the unique circumstances on the island of Ireland, *flexible and imaginative solutions will be required*, including with the aim of avoiding a hard border, while respecting the integrity of the Union legal order. In this context, the Union should also recognise existing bilateral agreements and arrangements between the United Kingdom and Ireland which are compatible with EU law (European Council, 2017: 11, emphasis added).

The UK government is also clear that flexibility and imagination are needed in addressing the challenges Brexit poses for Northern Ireland. As the Prime Minister, Theresa May, noted following the European Council in October 2017:

On Northern Ireland, we have agreed that the Belfast agreement must be at the heart of our approach and that Northern Ireland's unique circumstances demand specific solutions. It is vital that joint work on the peace process is not affected in any way - it is too important for that.

Both sides agree that there cannot be any physical infrastructure at the border and that the Common travel area must continue.

We have both committed to delivering a flexible and imaginative approach on this vital issue (May, 2017).

More recently the Secretary of State for Northern Ireland, James Brokenshire, has added:

as we have made equally clear we are determined to find bespoke solutions to Northern Ireland's unique circumstances ... not least as the only part of the UK to share a land border with an EU member state.

...

We fully recognise the extent to which the Northern Ireland economy, while an integral part of the UK economy, is also fully integrated with that of Ireland particularly in areas like the agri-food sector.

We fully recognise the flow of traffic across the border on a daily basis for people going about their business be it to work, study, shop or simply visit friends and relatives.

And we fully recognise those ties of family and shared history that exist between people on the island of Ireland as well as between Ireland and Great Britain.

All of this requires creative and imaginative thinking by the UK and Irish Governments along with negotiating partners in the EU. But I believe solutions can be found ... and it is in that positive sense that the UK Government has approached the current phase of negotiations and we will continue to do so (Brokenshire, 2017).

The fact that Brexit poses challenges for Northern Ireland is clearly recognized. So too is the need for flexibility and imagination. The question therefore is: what form or forms might solutions to the particular challenges poses for upholding the Good Friday Agreement and its implementation take?

4.2. Potential solutions

4.2.1. On the constitutional issue and citizenship

On the question of the constitutional future of Northern Ireland and the border poll issue, the EU-27 have already issued a statement confirming that the territory of a united Ireland would be part of the EU. Following proposals from the Irish government, the European Council, meeting without the UK, adopted in April 2017 a statement declaring that:

the Good Friday Agreement expressly provides for an agreed mechanism whereby a united Ireland may be brought about through peaceful and democratic means; and, in this regard, the European Council acknowledges that, in accordance with international law, the entire territory of such a united Ireland would thus be part of the European Union (European Council, 2017).

Of course, the question arises as to how such a re-entry into EU membership for Northern Ireland might be managed from the EU side, as a matter of the expansion of the territory of a member-state (Ireland). Skoutaris (2017) has identified the EU's treatment of the cases of East Germany, (northern) Cyprus and Norway as holding some useful parallels here. His assertion is that it is possible to have an adjustment to the territory to which the *acquis*

applies without the need for unanimous Council approval (as would be required for accession of a new member-state). To facilitate this, a provision regarding the future unification of Ireland could be included in the UK Withdrawal Agreement.

Closely related to this is the question of citizenship. It is the stated position of the UK government that the right of people born in Northern Ireland to hold Irish or British citizenship or both will remain. The UK government (2017a) has also already proposed that there be formal recognition that the citizenship rights set out in the Good Friday Agreement will continue to be upheld post-withdrawal. This could be done in the withdrawal agreement. However, simply recognizing such rights falls short of addressing the challenges that Brexit poses for rights. Moreover, there needs to be caution regarding any disparity of rights and entitlements between Irish and British citizens in Northern Ireland after Brexit as this would directly contravene the principle of equality between British and Irish citizens that is fundamental to the Agreement (CCBS, 2017a).

4.2.2. The protection of rights

In order to address these concerns and ensure that existing rights available to citizens through the Good Friday Agreement are upheld a number of measures have been suggested. Most focus on domestic UK legal frameworks relating to Northern Ireland and the terms of the UK government's withdrawal bill. For example, O'Connell and Harvey (2017) have suggested that the UK withdrawal bill provide explicit protections for EU standards regarding equality and discrimination law, workers' rights, and environmental rights. They have also suggested that the continued applicability of the Charter of Fundamental Rights (CFR) to Northern Ireland needs be established in the withdrawal bill. Currently, the CFR has been excluded as an area of retained EU law. They have also suggested that the range of rights currently available through EU membership be protected in Northern Ireland through a Bill of Rights. Others have suggested an all-island approach to rights with the option of establishing a Joint Committee on Human Rights and a Charter of Rights for the island of Ireland (Harvey, 2017; Smith, McWilliams and Yarnell, 2016; Houses of the Oireachtas, Seanad Special Committee on Withdrawal of the UK from the EU, 2017).

A key question is how Irish citizens born in Northern Ireland can ensure their EU citizenship rights are upheld in Northern Ireland.¹⁸ Related is the question of judicial remedies. From an EU-27 perspective, the European Council's negotiating guidelines are clear that the withdrawal agreement must contain 'effective enforcement and dispute resolution mechanisms. Such mechanisms need to 'fully respect the autonomy of the Union and if its legal order, including the role of the [CJEU]' (European Council, 2017: 17). One option, following McCrudden (2017: 10) is:

for any Withdrawal Agreement to be capable not only of creating obligations in international law but also, in some cases, creating individually enforceable and directly effective provisions in the domestic courts of EU-27 *and the UK*. The effect would be that individuals could rely directly on the relevant

¹⁸ The same would apply to British citizens born in Northern Ireland if, in order to maintain equality of rights, their current EU citizenship rights continued undiminished (see Gormally 2017).

provisions of the Withdrawal Treaty in front of UK domestic courts to override incompatible domestic legislation.

Commitments in the Withdrawal Agreement would be enforced through rights being granted in UK law, presumably in Parliamentary legislation, and would be enforceable through the domestic UK judicial system.

As McCrudden (2017) notes, such rights deriving from the withdrawal agreement would not have *direct* effect in UK courts. Moreover, such rights would also run the risk of both express and implied repeal by the UK Parliament. This raises the question of how the rights might be upheld and equivalent standards of protection across the island of Ireland ensured. The SDLP (2017) has argued that the adoption of an all-island Charter of Rights would secure access to 'European routes of justice'. McCrudden (2017) expands:

If a common position on rights in Northern Ireland and Ireland were to be maintained, this could mean that there should be some continuing role for the CJEU, if only in ensuring that the rights of the Northern Ireland-born citizens of Ireland (and thus EU citizens) are protected.¹⁹

The key question as to whether such measures and arrangements can be put in place is as much one of whether political agreement can be reached on doing so than it is a matter of whether it is legally possible. The EU has a history – often underappreciated – of flexibility and innovation where creative political compromises are reached and then skilfully crafted into legal text signed off by the member states or by the member states and third country partners. There is no reason to assume that inspiration cannot be drawn from the practice of converting political compromise into binding legal commitments and be repeated in the case of novel arrangements to uphold the Good Friday Agreement. It is worth noting here that the Good Friday Agreement itself was the result of political compromise and imagination – combined with some creative ambiguity.

4.2.3. The EU representation of Irish citizens from Northern Ireland

Beyond the issue of rights is the question of representation in the EU of those born and residing in Northern Ireland who hold Irish citizenship but who through the UK's withdrawal from the EU lose their right to vote in EP elections. The situation is not unprecedented in that Greenlanders lost their right to vote in EP elections when Greenland withdrew from the EU. The obvious difference with UK withdrawal is that the right to vote in an EP election is not just being taken from UK citizens but Irish citizens born and living in Northern Ireland.

One option would be to retain the status quo and for voters in Northern Ireland to elect MEPs. This could be done by either Northern Ireland retaining its existing seats or the constituency boundaries across the island of Ireland being redrawn on an all-island basis following a

¹⁹ There is also the issue of ensuring equality between Irish and British citizens born in Northern Ireland. Whereas the former will retain their EU rights post-Brexit, the latter will lose theirs unless they exercise their right to Irish citizenship. However, as Gormally (2017) has argued: 'it would be entirely contrary to the spirit of the Agreement to force people to choose one or other citizenship in order to access different rights'. Therefore 'those British citizens whose eligibility for UK citizenship arises from being born in Northern Ireland could [be] regarded as EU citizens along with their Irish neighbours'.

redistribution of the 73 UK seats among the EU27 (SDLP, 2017). The former option would, however, establish a highly anomalous situation of have MEPs directly representing a territory outside the EU. A second option would be to allow for more indirect representation of Irish – and so EU – citizens born and resident in Northern Ireland. This could be achieved through the establishment of transnational seats in the European Parliament. Eligibility to vote for a party on a transnational list could be extended to all Irish-EU citizens resident on the island of Ireland.

A third option is for Northern Ireland to elect or nominate observers to the EP. It follows from the fact that Northern Ireland could, in line with the provisions of the Good Friday Agreement, ultimately re-join the EU as part of a united Ireland. It is therefore currently in a position not dissimilar to an applicant state who the EU has formally agreed to admit, but has yet to complete the formalities for doing so. Once an applicant state has concluded its Treaty of Accession to the EU, it sends observers to the EP until such time as it has actually acceded and held elections.

If arrangements are to be put in place to ensure some continued representation in the EP of the people of Northern Ireland – where all or just Irish-EU citizens born and resident in Northern Ireland – it follows that representation should continue in other representative bodies where people and interests from Northern Ireland are currently represented. Existing representation in the Committee of the Regions and the Economic and Social Committee could continue or be replaced by some form of observer status.

4.3. Using the institutions of the Agreement

If the Good Friday Agreement was essentially about finding a means of meeting the common interests of the people of Northern Ireland through an imaginative approach to cross-border cooperation North/South and East/West, it also contains within it the potential to meet some of the challenges posed by Brexit.

The NSMC, with its Joint Secretariat, and the six 'implementation bodies' working on an all-island basis are core features of the Good Friday Agreement and demonstrate the integral role played by cross-border political cooperation in the governance of Northern Ireland. It has been argued that the NSMC and north/south bodies should be strengthened in order to navigate the post-Brexit environment (CCBS, 2017b). This would presumably have to be prefaced by a review of current competence and practice to ensure that they are fit for purpose for the post-Brexit environment, potentially including enhanced means of ensuring transparency and accountability if their role grows in importance.

In addition, Strand Two of the Agreement outlined a range of areas for possible cross-border cooperation that include (non-coincidentally) those now most exposed to change as a result of Brexit. These include agriculture, environment, (inland) fisheries, health, social security/social welfare,²⁰ transport, tourism, and urban and rural development. In addition,

²⁰ These matters could prove disruptive for cross-border workers after Brexit, especially prior to necessary legislation being passed in the UK and Ireland regarding the particular status of Irish and British citizens after Brexit (see Ryan, cited in McGuinness and Gower, 2017).

there are areas of all-island cooperation that have been identified by the NSMC as ones for protection through the UK's withdrawal, including education/ higher education, justice and security, telecommunications, and sport (Council of the European Union, 2017b).

One course of action to minimise disruption to cross-border cooperation in these areas would be to secure closer links between the organisations currently charged with responsibility in these areas in Northern Ireland and Ireland respectively. In some cases there are bodies already existing that could have their remits and competences adjusted in order to meet the new challenge of maintaining coordination in very specific areas, e.g. the Institute for Public Health for shared specialised services provision, or Universities Ireland. This could be overseen by the NSMC.

The Agreement also contains a number of suggested institutional arrangements that have not yet been realised but which could yet help navigate some of the social and political challenges arising from Brexit. The Northern Ireland Civic Forum, the north/south Consultative Forum, and a joint north/south Parliamentary Forum could play a vital role in ensuring civil society engagement and voice in the new arrangements (including business, trade union, voluntary sectors).

In addition, the Agreement allows for bilateral or multilateral arrangements between members of the BIC to develop bilateral or multilateral arrangements between them including 'mechanisms to enable consultation, co-operation and joint decision-making' and to implement joint decisions. This offers the opportunity for such arrangements as may help enhance the operation of some matters of mutual interest across these islands after Brexit.

5. MAINTAINING THE CONTEXT FOR THE AGREEMENT

The effective functioning of the Good Friday Agreement is of fundamental importance to sustaining the Northern Ireland peace process. The argument advanced so far is that action needs to be taken in the context of Brexit to safeguard not just specific provisions but also the spirit of the Good Friday Agreement. It follows from the initial analysis in Section 2 that effective implementation of the Agreement depends as much on the context in which it exists as on the political resolve to implement specific provisions. Brexit, depending on the terms of UK withdrawal and the nature and substance of the future UK-EU relationship, has the potential to disrupt and alter fundamentally that context, most obviously in terms of the legal frameworks that operate on the island of Ireland.

However, Brexit will also have economic implications following the UK withdrawal from the single market, the EU customs union, the Common Agricultural Policy, the Common Fisheries Policy and EU programmes designed to support regional and cross-border economic development. This is significant given the role of economic factors in underpinning the peace process. The UK government's position paper on Northern Ireland and Ireland duly recognized this in stressing the 'importance of economic prosperity to sustaining the peace process' (UK Government, 2017a: 9)

The limited economic modelling that has been undertaken on the effects of Brexit suggests that Northern Ireland will be among the UK regions most adversely affected. Analyses of the impact of Brexit on Ireland indicate that it will be the most adversely affected of all parts of the EU. Economic disruption will affect economic prosperity and so has the potential at least to disrupt the peace process

In order to minimize the impact of UK withdrawal on the effective implementation of the Good Friday Agreement disruption to the political, legal, institutional and economic context for its implementation needs to be kept to a minimum. If this can be achieved any negative consequence of UK withdrawal for the future of the peace process can also be minimized. Four key inter-related issues need to be addressed:

- Disruption to economic activity on the island of Ireland needs to be minimized.
- The border needs to be kept as soft as possible.
- Disruption to the common legal and regulatory frameworks established through shared membership of the EU need to be maintained.
- Opportunities for institutionalized cross-border cooperation need to be maintained.

A range of options exist for addressing these issues. Some provide comprehensive, macro-level solutions, i.e. ones that address a range of issues through a particular form of positioning of Northern Ireland vis-à-vis the EU compared to the rest of the United Kingdom. Others focus on more specific challenges, for example in discrete policy areas. All reflect the call for flexible and imaginative solutions to the unique situation on the island of Ireland.

5.1. Macro-level options for minimising disruption to the status quo

Barring the obvious option of the UK opting not to withdraw from the EU, there are a number of macro-level solutions to the challenge of minimizing the disruption to the status quo on the island of Ireland. A first set reflects options for the future UK-EU relationship and encompasses continued but partially suspended membership as well as extensive levels of sustained integration. In practice, given the official position of the current UK government, none is a realistic proposition at present. A second set therefore focuses on a differentiated treatment of Northern Ireland and is inspired by the EU's long-established ability to demonstrate flexibility internally and externally and accommodate the particular challenges posed by a specific geographical entity through forms of differentiated integration. These options are offered based on an assumption that Northern Ireland leaves the EU as part of the United Kingdom.

5.1.1 Maintaining the status quo via the UK-EU relationship

An obvious way of minimizing the disruption of UK withdrawal from the EU is for the UK to remain in an extremely close relationship with the EU based on essential elements of EU membership or for Northern Ireland itself to remain in the EU. Disruption to economic activity on the island of Ireland and to the shared regulatory framework provided by EU membership could be minimized if the UK opted to remain in the single market and the customs union and was able to secure free trade in agricultural goods and participations in EU programmes and cooperation frameworks.

The UK government's red lines of withdrawing from the jurisdiction of the CJEU, of 'taking back control' of its borders, and of being free to pursue its own trade policy rule out continued membership of the single market and participation in the EU customs union and limit the opportunities for continued participation in various programmes and cooperation frameworks. In such a context, a differentiated approach on the part of the EU and the UK to the withdrawal process and the treatment of Northern Ireland and the island of Ireland offers the most obvious way forward.

Political parties in Northern Ireland are generally supportive of as much of the status quo as possible being maintained. Crucially, both the DUP and Sinn Féin agree that the UK's withdrawal should take into account the fact that 'this region is unique in that it is the only part of the UK which has a land border with an EU member-state' (OFMDFM, 2016). All parties in Northern Ireland seek ease of trade with the Republic of Ireland and the rest of the EU and no diminution of the CTA. The DUP has also asserted the need for 'Northern Ireland-specific solutions' and ones that 'fully reflect' the 'particular circumstances' of Northern Ireland; these include the possibility of frictionless movement for cross-border workers, Northern Ireland being a 'hub for trade from Irish Republic into the broader UK market', an 'ability to opt-in to EU funds' and 'strong protections for agri-food to guard against vulnerabilities to cheap inferior imports' (DUP, 2017).

Parties differ, then, not so much on their preferred outcome for Northern Ireland (which sees the maintenance of the status quo) as on means by which this should be achieved. At the core of the problem is that this is framed as a choice of diverging either from UK law or EU

law. It thus becomes a point of typical ideological difference, spurred by the overlaying of Leave/Remain preferences onto unionist/nationalist views. But it should also be recognised that it is also a highly pragmatic conundrum too. The only way of addressing this would be through upholding the spirit as well as the letter of the Good Friday Agreement. The scope for 'flexibility and imagination' in the position of Northern Ireland from the EU would need to be matched with differentiation within the UK that enhances the devolved capacity of institutions that pivot on the Northern Ireland Assembly and Executive. For example, devolved responsibility for managing regional-level immigration policy or for regulatory oversight would go far towards creating the conditions that would enable the realisation of the common wishes of all parties in Northern Ireland at this point.

5.1.2 Beyond the UK-EU relationship: Northern Ireland remaining in the EU

In the absence of the UK agreeing to remain in a relationship with the EU that maintains the essentials of the status quo such that there is minimal or no disruption to the context in which the Good Friday Agreement can continue to be implemented and the peace process sustained, an option is for Northern Ireland to remain in the EU. The case for Northern Ireland remaining in the EU has been made ever since the UK referendum result was announced. Among its most vocal proponents are those who argue for Northern Ireland to be granted 'designated special status ... within the EU' (Sinn Féin, 2016, 2017; Social Democratic and Labour Party, 2017).

A number of proposals have been made that would allow for Northern Ireland to remain in the EU. An early proposal was the so-called 'reverse Greenland' option whereby the UK remains in the EU but that membership obligations are suspended in England and Wales (Gad, 2016). There is also the Dalriada option where England and Wales would secede from, but Northern Ireland and Scotland remain in, the EU (O'Leary, 2016).

Keeping Northern Ireland in the EU is theoretically an option. However, as evidenced by the EP voting down a resolution to confer special status on Northern Ireland there is currently very little political appetite for pursuing such an option even if the case has been made that it is legally possible to achieve (Gallagher and O'Byrne, 2017).

5.1.3 Within the UK-EU relationship: Differentiated treatment of Northern Ireland

If the UK opts to withdraw from the customs union and the single market and it is politically unrealistic to consider the option of Northern Ireland remaining in the EU, the remaining option for minimizing disruption to the status quo for Northern Ireland and the island of Ireland is to pursue differential treatment of Northern Ireland. Depending on the arrangements put in place, this could involve treating Northern Ireland as if it were a member of the EU, at least in terms of rights and obligations. Formally and institutionally, not least because it would remain part of the UK, it would be outside the EU. A number of options at a macro-level exist.

A first is for Northern Ireland to retain its participation in the single market. This could be achieved by Northern Ireland remaining in the European Economic Area (EEA). It would ensure continuity of the status quo in terms of the free movement of goods, services, capital

and people. It would also ensure continued access of Northern Ireland businesses to public procurement opportunities in Ireland and the rest of the EU. It would also provide a means of safeguarding certain socio-economic rights of Irish – and so EU citizens – in Northern Ireland. As proponents of the EEA option for Northern Ireland argue, such an arrangement would 'go some way to safeguarding the *status quo* as regards maintenance of the spirit, if not the letter, of the Belfast/Good Friday Agreement, in providing membership of both Northern Ireland and the Republic of Ireland in a common European economic entity' (Doherty et al, 2017: 39)).

The EEA option would not, however, be a panacea. The question of a hardening of the border would not be resolved. With the UK outside a customs union with the EU, the need for customs controls would remain, although their scope would be reduced if the UK-EU relationship comprised a deep and comprehensive free trade area. The EEA option would also leave open the question of agricultural trade.

This begs a number of questions. Could Northern Ireland remain in the EU customs union or have its own customs union arrangement with the EU even if the UK per se were outside a customs union with the EU? Could such a customs union arrangement extend to cover all agricultural trade on the island of Ireland provided producers in Northern Ireland continued to abide by EU regulations such that there would be no more need than there is currently for sanitary and phytosanitary or related checks on agri-food products at the border between Northern Ireland and Ireland?

A customs union arrangement for Northern Ireland should not be impossible to conceive. If it were agreed, it could make a significant contribution to maintaining the current soft border on the island of Ireland. Consequently, the disruption to the status quo would be kept to a minimum. However, a much-voiced objection to Northern Ireland being in an EU customs union as opposed to a UK customs union is that this would shift the customs border to the Irish Sea and so to within the UK. This could have significant implications for the trade between Northern Ireland and the UK and undermine the economic prosperity that is essential for the peace process. The same can also be said, however, for any customs controls on trade between Northern Ireland and Ireland. There is also the political dimension: any internal-UK customs border between Northern Ireland and the rest of the UK would be regarded by many unionists as a threat to the UK as a union. It could also undermine political support among unionists for the Good Friday Agreement if the imposition of customs – and potentially other – controls between Northern Ireland and the rest of the UK were seen as the price to be paid to maintain an agreement which enjoys much greater support among nationalists.

If combined with a deep and comprehensive free trade area, a substantial customs partnership between the UK and the EU, the extent of the customs controls that would be needed on goods moving between Northern Ireland and the rest of the UK could be limited. It should also be noted that the logistics surrounding such controls could well be more easily managed and afforded through an expansion of existing infrastructure at seaports and airports than through the development of new infrastructure at or near the more politically sensitive land border.

The same arguments would apply to any arrangement for maintaining current agricultural trade arrangements on the island of Ireland. Controls would be needed on agricultural products entering the island from outside the EU, so including from GB. An agricultural free-trade arrangement should be possible to conclude. It would require, however, the maintenance of the current sanitary and phytosanitary regime on the island. Again, this should be possible. An all-island regulatory regime already exists and institutional arrangements for its oversight should be possible, for example through the NSMC.

5.1.4 Assessment

Each of the options for the differentiated treatment of Northern Ireland is theoretically possible. There would appear to be no insurmountable legal obstacles provided that Ireland upholds the *acquis* and in Northern Ireland there is at least regulatory equivalence with the *acquis* and appropriate monitoring and enforcement arrangements are put in place. Ultimately, therefore the question of which, if any, option is pursued and realised is political. And here the obstacles are as much internal to the UK as they are to the EU. At present the EU-27 appear willing to consider options that do not compromise the integrity of the EU's legal order. Ensuring no regulatory divergence is key.

Within the UK the overriding concerns are the coherence of 'single UK market' and avoiding internal borders and controls. It should be noted here that already within the UK there are examples of regulatory divergence; and the realities of devolution mean that further internal divergence can be expected. On existing divergences, notable examples can be found in the sanitary and phytosanitary regimes that operate in Northern Ireland and the rest of the UK. In order for these to be enforced, controls on the movement of certain goods already exist even if they are limited. Also, it does not necessarily follow that maintaining regulatory equivalence with the EU should disrupt trade with the rest of the UK provided that regulatory equivalence with the UK single market exists. Currently, in so far as single market rules are upheld, there is regulatory equivalence, a point repeatedly made by the UK government. And, under the proposed terms of the UK withdrawal bill the status quo will be maintained initially at least post-withdrawal. To argue therefore that Northern Ireland maintaining regulatory equivalence with the EU would 'threaten the economic and constitutional integrity of the United Kingdom' (Davis, 2017) is to needlessly and dramatically overstate the extent of the implications of a differentiated arrangement for Northern Ireland.

Current political realities limit the willingness of the UK government to consider imaginative and flexible arrangements that would minimize the disruptive effects of Brexit on Northern Ireland and the island of Ireland more generally. The question therefore arises of how, in the absence of either the UK or Northern Ireland remaining in a customs union relationship with the EU and the single market, the hardening of the current border can be kept to a minimum.

5.2. Maintaining the 'soft' border

It is important to acknowledge that a hard border is not determined by its visibility or material manifestation but rather by the extent of divergence in practice and rules between the jurisdictions on either side as they relate to, *inter alia*, the movement of goods, services, capital and people. The EU's single market can have frictionless internal borders because all

its members subscribe to the same rules, standards and principles with regard to the four freedoms. To diverge from these rules, standards and principles immediately poses obstacles to free movement and thus requires border controls to ensure different rules are enforced on either side.

If the Irish border is not intended to be a block to the movement of people/goods, then the question becomes one of effective tracking of such movement in order to allow for the enforcement of border controls away from the border itself. The technological means of control and tracking of people at entry/exit points is already quite well advanced, as seen in the use of airport readers of the microchips in passports containing biometric data. Away from the border itself, other means of enforcing border controls on the movement of people still require face-to-face contact, such as through checks at transport hubs and at point of access to employment and public services (e.g. health, education). Options for checking on the movement of people between the islands of Ireland and Britain are fairly easy to hand (e.g. air passenger records) but would need to be balanced against sustained objection from unionists to any 'immigration' checks on passengers flying – or sailing – from Northern Ireland to another part of the UK.

The movement of goods is an even more complicated matter. The future designation of goods originating in Northern Ireland will affect the nature of the controls required on them in crossing the Irish border, as will be necessary to uphold the integrity of the customs regime on either side of this border. Technological solutions in this area are limited, and tend to rely on features that will be difficult to implement in the case of the Irish border. These include effective IT systems for traders to make customs declarations and for customs enforcement to perform risk analysis on these declared goods, on the predominance of single load containers for tracking (rather than those containing a range of products for delivery), on designated entry points along a land border for tracking/stopping the movement of goods, and on large spaces for customs inspections (for undeclared items, duty evasion or dangerous goods) to be performed. There are problems associated with all these 'solutions' when applied to the context of the Irish border. Some of these problems arise from the nature of cross-border trade on the island (groupage, Just in Time logistics, predominance of SMEs with small capacity and no experience of customs declarations, agri-food supply chains). Others arise from the nature of the border itself, with over 250 crossing points along its 499km length and an historical symbolism that would make any physical piece of monitoring equipment or customs checkpoint a security target.

There are means of minimising the needs for physical border controls, none of which are easy or straightforward solutions. The matter of supply chains that cross the border several times is particularly complex, particularly when combined with the issue of ensuring payment of VAT. There could be a model in which duty relief schemes could apply as part of 'Inward Processing', where goods are imported from outside the EU, processed in the EU and then exported to another non-EU country. For this to be facilitated, customs have to be able to audit the full trail of the goods and the processors concerned would have to be fully scrutinised before being authorised.

It is possible to have information processed and checks made other than at a border crossing or an airport or sea port, e.g. at a customs clearance depot; this minimises queues and delays at the border itself. To this end, there could be a drive to increase the scale and number of

authorised customs warehouses on both sides of the border. The most likely form this would take would be in the designation of the premises of producers as authorised warehouses. This would require major enhancement in the capacity of the Irish Revenue and Customs office and HM Revenue and Customs/UK Border Agency to process applications from producers on both sides of the border for authorised status, to inspect the premises for approval, and to implement spot checks. Larger scale solutions might include the harmonisation of tax regimes in the two jurisdictions; this does not have to be exact harmonisation or across all goods in order to greatly reduce the incentive for smuggling, which will inevitably increase as the economic border becomes more significant.

Lessons from elsewhere show that, even with the most effective technological measures and advanced risk management and tracing systems, the mechanisms that best ensure 'frictionless' trade require close cooperation, common regulation, harmonization, shared resources and coordinated investment between customs regimes (Hayward and Tannous, 2017). In this regard, it should be a priority from this early stage in the withdrawal process to see the UK and Ireland have close coordination of their customs and excise plans for after Brexit. Ideally this would entail the development of capacity for joint operations in customs enforcement and permission to share information relevant for risk management between an EU member and the UK as a third country (Murphy, 2017). Above all else, it is clear that in order to avoid the dangers and economic costs wrought by having an ineffective or inoperable customs regime on either side, an adequate transition period would be essential.

5.3. Policy-specific options for maintaining the status quo

Ensuring the continued free movement of goods, services, capital and people and maintaining a soft border on the island of Ireland will be vital elements of any strategy to ensure the context for upholding the Good Friday Agreement and sustaining the peace process. However, it is not only UK withdrawal from the single market and from the EU customs union that will prove disruptive to that context. Withdrawal from other forms of cooperation and integration will undermine the status quo and importantly remove important stimuli for the economic prosperity that the UK government recognizes as of importance for sustaining the peace process. It follows that in the absence of continued UK involvement in various forms of cooperation and integration, arrangements should be developed to allow for continued participation of Northern Ireland. A number of possibilities have already been identified with specific reference to upholding the Good Friday Agreement per se (see 4.2). Others relate primarily to minimizing disruption to the status quo.

In terms of promoting and sustaining the economic prosperity that is a vital underpinning of the peace process, EU membership has provided Northern Ireland with access to valuable funding through a variety of mechanisms, including funding for infrastructure projects from the Structural Funds and INTERREG, and through the loans from the European Investment Bank (EIB). Research and development have been supported through access to successive framework programmes, most recently Horizon 2020. A number of options might be pursued to facilitate continued access for Northern Ireland to these mechanisms and programmes.

A first option is simply to provide for existing access to be maintained. Northern Ireland would continue to be eligible to apply for relevant streams of funding under the Structural Funds

and INTERREG as if it were part of a member state. The same arrangement could be applied to funding for research and development. Such an option would require UK contributions to the EU budget potentially shared with Ireland.

A second option is for the territorial application of the Structural Funds, the INTERREG programme, EIB funding and EU framework programmes for research and development to be the island of Ireland. Applications from Northern Ireland would be treated as if they were from an Irish applicant and be processed through Ireland as a member state. Contributions to the EU budget, in the spirit of north-south cooperation under the Good Friday Agreement, could be via contributions from the Irish and UK governments. In the absence of a direct contribution from the UK government, a contribution to the EU budget could come from a devolved government in Northern Ireland.

These options could also be pursued to facilitate the continued involvement of Northern Ireland in other EU programmes and activities. For example, educational institutions in Northern Ireland could be treated as 'Irish' for the purposes of participation in the Erasmus programme. Applications from 'across the island of Ireland' would be eligible for funding. Alternatively, participation rights could simply be extended to Northern Ireland.

Beyond these more high-profile programmes there are opportunities to extend to Northern Ireland participation in other forms of cooperation in support of the implementation of the Good Friday Agreement. A form of observer status at the European Environment Agency could be pursued to support cross-border cooperation on environmental matters. Northern Ireland could also benefit from participation in EU cooperation initiatives around tourism, education, public health. This could be through direct representation of the devolved administration or some form of 'associate' status in specific initiatives.

Associate status might also provide a route for continued participation in areas of police and judicial cooperation if the UK post-Brexit opts not to seek to remain engaged. Such cooperation, as reflected in the UK's decision to remain in a range of activities following the 2014 review of continued participation, is viewed positively by the Department of Justice and the Police Service of Northern Ireland and contributes significantly to effective cross-border security and police cooperation under the Good Friday Agreement. Access to EU databases and involvement in the European Arrest Warrant system are particularly valued.

6. CONCLUSIONS

EU membership for the UK and Ireland has provided an essential context for the implementation of the Good Friday Agreement. UK withdrawal from the EU at least compromises – and could disrupt significantly – that shared context and in so doing undermine both the Good Friday Agreement *per se* and its effective implementation. With the UK government leaving the EU customs union and the single market, a hardening of the Irish border becomes inevitable. This will not only affect movement on the island, but symbolically and psychologically represent for many a reversal of the peace process and failure of the Good Friday Agreement.

UK withdrawal from the EU means that the trajectories of the UK and Ireland will now diverge. The divergence will be wide-ranging and will happen in law, trade, security, rights, politics; all areas that reach to the very core of the Agreement. Brexit therefore puts the Good Friday Agreement at risk of deep fissures. Such fissures, though, are not inevitable. Public statements by the UK government and from the EU-27 reveal a strong and repeated commitment to upholding the Good Friday Agreement in all its parts. Present in all parties' statements is a willingness to show flexibility and to seek out creative and imaginative solutions to the challenges that Brexit poses for Northern Ireland and the island of Ireland as a whole. It should be remembered that all main political parties in Northern Ireland are party to the Agreement/its successors and its institutions and that all have requested that the specific needs of Northern Ireland be addressed in the withdrawal process.

To minimize the threat that Brexit poses to the future of the Good Friday Agreement minimal disruption to the context for its effective implementation is imperative. This means maintaining as much of the status quo as possible in terms, for example, of the free movement of goods, services, capital and people, and ensuring that every effort is made to avoid any hardening of the border. It means maintaining the shared regulatory context that has facilitated increased economic integration and interdependence on the island of Ireland and thus the economic prosperity of Northern Ireland that is a vital underpinning of the peace process. It means ensuring continued access to EU programmes and funding that support the implementation of the Good Friday Agreement (e.g. via cross-border cooperation). It means ensuring that EU citizenship rights of Irish citizens born and residing in Northern Ireland are upheld and that equivalence of rights across the island of Ireland is maintained, without posing the risk of differential treatment or disparity for British citizens.

It is certainly possible to keep to an absolute minimum the disruption that UK withdrawal will have on the valuable shared context of EU-based integration in which the Good Friday Agreement is implemented. The precedent of differentiated integration within the EU – coupled with the precedent of territorial differentiation within the UK evidenced in the Good Friday Agreement and devolution – provides a valuable departure point for enabling the type of arrangements that would best reflect and protect the unique needs of Northern Ireland in the Brexit process.

Precedents and frameworks exist to be exploited to the benefit of Northern Ireland, the peace process and the island of Ireland more generally. Coupled with full exploitation of the language of finding 'flexible and imaginative solutions' to address 'the unique circumstances

on the island of Ireland', arrangements can be found, provided the political will exists and can be harnessed to exploit the opportunities that a differentiated treatment of the 'Irish dimension' to Brexit offer.

Establishing the post-Brexit arrangements for the island of Ireland will be a process of negotiation. Both sides need to be flexible and approach issues and solutions from the perspective of what needs to be addressed and what can best ensure that the Good Friday Agreement's unimpeded implementation. Fundamental to this will be maintaining the context of free movement on the island of Ireland and ensuring that the border remains as unobtrusive and as soft as it currently is. The best way to do this is to consider the nature and needs not of the border *per se* but of Northern Ireland as a point of contact between the UK and Ireland.

Discussions of the challenges that Brexit poses for Northern Ireland, the peace process and the Good Friday Agreement have identified a range of options for maintaining elements at least of the status quo. With imagination and flexibility, it should be possible to retain the free movement of goods, services, capital and people on the island of Ireland; it should, based on regulatory equivalence, be possible to enable the continued operation of all-island markets and of cross-border supply chains; it should be possible for access to different forms of EU cooperation to be maintained for the both jurisdictions on the island of Ireland. An opportunity also exists to breathe new life into the institutions of the Good Friday Agreement, especially the North-South Ministerial Council, to oversee aspects of new arrangements

For the EU, respecting the integrity of its legal order is of fundamental importance. This should not, however, provide an insuperable obstacle to the EU contributing to solutions addressing the challenges that UK withdrawal poses for the Good Friday Agreement and its implementation. Much of the history of the European integration is one of devising innovative solutions to problems. Given the commitment to addressing the 'unique circumstances on the island of Ireland', the language of 'flexible and imaginative solutions' and precedents for differentiation, there is no reason to doubt that the challenges can be addressed. What arrangements will be put will depend ultimately on political will.

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ANNEX 1

HM Government Position Paper on Northern Ireland and Ireland (An excerpt)

Section 1: The Belfast ('Good Friday') Agreement

Upholding the Agreement

6. The Belfast ('Good Friday') Agreement – signed by the UK Government, Irish Government, and eight of the Northern Ireland political parties on 10 April 1998; endorsed by a treaty between the UK Government and the Irish Government signed on the same date; and endorsed in parallel referendums in Northern Ireland and Ireland – represents the bedrock of the peace process. It paved the way for inclusive power-sharing devolved government in Northern Ireland and set up structures to foster strong relationships between the Northern Ireland Executive, UK Government, and Irish Government. It confirmed Northern Ireland's position as part of the United Kingdom, in accordance with the principle of consent: that Northern Ireland's constitutional status is a matter for the people of Northern Ireland alone to determine. It also confirmed the permanent birthright of all the people of Northern Ireland to hold both UK and Irish citizenship.

7. Political stability in Northern Ireland is dependent on the continued operation of the Agreement's institutions and constitutional framework, effective management of the security environment, and economic prosperity. Maintaining these three policy pillars has been a core part of UK Government policy, and is reflected in the structures and commitments in the Belfast ('Good Friday') Agreement, which takes a three-stranded approach:

- Strand 1 sets out the internal governance of Northern Ireland, including the arrangements for power-sharing within the Executive and the structure of the Northern Ireland devolved institutions;
- Strand 2 details relations between Northern Ireland and Ireland ("North-South cooperation"), including arrangements for cross-border and all-island cooperation; and
- Strand 3 focuses on relations between the UK and Ireland ("East-West cooperation"), reflecting the close ties between our two nations and our role as signatories to the Belfast ('Good Friday') Agreement.

8. The EU's unwavering support for the peace process has been valuable in furthering political progress and reconciliation. In particular, the EU has provided support through EU regional policy, including financial contributions to the International Fund for Ireland and, most recently, the PEACE programmes. As the Report of the European Commission's Task Force 2007-2014 of October 2014 states: "Northern Ireland can count on the European Commission in its efforts to ensure lasting peace and prosperity". The Opinion of the European Economic and Social Committee of 23 October 2008 (SC/029) sets out that: "The EU peace-building method in Northern Ireland has been a unique, long-term commitment of substantial resources, strategically planned and executed, based on the principles of social partnership and subsidiarity and guided every step of the way by inclusive local consultation. The EU should retain its long-term support for peace-building in Northern Ireland".

9. Although the Belfast ('Good Friday') Agreement is not predicated on EU membership, the UK is clear that it 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 framework for North-South and East-West cooperation; the border; citizenship rights; and the Northern Ireland economy in recognition of the importance of economic prosperity to sustaining the peace process.

Proposal for the dialogue

10. The UK believes that the UK Government, the Irish Government and the EU share a strong desire to continue to safeguard the Belfast ('Good Friday') Agreement, and to ensure that nothing agreed as part of the UK's exit in any way undermines the Agreement. The Prime Minister made clear in her Article 50 letter that the UK has "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".

The European Council's negotiating guidelines state that "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".

The Irish Government has also stated that "we must ensure that there is no disruption to the integrity of the peace settlement achieved through the Good Friday Agreement".

11. The UK believes that the UK and the EU should be mindful of the full breadth of 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. At this stage, the UK proposes that both the UK and the EU should:

- affirm the ongoing support of the UK Government and Irish Government, and the European Union, for the peace process;
- formally recognise that the citizenship rights set out in the Belfast ('Good Friday') Agreement will continue to be upheld; and
- agree to the continuation of PEACE funding to Northern Ireland and border counties of Ireland. More detail on these proposals is set out in the following sections.

Protecting the Belfast ('Good Friday') Agreement – identity and citizenship rights

12. Issues of identity go to the heart of the divisions in Northern Ireland, so finding a way to address them was a crucial part of the Belfast ('Good Friday') Agreement. The Agreement confirmed the permanent birthright of the people of Northern Ireland, irrespective of Northern Ireland's constitutional status: to identify themselves and be accepted as British or Irish or both, as they may so choose; to equal treatment irrespective of their choice; and to hold both British and Irish citizenship.

13. The British-Irish Agreement, signed by the UK Government and Irish Government, arose out of the Belfast ('Good Friday') Agreement, which was reached on the same day between the Northern Ireland parties, the UK Government and the Irish Government. The British-Irish Agreement is binding on the UK Government and Irish Government, and gives the commitments on equality, parity of esteem and citizenship legal force in international law.

Proposal for the dialogue

14. The UK proposes that the Withdrawal Agreement confirms that the current substantive position is not changed as a result of the UK's withdrawal from the EU and that both parties recognise that it will remain unchanged. As long as Ireland remains a member of the EU, Irish citizenship also confers EU citizenship, with all the rights that go with this. This is as true for the people of Northern Ireland who are Irish citizens – or who hold both British and Irish citizenship – as it is for Irish citizens in Ireland. The UK welcomes the commitment in the European Commission's directives that these EU rights should continue to be respected following the UK's departure from the EU: "Full account should be taken of the fact that Irish citizens residing in Northern Ireland will continue to enjoy rights as EU citizens".

Continuing PEACE funding

15. Since the first programme in 1995, there have been four PEACE programmes that have funded victims' groups and cross community projects in Northern Ireland and the border counties of Ireland. Funding is provided by the European Commission (through the European Regional Development Fund) and by the Northern Ireland Executive and the Irish Government. The programme is implemented by the Special EU Programmes Body (SEUPB) and its content is agreed by both the Northern Ireland Executive and the Irish Government through the North South Ministerial Council (NSMC). Both the SEUPB (one of the six North South Implementation Bodies) and the NSMC were established by treaties between the UK Government and the Irish Government in the context of Strand 2 of the Belfast ('Good Friday') Agreement relating to North-South cooperation.

16. Between 1995 and 2013, the PEACE programmes allocated almost €2 billion of funding to projects supporting peace and reconciliation, and the current programme (running from 2014 to 2020) has a total value of €270 million. PEACE funding has played a significant role in advancing cohesion between communities and promoting economic and social stability. The Irish Government has commented on the importance of PEACE funding in "sustaining cross-border cooperation beyond the immediate term".

Proposal for the dialogue

17. The UK proposes that, without prejudice to the wider discussions on the financial settlement and Structural and Investment Funds, the UK and the EU should agree the continuation of funding for PEACE IV for the duration of the existing programme and, with the Northern Ireland Executive and Irish Government, explore a potential future programme post-2020. In doing so, the UK wants to work with the EU on how together we can maintain the implementation of the PEACE IV programme, including the role of the SEUPB as managing authority, and that of the NSMC in agreeing the policy direction of future programmes. Notwithstanding the outcome of the negotiations on this specific issue, the UK government would remain committed to peace and reconciliation programmes and to sustaining cross-border cooperation. The UK's approach to PEACE funding applies to the exceptional circumstances of this programme, recognising its link to the Belfast ('Good Friday') Agreement, and should not be taken to imply any wider policy positions on the financial settlement as a whole.

ANNEX 2

European Commission: Guiding Principles for the Dialogue on Ireland/Northern Ireland (An excerpt)

Good Friday Agreement and Peace Process

The EU 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. 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.
- 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.
- 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. 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, 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.
- 5) 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.

- 6) 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.

Upon request by the AFCO Committee, the Policy Department for Citizens' Rights and Constitutional Affairs commissioned this in-depth analysis on UK withdrawal and the Good Friday Agreement (the 'Agreement'). It provides an overview of the Agreement and an assessment of the potential challenges posed to its implementation by 'Brexit'. In particular, it examines ways in which – through differentiation and 'flexible and imaginative solutions' – the Agreement can be upheld and the context for its effective implementation maintained.

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