Briefing Paper 4: The Belfast/Good Friday Agreement and the negotiations on the UK’s withdrawal from the EU
Executive Summary

- In line with its role as one of its co-guarantors, the UK Government must be fully committed to developing a backstop solution that affords the 1998 Belfast/Good Friday Agreement comprehensive protection. Such protection should be delivered through a backstop with the territorial scope necessary to safeguard the 1998 Agreement in both its North-South and East-West dimensions, but it cannot have the in-built insecurity of a time-limit. Neither can it require the EU to risk the integrity of its own common frameworks in order to protect the framework provided by the 1998 Agreement, of which it has been supportive but, ultimately, of which it is not a co-guarantor. That is the responsibility of the UK Government, and one that it must place at the heart of its approach to the negotiations.

- Through its three interdependent strands the 1998 Belfast/Good Friday Agreement (GFA) defines the constitutional status of Northern Ireland within the UK and with respect to the Republic of Ireland, with whom it shares an international border.

- According to the GFA the disappearance of the border with the Republic of Ireland as a marker separating the territorial scope of two sovereign states can only come about with the consent of a majority of the people of Northern Ireland. Whatever its invisibility, the border’s current status as an internal EU border has not diminished its role as a line separating the United Kingdom from the Republic of Ireland, nor has it altered Northern Ireland’s constitutional status as an integral part of the United Kingdom.

- The GFA presupposed that both Ireland and the UK would be members of the European Union. Its post-Brexit operation across all of its dimensions will depend on the UK’s future relations with the EU.

- Both the EU and the UK Government identified the protection of the GFA in all its parts as an objective from the outset of Brexit negotiations.
However, protection of the GFA was only one among a number of other distinct objectives, such as avoidance of a “hard” border, not necessarily seen as intimately linked to the GFA in all its dimensions. This is a conceptual flaw with consequences for the ensuing negotiations.

- Although the East-West dimension of the GFA is present at various points in the December 2017 Joint Report, there is arguably a tendency to view the scope of the 1998 Agreement through a geographically limited lens focused more on its North-South aspects. The December 2017 Joint Report set out how any resolution to the issue of the post-Brexit border between Ireland and Northern Ireland could neither infringe on the rules of the EU’s Customs Union and Single Market, nor on Northern Ireland’s constitutional position within the UK and its ability to trade without any barriers with the rest of the UK, in line with the GFA. However, its “backstop” proposal, which would among other things support North-South cooperation, does not fully reconcile these positions.

- Contained in the Protocol on Ireland/Northern Ireland in the draft Withdrawal Agreement published in March 2018, the European Commission’s proposals on a common regulatory area would obviate the need for controls at the border between Ireland and Northern Ireland and would potentially support areas of North-South cooperation. But they do not avoid the need for controls between the island of Ireland and Great Britain. The EU’s proposals are flexible enough to accommodate within its internal arrangements part of what will be a non-EU country and to support the North-South dimension of the GFA, but not enough to prevent some seeing them as introducing what they would judge to be unacceptable barriers between one part of the UK and its other constituent nations, and therefore undermining other dimensions of the 1998 Agreement.
• By putting forward proposals in June 2018 that would see the whole of the UK within the EU’s customs territory, the UK Government is applying the wider territorial scope necessary to support the geography encompassed by the 1998 Belfast/Good Friday Agreement, which is not limited to the island of Ireland. However, without addressing how it proposes to replace the common regulatory framework provided for by the EU’s Single Market that alongside the EU’s Customs Union has come to underpin the totality of relations within and between these islands, the UK Government cannot achieve its often repeated objective of not undermining the GFA in any of its parts, nor will it achieve agreement from the EU.

1. Introduction

The upcoming referendum on continued UK membership of the European Union raises significant questions for the Northern Ireland peace settlement and the future development of devolution. It is clear that a decision to leave the EU would require revisions to the Belfast Agreement and associated legislation. While some of these changes appear relatively minor, others have the potential to raise serious political difficulties.¹

The above quote is taken from the second in a series of Briefing Papers published by the Centre for Cross Border Studies, in collaboration with Cooperation Ireland, prior to the June 2016 referendum on the United Kingdom’s membership of the European Union. It highlighted how Brexit might result in the need to revisit the 1998 Belfast/Good Friday Agreement (GFA) and revise the legislation that implemented it; it also stressed this would require political consensus – a consensus that may be hard to achieve in the current absence of a functioning Northern Ireland Assembly and Executive. The present paper,² the fourth in the Centre for Cross Border Studies’ current series on “Brexit and the UK-Ireland Border”,³ considers how the UK’s decision to leave the EU may impact on relations across the UK-Ireland border and between the island of Ireland and Great Britain as these are structured by the GFA. It analyses how and to what extent the key stages and documents in the

² Authored by Anthony Soares, Deputy Director, Centre for Cross Border Studies.
Brexit negotiations have so far accommodated, contradicted or (potentially) undermined the Belfast/Good Friday Agreement.

In what follows we begin by briefly outlining how the GFA frames relations and the current context in which they operate, which is shaped by Ireland and the UK’s common membership of the EU. We then consider how the UK Government and the EU approached the issue of the GFA as the negotiations over the UK’s withdrawal began in June 2017, with both sides highlighting the need to protect all elements of the 1998 Agreement but without necessarily comprehending what this may entail. This will be followed by an analysis of the extent to which protection of the GFA in all its dimensions is reflected in the December 2017 Joint Report on the progress of negotiations, with a particular focus on the growing tensions in ensuring Northern Ireland’s post-Brexit relations with the Republic of Ireland whilst not disturbing its relations with the rest of the UK. Our attention then turns to how these tensions are translated into the draft Withdrawal Agreement published in March 2018, looking at how its Protocol on Ireland/Northern Ireland may have cemented an overly narrow perspective of the GFA. Before offering some conclusions, the final section in this paper analyses the proposals put forward by the UK Government as an alternative to some of the solutions suggested by the EU in relation to Northern Ireland, assessing how far they can properly accommodate the full scope of the GFA whilst simultaneously not unduly impinging upon the EU’s common frameworks.

Before developing our argument any further, it is important to remember why a focus on the 1998 Belfast/Good Friday Agreement is crucial if we are to really understand the nature of Northern Ireland’s borders with the Republic of Ireland and with Britain, as well as the (potential) effects of Brexit on how we relate across them. In the previous Briefing Papers of this Series we suggested that:

- **State borders are not merely lines at the edges of states** but exist in the way different legislation, policies and associated practices (e.g. with respect to citizens’ rights, immigration control, or trade) are applied within and between states.

- **Borders work through entire systems (regimes) of interlinked legal, political and social rules and practices.** They don’t simply regulate physical movement across states. Basic aspects of everyday life (e.g. registering at an address or with a GP, opening a bank account, finding employment, enrolling in school and so on) depend on the existence and enactment of rights, laws and policies which vary according to a person’s citizenship, and are linked to reciprocal agreements between states.

- **The Northern Ireland-Ireland and Northern Ireland-Britain borders are historically constituted through the crisscrossing of different border regimes that regulate to differing extents how, who and what is deemed to
fall on one side or other of borders. Brexit must be understood as
instigating a change in, and a different relationship between, the border
regimes that apply in both jurisdictions. One of these border regimes is the
1998 Belfast/Good Friday Agreement. This is so for a number of reasons,
not least since, through all of its strands, the Agreement defines the
constitutional status of Northern Ireland within the UK and with respect to
the Republic of Ireland, with whom it shares an international border.

- The 1998 Agreement maintains a version of sovereignty and border
management informed by a tradition of European Union that regards
national borders as sites of integration and cooperation.

- A principal element of the Agreement is rights and their protections, which
are either directly or indirectly underpinned by EU law. Having to
disassociate parts of the Agreement from EU law as a result of Brexit will
have consequences for such rights and their protections and may result in
differential treatment of Irish, British and other EU citizens, as well as
among different categories of EU citizens – with direct consequences for
social cohesion.

- The open and invisible UK-Ireland border of today – a symbol, a
consequence and itself a pillar of the peace process – is what it is mostly
because of the intertwining economic integration within the EU and
political agreement guaranteed by the governments of the UK and Ireland
(as EU member states), and boosted by Union law. However, if as part of
the UK, Northern Ireland leaves the EU’s Single Market and Customs Union
then obstacles to trade across the border will be unavoidable and so will be
checks on both goods and people. Not all of these checks have to take place
at the geographical borderline and so many may remain invisible for the
ordinary traveler. Still, under such circumstances the inevitable re-
emergence of both direct and non-direct barriers to trade will nonetheless
result in an effective economic border. This will be directly damaging to the
all-island economy and North-South cooperation, and will be inimical to
political relationships on these islands.
2. The effects of the Belfast/Good Friday Agreement as a border regime

Each of the Belfast/Good Friday Agreement’s three central strands created a set of institutions to support three sets of relations:

- **Strand 1** created a power-sharing Northern Ireland Assembly and Executive, bringing together political representatives of Northern Ireland’s two main communities.
- **Strand 2** brought about the creation of the North South Ministerial Council where the governments of both jurisdictions on the island of Ireland would jointly develop cross-border and all-island cooperation in six policy areas, as well as direct and oversee the work of six new implementation bodies for practical cross-border and all-island cooperation.\(^4\)
- **Finally, Strand 3** created the British Irish Council, which would bring together the Irish and UK Governments, the devolved administrations in Northern Ireland, Scotland and Wales, as well as the Governments of the Isle of Man and the Channel Islands, to consult and cooperate in matters within their respective competences. The third strand also set up the British Irish Intergovernmental Conference, which would see the British and Irish Governments looking to promote bilateral cooperation in matters of mutual interest and within their competence, as well as address non-devolved Northern Ireland matters and deal with all-island and cross-border cooperation on non-devolved matters.\(^5\)

Indeed, the Agreement between the UK and Irish Governments that forms part of the 1998 Agreement stresses that this is “an opportunity for a new beginning in relationships within Northern Ireland, within the island of Ireland and between the peoples of these islands”, and declares they have entered into it:

> “Wishing to develop still further the unique relationship between their peoples and the close cooperation between their countries as friendly neighbours and as partners in the European Union”.\(^6\)

This declaration can be interpreted as recognition by the two Governments of the opportunity the 1998 Agreement represented to fully capitalise on their countries’ common membership of the European Union. The commitment of the signatories to the agreement reached in the multi-party negotiations to, among other principles, “exclusively democratic and peaceful means of resolving differences on political issues”, would transform the physical nature of the border between Northern Ireland and Ireland with the gradual removal of the security infrastructure that was no longer necessary in the absence of an armed conflict that had also at times made itself painfully felt in Great Britain and even further afield.

\(^4\) The six policy areas are: agriculture, education, environment, health, tourism and transport. The six implementation bodies are: the Food Safety Promotion Board (known as safefood); the Foyle, Carlingford and Irish Lights Commission (consisting of two agencies – the Loughs Agency, and the Lights Agency, although the latter is yet to be established); the Language Body (consisting of two agencies – Foras na Gaeilge and Tha Boord o Ulster-Scotch/Ulster-Scots Agency); the Special European Union Programmes Body (SEUPB); the Trade and Business Development Body (known as InterTradeIreland); and Waterways Ireland.

\(^5\) Having not met since 2007, the British Irish Intergovernmental Conference had its most recent meeting in London on 25 July 2018.

The GFA made possible the dismantling of the security checkpoints at major border crossings and the re-opening of others that had been blocked during “the troubles”, resulting in the current “invisibility” of the Ireland-Northern Ireland border; but its invisibility has also come about due to the UK and Ireland’s common membership of the European Union. Before the removal of the security infrastructure, the border on the island of Ireland had already seen the disappearance of customs posts following the abolishment of customs controls at internal EU borders in 1993, with the establishment of the Single Market in the same year facilitating the free movement of people, goods, services and capital between member states. These changes were a direct result of a European process to which the United Kingdom and Ireland – the two states either side of the border on the island of Ireland – had become a party to and benefited from since joining the European Economic Community in 1973. With controls on the movement of goods already relegated to history, the signing of the GFA became the last step in making the Ireland-Northern Ireland border invisible.

The border’s invisibility, however, should not be interpreted as emptying it of its inherent meaning as the line of demarcation between two sovereign states and of Northern Ireland’s constitutional position within one of those states. The removal of customs controls and security infrastructure from the border has not altered Northern Ireland’s status as part of the United Kingdom. Any change to its constitutional position can only come about in accordance with the principle of consent enshrined in the Belfast/Good Friday Agreement.

However, even before negotiations on the UK’s withdrawal from the EU could formally begin, some of questions related to Northern Ireland were raised alongside the “Miller” case brought before the United Kingdom’s Supreme Court, where the Government was being challenged on its ability to trigger Article 50 without prior parliamentary approval. Although in its judgement the Supreme Court considered that there was no requirement for the UK Government to seek the consent of the devolved administration or people of Northern Ireland before triggering Article 50, it nevertheless touched on potential difficulties arising from Brexit. These included how, post-Brexit, citizens living on either side of the Ireland-Northern Ireland border may no longer enjoy the same rights or the same means of asserting them. Within Northern Ireland itself citizens may have different sets of rights according to whether they identify as solely Irish or British as they are entitled to do as a result of the GFA and the Northern Ireland Act 1998, which implemented the Agreement. The Supreme Court concluded those leading the challenge brought by Steven Agnew and others were “unquestionably right […] to claim that the NI Act conferred rights on the citizens of Northern Ireland”, and that it had “endowed the people of Northern Ireland with the right to challenge the

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7 R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant), UKSC 2016/0196, https://www.supremecourt.uk/cases/uks-2016-0196.html. As part of the overall case brought by Gina Miller and others, separate challenges by Steven Agnew and others, and Raymond McCord, were examined which had been referred to the Supreme Court by the Attorney General for Northern Ireland and by Northern Ireland’s Court of Appeal, respectively.

8 See the written submission to the Supreme Court on behalf of Steven Agnew and others, https://www.supremecourt.uk/docs/agnew-and-others.pdf [last accessed 12/06/2018].
actions of the Executive or the Assembly on the basis that they are in breach of EU law”. These are rights currently enjoyed by EU citizens on either side of the Ireland-Northern Ireland border (which, in the case of Northern Ireland means both those who identify themselves as Irish or British), with Irish legislators operating under the same constraints as their counterparts across the border in terms of having to abide by EU law. The Court noted how it is “normally impermissible” for rights derived from “the international sphere”, such as membership of the EU, to be removed from citizens through the use of prerogative powers, and that “it might be considered a constitutional anomaly” if the UK Government were, as a result of Brexit, to remove from the administration in Northern Ireland the devolved responsibility to observe and implement EU obligations.

Brexit, therefore, could pose a significant risk to the ability of the two jurisdictions on the island of Ireland in ensuring equivalent protection of human rights as called for by the 1998 Belfast/Good Friday Agreement. Whereas the GFA “clearly presupposed that both Ireland and the United Kingdom would both be members of the European Union”, decisions taken by UK Governments in the years that follow Brexit will determine the extent to which citizens in Northern Ireland will have equivalent rights to those of their counterparts across the border, and in turn how the 1998 Agreement can continue to operate in terms of its rights dimensions.

3. The Belfast/Good Friday Agreement in the opening stages of the negotiations

When the UK Prime Minister wrote to the President of the European Council on the 29th March 2017 to formally announce the decision to withdraw from the European Union, thereby triggering the Brexit process, one of the principles she proposed for the negotiations was “to pay attention to the UK’s unique relationship with the Republic of Ireland and the importance of the peace process in Northern Ireland”. As part of this, the Prime Minister included the desire “to avoid a return to a hard

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9 Section 6 (2)(d) of the Northern Ireland Act declares that the Northern Ireland Assembly cannot pass any law that is incompatible with EU law, while Section 24 (1) sets out the same constraint on Northern Ireland Ministers and Departments.

border between our two countries”, and “to continue to uphold the Belfast Agreement”. Before the withdrawal negotiations began on the 19th of June 2017, the main institutions of the European Union set out their own objectives, which also included the avoidance of a hard border on the island of Ireland and safeguarding the 1998 Agreement. On the 22nd of May 2017 the European Council agreed the directives to be followed by the European Commission in the negotiations with the UK Government, which reiterated in paragraph 14 the need to “avoid a hard border on the island of Ireland”, and that nothing in any eventual Withdrawal Agreement with the UK “should undermine the objectives and commitments set out in the Good Friday Agreement in all its parts and its related implementing agreements”.

Before we go on to consider the various rounds of negotiations that have taken place since June 2017, it is worth raising here a potential difficulty in how the Belfast/Good Friday Agreement has been accorded a place as one among a number of topics for discussion concerning the island of Ireland. To illustrate this, it is perhaps useful to cite paragraph 14 of the European Commission’s negotiating directives in its entirety:

“In line with the European Council guidelines, the Union is committed to continuing to support peace, stability and reconciliation on the island of Ireland. Nothing in the Agreement should undermine the objectives and commitments set out in the Good Friday Agreement in all its parts and its related implementing agreements; the unique circumstances and challenges on the island of Ireland will require flexible and imaginative solutions. Negotiations should in particular aim to avoid the creation of a hard border on the island of Ireland, while respecting the integrity of the Union legal order. Full account should be taken of the fact that Irish citizens residing in Northern Ireland will continue to enjoy rights as EU citizens. Existing bilateral agreements and arrangements between Ireland and the United Kingdom, such as the Common Travel Area, which are in conformity with EU law, should be recognised. The Agreement should also address issues arising from Ireland’s unique geographic situation, including transit of goods (to and from Ireland via the United Kingdom). These issues will be addressed in line with the approach established by the European Council guidelines [emphasis added].

While the Commission’s directives highlight the need to protect the “objectives and commitments set out in the Good Friday Agreement in all its parts”, they also list a range of other issues for resolution during the negotiations, including the EU rights of Irish citizens in Northern Ireland, the continuation of the Common Travel Area, and the avoidance of a hard border. These issues are seen

as constituting the “unique circumstances and challenges on the island of Ireland [emphasis added]” that “will require flexible and imaginative solutions”.

It is important to recognise, however, that rather than being a mere item among others that include the nature of the border between Northern Ireland and Ireland, the Belfast/Good Friday Agreement is inextricably linked to all these additional issues. Moreover, given its three strands, which provide an integrated framework for relations within Northern Ireland, between Northern Ireland and Ireland, and between the island of Ireland and Great Britain, such an approach may fail to see that a solution that does not fully provide for all three sets of relations cannot satisfy the stated objective not to undermine the Good Friday Agreement in all its parts.

Published in August 2017, the UK Government’s Position Paper on Northern Ireland and Ireland takes a similar approach. It also presents the question of upholding the GFA separately from other issues to be resolved. This separation is made despite the paper explaining how 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”, and how this “is reflected in the structures and commitments in the Belfast (‘Good Friday’) Agreement, which takes a three-stranded approach”. 13 Indeed, even as it separately considers the issues of the border and North-South and East-West cooperation, the Government’s position paper makes several references to the GFA. 14

References to the GFA in discussions relating to the border and other issues mistakenly suggest that they are not of the same order. Instead, the issue of the 1998 Agreement should be treated as the core question from which others flow. This should be the conceptual framework underpinning negotiations on the UK’s withdrawal from the EU, abandoning approaches that see the Belfast/Good Friday Agreement as one of a number of discrete elements requiring resolution.

14 The section addressing North-South and East-West cooperation, for example, begins by recalling how the GFA “provides the unique constitutional framework for the North-South and East-West cooperation that is so significant from an economic, political and social perspective to Northern Ireland” (p.20). Similarly, the section on avoiding a hard border for the movement of goods includes as one of the UK’s proposed principles for potential models for the post-Brexit border the need to “Respect the provisions of the Belfast (‘Good Friday’) Agreement in all its parts, with particular reference to […] the importance of promoting sustained economic growth in Northern Ireland” (p.15).
4. The Joint Report and the Belfast/Good Friday Agreement

After several rounds of negotiations, the European Commission and the UK Government published a Joint Report on 8th December 2017 outlining the progress made, which would be used to judge whether they had advanced sufficiently to allow discussions to begin on the framework for the UK’s future relationship with the EU. Paragraphs 42 to 56 of the Joint Report deal specifically with Ireland and Northern Ireland, with the first of these paragraphs setting out fundamental areas where both sides had reached agreement:

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

This is a joint recognition that such protection must be afforded to the Agreement “in all its parts”, and to its “practical application […] on the island of Ireland and to the totality of the relationships set out in the Agreement” [emphasis added]. It should be interpreted as setting the foundations for the post-Brexit continuation of relations across the UK-Ireland land border between the two jurisdictions on the island of Ireland (Strand 2 of the 1998 Agreement), and between the island of Ireland and Great Britain (Strand 3). However, subsequent paragraphs in the Joint Report highlight the difficulties in configuring these relationships in the context of a UK outside not only of the EU, but also of its Customs Union and Single Market.

While the closing sentence of paragraph 43, for example, states that the “United Kingdom […] recalls its commitment to the avoidance of a hard border, including any physical infrastructure or related checks and controls”, paragraph 45 reads:

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

According to this paragraph then, whatever solutions are found for the post-Brexit protection of the totality of relationships set out in the 1998 Agreement, the avoidance of a hard border between Ireland and Northern Ireland can neither impinge on Ireland’s rights and obligations as a continuing member of the European Union, nor can Northern Ireland’s ability to trade freely with the rest of the United Kingdom be jeopardised in favour of continuing unimpeded trade on a North-South basis.

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Paragraph 44 further underlines that the “United Kingdom continues to respect and support fully Northern Ireland’s position as an integral part of the United Kingdom, consistent with the principle of consent”.

**In sum, it appears that any resolution to the issue of the post-Brexit border between Ireland and Northern Ireland can neither infringe the rules of the European Union’s Customs Union and Single Market, nor on Northern Ireland’s constitutional position within the UK and its ability to trade without any barriers with the rest of the UK. How this will be achieved in practice, however, with the UK’s seeking to leave the Customs Union and Single Market (and the possibility its standards and policies will diverge from those of the EU post-Brexit) is not addressed by the Joint Report.**

The Joint Report pays significant attention to the North-South dimension of the Belfast/Good Friday Agreement. Paragraph 48 is paradigmatic of this:

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

Although the first part of the sentence in this paragraph confirms the UK’s commitment to protecting the totality of North-South and East-West relations in line with the GFA, its conclusion nevertheless emphasises the post-Brexit operation of the North-South implementation bodies. This emphasis could not only reflect the lack of comparable implementation bodies for East-West cooperation, but also the need to highlight that the smooth operation of the North-South implementation bodies has relied on a common EU regulatory framework between the two jurisdictions on the island of Ireland.

**It is thus to be understood that Brexit brings with it the potential for increasing cross-border divergence and, consequently, obstacles to the proper functioning of the implementation bodies as part of Strand 2 of the GFA.**

Paragraph 47 of the Joint Report focuses specifically on the North-South dimension of the GFA and its reliance on an EU framework:

> “Cooperation between Ireland and Northern Ireland is a central part of the 1998 Agreement and is essential for achieving reconciliation and the normalisation of relationships on the island of Ireland. In this regard, both Parties recall the roles, functions and safeguards of the Northern Ireland Executive, the Northern Ireland Assembly, and the North-South Ministerial Council (including its cross-community provisions) as set out in the 1998 Agreement. The two Parties have carried out a

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mapping exercise, which shows that North-South cooperation relies to a significant extent on a common European Union legal and policy framework. Therefore, the United Kingdom’s departure from the European Union gives rise to substantial challenges to the maintenance and development of North-South cooperation”.

While the above paragraph rightly highlights the role of North-South cooperation as a central element of the GFA in the ongoing reconciliation process and in normalising relations between the two jurisdictions on the island of Ireland, it does so without reference to the substantial challenges posed by Brexit to East-West cooperation in its various forms, or to the normalisation of relations between the island of Ireland and Great Britain.

**Although the East-West dimension of the GFA is present at various points in the section devoted to Ireland and Northern Ireland in the Joint Report, there is a tendency to view the scope of the 1998 Agreement through a geographically limited lens.**

The island of Ireland is the space which the Joint Report sees as requiring specific solutions to the difficulties posed by Brexit, with paragraph 46 declaring that the principles and commitments it outlines “are, as necessary, specific to the unique circumstances on the island of Ireland”. As a result, and in looking for specific solutions for the island of Ireland, the Joint Report contained two paragraphs that would become the source of much contention following its publication. These were paragraphs 49 and 50, reproduced here in their entirety:

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

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

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17 The results of this mapping exercise have not been made publicly available.

18 Publication of the Joint Report in its final form was delayed as a draft version gave rise to serious objections from the Democratic Unionist Party, which made its concerns clear to the UK Prime Minister that the document undermined Northern Ireland’s constitutional status as an integral part of the UK as it opened up the possibility of Northern Ireland remaining linked to the EU unlike the rest of the UK. These concerns were summarised in a DUP statement by its leader, Arlene Foster MLA, who explained that “the Democratic Unionist Party indicated to the Prime Minister that we could not support [the draft text] as a basis for moving forward”, and that the DUP had “always been clear that the Union that matters most to Northern Ireland is that of the Union of the United Kingdom of Great Britain and Northern Ireland”; “Democratic Unionist Party Statement” (8 December 2017), [http://www.mydup.com/news/article/democratic-unionist-party-statement](http://www.mydup.com/news/article/democratic-unionist-party-statement) [last accessed 02/07/2018].
businesses to the whole of the United Kingdom internal market”.

Whereas both paragraphs make passing reference to the GFA, their overall focus is on North-South cooperation, the avoidance of a “hard” border on the island of Ireland, and the all-island economy – in other words Strand 2 and, to a certain extent in paragraph 50, Strand 1. Paragraph 49 sets out three options that would guarantee the post-Brexit protection of North-South cooperation and the avoidance of a hard border:

1. Achieving a comprehensive post-Brexit UK-EU trading relationship that would negate the need for any customs or other controls between the UK and the EU, which would in turn mean there would be no need for any specific arrangements for Northern Ireland.
2. If the first option is not possible, then the UK Government will propose its own specific solutions for Northern Ireland.
3. If neither of the first two options is possible, then the UK Government would ensure full alignment with the rules of the EU’s Single Market and Customs Union necessary to support North-South cooperation, the all-island economy and the protection of the GFA. This is what has become popularly known as the “backstop option”.19

Paragraph 50 states that in applying the third option – full alignment with the rules of the Single Market and Customs Union to support North-South cooperation – the UK Government will ensure that no new regulatory barriers are created between Northern Ireland and the rest of the UK, while also making it possible for the Northern Ireland Assembly and its Executive to introduce specific arrangements for Northern Ireland. If this were the case, the UK Government would continue to ensure no barriers to trade between Northern Ireland and the rest of the UK.20

The latter commitment to Northern Ireland is clearly in line with the position of the Democratic Unionist Party that the UK as a whole must leave the EU, and that Northern Ireland should not be treated any differently from the rest of the UK – a view not shared by other political parties in Northern Ireland.21 Outside the party political sphere, others have argued for a differentiated post-

19 For a more detailed analysis of the options put forward in the Joint Report see, for example, Katy Hayward and David Phinnemore, “The Northern Ireland/Ireland Border, Regulatory Alignment and Brexit: Principles and options in light of the UK-EU Joint Report of 8 December 2017” (February 2018), http://www.qub.ac.uk/brexit/Brexitfilestore/Filetoupload,796726,en.pdf [last accessed 02/07/2018].
20 What is set out in paragraph 50 of the Joint Report in terms of “no new regulatory barriers [...] between Northern Ireland and the rest of the United Kingdom” and “unfettered access for Northern Ireland’s businesses to the whole of the United Kingdom internal market” is clearly underlined by the UK Prime Minister in a letter setting out her commitments to Northern Ireland. Published on the same day as the Joint Report, those commitments include that the Government “will fully protect and maintain Northern Ireland’s position within the single market of the United Kingdom”, that “there will be no new borders within the United Kingdom of Great Britain and Northern Ireland”, and that “the whole of the United Kingdom, including Northern Ireland, will leave the EU customs union and the EU single market”; HM Government, “Prime Minister’s commitments to Northern Ireland” (8 December 2017), https://www.gov.uk/government/publications/prime-ministers-commitments-to-northern-ireland [last accessed 26/08/2018].
21 See, for example, Alliance’s “The Case for a Special Deal: How to Mitigate the Impact of Brexit on Northern Ireland” (November 2017), https://allianceparty.org/document/the-case-for-a-special-deal#document, the SDLP’s “Securing Our Future in Europe: Proposals for a Special Status for Northern Ireland Within the EU” (February 2017), http://www.newry.ie/attachments/article/4720/eusatus.pdf, and Sinn Féin’s “The Case for the North to Achieve Designated Special Status Within the EU” (November 2016), http://www.sinnfein.ie/files/2016/The_Case_For_The_North_To_Achieve_Special_Designated_Status_Within_The_EU.pdf, [last accessed 03/07/2018].
Brexit solution for Northern Ireland, noting that it already differs from other parts of the UK whether, for example, as a natural consequence of the “asymmetrical processes of devolution” within the UK, or Northern Ireland’s current place within an all-island single electricity market and the all-island sanitary and phyto-sanitary regime for animal health and welfare.

Another factor already differentiating Northern Ireland from the rest of the UK is addressed in paragraph 52 of the Joint Report:

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

The right enshrined in the GFA of those born in Northern Ireland to claim Irish citizenship distinguishes it from other parts of the UK, and means they will continue to be EU citizens post-Brexit, although it is unclear how they will retain complete access to the full complement of EU rights they enjoy now. This issue is implicitly raised in the Joint Report, but its resolution is left to the next phase of negotiations.

There are certain overall conclusions that can be made from the Joint Report’s analysis of the progress made in the first stage of the negotiations, and the extent to which the options it outlines for Ireland and Northern Ireland are feasible and compatible with protecting all parts of the GFA:

- With the UK outside the EU’s Single Market and Customs Union, it is difficult to conceive of any future UK-EU trading agreement capable of maintaining the current status of the totality of relationships – North-

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23 Katy Hayward and David Phinnemore, “The Northern Ireland/Ireland Border, Regulatory Alignment and Brexit”, and Brian Doherty et al, “Northern Ireland and Brexit: the European Economic Area option” (7 April 2017), http://www.epc.eu/pub_details.php?pub_id=7576&cat_id=17, [last accessed 03/07/2018]. Indeed, Phinnemore and Hayward summarise the argument in a report for the European Parliament: “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”; David Phinnemore and Katy Hayward, European Parliament, “UK Withdrawal (‘Brexit’) and the Good Friday Agreement” (November 2017), p.7,

24 For a recent discussion on this, see Daniel Holder, “Brexit – Sleepwalking into second class EU citizenship?” (2 July 2018), http://rightsni.org/2018/07/brexit-sleepwalking-into-second-class-eu-citizenship/ [last accessed 03/07/208].
South and East-West – set out in the 1998 Agreement. Even if a future UK-EU agreement were able to avoid a “hard” border with physical infrastructure, it is unlikely that this would imply the total absence of any customs procedures for cross-border trade (North-South and/or East-West) or post-Brexit regulatory, policy and rights divergence inhibiting North-South and East-West relations.

- In the event that no agreement is reached on a UK-EU trading agreement capable of maintaining the totality of relationships set out in the GFA, there is little likelihood that a UK Government not fully aligned with the EU’s Single Market and Customs Union will be able to provide specific solutions for Northern Ireland that will not either be rejected by the EU as contravening its legal order, or rejected by various forces in the UK for creating unacceptable barriers between Northern Ireland and the rest of the UK.

- In the absence of a sufficiently comprehensive UK-EU trade agreement, or of specific solutions for Northern Ireland proposed by the UK and acceptable to all parties, significant challenges need to be overcome if the option of the UK maintaining full alignment with the rules of the EU’s Single Market and Customs is pursued. To overcome them, the objective of UK full alignment with the rules of the Single Market and Customs Union should be explicitly undertaken as a means of protecting all parts of the 1998 Agreement, understood as encompassing the totality of North-South and East-West socio-economic relations.

5. The Belfast/Good Friday Agreement in the draft Withdrawal Agreement

With the Joint Report indicating that sufficient progress had been made in the first phase of negotiations, and after further rounds of negotiations that could now encompass discussions on possible frameworks for the UK’s future relationship with the EU, the European Union published a draft Withdrawal Agreement on the 15th March 2018.25 Another version was published on the 19th of


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March, highlighting in colour the progress made in agreeing the text with the UK. As part of the draft Withdrawal Agreement there is a Protocol on Ireland/Northern Ireland which, along with a preamble, consists of five chapters:

- Chapter I: “Rights of individuals”
- Chapter II: “Movement of persons”
- Chapter III: “Common regulatory area”
- Chapter IV: “Institutional provisions”
- Chapter V: “General and final provisions”

Four of the Protocol’s constituent articles are highlighted in green to indicate that, subject to technical legal revisions, agreement had been reached on the text. However, much of the Protocol is either in white as no agreement had been possible and therefore the text only reflects the European Union position, or in yellow to show agreement on the text only in relation to the issue in general, with further changes or clarifications still required.

Of the four agreed articles in the Protocol, three make reference to GFA, but without giving due emphasis to the interlocking nature of all of the GFA’s dimensions. For instance, the principle focus of Article 15 is the North-South dimension – Strand 2 of the GFA. This is unsurprising given the very framing of the Protocol itself – Ireland and Northern Ireland – but it nevertheless could be said to encourage an interpretation of the 1998 Agreement that underplays the interdependence of its three constituent strands. In turn this could lead to reading the “unique circumstances on the island of Ireland [emphasis added]” as divorced from the island of Ireland’s socio-economic and political relations with Great Britain.

Let us take the question of cooperation between the two jurisdictions on the island of Ireland as an example of the difficulty in separating the North-South dimension from the East-West one. Article 8 – where there is agreement between the UK and the EU – sets out how the Protocol’s implementation will maintain the conditions for continued North-South cooperation, which would assist compliance with Strand 2 of the GFA.


27 Article 15 sets out the future of the Protocol on Ireland/Northern Ireland should the EU and the UK reach a subsequent agreement that manages to avoid a hard border and protect the 1998 Agreement “in all its dimensions”.
However, whereas the GFA was framed to encompass North-South and East-West relations operating within a common EU framework, Brexit removes the UK from this shared regulatory and policy framework. This places Northern Ireland in a position where, if the UK begins to diverge from the EU framework post-Brexit, it will potentially either have to align itself (or be aligned by the UK Government) with Ireland and the EU in order to maintain North-South cooperation in areas such as the Single Electricity Market. This could mean divergence from Great Britain and undermine the East-West dimension of the 1998 Agreement.

Otherwise, Northern Ireland aligns itself with Great Britain as part of UK-wide common regulatory and policy frameworks. This could mean regulatory divergence from Ireland and the rest of the EU and undermine the North-South dimension of the Agreement.

In this context, where the UK as a whole would leave the Single Market and the Customs Union, either choice would undermine part of the GFA and could not, therefore, be seen as fulfilling the commitments contained within the draft Withdrawal Agreement.

The agreement reached on Article 8 appears to indicate that post-Brexit North-South cooperation on the island of Ireland would be compliant with EU law. On closer reading, however, and notwithstanding that the entirety of its two constituent paragraphs are in green in the coloured version, a note of caution is necessary. Article 8 of the Protocol on Ireland/Northern Ireland begins:

“Consistent with the arrangements set out in Articles 4 to 7 of this Protocol, and in full respect of Union law, this Protocol shall be applied so as to maintain the necessary conditions for continued North-South cooperation [...]”.


29 Again highlighting the example of cooperation on energy, a recent House of Commons Committee report has also noted this tension, stating that “any [UK] Common Framework regime would have to be able to take account of the potential need in Northern Ireland to be able to maintain not only east-west but also north-south Common Frameworks in areas such as energy supply”; House of Commons Public Administration and Constitutional Affairs Committee, “Devolution and Exiting the EU: reconciling differences and building strong relationships” (July 2018), pp.31-32, https://publications.parliament.uk/pa/cm201719/cmselect/cmpubadm/1485/1485.pdf [last accessed 31/07/2018].
Of Articles 4 to 7 in the Protocol mentioned in Article 8 above, Article 6 is in yellow to indicate further changes need to be made to the text before full agreement between the UK and EU is possible, whereas the others are in white as no agreement has been reached.

### What appears to be agreement in Article 8 in relation to the post-Brexit continuation of North-South cooperation and support for Strand 2 of the GFA

What appears to be agreement in Article 8 in relation to the post-Brexit continuation of North-South cooperation and support for Strand 2 of the GFA is seriously undercut, therefore, by lack of agreement on other elements in the Withdrawal Agreement.  

Indeed, Article 8 is the only one in the “Common regulatory area” Chapter of the Protocol on Ireland/Northern Ireland where agreement between the UK and the EU has been reached. Of the other six articles in the same Chapter, two are in yellow (Articles 6 and Article 9), with the other four being in white (Articles 3, 4, 5 and 7).

The Chapter on a common regulatory area within the Protocol represents the translation of the “backstop option” from the December 2017 Joint Report. It also replicates and indeed magnifies the Joint Report’s tendency we had suggested earlier of narrowing the scope of the GFA to its North-South dimension. The issue of the Single Energy Market on the island of Ireland, which is the subject of Article 6 and where there is some basic level of agreement between the UK and the EU, begins to illustrate the underlying difficulties in reaching full agreement.

Bearing in mind that the UK Government negotiators gave the green light to Article 8 on continued North-South cooperation in a range of areas including energy, Article 6 reads:

> “The provisions of Union law governing wholesale electricity markets […] shall apply to and in the United Kingdom in respect of Northern Ireland”.

It is the possibility of EU law being applicable to Northern Ireland post-Brexit that has prevented the UK Government from signing off on the text of Article 6. This reluctance stems from the Government’s current approach that cannot contemplate “the creation” of a border between Northern Ireland and Great Britain in relation to rules governing electricity markets, notwithstanding any existing regulatory divergences between Northern Ireland and the rest of the UK in other areas.

In other words, although it may be prepared to declare in Article 8 its willingness to “maintain the necessary conditions for continued North-South cooperation” in principle, the UK Government is

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30 It also emphasises one of the underlying principles of the negotiations, which is that nothing is agreed until everything is agreed. This was recalled by the European Council on the 23rd of March 2018, for example, when it issued its guidelines to the European Commission for the negotiations with the UK on the possible framework for future relations, stating: “The European Council calls for intensified efforts on the remaining withdrawal issues as well as issues related to the territorial application of the Withdrawal Agreement, notably as regards Gibraltar, and reiterates that nothing is agreed until everything is agreed”; European Council, “European Council (Art. 50) (23 March 2018) – Guidelines”, p.2, [https://www.consilium.europa.eu/media/33458/23-euco-art50-guidelines.pdf](https://www.consilium.europa.eu/media/33458/23-euco-art50-guidelines.pdf) [last accessed 01/08/2018].

unwilling to do so if in practice it means creating new barriers between Northern Ireland and Great Britain by allowing regulatory and other divergences between the two.

Also in yellow, and therefore where full agreement has not yet been achieved, is Article 9 of the Protocol, which states in relation to state aid:

> “The provisions of Union law on aids granted by States listed in Annex 2.9 to this Protocol shall apply to the United Kingdom in respect of Northern Ireland. For the purposes of those provisions, “in respect of Northern Ireland” means that only measures that affect trade between the territory of Northern Ireland and the Union shall be considered as aid within the meaning of Article 107(1) TFEU”.\(^{32}\)

Article 9 makes clear how its specific provisions – as is the case in much of the Protocol on Ireland/Northern Ireland – are limited to securing Northern Ireland’s post-Brexit relations with its southern neighbour and the rest of the EU, and not necessarily those with the rest of the UK. As it is currently framed, the draft Protocol rejects the possibility of including the entirety of the UK within its provisions on state aid or the law governing wholesale electricity markets, for example, even if the UK Government were to abide by EU regulations in these areas; while its North-South relations are protected, a post-Brexit regulatory border is placed between Northern Ireland and the rest of the UK.

At the heart of disagreements between the UK and EU, and why much of Chapter 3 in the Protocol on Ireland/Northern Ireland remains in white, is the nature of any post-Brexit “common regulatory area”. Article 3 on the establishment of a common regulatory area, which opens this chapter and has not been approved by the UK, reads:

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

Many of the articles (also in white) that follow in this chapter define the area without internal borders that will allow the post-Brexit free movement of goods and continued North-South cooperation as exclusive of Great Britain. Whatever these articles propose in relation to VAT and excise rules, agriculture and fisheries, the environment and so on, they do so assuming their post-Brexit application uniquely to Northern Ireland within the United Kingdom, and specifically to support its continued relations on a North-South dimension and with the wider EU.

**Importantly, the Protocol in the draft Withdrawal Agreement puts forward mechanisms to support North-South cooperation and the free movement of**

\(^{32}\) Article 107(1) of the Treaty on the Functioning of the European Union (TFEU) states: “Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market”; [https://eur-lex.europa.eu/legal-content/en/pdf/?uri=CELEX:12012E/TXT](https://eur-lex.europa.eu/legal-content/en/pdf/?uri=CELEX:12012E/TXT).
goods even though Northern Ireland will have left the European Union along with the rest of the UK.

Essentially, the European Commission’s proposals on a common regulatory area would obviate the need for controls at the border between Ireland and Northern Ireland and would potentially support areas of North-South cooperation; but they do not avoid the need for controls between the island of Ireland and Great Britain as goods from the latter will not originate from within the “common” area.

The EU’s proposals are flexible enough to accommodate within its internal arrangements part of what will be a non-EU country and to support the North-South dimension of the 1998 Belfast/Good Friday Agreement, but not enough to prevent some seeing them as introducing what they would judge to be unacceptable barriers between one part of the UK and its other constituent nations, and therefore undermining other dimensions of the GFA.\textsuperscript{33}

At a press conference following the publication of the first draft of the Withdrawal Agreement on the 28\textsuperscript{th} February 2018, asked whether what was being proposed would result in a border between Northern Ireland and the rest of the UK, Michel Barnier (the EU’s chief Brexit negotiator) replied: “there would be in some places controls – in ports, in airports – as is already the case, but I wouldn’t refer to them as a border”.\textsuperscript{34} These comments, we suggest, could be construed as underplaying how such differences constitute the existing wide array of border practices that have the potential to further increase in intensity and frequency in the event of the common regulatory area coming into force. Of course, the impact of any such increases at sea and airports would be far less directly felt by communities than if they were to occur at the land border between Northern Ireland and Ireland, but they would nevertheless represent a significant change to the operation of East-West flows.

However, the provisions in the Protocol on Ireland/Northern Ireland in the draft Withdrawal Agreement on a common regulatory area should also be seen as the translation into a legal text of

\textsuperscript{33} In an interview to the conservativehome blog, for example, the Deputy Leader of the DUP, Nigel Dodds MP, stated: “for us there is the fact that if as a result of the Brexit negotiations for instance there was to be any suggestion that Northern Ireland would be treated differently, in a way for instance that we were part of a customs union and a single market and the rest of the UK wasn’t – if there was anything like the EU’s definition of the backstop arrangements that was agreed in December – for us that would be a red line”; “Interview. The Brexit negotiation – Dodds warns against the ‘annexation’ of Northern Ireland” (25 April 2018), https://www.conservativehome.com/highlights/2018/04/interview-the-brexit-negotiation-dodds-warns-against-the-annexation-of-northern-ireland.html [last accessed 08/08/2018].

\textsuperscript{34} European Commission, Audiovisual Services, “Press conference of Michel Barnier, Chief Negotiator in charge of the Preparation and Conduct of the Negotiations with the United Kingdom” (28 February 2018), http://ec.europa.eu/avservices/video/player.cfm?ref=1151203 [last accessed 10/08/2018].
the “backstop option” included in paragraph 49 of the Joint Report of December 2017. It does not extend to what had been stated in paragraph 50 of the Joint Report, specifically how “the United Kingdom will ensure that no new regulatory barriers develop between Northern Ireland and the rest of the United Kingdom”, and that the UK “will continue to ensure the same unfettered access for Northern Ireland’s businesses to the whole of the United Kingdom internal market”. Indeed, the preamble to the Protocol (all of which is in yellow in the coloured version of the draft Withdrawal Agreement) makes its focus clear:

“Recalling that the Joint Report from the negotiators of the European Union and the United Kingdom Government on progress during Phase 1 of negotiations [...] outlines three different scenarios for protecting North-South cooperation and avoiding a hard border [...], this Protocol is based on the third scenario of maintaining full alignment with those rules of the Union’s internal market and the customs union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement, and that it applies unless and until an alternative arrangement implementing another scenario is agreed [...]”.

The backstop, then, is a proposed “alternative arrangement” capable of preserving many if not all of the North-South dimensions of the 1998 Agreement, and would only come into play “unless and until” either a comprehensive UK-EU trade agreement was reached, or the UK Government presented its own proposals acceptable to the EU, either of which would hopefully safeguard the Belfast/Good Friday Agreement in all of its parts. Nevertheless, the provisions for a common regulatory area in the Protocol on Ireland/Northern Ireland have not been accepted by the UK Government.

6. The 1998 Agreement and UK alternatives to the “backstop”

On the 7th of June 2018 the UK Government published its own proposals on its future customs relationship with the EU which, it stated, were developed mindful of “the need to protect the Belfast (Good Friday) Agreement in all its parts, including that there will be no hard border between Northern Ireland and Ireland, and no physical infrastructure or related checks and controls”. The document recalls the December 2017 Joint Report’s recognition of “the need to ensure that any solution protects Ireland’s place within the EU Internal Market and Customs Union, and preserves the integrity of the UK’s internal market and Northern Ireland’s place within it” (paragraph 2). By highlighting Northern Ireland’s post-Brexit place within the UK’s internal market, the UK Government brought back into play paragraph 50 of the Joint Report and, therefore, underlined its opposition to the EU’s proposals for a common regulatory area included in the draft Withdrawal Agreement. The UK Government’s alternative proposals “for the customs element of the backstop” seek to remove the risk of a post-Brexit customs border emerging between Northern Ireland and the

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rest of the UK with the introduction of “a temporary customs arrangement […] between the UK and the EU” (paragraph 4), but without committing itself to regulatory alignment with the EU – an essential requirement in avoiding the creation of borders.36

The essence of the UK Government’s proposals is outlined in paragraph 5:

“This arrangement would see:

- The elimination of tariffs, quotas, rules of origin and customs processes including declarations on all UK-EU trade;
- The UK outside the scope of the Common Commercial Policy (CCP), except where it is required to enable the temporary customs arrangement to function. This will mean applying the EU’s common external tariff (CET) at the UK’s external border, alongside the Union Customs Code (UCC) and such other parts of the Common Commercial Policy that are required to enable the temporary customs arrangement to function; and
- The UK able to negotiate, sign and ratify free trade agreements (FTAs) with rest of world partners and implement those elements that do not affect the functioning of the temporary customs arrangement”.

According to these proposals then, the whole of the UK would, whilst being outside it, abide by the rules of the EU’s Customs Union (although not of its Single Market) to the extent necessary to simultaneously avoid a UK-EU customs border (and thereby protect elements of both the North-South and East-West dimensions of the 1998 Agreement), and allowing it to pursue free trade agreements with non-EU countries. However, whilst the UK Government may in some respects have widened the territorial scope of its own proposals to not only accommodate the North-South relations embedded in the GFA, it limits them in a crucial way.

Whereas the draft Withdrawal Agreement included a backstop that would remain in place to “support North-South cooperation, the all-island economy and […] the 1998 Agreement” until and in the event of alternative arrangements being found, the UK’s solution would only do so on a temporary basis and on the understanding that the EU would have agreed to new customs arrangements before the UK’s withdrawal. These constraints are set out in paragraphs 6 and 7:

“6. The temporary customs arrangement will be replaced by a permanent end state settlement, whose terms will need to be agreed by both parties. This temporary arrangement would only come into force following the Implementation Period, in specific and narrow circumstances, such as a delay in the implementation of the end state customs arrangement, and would be time-limited. The UK is clear that this is not its preferred option.

7. Such a temporary arrangement could only be provided for in law if a Withdrawal Agreement is agreed between the UK and the EU. This Withdrawal Agreement will be accompanied by, and refer to, an agreed future partnership framework, which would set out the new customs end state arrangement”.

Having stated that a “new customs end state arrangement” should be included in the Withdrawal Agreement – which runs contrary to the EU’s position that such details can only be negotiated once

36 Indeed, the second paragraph in the document ends by acknowledging that to fulfil the commitments to Ireland and Northern Ireland in the December Joint Report “requires a joint solution on both customs, which is addressed in this paper, and an approach on regulatory standards, which will also need to be addressed”.
the UK has left the EU and become a third country – the UK Government underlines in the final paragraph how its customs proposals are time-limited:

“\textit{The UK is clear that the temporary customs arrangement, should it be needed, should be time limited, and that it will be only in place until the future customs arrangement can be introduced. The UK is clear that the future customs arrangement needs to deliver on the commitments made in relation to Northern Ireland. The UK expects the future arrangement to be in place by the end of December 2021 at the latest. There are a range of options for how a time limit could be delivered, which the UK will propose and discuss with the EU}.”

As well as, for example, being able “to pursue an independent trade policy” (paragraph 15), “to negotiate, sign and ratify new bilateral, plurilateral and multilateral trade agreements”, and “to continue to participate in any new FTAs [Free Trade Agreements]” (paragraph 18) negotiated by the EU with other countries, the UK Government suggests changes to the draft Protocol on Ireland/Northern Ireland that would widen the territorial scope of any future customs arrangements to include the whole of the UK.

In most cases this is done by deleting the phrase “in respect of Northern Ireland” from the original text in the draft Protocol. Indeed, the first change the UK Government’s paper proposes, which has the overarching aim of applying any relevant customs legislation to the whole of the UK and the Crown Dependencies, and not just to Northern Ireland, results in the text of Article 4.2 of the draft Protocol declaring “The territory of the United Kingdom shall be considered part of the customs territory of the Union”.\textsuperscript{37} This would be achieved, according to the UK Government, by “providing that the territory of the UK would form part of the EU’s customs territory or creating a new customs territory comprising the customs territories of the UK and the EU” (paragraph 11), although in a way that would remove any role for EU customs authorities in Northern Ireland or anywhere else in the UK (according to the changes suggested to Article 4.7) and would not place the UK under the continued direct jurisdiction of the European Court of Justice (as set out in paragraphs 22 to 24).

By putting forward proposals that would see the whole of the UK within the EU’s customs territory the UK Government is applying the wider territorial scope necessary to support the geography encompassed by the 1998 Belfast/Good Friday Agreement, which is not limited to the island of Ireland. However, without addressing how it proposes to replace the common regulatory framework provided for by the EU’s Single Market that alongside the EU’s Customs Union has come to underpin the totality of relations within and between these islands, the UK Government cannot achieve its often repeated objective of not undermining the GFA in any of its parts.

\textsuperscript{37} The equivalent text in Article 4.2, as drafted by the European Commission, reads: “The territory of Northern Ireland, excluding the territorial waters of the United Kingdom (the ‘territory of Northern Ireland’), shall be considered to be part of the customs territory of the Union”.

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In his initial assessment of the UK Government’s proposals, Michel Barnier not only questioned, among other things, how the absence of any commitment to regulatory alignment would avoid the need for a “hard” border, he also firmly rejected the UK Government’s attempts to widen the territorial scope of any backstop solutions:

“[L]et me recall that our backstop […] provides specific solutions to the unique situation of Northern Ireland. The UK is taking a different angle, however. It is looking for a UK-wide solution. Let me be clear: our backstop cannot be extended to the whole of the UK. Why? Because it has been designed for the specific situation of Northern Ireland”. 38

While arguing that “What is feasible with a territory the size of Northern Ireland is not necessarily feasible with the whole UK”, the EU’s chief negotiator repeatedly emphasises the uniqueness of the circumstances pertaining to Northern Ireland, but doing so generally in terms of its geographical location and the consequences of that in light of the UK’s withdrawal from the EU. Thus, in relation to Northern Ireland maintaining post-Brexit regulatory alignment with the EU, he stresses the need for “common rules to preserve the free movement of goods on the island and to preserve and encourage North-South cooperation”, and “to avoid new barriers to the daily exchanges on the island”. Without explicitly acknowledging that by limiting proposed solutions to Northern Ireland new barriers will appear between the island of Ireland and Great Britain, Michel Barnier returns to the question of the comparative impact of disruption at the land border and other points of entry:

“Let’s go back to pragmatism. Checks carried out on ferries are less disruptive than along a 500km-long land border. In addition, these checks can build on arrangements and facilities which already exist – which already exist – between the rest of the UK and Northern Ireland.”

So, in terms of the backstop included in the Protocol on Ireland/Northern Ireland in the draft Withdrawal Agreement, and in light of the UK Government’s stance in relation to the EU’s Single Market and Customs Union, the EU’s position is clear: to avoid a hard border on the island of Ireland and to maintain North-South cooperation and the all-island economy, its territorial limit is Northern Ireland. The rest of the UK will not be included.

Conclusion

- There can be little question that in terms of levels of social disruption, faced with a choice between placing controls along a meandering border or at specific sites of transit, the former option would be preferable in practical if not necessarily political or economic terms, not least to many of those communities living within the border region. However, there

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can also be no doubt that to impose such a choice is to undermine the totality of relations encompassed by the 1998 Belfast/Good Friday Agreement. It is to take an approach that in promoting one set of relations in order to maintain their post-Brexit continuity alters the ability of another set to function in the same way it has since 1998.

- The post-Brexit preservation and development of the full range of socio-economic relations and North-South cooperation between the two jurisdictions on the island of Ireland are essential to the continued adherence to the 1998 Agreement. But so is the preservation and development of relations and cooperation between the island of Ireland and Great Britain, which includes not only relations between Northern Ireland and the rest of the UK, but also between England, Scotland, Wales and Ireland. That is to adhere to the full spirit of the Belfast/Good Friday Agreement. If we have (yet again) reached a point in the negotiations over the UK’s withdrawal from the EU where the post-Brexit location of controls is being debated – whether customs, regulatory or both – this surely indicates that the full nature and geographical scope of the Belfast/Good Friday Agreement has not provided the central framework for those negotiations. Instead, it has been seen as a discrete issue alongside others, such as the avoidance of a hard border or the all-island economy. It has lost the necessary visibility in debates that either deliberately or unwittingly present the manifestation of the limits of different sovereign entities as a physical border rather than as how and the extent to which people, goods, services and capital encounter different border practices.

- The “unique circumstances on the island of Ireland” derive some of their uniqueness precisely through their interrelation with Great Britain as a consequence of the Belfast/Good Friday Agreement, whose operation has been facilitated by Ireland and the UK’s common membership of the
A post-Brexit backstop territorially limited to the island of Ireland, therefore, may go some way to avoiding a hard border between Ireland and Northern Ireland and protecting the all-island economy and North-South cooperation, but it cannot be presented as the fulfilment of one of the core objectives set out by both the EU and the UK at the outset of the withdrawal negotiations, which was not to undermine the 1998 Agreement in all its parts. In this sense, a backstop solution limited to the island of Ireland is only a partial solution to the protection of the Belfast/Good Friday Agreement.

As the co-guarantor of the 1998 Agreement withdrawing from the European Union, it is the prime responsibility of the UK Government to come forward with solutions that will preserve all of the parts of the Belfast/Good Friday Agreement. This includes alternative proposals to the backstop arrangements set out in the Protocol on Ireland/Northern Ireland in the draft Withdrawal Agreement. However, whilst what the UK Government proposed in June 2018 is more able to accommodate both the North-South and East-West dimensions of the 1998 Agreement by encompassing the whole of the UK, its refusal to address regulatory alignment means it fails to take into account the full range of mechanisms derived from EU membership that facilitate relations and cooperation within and between these islands. Moreover, although on one hand its wider territorial scope appears to offer more adequate protection to the Belfast/Good Friday Agreement, the UK Government’s...

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39 It is interesting to note in this regard a paper recently submitted by the Foreign and Commonwealth Office to the House of Commons Foreign Affairs Committee, which in its overview and analysis of UK-Ireland bilateral relations makes repeated references to the 2012 Joint Statement by the then Prime Minister David Cameron and Taoiseach Enda Kenny “marking the start of a decade of intensified cooperation across areas of mutual interest” (24 July 2018, https://www.parliament.uk/documents/commons-committees/foreign-affairs/Correspondence/2017-19/OFFICIAL-Analysis-of%20UK-Ireland-bilateral-relationship-(FAC)-Final.pdf, last accessed 16/08/2018). However, what is not highlighted in this analysis is how the 2012 Joint Statement paid specific attention to the two countries’ membership of the EU in a section entitled “Working together in Europe”, which began: “Our two countries have shared common membership of the European Union for almost forty years. As partners in the European Union we are firm supporters of the Single Market and will work together to encourage and outward-facing EU, which promotes growth and jobs” (12 March 2012, https://www.gov.uk/government/news/british-irish-relations-the-next-decade, last accessed 16/08/2018).
June proposal places this in doubt on the other by insisting it should be time-limited.

- A time-bound solution is not an acceptable protection of the 1998 Belfast/Good Friday Agreement if it is deliberately conceived as coming to an end even if a suitable alternative is not found. Reassurances offered by the UK Government in its White Paper on the UK’s future relations with the EU that it is committed to “honouring the letter and the spirit of the Belfast (‘Good Friday’) Agreement” are undercut as it repeats its intent in “ensuring that the operational legal text the UK will agree with the EU on the ‘backstop’ solution as part of the Withdrawal Agreement will not have to be used”.  

- Although the UK Government’s ultimate objective may be to secure a future relationship with the EU so comprehensive that it will secure the functioning of the letter and spirit of the 1998 Agreement in all its parts, this will not be possible until after the UK has withdrawn from the EU. Therefore, in line with its role as one of its co-guarantors, the UK Government must be fully committed to developing a backstop solution that affords the Belfast/Good Friday Agreement comprehensive protection. Such protection should be delivered through a backstop with the territorial scope necessary to safeguard the 1998 Agreement in both its North-South and East-West dimensions, but it cannot have the in-built insecurity of a time-limit. Neither can it require the EU to risk the integrity of its common frameworks in order to protect the framework provided by the 1998 Agreement, of which it has been supportive but, ultimately, of which it is not a co-guarantor. That is the responsibility of

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the UK Government, and one that it must place at the heart of its approach to the negotiations.