



The Centre for
Cross Border Studies

Briefing Paper

The UK Government's proposals for an amended Protocol on Ireland/Northern Ireland

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Introduction

This Briefing Paper¹ forms part of the Centre for Cross Border Studies' ongoing work into the potential consequences of the UK's withdrawal from the European Union for North-South and cross-border cooperation.² It has been prompted by the recent publication of the UK Prime Minister's letter to the President of the European Council,³ and of the accompanying Explanatory Note on the UK proposals for an amended Protocol on Ireland/Northern Ireland,⁴ which set out the UK Government's approach to the ongoing negotiations over the UK's withdrawal from the European Union. As it currently stands, the UK is set to leave the EU on the 31st of October.

It is important to note that the publication of this Briefing Paper departs from our usual methods of working, since it sets out our initial analysis of what remains an incomplete picture in terms of the UK Government's current position. In his 2nd of October letter to Donald Tusk, the UK Prime Minister states the UK Government was "delivering the draft legal text of [the proposed amended] Protocol to Task Force 50" on the same day.⁵ However, although the letter and an Explanatory were made publicly available, the draft legal text has not been published to date. In response to an urgent question in the House of Commons on 7th October by the Shadow Secretary of State for Exiting the European Union, Keir Starmer, on when the Government intended to publish the legal text, the Parliamentary Under-Secretary of State for Exiting the European Union, James Duddridge, replied: "The legal text that we have shared with the [European] Commission will only be published when doing so will assist the negotiations".⁶

¹ This Briefing Paper was authored by Dr Anthony Soares, CCBS Acting Director.

² This work has included two Briefing Paper series ("Brexit and the UK-Ireland Border" and, in collaboration with Cooperation Ireland, "The EU Referendum Briefing Papers"), as well as numerous other publications and appearances before parliamentary committees. For more of our Briefing Papers, see <http://crossborder.ie/category/research-and-policy/policy/briefings/>; for our submissions to parliamentary committees see <http://crossborder.ie/category/research-and-policy/policy/consultation-responses/>.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/836029/PM_letter_to_Juncker.pdf.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/836116/Explanatory_Note_Accessible.pdf.

⁵ The Taskforce on Article 50 Negotiations with the United Kingdom is the European Commission's team responsible for negotiating on behalf of the European Union with the United Kingdom Government over the UK's withdrawal. For more see https://ec.europa.eu/info/departments/taskforce-article-50-negotiations-united-kingdom_en.

⁶ House of Commons, *Hansard*, Volume 664. "Withdrawal Agreement: Proposed Changes" (7 October 2019), <https://hansard.parliament.uk/commons/2019-10-07/debates/6CCB91CE-9DF6-4E0A-9062-41A188D38967/WithdrawalAgreementProposedChanges>.

Notwithstanding the continued absence of a publicly available legal text, which would contain the detail of the UK Government's position, the Centre for Cross Border Studies has decided to set out its assessment of the UK's approach to the Brexit negotiations as gleaned from the Prime Minister's letter and the accompanying Explanatory Note. Although our normal practice is to offer such assessments on the basis of concrete proposals and formal documents, the urgency of the current context requires this response.

However, in order for citizens and organisations such as ours to be in a position to fully understand the approach being taken by the UK to its withdrawal from the European Union, **it is imperative that the draft legal text of the proposed amended Protocol delivered to Task Force 50 be immediately made public by the UK Government** in order to ensure necessary transparency.

The UK's proposals for an amended Protocol on Ireland/Northern Ireland: What came before

When the then UK Prime Minister, Theresa May, wrote to the President of the European Council, Donald Tusk, formally announcing the UK's decision to leave the EU, and thereby commencing the Article 50 process, she listed the following as a core priority in the upcoming negotiations:

"In particular, we must pay attention to the UK's unique relationship with the Republic of Ireland and the importance of the peace process in Northern Ireland. The Republic of Ireland is the only EU member state with a land border with the United Kingdom. We want to avoid a return to a hard border between our two countries, to be able to maintain the Common Travel Area between us, and to make sure the UK's withdrawal from the EU does not harm the Republic of Ireland. We also have an important responsibility to make sure that nothing is done to jeopardise the peace process in Northern Ireland, and to continue to uphold the Belfast Agreement" (p.5, emphasis in the original).⁷

In December 2017, the UK Government and the European Commission published a Joint Report assessing progress in the negotiations over the UK's withdrawal. In relation to Ireland and Northern Ireland, the Joint Report noted the following commitments:⁸

- "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" (paragraph 42).

⁷ <https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50>.

⁸ https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf.

- “The United Kingdom recalls its commitment to protecting the operation of the 1998 Agreement, including its subsequent implementation agreements and arrangements, and to the effective operation of each of the institutions and bodies established under them. The United Kingdom also recalls its commitment to the avoidance of a hard border, including any physical infrastructure or related checks and controls” (paragraph 43).
- “Both Parties recognise the need to respect the provisions of the 1998 Agreement regarding the constitutional status of Northern Ireland and the principle of consent. The commitments set out in this joint report are and must remain fully consistent with these provisions. The United Kingdom continues to respect and support fully Northern Ireland's position as an integral part of the United Kingdom, consistent with the principle of consent” (paragraph 44).
- “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” (paragraph 45).
- “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” (paragraph 48).
- “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” (paragraph 49).
- “In the absence of agreed solutions, as set out in the previous paragraph, the United Kingdom will ensure that no new regulatory barriers develop between Northern Ireland and the rest of the United Kingdom, unless, consistent with the 1998 Agreement, the Northern Ireland Executive and Assembly agree that distinct arrangements are appropriate for Northern Ireland. In all circumstances, the United Kingdom will continue to ensure the same unfettered access for Northern Ireland's businesses to the whole of the United Kingdom internal market” (paragraph 50).

The commitments set out in this Joint Report would inform the negotiations that led to the Withdrawal Agreement reached in November 2018,⁹ but subsequently rejected by the House of Commons. Largely as a result of the repeated failure to pass the Withdrawal Agreement through the UK Parliament, Theresa May resigned, to be subsequently replaced by the current Prime Minister, Boris Johnston.

What the current UK Prime Minister is proposing to the European Union is an alternative to the Protocol on Ireland/Northern Ireland that was part of the November 2018 Withdrawal Agreement. Among other things, the 2018 Protocol set out an arrangement whereby the whole of the United Kingdom would become part of a “single customs territory” along with the EU until such time as an alternative solution was found to avoid a customs border with the Republic of Ireland, or until the UK and EU subsequently reached a trade agreement that would achieve the same result. It also established that Northern Ireland would align with EU regulations and standards, giving it continued access to the EU’s Single Market, and supporting continued cooperation between Northern Ireland and the Republic of Ireland. These arrangements, which avoided a customs or regulatory border between the two jurisdictions on the island of Ireland, became commonly known as “the backstop”.

The UK’s proposals for an amended Protocol on Ireland/Northern Ireland: (In)compatibility with the 1998 Belfast/Good Friday Agreement

Contrary to what is suggested in Boris Johnston’s 2nd October letter to Donald Tusk and the accompanying Explanatory Note, **the proposals put forward by the UK Government undermine all three core strands of the 1998 Belfast/Good Friday Agreement.** They represent a complete retreat from the commitments made in the March 2017 letter triggering Article 50, and from those contained in the December 2017 Joint Report. Central to this is the rejection of the single customs territory contained in the 2018 Protocol, and the proposed role for the Northern Ireland Assembly in deciding on whether to align with EU rules or those in the rest of the UK.

In terms of customs, the Explanatory Note is categorical:

“It is a fundamental point that the UK will be exiting the EU Customs Union as a whole at the end of the transition period. This means that the UK and EU will operate distinct customs territories and that Northern Ireland will be part of the UK customs territory” (paragraph 14).

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759019/25_November_Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf.

It goes on to recognise that “This means that the border between Ireland and Northern Ireland will be a customs border” (paragraph 15).

By withdrawing Northern Ireland, along with the rest of the UK, from the EU Customs Union the UK Government would be ultimately responsible for the imposition of a customs border between the two jurisdictions on the island of Ireland, with physical checks on goods not only at traders’ premises, but also “at other designated locations which could be located anywhere in Ireland or Northern Ireland” (Explanatory note, paragraph 17 (b)).

This will have a profoundly negative impact on the all-island economy, cross-border trade, and on cross-border economic cooperation (affecting the effective operation of InterTradeIreland, one of the implementation bodies under Strand 2 of the GFA), as well as on the individual economies of both jurisdictions on the island of Ireland.

The introduction of controls and physical checks, wherever they may take place in relation to the actual border, would have significant security implications and affect community relations within Northern Ireland. The UK’s withdrawal of Northern Ireland from the EU’s Customs Union will have immediate negative consequences for Strands 1 and 2 of the Belfast/Good Friday Agreement.

According to the proposals set out in the Explanatory Note:

“The introduction of a zone of regulatory compliance across Northern Ireland and the EU would remove the need for regulatory checks and related infrastructure at the border between Northern Ireland and Ireland, while enabling the UK and EU to maintain their own distinct customs regimes” (paragraph 6).

The introduction of “a zone of regulatory compliance across Northern Ireland and the EU” would not only of itself *not* avoid checks and infrastructure (due to Northern Ireland’s position outside the EU Customs Union), it will necessitate controls of goods from Great Britain into Northern Ireland, thereby undermining the spirit if not the letter of Strand 3 of the Belfast/Good Friday Agreement.¹⁰ In effect, the UK Government’s current proposals would result in *two* borders: a customs border between Northern Ireland and Ireland, and a regulatory border between Great Britain and Northern Ireland.

In relation to the initial establishment and continued operation of the “zone of regulatory compliance”, the Explanatory Note states:

¹⁰ From the outset, and informed by the previous commitments made by the EU and the UK Government not to undermine the Good Friday Agreement in any of its parts, the Centre for Cross Border Studies has always assessed developments in the negotiations according to how they may impact on all three core strands of the GFA. Accordingly, in relation to the Protocol on Ireland/Northern Ireland in the Withdrawal Agreement, the Centre stated: “the Protocol does not protect the totality of existing socio-economic relations within and between these islands, notably the East-West dimension, of the 1998 Belfast/Good Friday Agreement” (<http://crossborder.ie/site2015/wp-content/uploads/2018/11/CCBS-Statement-on-the-UK-EU-Political-Declaration-Final.pdf>).

“The zone of regulatory compliance will mean that Northern Ireland will be, in significant sectors of its economy, governed by laws in which it has no say. That is clearly a significant democratic problem. For this to be a sustainable situation, these arrangements must have the endorsement of those affected by them, and there must be an ability to exit them. That means that the Northern Ireland institutions – the Assembly and the Executive – must be able to give their consent on an ongoing basis to this zone” (paragraph 12).

Given the specific nature of the operation of the Northern Ireland Assembly and Executive, the proposal for these institutions to “give their consent on an ongoing basis” to the zone of regulatory compliance would not only give rise to political and community tensions and create intolerable uncertainty for businesses and citizens, it also practically ensures talks between the political parties in Northern Ireland to restore these institutions will not be successful in the short to medium term. This not only undermines Strand 1 of the GFA, but also Strand 2 as the continuing absence of functioning institutions in Northern Ireland will mean the continuing failure of the North South Ministerial Council to meet.

Ultimately, under the current procedures for operation of the devolved institutions in Northern Ireland, these proposals in terms of consent would create a situation whereby a larger party in the Assembly could veto the regulatory direction for Northern Ireland favoured by other parties. Crucially, **the UK Government’s proposals also do not set out *who* in Northern Ireland is to give such consent if the Northern Ireland Assembly and Executive continue to be in suspension**, or if the institutions collapse once again if the current talks result in their reestablishment.

Conclusion

On the basis of the Explanatory Note and the UK Prime Minister’s letter to the President of the European Council, the UK Government’s proposals for an amended Protocol on Ireland/Northern Ireland undermine the Belfast/Good Friday Agreement in all of its core strands. They also represent a retreat from commitments made at the outset of the negotiations over the UK’s withdrawal from the EU, and include suggestions previously rejected by the European Union (such as exempting smaller traders from customs procedures and from paying customs duties). What they underline once again is the current incompatibility of the UK’s approach to withdrawing from the EU – which entails leaving both the Single Market and Customs Union – with its role as a co-guarantor of the 1998 Belfast/Good Friday Agreement.