



The Centre for  
Cross Border Studies

# Brexit and the UK-Ireland Border

## *Briefing Paper series*

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## Briefing Paper 3: Changing Trade Relations and Regulations

## Executive Summary

- The future trade relationship between the EU and the UK will have critical impact on the border between Northern Ireland and the Republic of Ireland as the only UK-EU land border.
- The UK-Ireland border of today is open and invisible largely because of the intertwining of EU economic integration and the Belfast (Good Friday) Agreement, itself boosted by Union law.
- If, as part of the UK, Northern Ireland does leave the European Single Market (SM) and Customs Union (CU) then new obstacles to trade across the border will be unavoidable. Under such circumstances direct and non-direct barriers to trade will re-emerge and result in an effective economic border, no matter if border checks on goods are performed at the physical borderline or out of sight.
- An economic border will be directly damaging to the all-island economy and North-South cooperation, and undermine political relationships on the island and between this island and Great Britain.
- The UK has committed to avoiding a 'hard' border on this island. However, a 'hard' border is a relative term and there is no absolute standard of 'border hardness' against which to judge the fulfillment of guarantees to avoid it. What may be 'hard' for some could be seen as otherwise for others.
- It is therefore important to understand not whether the future border will be 'hard' or 'soft' but how precisely it will deviate from the present status quo, by what legal means, and with what effects on trade, border checks and costs.
- None of the proposals in the Joint Report on the EU-UK negotiations of December 8<sup>th</sup> 2017 for avoiding a 'hard' border offers a clear way of achieving this if the UK and Northern Ireland leave the SM and the CU.
- In all cases and scenarios proposed it remains difficult to see how a customs border and checks on the movement of goods can be avoided simultaneously on land and sea.
- A customs border requires physical infrastructure. It can be made more efficient but cannot be entirely avoided by electronic means. Electronic borders cannot substitute for the ease of trade that the CU and SM currently provide for.

## 1. Introduction

The withdrawal of the United Kingdom from the European Union will change the country's trade relations with the world. Such a change will unavoidably affect how the UK's international borders regulate, among other things, the movement of goods. This paper discusses the consequences for the land border between Northern Ireland and the Republic of Ireland.<sup>1</sup>

To understand the relationship between imminent changes in trade relations and regulations (resulting from Brexit) and the UK-Ireland border it is important to remember, as we argued in the previous two Briefing Papers in this series, that:

- Borders are not simply physical lines that separate states. Instead, borders 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.
- Border regimes (i.e. systems of legal rules, policies, and their associated practices) regulate not just movement (of people or of goods and services) across borders but extend to every aspect of social and commercial life.
- Changes in the rules and practices for regulating one type of movement (e.g. of goods) affect a border's openness to other types of movement (e.g. of people);
- The lack of visible physical infrastructure at the post-Brexit UK-Ireland border would not in itself mean that the border will remain 'open' or 'frictionless'.

Borders are central to and represent the main contradiction behind both the popular and political support for Brexit and the position adopted by the UK Government vis-à-vis Brexit negotiations. One of the main motivations behind the leave vote, i.e. the stated desire to take 'back control of our borders and who comes into our country',<sup>2</sup> represented in essence a political position and an ideological belief: first, that poorly controlled immigration was responsible for a range of social problems in the UK and that membership of the EU was preventing the UK from exercising proper control over immigration (even one not from the EU);<sup>3</sup> second, that the UK's membership of the EU was a hindrance to its economic development which could only be solved if it were to 'regain' the freedom to strike its own trade deals with non-EU countries. At the same time, however, most economic analyses overwhelmingly suggest that exiting the European single market (SM) and the European customs union (CU) (as the particular proposed version of Brexit), would hurt the United

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<sup>1</sup> Authored by Dr Milena Komarova, Research Officer, Centre for Cross Border Studies.

<sup>2</sup> [http://www.ukip.org/time\\_we\\_took\\_back\\_control\\_of\\_our\\_borders\\_and\\_who\\_comes\\_into\\_our\\_country](http://www.ukip.org/time_we_took_back_control_of_our_borders_and_who_comes_into_our_country)

<sup>3</sup> From perceived loss of sovereignty, to the pressure on many parts of society and public services.

Kingdom's international trade, overall economic development and living standards in the immediate future.<sup>4</sup>

The possibility of reconciling the ideological rationale behind Brexit with its potential economic damage hinges on how the UK's borders can be transformed after withdrawal. In this respect the UK-Ireland border is something akin to a collision point where economic and political interests, and ideological beliefs clash. Here loose notions such as 'hard', 'soft', 'frictionless', and 'invisible' mask over the incompatibility of negotiating positions and the inadequacy of purported technological fixes for avoiding new barriers to trade.

The political decision of the UK Government to leave both the SM and the CU are widely viewed as *de facto* negating the possibility for the UK-Irish border to remain as open and 'invisible' as it presently stands.<sup>5</sup> This Briefing Paper develops an overview of the proposals that have been put forward to address the border challenges of Brexit, querying the capacity of proposed measures to avoid a 'hard' border on the island of Ireland and questioning the substance of the notion of a 'hard' border itself.

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## 2. Negotiating positions and 'red lines'

It is essential to appreciate that the EU and the UK are each strongly driven by the interest to establish a mutually beneficial long term economic relationship *and* by the imperative to

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<sup>4</sup> To name but a few: Begg, I. and Mushövel, F. (2016) 'The economic impact of Brexit: jobs, growth and the public finances', European Institute, London School of Economics, <https://www.lse.ac.uk/europeanInstitute/LSE-Commission/Hearing-11---The-impact-of-Brexit-on-jobs-and-economic-growth-sumary.pdf>; HM Government (2016) 'HM Treasury analysis: the long-term economic impact of EU membership and the alternatives', [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/517415/treasury\\_analysis\\_economic\\_impact\\_of\\_eu\\_membership\\_web.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/517415/treasury_analysis_economic_impact_of_eu_membership_web.pdf); Portes, J. (2013) 'The economic implications for the United Kingdom of leaving the European Union', National Institute Economic Review, No 226, <http://ner.sagepub.com/cgi/reprint/226/1/F4?rss=1>; Dhingra, S., Ottaviano, G., Sampson, T. and Reenen, J.V. (2016) 'The consequences of Brexit for UK trade and living standards', <http://cep.lse.ac.uk/pubs/download/brexit02.pdf>; Cambridge Econometrics (2018) 'Preparing for Brexit', <https://www.camecon.com/wp-content/uploads/2018/01/Preparing-for-Brexit.pdf>. However, a more critical view of the previous economic analyses is reflected in Gudgin, G., Coutts, K., Gibson, N. and Buchanan, J. (2017) 'Defying Gravity: A critique of estimates of the economic impact of Brexit'. A Policy Exchange report, <https://policyexchange.org.uk/wp-content/uploads/2017/06/Defying-Gravity-A-critique-of-estimates-of-the-economic-impact-of-Brexit.pdf>

<sup>5</sup> Taylor, C. (July 1<sup>st</sup> 2017) 'Post-Brexit frictionless Border is a fantasy', <https://www.irishtimes.com/opinion/cliff-taylor-post-brexit-frictionless-border-is-a-fantasy-1.3139240>; 'Theresa May, Ireland and the EU need to accept that there will have to be a hard Irish border after Brexit', Editorial, <http://www.independent.co.uk/voices/editorials/irish-border-brexit-customs-union-single-market-not-possible-united-ireland-a7896091.html>; 'Is a frictionless Irish border 'magical thinking'? – Brexit Means... podcast, <https://www.theguardian.com/politics/audio/2017/sep/01/frictionless-irish-border-magical-thinking-brexit-means-podcast-northern-ireland>; Hayward, K. (2017) 'A hard Irish border is quite possible, a frictionless one is an oxymoron', <http://blogs.lse.ac.uk/brexit/2017/07/10/a-hard-irish-border-is-possible-a-frictionless-one-is-an-oxymoron/>

safeguard their internal political and economic unity after Brexit.<sup>6</sup> The table below represents the non-negotiable aspects of their respective positions:

Figure 1<sup>7</sup>

UK 'red lines'	EU 'red lines'
<ul style="list-style-type: none"> <li>• Better, sovereign control of immigration e.g. no free movement of people</li> <li>• Freedom to negotiate own trade agreements</li> <li>• Reject the authority of the European Court of Justice (ECJ)</li> <li>• Exit the EU as one country e.g. no 'special status' deals for devolved regions.</li> </ul>	<ul style="list-style-type: none"> <li>• The four single market freedoms of movement (of goods, capital, services and labour) are indivisible - the UK cannot 'cherry-pick'</li> <li>• Solutions for avoiding a hard UK-Ireland border must respect 'the integrity of the Union legal order' and 'cannot serve to preconfigure solutions in the context of the wider discussions on the future relationship between the European Union and the United Kingdom'.</li> <li>• Any future UK-EU trade agreement, however ambitious and wide-ranging, 'cannot ...amount to participation in the Single Market or parts thereof, as this would undermine its integrity and proper functioning.</li> </ul>

It is clear from the above that the achievement of the UK's political goals of better control of immigration from within the EU and of the freedom to strike its own bi-/multi-lateral trade deals has two inevitable consequences: first, rejecting the freedom of movement of people, associated with the European Single Market (SM) and therefore - because the EU considers its four freedoms of movement to be indivisible - withdrawal from the SM; and second, withdrawal from the European Customs Union (CU), membership of which prevents individual states from concluding bilateral trade agreements with third countries.

Why does the above rationale represent a problem for the UK-Ireland border? The whole logic behind the existence of both the CU and the SM is to remove barriers to trade between their respective members. The CU achieves this by eliminating customs and duties on goods traded between members and by imposing a common external tariff on goods

<sup>6</sup> For instance, the 'European Council (Art. 50) guidelines for Brexit Negotiations' of April 2017, p. 1 state that 'the Union's overall objective in these negotiations will be to preserve its interests, those of its citizens, its businesses and its Member States'. At the same time, the former Northern Ireland Secretary's statement to the effect that the UK will leave the EU as 'one-nation' was reported by Reuters at <https://ca.reuters.com/article/topNews/idCAKCN1C61LA-OCATP>

<sup>7</sup> EU red lines derived from: 'European Council (Art. 50) guidelines following the United Kingdom's notification under Article 50 TEU', 29 April 2017 press release, <http://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexite-guidelines/>; and European Commission 'Guiding principles for the Dialogue on Ireland/Northern Ireland', 20 September 2017, p. 2, [https://ec.europa.eu/commission/sites/beta-political/files/dialogue\\_ie-ni.pdf](https://ec.europa.eu/commission/sites/beta-political/files/dialogue_ie-ni.pdf)

imported from outside the Union. The SM, on the other hand, ensures the freedom of movement of people, goods, services and capital and removes indirect barriers to trade by harmonizing laws and regulations on citizens' and workers' rights, professional qualifications, product standards, and many others. This means that all EU member states are able to trade with each other as 'one territory without any internal borders or other regulatory obstacles'.<sup>8</sup>

Together, the Customs Union and the Single Market largely remove economic borders between EU member states.<sup>9</sup> As a consequence, the need for border checks on goods and citizens circulating within their territories has also been removed. Yet, because the European Single Market is an unfinished project, some friction at the EU's internal borders still exists. For example, differences on each side of the UK-Ireland border with respect to VAT systems and social security payments present a challenge for companies, organizations and individuals working on a cross-border basis (as can be the case at other internal EU borders). However, this must be distinguished from the new barriers to trade that leaving the SM and the CU will effectively erect.

It is precisely EU economic integration (given that both the UK and Ireland are members of the CU and the SM) that led to the gradual fading of the economic border between the two parts of the island. This was physically expressed in the removal of customs posts in January 1993. Crucially, this economic process was boosted politically by the Belfast (Good Friday) Agreement of 1998 and a number of the rights and governance arrangements which form part of this Agreement are underpinned or guaranteed by recourse to EU law.<sup>10</sup> Since that time military check points and border security infrastructure were gradually dismantled, leading to the disappearance of the border as a visible phenomenon. The waning visibility of the border (with its symbolic significance and practical implications) is itself an essential element of the ongoing peace and reconciliation process. This is why all sides to the Brexit negotiations, ever since the 2016 UK Referendum on exiting the European Union, have consistently stated their desire to 'avoid any return to a hard border, and to maintain as seamless and frictionless a border as possible'<sup>11</sup> as well as 'to avoid any physical infrastructure in either the United Kingdom or Ireland'.<sup>12</sup>

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<sup>8</sup> As described by the European Commission at [https://ec.europa.eu/growth/single-market\\_en](https://ec.europa.eu/growth/single-market_en), though as previously discussed – being an incomplete project, the SM has not yet resulted in the complete obliteration of economic borders within the Union.

<sup>9</sup> 'Economic border' thus means any obstacles for trade arising from different national trade rules, standards for goods, or from tariffs imposed by individual states.

<sup>10</sup> See our discussion of the role of EU law in the Belfast (Good Friday) Agreement, particularly with respect to citizens' rights, in Briefing Paper 2 of this Series, <http://crossborder.ie/centre-cross-border-studies-publishes-new-briefing-paper-citizens-rights-uk-ireland-border/>.

<sup>11</sup> HM Government (2017) 'Northern Ireland and Ireland Position Paper', p. 14, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/638135/6.3703\\_DEXEU\\_Northern\\_Ireland\\_and\\_Ireland\\_INTERACTIVE.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/638135/6.3703_DEXEU_Northern_Ireland_and_Ireland_INTERACTIVE.pdf);

<sup>12</sup> TF50 (2017) 15 – Commission to UK (20 September 2017) 'Guiding principles for the Dialogue on Ireland/Northern Ireland', [https://ec.europa.eu/commission/sites/beta-political/files/dialogue\\_ie-ni.pdf](https://ec.europa.eu/commission/sites/beta-political/files/dialogue_ie-ni.pdf)

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 does leave the SM and the CU 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.

### 3. The state of Brexit negotiations on the UK-Ireland border

The Joint Report on the UK-EU negotiations of December 8<sup>th</sup> 2017 made a number of stipulations with respect to the future of the UK-Ireland border,<sup>13</sup> intended to serve as a basis for arrangements to avoid a ‘hard’ border on the island. Paragraphs 49 and 50 are critical in this respect:

- ‘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***’ (para 49, emphasis added).
- ‘***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’ (para 50, emphasis added).

<sup>13</sup> TF50 (2017) 19 – Commission to EU 27, ‘Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union’, [https://ec.europa.eu/commission/sites/beta-political/files/joint\\_report.pdf](https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf)

Paragraph 49 is often interpreted as outlining three possible pathways to avoiding a ‘hard’ border on the island of Ireland:

- First, through the ‘overall EU-UK relationship’, that is - a future trade agreement between the two sides;
- Second, in the absence of such an agreement, the UK should propose ‘specific solutions’ for ‘the unique circumstance on the island’; and
- Third, ‘in the absence of agreed solutions’, the UK will maintain full alignment with rules of the Internal Market and the Customs Union which support North-South cooperation, the all-island economy and the Belfast (Good Friday) Agreement.

Each of the above proposed directions for avoiding a ‘hard’ border on the island treads gingerly on a ground abundantly draped in political ‘red lines’ and so has deservedly been referred to as an exercise in ‘squaring the circle’.<sup>14</sup> The UK-Ireland border in a world where the UK is outside the CU and the SM, even if full EU-UK or EU-NI regulatory convergence is maintained, will at the very least require customs controls.<sup>15</sup> Shifting such controls to the Irish Sea is an option seen as politically unacceptable to unionists in Northern Ireland and to the UK Government. How then will the task of avoiding a ‘hard’ border be achieved? It must be noted here that:

The Joint Report on the EU-UK negotiations of December 8<sup>th</sup> 2017 suggests that the notion of a ‘hard’ border includes ‘any physical infrastructure or related checks and controls’. However, there is a wide range of possible combinations of these elements. A variety of standards of ‘border hardness’ may exist, making it difficult to judge the fulfillment of any guarantee to avoid a ‘hard’ border. Equally importantly, an absence of a ‘hard’ border i.e. one with (manned or electronic) physical infrastructure does not mean a ‘frictionless’ border. As the former head of the World Trade Organization has stated, ‘Even if you have a zero-tariff [regime] for UK-produced goods, you have to check that these UK-exported goods are produced in the UK and not in China or Korea which export to the UK, which re-export[s] on the continent. So, inevitably the existence of a border entails frictions, i.e. cost’.<sup>16</sup>

The realistic possibilities and specific measures to avoid a ‘hard’ border under the different pathways outlined above were not addressed in the Joint Report of December 8<sup>th</sup> 2017. Questions that remain unanswered include:

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<sup>14</sup>Phinnemore, D. (15 February, 2018) ‘Brexit: Where are we now? Pt 5: Northern Ireland’, <https://www.iiea.com/brexit/brexit-now-pt-5-northern-ireland/>

<sup>15</sup> Lamy, P. (27 February, 2018) Oral evidence session on ‘The progress of the UK’s negotiations on EU withdrawal’ to the Exiting the European Union Committee, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/exiting-the-european-union-committee/the-progress-of-the-uks-negotiations-on-eu-withdrawal/oral/78927.pdf>.

<sup>16</sup> RTE (27 October, 2017) Interview with Pascal Lamy, former WTO Director General, <https://www.rte.ie/news/business/2017/1027/915747-could-wto-could-help-avoid-hard-border-after-brexit/>

- How precisely could a future UK-EU trade agreement avoid a ‘hard’ border with one of the partners being outside the SM and the CU?
- How could any ‘specific solutions for the unique circumstance on the island’ avoid both an economic border on the island and one in the Irish Sea?
- Finally, in the absence of a consensus on what rules of the Internal Market and the Customs Union support North-South cooperation, the all-island economy and the 1998 Agreement,<sup>17</sup> is it even possible that regulatory convergence on those rules can by itself maintain the present status quo of the UK-Ireland border?

The draft Withdrawal Agreement that the EU published on February 28<sup>th</sup> 2018 was an attempt to respond to some of these outstanding questions by anchoring pathway three above (regulatory alignment) in legal terms. In the following section, where we discuss the possibilities and particular arrangements that each pathway may or will require, we touch on this latest EU proposal as well as the UK Prime Minister’s response to it in her London speech of March 2<sup>nd</sup>, 2018.

#### **4. Pathways to Brexit and their impact on the border**

Analysts suggest that in order to avoid any physical border posts and the associated checks at the land border between the UK and Ireland, at least three conditions need to be met:

- First, there must be no customs border. This can only be achieved if the UK as a whole (or at least Northern Ireland) remain in the EU Customs Union (CU);
- Second, all goods crossing the border must comply with EU legislation (hence the need for regulatory convergence); and
- Third, movement of people across the border must be free in order to avoid any passport or visa checks.<sup>18</sup>

None of the pathways to avoiding a ‘hard’ border outlined in the December 8<sup>th</sup> Joint Report proposes to fulfill all of the above conditions. It should be borne in mind, however, that a wide range of specific arrangements are possible within each pathway. Below we ask what specific arrangements would be necessary within each proposed pathway in order to effectively avoid a ‘hard’ border.

##### **4.1. A free trade agreement (FTA) pathway**

The UK Government has consistently maintained that their preferred form of Brexit is to secure an ‘off-the-shelf’, ‘bespoke’ and ‘literally unique in the history of trade agreements’<sup>19</sup>

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<sup>17</sup> Commentators suggest there is a lack of shared understanding of the amount and scope of necessary regulatory alignment to avoid a hard border, with the UK favouring alignment in a more limited range of co-operation areas (including transport, agriculture, education, health, environment and tourism) and the EU having a much more all-encompassing view (see Schiek, D. (February 7<sup>th</sup> 2018) ‘Will the Irish question be solved’, <http://qpol.qub.ac.uk/brexit-will-irish-question-be-solved/>).

<sup>18</sup> Schiek suggests a fourth condition, i.e. that Northern Ireland needs to maintain EU VAT rules (even as it applies different VAT rates to those in Ireland) in order to avoid checks on re-evaluated imports to either part of the island. See Schiek, D. (February 7<sup>th</sup> 2018) ‘Will the Irish question be solved’, <http://qpol.qub.ac.uk/brexit-will-irish-question-be-solved/>

<sup>19</sup> Chancellor Hammond, Davos Speech, January 26<sup>th</sup>, 2018, <http://www.ukpol.co.uk/philip-hammond-2018-speech-at-davos/>

trade deal with the EU. It has also categorically stated its resolve to leave the CU, rejecting even the possibility of being in ‘a’ or ‘any’ customs union with the EU after withdrawal.<sup>20</sup> After the UK Prime Minister’s London speech of March 2<sup>nd</sup> 2018 reaffirmed this commitment, the President of the European Council, Donald Tusk, confirmed that ‘the only remaining possible model [for the future UK – EU relationship] is a free trade agreement’.<sup>21</sup>

However, even in a scenario of a successfully concluded EU-UK zero-tariff FTA, checks for compliance with tariffs and quotas and for verifying the origin of imported goods (e.g. ‘rules of origin’) will still be necessary to ensure that such goods can be traded under the agreed rules.<sup>22</sup> This means, a customs border will be maintained. Secondly, an FTA does not by itself ensure the necessary degree of regulatory alignment that entirely avoids trade friction, and checks to ensure goods’ compliance to different regulatory standards will also be necessary. Thirdly, since FTAs do not normally extend to agricultural produce, there will need to be a separate arrangement in this respect.

Figure 2

### Option 1: An FTA pathway (the UK outside the SM and the CU)

#### Effects on UK-Ireland border and controls

- Subject to agreement, duty-free trade for most EU-UK trade in goods but with some tariffs on agri-food products (subject to a separate agreement)
- Need for a customs border: Full range of checks (e.g. on payment of tariffs and rules of origin) required for third-country goods and for goods not covered by an FTA. Customs costs and costs on trade increase
- Higher risk of regulatory divergence in both goods and services trade.

Even if a bespoke UK-EU FTA is successfully negotiated but the UK and the EU are not members of a common customs union, a customs border on the island of Ireland cannot be avoided. Moreover, since ‘border fortifications are most

<sup>20</sup> According to the [statement](https://www.standard.co.uk/news/politics/brexit-latest-britain-will-categorically-leave-customs-union-as-theresa-may-prepares-for-fresh-talks-a3757791.html) issued by 10 Downing Street on February 4<sup>th</sup>, 2018), <https://www.standard.co.uk/news/politics/brexit-latest-britain-will-categorically-leave-customs-union-as-theresa-may-prepares-for-fresh-talks-a3757791.html>; Instead, in its ‘Future Customs Arrangement’ Position Paper, published in August 2017, the Government suggested a highly streamlined ‘customs arrangement’. Critics, however, stress that what that means remains unspecified in practice.

<sup>21</sup> Statement by President Donald Tusk on the draft guidelines on the framework for the future relationship with the UK (7 March, 2018), <http://www.consilium.europa.eu/en/press/press-releases/2018/03/07/statement-by-president-donald-tusk-on-the-draft-guidelines-on-the-framework-for-the-future-relationship-with-the-uk/pdf>

<sup>22</sup> As Mac Flynn explains, ‘the nature of the modern manufacturing process means that goods traded between the UK and the EU may contain component parts from beyond both. In this case it is common practice for countries or trading blocs to have a system of Rules of Origin (RoO) which govern how such goods are treated for tariff purposes.... RoO are also quite complex and dealing with them can add significantly to business costs’. See Mac Flynn, P. (2017) ‘Northern Ireland, the republic of Ireland and the Customs Union’, NERI WP 2017/No 47, [www.NERInstitute.net](http://www.NERInstitute.net), p. 14.

necessary for customs controls',<sup>23</sup> under such an arrangement there remains the distinct possibility of reintroducing some form of a visible physical border.<sup>24</sup>

#### 4.2. Northern Ireland/Ireland 'specific solutions'

The Joint Report of December 8<sup>th</sup> 2017 commits the UK to the alternative of proposing 'specific solutions' for 'the unique circumstance on the island' should the achievement of a free trade agreement between the EU and the UK prove impossible. The UK Government's understanding of 'specific solutions' for the island has so far been expressed in the proposals put forward in its August 2017 Position Paper on Northern Ireland and Ireland (later reiterated in the UK Prime Minister's Mansion House Speech of March 2<sup>nd</sup>, 2018). These unequivocally suggest the idea that the UK's preferred option for avoiding a hard border for goods on the Island of Ireland is through negotiating 'a bold and ambitious free trade agreement'<sup>25</sup> with the EU, and it is in conjunction with such an agreement that the Government proposes two options for a future customs relationship to avoid a 'hard' border on the island:

- First, 'a highly streamlined customs arrangement' that simplifies requirements for customs control, including the implementation of 'technology-based solutions' that ease compliance with customs procedures;
- Second, a 'new customs partnership' that aligns the UK's approach to the EU customs border in a way that removes the need for customs checks. A range of measures is proposed in this regard, including a cross-border trade exemption for small and medium businesses, negotiating mutual recognition of Authorised Economic Operators for faster customs clearance, and establishing a 'trusted traders' system to reduce declaration requirements and periodic payment of duty.

Criticism of the UK Government's 'customs arrangement' proposals has come from all quarters and it could be argued that by outlining three pathways to avoiding a 'hard' border the Joint Report of December 8<sup>th</sup> implicitly rejects them. Analysts and trade experts have widely stressed the vagueness of the proposals, emphasising that:

Although streamlined customs arrangements could make the border more efficient, they would not replace the need for a customs border.<sup>26</sup> This is because, not being members of the same customs union, the UK and the EU

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<sup>23</sup> Mac Flynn (2017), p.15. See full reference in previous footnote.

<sup>24</sup> In this respect, as Chris Grey suggests, the UK Government's position that a border can be avoided, either by a very comprehensive free trade agreement (pathway 1 above) or by means of a technological solution (pathway 2) constitutes a misrecognition of [the difference between a single market and a free trade agreement](#). A free trade agreement cannot have the same effects as single market membership, <http://chrisgreybrexitblog.blogspot.co.uk/2018/03/four-speeches-and-wake-up-call.html>, 5 March, 2018.

<sup>25</sup> HM Government (2017) 'Northern Ireland and Ireland Position Paper', p. 12.

<sup>26</sup> See P. Lamy, Exiting the European Union Committee The progress of the UK's negotiations on EU withdrawal, oral evidence HC 372 Tuesday 27 February 2018, [http://data.parliament.uk/writtenevidence/committee\\_evidence.svc/evidencedocument/exiting-the-european-union-committee/the-progress-of-the-uks-negotiations-on-eu-withdrawal/oral/79454.pdf](http://data.parliament.uk/writtenevidence/committee_evidence.svc/evidencedocument/exiting-the-european-union-committee/the-progress-of-the-uks-negotiations-on-eu-withdrawal/oral/79454.pdf)

will each need differing arrangements for trade with third countries and, therefore, the need for separate customs control for such trade.<sup>27</sup>

Academics and practitioners have put forward other interpretations of what ‘specific solutions’ for Northern Ireland may look like, including the possibility of regional affiliation with the European Economic Area (EEA) through Northern Ireland’s membership of the European Free Trade Association (EFTA).<sup>28</sup> Such a scenario would see Northern Ireland effectively remaining a member of the European single market but not in the European customs union, therefore retaining the freedom to be part of the UK’s own free trade policy vis-à-vis third countries, while continuing to trade freely with both the EU and the rest of the UK.

An arrangement of the EEA type for Northern Ireland, however, would still mean that some customs control will be necessary at both Northern Ireland’s borders with the Republic of Ireland and with Britain. This would include checks at airports/harbours on third-country goods imported in Northern Ireland from the EU before they enter Britain, and checks at the UK-Ireland land border on third-country goods entering the Republic of Ireland via the UK (e.g. for payment of EU tariffs and compliance with other restrictions such as regulatory standards).<sup>29, 30</sup>

The Centre for Cross Border Studies has also published a proposal of its own that employs the 1998 Agreement as a legal and institutional framework enabling the ‘flexible and imaginative solutions’ required for the avoidance of a ‘hard’ border on the island. It suggests two conceptual models with the potential to maintain post-Brexit relations within and between the island of Ireland and Great Britain: one maintaining current flows of goods and

<sup>27</sup> K. Hayward, BBC Daily Politics, 5 March 2018, [https://twitter.com/daily\\_politics](https://twitter.com/daily_politics)

<sup>28</sup> Doherty, B., Temple Lang, J., McCrudden C., McGowan, L., Phinnemore, D., and Shiek, D. ‘Northern Ireland and Brexit: the European Economic Area option’ (2017), [https://pure.qub.ac.uk/portal/files/128224891/EPC\\_Northern\\_Ireland\\_and\\_Brexit\\_the\\_European\\_Economic\\_Area\\_Option\\_Published\\_20170407.pdf](https://pure.qub.ac.uk/portal/files/128224891/EPC_Northern_Ireland_and_Brexit_the_European_Economic_Area_Option_Published_20170407.pdf)

<sup>29</sup> As discussed in Lang, J. (2017) ‘Brexit and Ireland – Legal, political and economic considerations’, Study for the AFCO Committee, European Parliament, [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596825/IPOL\\_STU\(2017\)596825\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596825/IPOL_STU(2017)596825_EN.pdf).

<sup>30</sup> As Hayward argues, in this scenario Northern Ireland’s constitutional position within the UK would not be affected. From a legal perspective, efforts to make such arrangements would need to focus on changes to the devolved competences of Northern Ireland parliament, on securing the institutions of the Belfast (Good Friday) Agreement, and possibly on allowing the jurisdiction of the EFTA court (or a similar body). Practically, efforts will need to be invested in boosting the capacity of Northern Ireland’s airports and harbours for customs checks. See Hayward, K. (5 December, 2017) ‘[Without specific arrangements for Northern Ireland, talk about ‘avoiding a hard border’ is either empty rhetoric or dangerous delusion](http://blogs.lse.ac.uk/brexit/2017/12/01/without-specific-arrangements-for-northern-ireland-talk-about-avoiding-a-hard-border-is-either-empty-rhetoric-or-dangerous-delusion/)’, <http://blogs.lse.ac.uk/brexit/2017/12/01/without-specific-arrangements-for-northern-ireland-talk-about-avoiding-a-hard-border-is-either-empty-rhetoric-or-dangerous-delusion/>; Similarly, Lang (2017: 24) argues, ‘It is true that joining the EEA might make it appropriate for additional powers to be devolved to Northern Ireland, but that would have no more constitutional significance than any other adjustment of powers devolved to Northern Ireland, Scotland or Wales. Conferring an economic advantage cannot weaken a constitutional position’.

services between the UK and the Republic of Ireland, but with no goods or services from the UK entering further into the EU; and a second model that maintains current flows of goods and services between the UK and the Republic of Ireland while also allowing for the flow of goods and services from Northern Ireland into the Republic of Ireland and the rest of the EU, although both models rely on UK alignment with the SM and CU.<sup>31</sup>

Figure 3

**Option 2: Northern Ireland-specific arrangements pathway (an EEA-like arrangement for Northern Ireland)**

Main benefits and requirements	Effects on the border
<ul style="list-style-type: none"> <li>• NI leaving the CU together with the UK, i.e. can benefit from UK's FTAs with third countries</li> <li>• NI can continue to trade freely with the rest of the EU (incl Ireland) and with Britain</li> <li>• NI must continue to adopt SM measures</li> <li>• UK and NI outside the Common Agricultural Policy and the Common Fisheries Policy. Separate agreements needed for agriculture, fisheries, taxation, and security.</li> </ul>	<ul style="list-style-type: none"> <li>• Tariffs and rules of origin checks on third-country goods imported in NI via the EU apply when entering Britain (e.g. customs at harbours/airports)</li> <li>• Tariffs and rules of origin checks on British or third-country goods entering Ireland from or via Britain apply (e.g. customs at land border)</li> <li>• Tariffs and rules of origin checks apply to EU goods imported in Northern Ireland via Ireland</li> <li>• Control on movement of people from the rest of the UK to NI and, likely, vice versa (e.g. at harbours/airports)</li> </ul>

**4.3. The UK maintaining full alignment with some SM and CU rules**

In the ‘absence of agreed solutions’, the Joint Report of December 8<sup>th</sup> 2017 commits the United Kingdom to ‘maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement’ (para 49).

Interpretations of what this commitment may mean in practice vary. Some commentators suggest that ‘a plausible meaning of “alignment” is that it contains elements of both harmonization and approximation’<sup>32</sup> – terms used in the EU treaties to refer to the convergence of laws by either legal measures (e.g. through directives and regulations) or by

<sup>31</sup> CCBS (2017) ‘“Flexible and imaginative solutions”: The 1998 Belfast/Good Friday Agreement as a framework for post-Brexit relations within and between these islands’, p. 9, <http://crossborder.ie/site2015/wp-content/uploads/2017/07/Brexit-GFA-19.07.2017-revised.pdf>

<sup>32</sup> See Deakin, S. (21 December 2017) ‘For regulatory ‘alignment’, read ‘de facto convergence’, and a symbolic Brexit’, <https://cbr.blog.jbs.cam.ac.uk/for-regulatory-alignment-read-de-facto-convergence-and-a-symbolic-brexit/>

means of cooperation in order to set binding standards on member states. 'Approximation' is also used in the context of association agreements with third countries,<sup>33</sup> such as the one between the EU and Ukraine. Thus, the above statement may be understood 'as a commitment by the UK to keep its laws and regulations in line with those of the EU's internal market after Brexit'.<sup>34</sup> It could be speculated then that a future free trade agreement between the UK and the EU may contain 'legally binding requirements for the approximation of laws'.<sup>35</sup> It is important to note that regulatory alignment would not only remove most barriers to trade (in goods and services) but that it has a particular significance in the context of supporting North-South co-operation on the island of Ireland.

However, two particular upshots of a possible EU-UK agreement on regulatory alignment may remain difficult to digest politically: the possibility of the UK having to accept some freedom of movement for EU citizens; and the difficulties that such convergence would present for making deals with third countries which depart from EU laws and standards. Deakin suggests in this respect that the UK 'will not be able to agree an FTA with the United States, for example, which is premised on the convergence of UK standards with those prevailing in the US, or even one which provides for mutual recognition of US and UK standards, as this would undercut the commitment to EU-UK 'alignment''.<sup>36</sup>

**Regulatory alignment is not in itself sufficient in order to avoid a customs border on the island of Ireland. Mechanisms and structures to control regulatory compliance will also be required.**

On February 28<sup>th</sup> the European Commission issued a Draft Withdrawal Agreement the aim of which was to translate the understanding arrived at on December 8<sup>th</sup> 2017 into legal form.<sup>37</sup> The Draft Withdrawal Agreement contains a Protocol on Ireland/Northern Ireland which is explicitly 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'.<sup>38</sup>

Two among the many proposals contained in the Protocol on Ireland/Northern Ireland are of particular significance to the attempts to avoid a 'hard' border on the island of Ireland: first, to establish 'a common regulatory area comprising the Union and the United Kingdom in respect of Northern Ireland' constituting 'an area without internal borders in which the free movement of goods is ensured and North-South cooperation protected in accordance with this Chapter'; second, in order to avoid the imposition of customs duties, or 'any

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<sup>33</sup> Schiek, D. (2018) suggests: 'This is a commitment on the part of the neighbouring (or acceding) country to emulate EU legislation in certain fields, upon which market access is eased', see <http://qpol.qub.ac.uk/brexit-will-irish-question-be-solved/>

<sup>34</sup> Deakin, S. (2017). Full reference in footnote 32.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> EC (28 February, 2018) 'European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community', [https://ec.europa.eu/commission/sites/beta-political/files/draft\\_withdrawal\\_agreement.pdf](https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement.pdf)

<sup>38</sup> Ibid, p. 98.

charges with equivalent effect' (e.g. customs controls) on trade across the UK-Ireland border, that Northern Ireland is considered part of the customs territory of the Union (Chapter III Art. 4).

As part of the Draft Withdrawal Agreement proposed by the European Commission the Protocol on Ireland/Northern Ireland provides only for a scenario where the EU and the UK fail to agree either a Free Trade Agreement or 'specific solutions' for Northern Ireland that avoid a 'hard' border on the island.

In combining proposals to establish a common regulatory area between the EU and the UK with respect to Northern Ireland and to consider Northern Ireland as part of the European Customs Union, the EC Draft Withdrawal Agreement largely avoids a regulatory and customs border on the island of Ireland. This means that minimal changes would apply to the UK-ROI land border.

Additional provisions are made for: avoiding quotas on imports and exports; applying Union law on sanitary and phytosanitary rules as well as on the production and marketing of agricultural and fisheries products; governing wholesale electricity markets, and environmental protection. Provisions are also made 'to maintain the necessary conditions for continued North-South cooperation, including in the areas of environment, health, agriculture, transport, education and tourism, as well as energy, telecommunications, broadcasting, inland fisheries, justice and security, higher education and sport' (Chapter III, Art 8).

In her speech of March 2<sup>nd</sup> 2018 the PM Theresa May rejected the idea that the United Kingdom would ever agree to the proposals for a common regulatory area and a custom union between the EU and the UK applying in respect to Northern Ireland. The onus now is on the UK Government to propose specific workable alternatives to the draft legal text proposed by the European Commission.

#### 4.4. A 'no deal' scenario

Last but not least, should no other agreement be achieved between the EU and the UK, their trade relationship will be bound by the rules of the World Trade Organization (WTO). This eventuality has been widely described as the least attractive Brexit outcome for the UK and one with the worst outcomes for the UK-Ireland border. It would mean that both the EU and the UK will be obliged (following WTO rules) to impose on each other customs controls on all trade in goods and under a schedule of tariffs that will create significant barriers to trade.<sup>39</sup> Mac Flynn notes that '[t]he average most-favoured nation tariff rate on imports into

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<sup>39</sup> Lang, J. (2017). Full reference in footnote 29.

the EU can be as high as 33.5% for dairy products or 19.4% for beverages and tobacco. Within these groupings there are large variations and the effective tariff across industries will vary widely.<sup>40</sup> Thus, each side will need to ensure the payment of duties and tariffs on all goods crossing the UK-Ireland border. More generally, in the event of a no deal', '[t]he UK will need to negotiate new trade agreements with every country in the world with which it wishes to trade, and until it has done so it will only have the same rights as any other WTO member to sell to those countries'.<sup>41</sup>

Figure 4

### No Deal. WTO Rules Apply

Main elements	Effects on the border
<ul style="list-style-type: none"> <li>• Freedom to strike own FTAs with third countries</li> <li>• EU obliged to treat the UK as every other non-EU state (e.g. extend it a Most Favoured Nation status)</li> <li>• UK prohibited subsidies for own exports</li> </ul>	<ul style="list-style-type: none"> <li>• Regulatory divergence for both services and goods</li> <li>• Most Favoured Nation tariffs and tariff-rate quotas apply to some EU-UK trade</li> <li>• Tariffs highest in this scenario</li> <li>• Non-tariff barriers to trade apply</li> <li>• Full customs checks necessary (incl rules of origin checks)</li> </ul>

Commentators agree that in a 'no deal' scenario tariffs on all goods, cost of trade, regulatory divergence, and service barriers would be the highest.<sup>42</sup> This is also the option that will potentially require the fullest extent of border checks, resulting in a 'hard' border with the greatest extent of visibility.

<sup>40</sup> Mac Flynn, P. (2017), p. 12. For a full reference see footnote 22.

<sup>41</sup> Lang, J. (2017), p. 30. Full reference in footnote 29.

<sup>42</sup> Copenhagen Economics (2018) 'Ireland and the Impacts of Brexit. Strategic Implications for Ireland arising from Changing EU-UK Trading Relations', report for Department of Business, Enterprise and Innovation, for the Government of Ireland, <https://dbei.gov.ie/en/Publications/Publication-files/Ireland-and-the-Impacts-of-Brexit.pdf>

## 5. An electronic border?

There have been repeated suggestions, not least in the UK Government position papers on *A Future Customs Arrangement* and on *Northern Ireland/Ireland*<sup>43</sup> that electronic borders may provide an appropriate technological solution to the difficulties associated with new visibilities and friction created at the UK-Ireland border after Brexit. Indeed, it is argued that electronic or ‘smart border’ practices (e.g. trusted trader/traveller programmes, release before clearance, deferred duty payments, clearance away from the border, automatic number plate recognition, enhanced driver licenses, barcode scanning, and smartphone apps) ‘create low friction borders that support ...fast and secure movement of persons and goods’ by ‘reducing paperwork’ and ‘even eliminat[ing] the need to stop or undergo checks’.

44

While combinations of such technologically sophisticated border controls are used around the world (in places such as the Norway-Sweden border and the Canada-US border), the question remains if an effective border is also a ‘frictionless’ and ‘invisible’ border. It is important to note in this respect that electronic or ‘smart’ borders may minimize disruption of border crossings but cannot avoid the reintroduction of direct and indirect barriers to trade that would result from exiting the SM and the CU.

It should be borne in mind that:

- To work effectively technological borders require a considerable degree of physical surveillance. For instance, vehicles not equipped to cooperate with the system or with falsified number plates would need to be identified and traced;
- Electronic devices used to identify and record vehicles crossing the border could be easily sabotaged or destroyed;
- Electronic border have not proven effective in the control of smuggling activity;
- Enforcing electronic borders requires considerable financial resources.<sup>45</sup>

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<sup>43</sup> HM Government (2017) ‘Future customs arrangements. A Future Partnership Paper’, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/637748/Future\\_customs\\_arrangements\\_-\\_a\\_future\\_partnership\\_paper.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/637748/Future_customs_arrangements_-_a_future_partnership_paper.pdf); HM Government (2017) ‘Northern Ireland and Ireland Position Paper’,

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/638135/6.3703\\_DEXEU\\_Northern\\_Ireland\\_and\\_Ireland\\_INTERACTIVE.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/638135/6.3703_DEXEU_Northern_Ireland_and_Ireland_INTERACTIVE.pdf)

<sup>44</sup> Karlsson, L. (2017) ‘Smart Border 2.0 Avoiding a hard border on the island of Ireland for Customs control and the free movement of persons’, Study for the AFCO Committee, European Parliament, p. 9 – 10, [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596828/IPOL\\_STU\(2017\)596828\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596828/IPOL_STU(2017)596828_EN.pdf)

<sup>45</sup> See discussion in Lang, J. (2017) ) ‘Brexit and Ireland – Legal, political and economic considerations’, Study for the AFCO Committee, European Parliament, [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596825/IPOL\\_STU\(2017\)596825\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596825/IPOL_STU(2017)596825_EN.pdf); and Hayward, K. and Phinnemore, D. (2018) ‘The Northern Ireland/Ireland Border, Regulatory Alignment and Brexit: Principles and options in light of the UK-EU Joint Report of 8 December 2017’, Queen’s on Brexit, Briefing Paper 3, <http://www.qub.ac.uk/brexit/Brexitfilestore/Fileupload,796726,en.pdf>

## 6. Summary

- The UK has committed to leaving both the SM and the CU. This will result in erecting new barriers to trade between the UK and the EU and therefore – in an economic border on the island of Ireland, with regulatory differences between each side and the necessity for customs controls. Whether or not such controls and the associated checks are conducted visibly and require physical infrastructure, an economic border does mean a ‘hard’ border on this island.
- While all sides have rhetorically committed to avoiding a ‘hard’ border on the island of Ireland, none of the specific proposals put forward by the UK Government so far, under either of the three pathways to avoiding a ‘hard’ border outlined in the Joint Negotiations Report of December 8<sup>th</sup> 2017, offers a realistic possibility for achieving this. All UK Government proposal still imply the presence of a customs border.
- Unless the UK or NI remain in the CU and full EU-UK regulatory convergence is agreed, there will be a ‘hard’ border on the island of Ireland.
- Electronic solutions can minimize disruption but they do not remove the necessity for an economic border on the island after Brexit. The only solution for the resulting border conundrum is an UK-EU agreement that removes the need for an economic border on the island of Ireland.