



Centre for
Cross Border Studies

CCBS BRIEFING NOTE

**Response to UK Government White Paper:
*The Future Relationship Between the United
Kingdom and the European Union***

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The White Paper, *The Future Relationship Between the United Kingdom and the European Union*¹, published by the UK Government (12 July 2018) goes some way to clarifying the UK Government's position for the forthcoming negotiations with the EU Commission. While at the time of writing, it is impossible to predict whether or not the UK Government and Parliament can agree a coherent negotiating position that will lead to an 'orderly withdrawal', the White Paper offers the clearest statement to date of the UK Government's position. Our review here of the contents of the White Paper focuses on those proposals for future relationships that are particularly relevant to the island of Ireland.

The White Paper makes repeated (and welcome) references to delivering on the UK's commitment to honouring "the letter and the spirit of the Belfast ('Good Friday') Agreement,"² protecting the peace process, avoiding a hard border and devolving appropriate powers to Belfast.³ However, the paper's focus on economic partnership does not in itself deliver on the UK's commitment in the 8 December 2017 Protocol on Ireland/Northern Ireland, "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".⁴

Furthermore, we are now faced with the fact that the future relationship and the exit agreement are being discussed at the same time. It is highly unlikely that a comprehensive agreement on the future relationship will be possible by March 2019. It is crucial therefore, that the Protocol on Ireland/Northern Ireland is enshrined in the Withdrawal Treaty and not left to the vagaries of protracted post-Brexit negotiations.

¹ HM Government, *The Future Relationship Between the United Kingdom and the European Union*, CM9593, July 2018 (White Paper).

² White Paper, p. 9.

³ *Ibid.*, p. 6-7.

⁴ Protocol on Ireland/Northern Ireland, *Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*, 19 March 2018, para 48.

The Withdrawal Treaty

It is particularly concerning that the White Paper states, “The UK and the EU have been clear that the Withdrawal Agreement and the Future Framework form a package,” and that “nothing is agreed until everything is agreed, meaning that neither document can be considered final until this is true of both.” Therefore, it intends that only when agreement has been reached on both the Withdrawal Treaty *and* the Future Framework will there be a debate in the UK Parliament to give legal effect to the Withdrawal Agreement in the UK.⁵ The White Paper is explicit that the UK and EU will “**meet their shared commitments to Northern Ireland and Ireland** through the overall future relationship”.⁶

This contradicts the EU’s position, set out in its Negotiating Directives of 22 May 2017 and consistently reaffirmed since then, that issues related to the border between the Republic of Ireland and Northern Ireland need to be resolved *before* negotiation of the future trade relationship with the UK can proceed.

In the interim it has been made clear by the EU’s chief negotiator Michel Barnier and the Irish Government⁷ on numerous occasions that a ‘legally operable’ backstop, preventing a hard border on the island of Ireland – agreed in principle by the UK Government as set out in the Protocol on Ireland/Northern Ireland⁸ published by the EU Commission on 19 March 2018 – was intrinsic to the Withdrawal Agreement.⁹

While accepting that the backstop could be unnecessary if the UK can offer a more comprehensive solution for the Northern Ireland border, the Irish Government and its partners in the EU have insisted that there can be no Withdrawal Agreement without a backstop.

In March, Prime Minister Theresa May confirmed her commitment to including operational legal text on the backstop in the Withdrawal Agreement in a letter to EU Council President Donald Tusk.¹⁰ By May, the UK’s position was revised to agreement that there should be ‘a’ legally binding backstop in the Withdrawal Agreement, but that the version drafted by the EU was unacceptable.

It has been generally acknowledged that the complexity of issues to be negotiated in respect of the future relationship will make agreement before the March 2019 deadline impossible. Indeed, Theresa May stated in June that the backstop proposed by the UK would be used only if a

⁵ *Ibid.*, pp. 97-98.

⁶ *Ibid.*, p. 7.

⁷ <https://www.politico.eu/article/customs-union-leo-varadkar-no-brexite-deal-without-border-backstop-western-balkans-summit-sofia/>

⁸ While other scenarios may be pursued, the Protocol’s objective of for protecting North-South cooperation and avoiding a hard border is based on the ‘backstop’ 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 applies unless and until an alternative arrangement implementing another scenario is agreed.

⁹ EU Commission, *Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community* TF50 (2018) 35 – Commission to EU27, 19 March 2018.

¹⁰ <https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-19-march-2018>

permanent customs deal was not in place *at the end of the transition period*; at the very latest by *December 2021*.¹¹

As Michel Barnier and the Irish Government have repeatedly made clear, **“without a backstop, there can be no withdrawal agreement.”**¹² While it now appears a possibility that the UK Government could request an extension to the Article 50 negotiations, it remains the case that the agreed sequencing – *first a Withdrawal Treaty*, then agreement on future relationships – cannot be compromised.

The White Paper’s overall approach to the Ireland-Northern Ireland border

The way in which the UK-Ireland land border is portrayed, imagined and planned for in the paper raises some important concerns.

*‘The future relationship... needs to be informed by both the UK and the EU taking a responsible approach to avoiding a hard border between Northern Ireland and Ireland’*¹³

The UK government cannot yet acknowledge that the enormous risk of a ‘hard’ border is a phenomenon of Brexit itself and more specifically, of the government’s own determination to leave both the European customs union and single market.

Central to the White Paper proposals, is the UK Government’s commitment to designing a new trade relationship between the UK and the EU that focuses on **“ensuring continued *frictionless access at the border to each other’s markets for goods.*”**¹⁴ While any commitment to minimising friction at the border is obviously welcome, the proposals here – a common rulebook for goods (including agri-food); agencies that provide authorisations for goods; a Facilitated Customs Arrangement; and no tariffs on any goods – for establishing a ‘free trade area for goods’, cannot in principle deliver on the ‘avoidance of a hard border, including any physical infrastructure or related checks and controls’ as agreed in the Protocol on Ireland/Northern Ireland.¹⁵

Indeed, the very suggestion that a ‘frictionless’ border can be achieved by facilitating the movement of goods (with some limited facilitation of labour) betrays an outdated understanding of the border (*any* border) as a physical line that primarily controls the movement of goods. It also ignores the EU’s red line of the indivisibility of the ‘four freedoms’ (movement of goods, services, labour and capital). Irrespective of the new language the government has found to describe the act of the UK leaving the customs union and the single market, the fact remains that at least some checks will need to be performed at the physical border while others will simply be performed at other places and at points of contact. We have already elaborated in great detail on this argument in a series of briefing papers, statements and responses published on our website.¹⁶

The UK government’s proposed route to reaching an Association Agreement – one based on special treatment and privileges stemming from the UK’s former membership of the EU, rather than ‘third

¹¹ BBC News <https://www.bbc.co.uk/news/uk-politics-44407397>

¹² BBC News, <https://www.bbc.co.uk/news/world-europe-43949962>

¹³ White Paper, p. 7.

¹⁴ *Ibid.*, p. 7

¹⁵ Protocol, *op. cit.*, para 43.

¹⁶ <http://crossborder.ie/category/research-and-policy/policy/briefings/>

country' status – does not unequivocally chart a route away from 'cherry-picking' and is difficult to reconcile with the EU's determination to protect the integrity of the single market.¹⁷

Proposals for economic partnership

The UK Government's proposal for a new free trade area is an elaboration of its objective of achieving an independent trade policy and leaving both the European customs union and the single market. Once again, however, it demonstrates a desire to pick cherries: opting in to selected elements of the single market without the obligations of membership.

As an aspect of establishing 'a new free trade area' the UK government proposes to maintain a 'common rulebook' for goods, covering only those rules necessary to provide for frictionless trade at the border.¹⁸ The proposed 'common rulebook' would cover manufactured goods, agriculture, food and fisheries products and would encompass "rules that must be checked at the border, alongside equivalence for certain other rules, such as wider food policy."¹⁹ It is unclear how frictionless trade can be achieved by harmonising the rules for some (not all) goods without harmonising rules for services. As such this proposal clearly contradicts the commitment made in the White Paper to a "frictionless trade at the border" (or, at the very least, suggests a misunderstanding of how borders operate) let alone the commitment to no hard border expressed in the 8 December 2017 joint agreement.²⁰

Overall, more detail on the government's proposals for a Facilitated Customs Arrangement (a mixture of the earlier Maximum Facilitation and New Customs Partnership proposals) is welcome but does not change the fact that the EU has already rejected the previous similar proposals. Furthermore, the proposed Arrangement's reliance on a 'trusted traders' scheme has been criticised for being inoperable in the Ireland-Northern Ireland border region with its preponderance of small enterprises. In any case, as the document admits, such a scheme would be most relevant to finished goods whilst a lot of the trade across the Ireland-Northern Ireland border is of a supply-chain character.

Citizens' rights and 'framework for mobility'

Reflecting the rhetoric of the Leave campaign, the White Paper promises to "End free movement, giving the UK back control over how many people come to live in the UK."²¹ Suggesting, however, that ending free movement from within the EU will give back control over immigration is misleading. The majority of immigration to the UK has long originated from outside the European Union and despite falling numbers of EU immigrants to the UK since the 2016 Referendum on leaving the EU, numbers of other immigrants are continuing to grow.

The White Paper promises "a system that works for all parts of the UK," it wants to "attract the brightest and the best," "enhancing the UK's attractiveness for research, development and

¹⁷ M. Barnier interview (May 2018), <https://www.youtube.com/watch?v=3SP9mhof9Es>

¹⁸ White Paper, *op. cit.*, p. 14.

¹⁹ *Ibid.*, p. 16.

²⁰ UK Government, *Joint report on progress during phase 1 of negotiations under Article 50 TEU on the UK's orderly withdrawal from the EU* <https://www.gov.uk/government/publications/joint-report-on-progress-during-phase-1-of-negotiations-under-article-50-teu-on-the-uks-orderly-withdrawal-from-the-eu>

²¹ White Paper, *op. cit.*, p. 14.

innovation.”²² It is not unexpected that the proposals on mobility favour white collar and professional labour movement but they do not address the needs of a highly regionalised labour market. Northern Ireland’s agricultural sector and its health and social care sector have relied heavily on European labour. It would not be incompatible with respecting the ‘constitutional integrity’ of the United Kingdom to create a differentiated immigration policy that addressed the needs of the devolved regions – and indeed, parts of England itself.

The government pledges that the future mobility framework will “facilitate mobility for students and young people, enabling them to continue to benefit from world leading universities and the cultural experiences the UK and the EU have to offer”.²³ While this aspiration is of course welcome, there is not yet clarity about reciprocal arrangements for tuition fees, or access to EU programmes, such as Erasmus+. It would also be very positive if young people from the EU were permitted to engage in temporary and part-time employment and if students were no longer counted in immigration quotas.

With respect to the CTA the White Paper states: “These proposals are without prejudice to the Common Travel Area (CTA) arrangements between the UK and Ireland, and the Crown Dependencies. The CTA means that Irish citizens will continue to enjoy a special status in the UK, provided for by domestic legislation, distinct from the status of other EU nationals.”²⁴ However, as many analysts have already stated,²⁵ the CTA is in reality codified largely through EU law. What is needed at this stage, therefore, is an acknowledgment of this fact, followed by specific suggestions as to what legal framework and guarantees will substitute present legal codification. Clearly also, the CTA only addresses the movement and rights of Irish and British citizens in each other’s countries, leaving open the question of any other form of movement.

The commitment to reciprocal arrangements on elements of social security coordination and healthcare including reciprocal healthcare cover for state pensioners retiring to the EU or the UK, continued participation in the EHIC scheme and cooperation on planned medical treatment²⁶ is particularly welcome. At present the application of these rights for all EU citizens depends on residence in an EU country in the preceding number of years. As these are rights and entitlements that very directly affect the lives of individuals and their families, it is essential that arrangements for their continued practical delivery after withdrawal be agreed and understood by citizens. For instance, will the current arrangements facilitated by the Cross-border Healthcare Directive be maintained? Will these arrangements be at the discretion of the devolved administrations?

Likewise welcome is the White Paper’s express commitment to “respect for human rights, comprehensive data protection arrangements and robust, appropriate governance arrangements”

²² *Ibid.*, p. 32.

²³ *Ibid.*, p. 33.

²⁴ White Paper, p. 33.

²⁵ Ryan, B. (2016) ‘Written evidence. Submission to House of Lords European Union Committee inquiry on *Brexit: UK-Irish Relations*’, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/european-union-committee/brexit-ukirish-relations/written/39488.html> ;

²⁵ de Mars, S., Murray, C., O’Donaghue, A., and Warwick, B. (2017) ‘Policy paper. The Common Travel area: Prospects After Brexit’, <http://dro.dur.ac.uk/20869/1/20869.pdf?DDC71+DDD19+DDC108+dla0ao>

²⁶ White Paper, op. cit., p. 35.

and to “membership of the European Convention on Human Rights (ECHR).”²⁷ Further clarification is essential, however, because the Conservative Party Manifesto for the 2016 General Election committed to remaining a signatory of the ECHR only “for the duration of the next parliament” (which, given recent turmoil at Westminster may prove to be unexpectedly short-lived). At the same time, its commitment to not repeal or replace the Human Rights Act is restricted to “while the process of Brexit is underway” and rejects any intention to bring the EU Charter of Fundamental Freedoms into UK law.²⁸ As all members of the Council of Europe (COE) are signatories to the ECHR and Prime Minister May has stated that the UK is leaving the EU but “not leaving Europe”²⁹ – repeated again in her Foreword to the White Paper – it should be safe to presume that there is no intention to withdraw from the COE. The reassurances in the White Paper on respect for human rights in the context of the future relationship would gain credibility if the UK Government promised an enduring commitment to both the ECHR and the Human Rights Act.

Joint institutional arrangements

There is continuing lack of clarity in respect of dispute resolution and in respect of the European Court of Justice (ECJ). The White Paper’s proposals for “facilitate[d] dialogue between the judiciaries of the UK and the EU”, the role of a Joint Committee in keeping “under review the case law of both the senior courts of the UK and the CJEU where this was relevant to the interpretation of the agreements” and a UK commitment that “by treaty that its courts will pay due regard to CJEU case law, insofar as this was relevant to the matter before them”³⁰ are unfortunately vague and do not unequivocally settle the role of either courts. The Northern Ireland Act 1998 that transposes the Belfast/Good Friday Agreement into UK Law makes specific provisions (section 12) for the Northern Ireland Assembly to make reference to the ECJ. There should be extensive consultation with parties in Northern Ireland and the Irish Government about what is intended to amend or replace these provisions.

Shared Prosperity Fund and EU Programmes

The White Paper commits to “taking the UK out of the Common Agricultural Policy and the Common Fisheries Policy, and supporting regeneration through the Shared Prosperity Fund.”³¹ This was a commitment first made in the Conservative Party’s Manifesto: the fund would come “from money coming back to the UK as we leave the EU, to reduce inequalities between communities across our four nations.”³² The Shared Prosperity Fund will be used to “spark a new wave of regeneration in the UK’s towns and cities, and keeping citizens safe.”³³ It seems unlikely, however, that Northern Ireland, with just 2.9% of the total UK population – that has hitherto been a net beneficiary of EU funding programmes (although the UK as a whole has been a net contributor) – could expect its share of the Shared Prosperity Fund to replace what will be lost after the UK leaves the EU.

²⁷ *Ibid.*, p. 52.

²⁸ *Forward Together: The Conservative Manifesto*, p. 37. <https://www.conservatives.com/manifesto>

²⁹ See for instance, “UK Prime Minister May: ‘We may be leaving the EU but we are not leaving Europe’”, 27 November 2017. <https://www.defensenews.com/global/europe/2017/11/27/uk-prime-minister-may-we-may-be-leaving-the-eu-but-we-are-not-leaving-europe/>

³⁰ White Paper, pp. 91-92.

³¹ *Ibid.*, p. 97.

³² *Forward Together*, *op. cit.*, p30.

³³ White Paper, *op. cit.*, p. 6.

More recently, Prime Minister May has pledged an extra £20bn per year for the NHS, partially paid from this theoretical 'Brexit dividend'. However, the Office for Budget Responsibility has already forecast that Brexit is more likely to weaken than strengthen the UK's public finances, confirming that there will in fact be no 'Brexit dividend'.³⁴

No specific mention is made of other Structural Funds – the ERDF and the ESF – although mention is made of support for a new Peace fund and EU plans for a future programme protecting work in Northern Ireland on reconciliation and a shared future, as well as broader cross-border cooperation.³⁵ Additionally, there is an intention to seek a cooperative accord with the EU that will allow for the UK to participate in specific EU programmes.³⁶ We look forward to more details about what programmes will in fact be available and the resources they will bring to the island of Ireland.

³⁴ <https://www.independent.co.uk/news/business/news/brexit-dividend-nhs-obr-fiscal-sustainability-report-a8450731.html>

³⁵ *Ibid.*, p. 77.

³⁶ *Ibid.*, p. 68 and p. 76.