



The negotiations for the UK's withdrawal from the European Union

What do they mean for relations within and between these islands?

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Introduction

With the electorate having voted on the 23rd of June 2016 to leave the European Union,¹ and the Prime Minister, Theresa May, formally notifying the President of the European Council, Donald Tusk, on the 29th of March 2017 of the United Kingdom's intention to withdraw, negotiations between the UK Government and the European Union on the UK's withdrawal began on the 19th of June. Their outcome is likely to determine future relations between the two jurisdictions on the island of Ireland, between the island of Ireland and Great Britain, and between these islands and the European Union.

The purpose of this report, therefore, is to evaluate how those relations are framed within the approaches to the negotiations being taken by the main players involved, and to suggest how to safeguard North-South and East-West relations in the post-Brexit context. This report forms part of the Centre for Cross Border Studies' ongoing work on Brexit, which has included a series of Briefing Papers published in collaboration with Cooperation Ireland prior to the June 2016 referendum,² as well as additional Briefing Papers and submissions to various relevant inquiries following its outcome.³ All our work on this topic, as well as reports and other relevant material produced by

¹ The Electoral Commission shows that 51.9% of the electorate voted for the UK to leave the EU, with 48.1% voting against and a turnout of 72.2%; <https://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information> [last accessed 29/05/2017].

² "The UK Referendum on Membership of the EU: What does it mean for us?" (<http://crossborder.ie/site2015/wp-content/uploads/2016/02/CCBS-and-Cooperation-Ireland-EU-Referendum-Briefing-Paper-1.pdf>), "The UK Referendum on Membership of the EU: Potential Constitutional Consequences" (<http://crossborder.ie/site2015/wp-content/uploads/2016/03/EU-Referendum-Briefing-Paper-2.pdf>), "The UK Referendum on Membership of the EU: Cross-Border Cooperation, Peace-Building and Regional Development" (<http://crossborder.ie/site2015/wp-content/uploads/2016/06/CCBS-Cooperation-Ireland-EU-Referendum-Briefing-Paper-31.pdf>), "The UK Referendum on Membership of the EU: Citizen Mobility" (<http://crossborder.ie/site2015/wp-content/uploads/2016/06/CCBS-and-Cooperation-Ireland-EU-Referendum-Briefing-Paper-4.pdf>), and "The UK Referendum on Membership of the EU: Economic Development" (<http://crossborder.ie/site2015/wp-content/uploads/2016/06/EU-Referendum-Briefing-Paper-5.pdf>).

³ These include: "Submission to the House of Lords European Union Select Committee's Inquiry on Brexit and UK-Irish Relations" (<http://crossborder.ie/site2015/wp-content/uploads/2015/10/CCBS-submission-to-House-of-Lords-EU-Committee-Inquiry-Brexit-and-UK-Irish-Relations.pdf>); "Submission to the Northern Ireland Affairs Committee Inquiry: Future of the land border with the Republic of Ireland" (<http://crossborder.ie/submission-to-the-ni-affairs-committee-inquiry-future-of-the-land-border-with-the-republic-of-ireland/>); "Introductory statement to oral evidence submitted to the Joint Committee on the Implementation of the Good Friday Agreement: Implications of the UK Referendum decision for the GFA and its Institutions" (<http://crossborder.ie/oral-evidence-implications-of-the-uk-referendum-for-the-good-friday-agreement-and-institutions/>); "Introductory statement to oral evidence submitted to the Joint Committee on Jobs, Enterprise and Innovation: Economic implications of the UK Referendum decision" (<http://crossborder.ie/oral-evidence-economic-implications-of-the-uk-referendum-decision/>); "Briefing Notes for Meeting with the British-Irish Parliamentary Assembly", (<http://crossborder.ie/site2015/wp-content/uploads/2015/10/CCBS-Briefing-Notes-for-Meeting-with-the-British-Irish-Parliamentary-Assembly-Jan-2017.pdf>); "Submission to the House of Lords European Union Select Committee's Brexit: Devolution Inquiry", (<http://crossborder.ie/house-of-lords-devolution-inquiry/>); and "Centre for Cross Border Studies meeting with the Oireachtas Joint Committee on Arts, Heritage, Regional, Rural and Gaeltacht Affairs: Written

others can be found on our dedicated webpage at <http://crossborder.ie/research-policy/research/uk-eu-referendum/>.

However, given that the core mission of the Centre for Cross Border Studies is to contribute to the increased social, economic and territorial cohesion of the island of Ireland by promoting, advocating and providing support for cross-border cooperation, our focus here will be informed by that mission and cannot, therefore, be exhaustive. Nevertheless, the issues raised here are complex and interrelated, and their ultimate impact on the future shape of relations within, between and beyond these islands cannot be determined definitively until the negotiations on the UK's withdrawal come to a conclusion.

We will begin, then, by outlining the main points raised in the approaches to the negotiations published to date by the principal actors involved, before identifying common concerns and potential areas of divergence.⁴ Our analysis is based on the formal positions adopted prior to the commencement of negotiations, as well as the additional material supplied by the UK Government and the European Commission following the first two negotiating rounds. This report will conclude by proposing some possible avenues to secure socio-economic relations between Northern Ireland and the Republic of Ireland, and between the island of Ireland and Great Britain, as well as the extent to which these may be compatible with relations with the European Union.

Executive Summary

Having analysed the stated approaches to the UK's exit from the European Union by the UK Government, the devolved administrations, the EU's institutions, and the Irish Government, the Centre for Cross Border Studies concludes the following:

- The United Kingdom Government's overall objective for the negotiations on its withdrawal from the European Union is to achieve a comprehensive free trade agreement, but its stated approach also raises the possibility that it would be prepared to revert to World Trade Organisation rules rather than accepting an outcome it perceives as unacceptable.
- The UK Government has ruled out any outcome that would involve continued membership of the EU's Single Market, Customs Union, or acceptance of the jurisdiction of the Court of Justice of the European Union and of the principle of the freedom of movement of EU citizens.
- However, the UK's approach to the negotiations also suggests that it would be willing to enter into an agreement with the EU that would involve UK participation in some elements of the Single Market and specific arrangements in relation to the Customs Union.
- The United Kingdom's rejection of continued membership of the Single Market is at odds with the stated negotiation priorities of the Scottish and Welsh Governments, and does not appear to accommodate the needs of the Northern Ireland administration as had been expressed by the former First and Deputy First Ministers.

Statement", (<http://crossborder.ie/centre-for-cross-border-studies-meeting-with-the-oireachtas-joint-committee-on-arts-heritage-regional-rural-and-gaeltacht-affairs-written-statement/>).

⁴ It should be noted that this report singles out Ireland's approach to the negotiations, but we recognise that all the other remaining Member States of the EU will also have their individual concerns and priorities.

- Partial or sectoral participation by the UK in the Single Market is ruled out in the approaches to the negotiations adopted by the EU, and protecting the integrity of the Single Market has been identified as a priority by the EU's institutions and the Irish Government.
- The UK Government, the EU and the Irish Government have all identified the specific circumstances pertaining to the island of Ireland, the border between Northern Ireland and the Republic of Ireland, the peace process in Northern Ireland, and the 1998 Belfast/Good Friday Agreement as issues requiring resolution during the negotiations.
- Although the UK had indicated negotiations over its withdrawal should coincide with negotiations over its future relationship with the EU, the latter stipulated that discussions over a framework for a future relationship could only take place after it judged sufficient progress had been made in an initial phase dedicated to the UK's exit (including citizens' rights and the financial settlement) and the specific circumstances pertaining to the island of Ireland. The EU's proposed sequencing was accepted by the UK Government in the opening round of negotiations on the 19th of June 2017.
- The UK Government and the EU shared the Irish Government's view that Ireland would be particularly affected by the UK's withdrawal from the EU, and that any agreement between the UK and the EU should avoid damaging the Irish economy.

In light of the priorities identified in the approaches to the negotiations adopted by the UK, the EU and the Irish Government, **the Centre for Cross Border Studies proposes the following:**

- There is a shared concern among all of the main participants in the negotiations over protecting the integrity of the 1998 Belfast/Good Friday Agreement.
- Where the EU expresses its intent not to undermine the 1998 Agreement in any of its parts, this should be interpreted as relating to its three interconnected strands, with the Governments of the UK and Ireland as its co-guarantors.
- That those strands represent geographical areas with institutions with the potential to maintain post-Brexit relations between Ireland and Northern Ireland, and between the island of Ireland and Great Britain.
- That the Republic of Ireland, a Member State of the European Union and under the jurisdiction of the Court of Justice of the European Union, will continue to participate in the institutions created under the 1998 Agreement.
- That the 1998 Belfast/Good Friday Agreement should not be viewed simply as a problem to be overcome during the negotiations over the UK's exit from the EU, but also as a potential "flexible and imaginative" solution to the maintenance of post-Brexit relations.
- That the 1998 Agreement should become a framework enabling the post-Brexit flow of people, goods and services between the two jurisdictions on the island of Ireland, and between the island of Ireland and Great Britain, avoiding the hardening of existing borders or the creation of new ones.
- That one possible model under this framework maintains current flows of goods and services between the UK and Ireland, but that no goods or services from the UK enter further into the EU.
- That a second possible model also allows for the flow of goods and services from Northern Ireland into the Republic of Ireland and the rest of the EU.

1. Approaches to the negotiations: The United Kingdom

Our analysis of the United Kingdom's approach to the negotiations with the European Union is based on the principle documents published by the UK Government and the devolved administrations, considered here as the existing basis for the UK's position as it enters those negotiations. We do not consider commentary by UK Government Ministers, Ministers from the devolved administrations or other politicians made outside these documents, nor do we include here positions contained within political parties' manifestoes.

1.1 Triggering Article 50

The formal process to trigger the UK's withdrawal from the European Union began with the letter sent by the Prime Minister, Theresa May, to the President of the European Council, Donald Tusk, on the 29th of March 2017. In that letter the Prime Minister stated: "I hereby notify the European Council in accordance with Article 50(2) of the Treaty on European Union of the United Kingdom's intention to withdraw from the European Union".⁵

However, the letter also sets out the United Kingdom's overarching objective for the negotiations ("to agree with the European Union a deep and special partnership that takes in both economic and security cooperation"), as well as the outcome if that objective were not to be achieved ("If, however, we leave the European Union without an agreement the default position is that we would have to trade on World Trade Organisation terms"), before outlining some suggested core principles for the upcoming negotiations. These are:

- For the UK and EU "to engage with one another constructively and respectfully, in a spirit of sincere cooperation", and in the knowledge that "the United Kingdom does not seek membership of the single market".
- Achieving early agreement on the rights of EU citizens in the UK, and UK citizens in the EU.
- To secure a comprehensive agreement that includes economic and security cooperation, and "determine a fair settlement of the UK's [financial] rights and obligations as a departing member state". Moreover that "it is necessary to agree the terms of our future partnership alongside those of our withdrawal from the EU".
- To minimise the disruption and uncertainty to businesses and citizens by agreeing on "implementation periods" as the UK moves from its current relationship with the EU to a future partnership.
- To "pay attention to the UK's unique relationship with the Republic of Ireland and the importance of the peace process in Northern Ireland". In doing so, there is the desire to "avoid a return to a hard border", maintain the Common Travel Area, and that "the UK's

⁵ "Prime Minister's letter to Donald Tusk triggering Article 50", <https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50> [last accessed 30/05/2017]. Paragraph 2 of Article 50 of the Treaty on European Union reads: "A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament"; http://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF [last accessed 30/05/2017].

withdrawal from the EU does not harm the Republic of Ireland”, whilst also continuing to uphold the 1998 Belfast/Good Friday Agreement.⁶

- That although agreement on a high-level approach to the technical issues arising from the UK’s withdrawal will be an early priority, the negotiations should also prioritise UK proposals for a “bold and ambitious Free Trade Agreement between the United Kingdom and the European Union”.
- To “continue to work together to advance and protect our shared European values”.

Of immediate relevance to relations between the two jurisdictions on the island of Ireland and between this island and Great Britain, the stated future position of the United Kingdom outside the Single Market (referred to as the Internal Market in the EU Treaties) could be seen as having implications for the border between Northern Ireland and the Republic of Ireland. Relinquishing membership of the Single Market would mean the UK would no longer need to abide by its four fundamental freedoms: freedom of movement of goods, services, capital and people.⁷

In terms of the trading of goods between Northern Ireland and the Republic of Ireland, as well as between the United Kingdom as a whole and the Republic of Ireland, the UK’s departure from the Single Market would potentially result in individual exporting producers having to overcome regulatory obstacles since the UK would no longer be part of a common set of rules and standards shared by all EU Member States. In this sense, the border between Northern Ireland and the Republic of Ireland would represent a regulatory barrier to cross-border trade. Moreover, by not having to abide by the Single Market’s principle of the freedom of movement of labour, the UK would be free to impose restrictions on the entry of EU citizens into the UK. However, the extent to which these potential impacts can be mitigated would depend on how negotiations over the UK’s withdrawal from the EU accommodate the priorities relating to the island of Ireland and the Common Travel Area highlighted in Theresa May’s letter triggering Article 50, as well as to the ability of the UK Government to strike a “bold and ambitious Free Trade Agreement between the United Kingdom and the European Union”.

1.2 The UK Government’s White Paper

The Prime Minister’s letter triggering Article 50 was preceded by a Government White Paper entitled *The United Kingdom’s exit from and new partnership with the European Union*, published on the 2nd of February 2017.⁸ It set out in further detail the 12 principles that are to guide the Government in

⁶ For the Centre Cross Border Studies’ considerations prior to the referendum on EU membership on the prospects for the 1998 Belfast/Good Friday Agreement and the Common Travel Area, see its joint publication with Cooperation Ireland, “Potential Constitutional Consequences” (<http://crossborder.ie/site2015/wp-content/uploads/2016/03/EU-Referendum-Briefing-Paper-2.pdf>).

⁷ Article 26(2) of the Treaty on the Functioning of the European Union states: “The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties”. Chapter 3 (Approximation of Laws) of this Treaty deals with the establishment of the Internal Market’s common regulatory framework; <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT> [last accessed 31/05/2017].

⁸ HM Government, “The United Kingdom’s exit from and new partnership with the European Union” (February 2017), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf [last accessed 31/05/2017].

its negotiations with the EU, and which were the subject of a speech by the Prime Minister in Lancaster House on the 17th of January 2017.⁹ These principles are:

1. Providing certainty and clarity;
2. The UK taking control of its own laws;
3. Strengthening the Union of the United Kingdom;
4. Protecting the UK's historic ties with Ireland and maintaining the Common Travel Area;
5. Controlling immigration;
6. Securing rights for EU nationals in the UK and UK nationals in the EU;
7. Protecting workers' rights;
8. Ensuring free trade with European markets;
9. Securing new trade agreements with other countries;
10. Ensuring the UK remains "the best place" for science and innovation;¹⁰
11. Cooperating in the fight against crime and terrorism; and
12. Delivering a smooth, orderly exit from the EU.

Although many if not all of these principles have a bearing on future relations within and between these islands, we will focus here initially on what the White Paper tells us of the UK Government's views on its post-Brexit relationship with the Republic of Ireland, and on the importance of retaining the Common Travel Area – the fourth of its 12 principles.

A summary of the Government's position on these issues is contained within the concluding paragraph to its fourth principle for the negotiations, which also serves to highlight how Northern Ireland's position is intertwined with the UK's relationship with the Republic of Ireland:

We will work with the Irish Government and the Northern Ireland Executive to find a practical solution that recognises the unique economic, social and political context of the land border between Northern Ireland and Ireland. An explicit objective of the UK Government's work on EU exit is to ensure that full account is taken for the particular circumstances of Northern Ireland. We will seek to safeguard business interests in the exit negotiations. We will maintain close operational collaboration between UK and Irish law enforcement and security agencies and their judicial counterparts (p.23).

Specifically, the White Paper notes how the "UK and Irish economies are deeply integrated, through trade and cross-border investments, as well as through the free flow of goods, utilities, services and people" (p.21), and "that for the people of Northern Ireland and Ireland, the ability to move freely across the border is an essential part of daily life" (p.21). For this to continue in the post-Brexit context, the White Paper states "we aim to have as seamless and frictionless a border as possible between Northern Ireland and Ireland, so that we can continue to see the trade and everyday movements we have seen up to now" (p.21). The particular circumstances pertaining to Northern Ireland derived from the 1998 Belfast/Good Friday Agreement are identified by the UK Government as requiring joint safeguarding with the Irish Government, as it notes:

⁹ "The government's negotiating objectives for exiting the EU: PM speech", <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech> [last accessed 31/05/2017].

¹⁰ The description of the UK as "the best place" for science and innovation is within the document itself, and we have no value judgement on this.

Both the UK and Irish Governments have set out their desire to protect this reciprocal treatment of each other's nationals once the UK has left the EU. In particular, in recognition of their importance in the Belfast Agreement, the people of Northern Ireland will continue to be able to identify themselves as British or Irish, or both, and to hold citizenship accordingly (p.22).

However, what this fails to make explicit is the fact that those in Northern Ireland who have or will exercise their right to hold Irish citizenship will therefore also be EU citizens. As the Centre for Cross Border Studies remarked prior to the UK's referendum on EU membership, their ability to assert rights derived from EU citizenship within the UK will become a matter in need of resolution and could also become a marker of division:

The implications of Brexit for holders of Irish citizenship resident in Northern Ireland are unclear. Legally, it would appear that they would continue to be entitled to EU citizenship but, if so, what practical arrangements would need to be put in place to enable them to vindicate their rights as EU citizens? In Northern Ireland, the entitlement to EU citizenship could become a valuable commodity, enabling continued access to some of the advantages of EU membership. Would this lead to greater uptake of Irish citizenship among the Protestant Unionist community? Or, would it potentially become a source of contention, with nationalists perceived as having access to advantages which unionists, for reasons of culture and identity, felt unable to avail of?¹¹

Moreover, the extent to which the Irish Government may be able to maintain reciprocity in the treatment of UK citizens, as well as the continued operation of the Common Travel Area, will be a matter for negotiation with the EU as Ireland will remain a Member State, and therefore bound to follow whatever position is adopted by the EU in relation to the UK as a third country. This is not made clear in the White Paper which, after having declared the UK Government's desire "to protect the ability to move freely between the UK and Ireland, north-south and east-west", says it "will work with the Northern Ireland Executive, the Irish Government and the Crown Dependencies to deliver a practical solution that allows for the maintenance of the CTA" (p.22). This desire was reinforced in a position paper published following the commencement of negotiations with the EU, which outlines how "after we leave the EU, we will create new rights in UK law for qualifying EU citizens resident here before our exit", and that "qualifying individuals will be granted 'settled status' in UK law".¹² However, the paper makes clear that the UK Government's proposals regarding EU citizens' post-Brexit rights are not aimed at Irish citizens and should not undermine the Common Travel Area or the 1998 Belfast/Good Friday Agreement:

Our proposals [...] are without prejudice to Common Travel Area arrangements between the UK and Ireland (and the Crown Dependencies), and the rights of British and Irish citizens in each others' countries rooted in the Ireland Act 1949. These arrangements reflect the long-standing social and economic ties between the UK and Ireland and pre-date both countries' membership of the EU. As such, we want to protect the Common Travel Area arrangements, and Irish citizens residing in the UK will not need to apply for settled status to protect their entitlements. We have also been clear that our exit will in no way impact on the terms of the Belfast Agreement. We will continue to

¹¹ Centre for Cross Border Studies and Cooperation Ireland, "The UK Referendum on Membership of the EU: Potential Constitutional Consequences", p.3.

¹² HM Government, "The United Kingdom's Exit from the European Union: Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU" (26 June 2017), p.4, <https://www.gov.uk/government/publications/safeguarding-the-position-of-eu-citizens-in-the-uk-and-uk-nationals-in-the-eu> [last accessed 21/07/17].

uphold in that context the rights of the people of Northern Ireland to be able to identify as British or Irish, or both, and to hold citizenship accordingly (p.3).

In summary, then, the White Paper contains the following aspirations for post-Brexit relations between Great Britain, Northern Ireland and the Republic of Ireland:

- To “have as seamless and frictionless a border as possible between Northern Ireland and Ireland, so that we can continue to see the trade and everyday movements we have seen up to now”;
- To protect Ireland’s and the UK’s reciprocal treatment of each other’s nationals, with recognition of the continued ability of citizens in Northern Ireland to claim Irish citizenship as set out in the 1998 Belfast/Good Friday Agreement; and
- To “deliver a practical solution that allows for the maintenance of the CTA”.

Importantly, however, the UK Government’s White Paper does not provide any substantive indications as to how these aspirations will be achieved, or what they would look like in practical terms. This is most obviously the case in relation to the concrete nature of the land border between Northern Ireland and the Republic of Ireland, where no details are given as to how a “seamless and frictionless” border would operate in reality.

The degree to which the land border can be “seamless and frictionless” and the movement of people and goods within and between these islands can continue in its current form, is dependent on the priority given to other objectives set out in the UK Government’s White Paper. In general terms, the more distant the UK’s future relationship with the EU, the greater the challenges will be for the UK Government to realise its ambitions in relation to the island of Ireland and its proximity to Great Britain. These challenges will also be faced to a greater or lesser extent by the implementation bodies created under Strand II of the Belfast/Good Friday Agreement. Central to this will be the nature of the UK’s future trading arrangements with the EU, the divergence of UK laws and regulatory standards from those of the EU, and the nature of immigration controls imposed by the UK Government. For Northern Ireland in particular, the ultimate resolution of these issues will also depend on the role envisaged by the UK Government for the devolved administrations in the negotiations and the post-Brexit context, and whether Belfast, Edinburgh and Cardiff will have the ability to pursue different relationships with the EU from those sought by London.

In presenting its principle for the upcoming Brexit negotiations on “Ensuring free trade with European markets”, the UK Government’s White Paper notes that “We are [...] aware of the specific circumstances faced by businesses in Northern Ireland”, and that “As with the Common Travel Area, we are committed to working with the Irish Government and the Northern Ireland Executive to minimise administrative burdens, and to find a practical solution that keeps the border as seamless and frictionless as possible” (p.49). Again, the ambition of keeping the Northern Ireland-Ireland border “as seamless and frictionless as possible” in terms of the movement of goods and services needs to be seen within the wider context of the UK Government’s stated position that it “will not be seeking membership of the Single Market” (p.35), nor will it “be bound by the EU’s Common

External Tariff or participate in the Common Commercial Policy” (p.46).¹³ Instead, the overriding objective is to secure “a new comprehensive, bold and ambitious free trade agreement” with the EU (p.35).

Whereas the possibility that a free trade agreement between the UK and the EU that allows for the unimpeded flow of goods across the Ireland-Northern Ireland border and between Ireland and Great Britain cannot be discounted entirely, the UK Government’s decision to leave the Single Market and the Customs Union needs to be considered in terms of its potential impact for cross-border trade on these islands. However, in doing so it should be noted that the UK Government’s White Paper also states that the future agreement it hopes to strike with the EU “may take in elements of current Single Market arrangements in certain areas”, and “should include a new customs agreement with the EU” (p.35). In terms of the latter, the White Paper proposes that there are “a number of options for any new customs arrangement, including a completely new agreement, or for the UK to remain a signatory to some of the elements of the existing arrangements” (p.48).

Both in relation to the Single Market and the Customs Union, therefore, the UK Government’s proposals are based on partial rather than comprehensive adherence to the EU’s common frameworks, which would suggest the nature of the flows of goods between Ireland and the UK, including cross-border trade between the two jurisdictions on the island of Ireland, could not remain entirely unaffected. The effects of the proposed arrangements could be felt to differing extents if certain economic sectors are prioritised by the UK Government in its negotiations with the EU, with some sectors perhaps facing higher tariffs and/or greater regulatory barriers, as well as the imposition of customs controls.

UK divergence from EU regulatory standards governing trade will depend on post-Brexit decisions taken by the UK Government and, in some cases, by the devolved administrations. However, to underscore its argument that a free trade agreement with the EU could be more easily achieved than where such agreements are negotiated with countries that have never been a Member State of the European Union, the UK Government’s White Paper points to the current regulatory context:

The UK already has zero tariffs on goods and a common regulatory framework with the EU Single Market. This position is unprecedented in previous trade negotiations. Unlike other trade negotiations, this is not about bringing two divergent systems together. It is about finding the best way for the benefit of the common systems and frameworks, that currently enable UK and EU businesses to trade with and operate in each others’ markets, to continue when we leave the EU through a new comprehensive, bold and ambitious free trade agreement (p.35).

¹³ According to Article 28(1) of the Treaty on the Functioning of the European Union, “The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries”. Article 207(1) of the same Treaty sets out the Common Commercial Policy in the following terms: “The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union’s external action”.

This position of a common regulatory framework is also underlined as the White Paper seeks to provide reassurance that there will be no legislative instability as the UK leaves the EU:

To provide legal certainty over our exit from the EU, we will introduce the Great Repeal Bill to remove the European Communities Act 1972 from the statute book and convert the ‘acquis’ – the body of existing EU law – into domestic law. This means that, wherever practical and appropriate, the same rules and laws will apply on the day after we leave the EU as they did before (p.9).

What happens thereafter to this situation where the same rules and laws will largely apply in the UK as they do in the EU will, in the first instance, be dependent on the choices made by legislators in the UK. “Once we have left the EU”, the White Paper states, “Parliament (and, where appropriate, the devolved legislatures) will then be able to decide which elements of that law to keep, amend or repeal” (p.9). Therefore, for those businesses in the UK, including Northern Ireland, trading with the Republic of Ireland and the rest of the EU, the more amendments and repeals of EU law currently enacted in UK law, the greater the potential for regulatory barriers hampering their activities. This would be especially felt by those businesses selling to both the domestic market and to the EU, where different standards would then apply. Importantly for the island of Ireland, regulatory divergence between the UK and the EU would also present challenges to the cross-border operation of a range of implementation bodies set up under Strand II of the 1998 Belfast/Good Friday Agreement, which currently rely on common EU standards applicable to both Ireland and Northern Ireland.

There is also the possibility that post-Brexit regulatory divergence could occur not as a result of legislative changes made by the UK Parliament or the devolved administrations, but rather due to evolving EU law. The separate White Paper outlining the scope of the Great Repeal Bill, for example, sets out the procedures to be followed if a conflict arises between new legislation introduced by the UK Parliament post-Brexit and existing legislation based on EU law:

Our proposed approach is that, where a conflict arises between EU-derived law and new primary legislation passed by Parliament after our exit from the EU, then newer legislation will take precedence over the EU-derived law we have preserved. In this way, the Great Repeal Bill will end the general supremacy of EU law.¹⁴

While the focus here is on resolving conflicts arising from discrepancies between new UK legislation and the body of EU law as it existed at the date of the UK’s withdrawal from the EU, UK businesses, organisations and individuals with interests in the EU – including in Ireland – will have to follow post-Brexit developments in EU law where it may have relevance to them. They will no longer be able to automatically rely on UK standards derived from UK legislation as being compatible with EU standards derived from EU law – standards that will be in force in the Republic of Ireland.

Whereas the overarching aim of the Great Repeal Bill is to end the supremacy of EU law and the Court of Justice of the European Union, the UK Government’s White Paper on exiting the EU also makes clear its intention to impose controls on immigration from the EU. “In future”, it states, “the Free Movement Directive will no longer apply and the migration of EU nationals will be subject to UK

¹⁴ Department for Exiting the European Union, *Legislating for the United Kingdom’s withdrawal from the European Union* (March 2017), p.17, <https://www.gov.uk/government/publications/the-great-repeal-bill-white-paper> [last accessed 07/06/2017].

law” (p.25).¹⁵ As already noted, by discontinuing the application of the Free Movement Directive, the UK would no longer be abiding by one of the fundamental principles of the Single Market, which not only encompasses all EU Member States, but also the non-EU countries that along with the EU make up the European Economic Area (EEA).¹⁶ This is a core reason why the UK Government has stated that it will not be seeking membership of the Single Market post-Brexit.

However, just as the White paper puts forward the possibility of participation in elements of the Single Market and the Customs Union, it also suggests that immigration from EU countries will continue post-Brexit, although with controls, and that the UK Government will consider continuing sectoral and regional labour needs. Thus, it states that “we will always want immigration, including from EU countries” (p.25), and recognises “it is important that we understand the impacts on the different sectors of the economy and the labour market”, while declaring that the Government “will build a comprehensive picture of the needs and interests of all parts of the UK and look to develop a system [of immigration] that works for all” (p.27).

However, whether in relation to immigration or trade, for example, whilst the White Paper refers to the needs and interests of the different parts of the UK, there is an underlying tension arising from the potential difficulties in developing UK-wide frameworks capable of adequately accommodating divergent needs from the devolved regions. According to the White Paper, the current freedoms of the administrations in Belfast, Cardiff and Edinburgh to legislate in devolved policy areas are constrained by the UK’s membership of the European Union. It states that, “even in areas where the devolved legislatures and administrations currently have some competence, such as agriculture, environment and some transport issues, most rules are set through common EU legal and regulatory frameworks, devised and agreed in Brussels” (p.18). Thus, as the UK leaves the EU, there will be the “opportunity to determine the level best placed to make new laws and policies on these issues, ensuring power sits closer to the people of the UK than ever before” (p.18). Moreover, the White Paper reminds us that the UK Government has “already committed that no decisions currently taken by the devolved administrations will be removed from them and we will use the opportunity of bringing decision making back to the UK to ensure that more decisions are devolved” (p.18).

Decisions taken by the devolved administrations, however, cannot disrupt the post-Brexit regulatory framework set in Westminster if they are seen to produce obstacles to trade. This is underlined as the White Paper notes that “We must [...] recognise the importance of trade within the UK to all parts of the Union”, and therefore the UK Government’s “guiding principle will be to ensure that – as we leave the EU – no new barriers to living and doing business within our own Union are created” (p.19). To that end the Government “will maintain the necessary common standards and frameworks for our own domestic market” (p.19), which necessarily implies that legislation from the devolved administrations will not be able to conflict with the common standards and frameworks set in London.

¹⁵ The Directive referred to here is Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:en:PDF> [last accessed 07/06/2017].

¹⁶ The non-EU countries within the EEA are Iceland, Liechtenstein and Norway.

The importance of replacing common frameworks currently provided by the European Union for those developed in Westminster is summarised by the Secretary of State for Exiting the European Union in his foreword to the White Paper on the Great Repeal Bill. “In some areas”, he explains, “where the existence of common frameworks at EU level has also provided common UK frameworks, it will be important to ensure that this stability and certainty are not compromised”.¹⁷ Such common frameworks may “include where they are necessary to protect the freedom of business to operate across the UK single market and to enable the UK to strike free trade deals” (p.7). This means that although it is claimed “the outcome of this process will be a significant increase in the decision-making power of each devolved administration” (p.8), the post-Brexit decisions arrived at by the devolved administrations in Northern Ireland, Scotland and Wales must remain within the limits set by Westminster. Therefore, it becomes all the more crucial that the devolved administrations are actively involved in shaping any common frameworks and core pieces of legislation such as the proposed customs and immigration bills,¹⁸ thereby ensuring that they properly accommodate the specific needs of the devolved regions. The importance of that involvement continues to hold true following the publication of the European Union (Withdrawal) Bill;¹⁹ the accompanying explanatory notes confirm that “The Bill [...] provides a power to release areas from the limit on modifying retained EU law where it is agreed that a common approach established by EU law does not need to be maintained and can be changed”, and that “The UK Government hopes to rapidly identify, working closely with devolved administrations, areas that do not need a common framework and which could therefore be released from the transitional arrangement by this power”.²⁰

1.3 The views of the devolved administrations

Particularly in regards to the Single Market, there are significant disparities between the UK Government’s position on Brexit and those of the devolved administrations in Belfast, Cardiff and Edinburgh.²¹ Whereas the UK Government’s White Paper states that the UK “will not be seeking membership of the Single Market” (p.35), that of the Scottish Government places “retaining membership of the European Single Market and its market of 500 million people” as one of its core priorities,²² while the Welsh Government’s White Paper declares that “the case for continuing Single Market participation is overwhelming and [it] can agree to no other position”.²³ Both the Scottish

¹⁷ Department for Exiting the European Union, *Legislating for the United Kingdom’s withdrawal from the European Union*, p.7.

¹⁸ See *Legislating for the United Kingdom’s withdrawal from the European Union*, p.11.

¹⁹ HM Government, European Union (Withdrawal) Bill (13 July 2017), <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/18005.pdf> [last accessed 21/07/17].

²⁰ HM Government, European Union (Withdrawal) Bill: Explanatory Notes (13 July 2017), <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/en/18005en.pdf> [last accessed 21/07/17].

²¹ For more on the Centre for Cross Border Studies’ view on representing the interests of the devolved administrations, see “Submission to the House of Lords European Union Select Committee’s Brexit: Devolution Inquiry”, pp.7-10, <http://crossborder.ie/house-of-lords-devolution-inquiry/>

²² The Scottish Government, *Scotland’s Place in Europe* (December 2016), p.2, <http://www.gov.scot/Publications/2016/12/9234/downloads> [last accessed 14/06/2017]. See also Scottish Government, “Potential Implications of the UK Leaving the EU on Scotland’s Long Run Economic Performance” (August 2016), <http://www.gov.scot/Topics/Economy/Publications/PotentialEU> [last accessed 14/06/2017].

²³ Welsh Government, *Securing Wales’ Future: Transition from the European Union to a new relationship with Europe* (January 2017), p.9, https://beta.gov.wales/sites/default/files/2017-01/30683%20Securing%20Wales%20B9%20Future_ENGLISH_WEB.pdf [last accessed 14/06/2017]. The Welsh Government’s position was developed in conjunction with Plaid Cymru.

and Welsh Governments also call for continuing inward movement of EU labour, with the former noting the need for “ensuring [Scottish] firms have access to the EU workforce they need” (p.2). For its part, the Welsh Government proposes “ensuring a stronger link between employment and the right to remain for new EU migrants [...], an approach [it believes] is broadly compatible with the principles of freedom of movement of people” (p.19). For both the Scottish and Welsh governments, therefore, the priority is for the UK to retain full and unfettered access to the Single Market, with both suggesting that this could be achieved through membership of the European Free Trade Association, and thus of the European Economic Area.

The situation of the devolved administration in Northern Ireland is somewhat different from Scotland and Wales. The Centre for Cross Border Studies has previously expressed its grave concern that unlike the Scottish and Welsh Governments, not only was the Northern Ireland Executive unable to set out a similarly comprehensive position ahead of the UK Government’s negotiations with the EU, but that there is currently no Executive or Assembly in place to do so.²⁴ Nevertheless, the August 2016 letter to the Prime Minister from the former First Minister and Deputy First Minister set out a number of concerns that cannot be addressed by the UK Government’s stated approach to the negotiations. These included the “need to retain as far as possible the ease with which we trade with EU member states and, also importantly retain access to labour”.²⁵ Moreover, the wish that businesses in Northern Ireland “retain their competitiveness and do not incur additional costs”, and the concern that Northern Ireland’s “agri-food sector, and hence [Northern Ireland’s] wider economy, is therefore uniquely vulnerable both to the loss of EU funding, and to potential tariff and non-tariff barriers to trade”. Whilst unlike the devolved administrations in Scotland and Wales the former Northern Ireland Executive did not explicitly say so in the August 2016 letter to the Prime Minister, in order for its concerns to be fully addressed it would appear that the UK would have to seek continued post-Brexit membership of the Single Market and the Customs Union – unless the UK were able to strike a comprehensive free trade agreement with the EU that would resemble the current position in terms of trade.

In their letter, the former First and Deputy First Ministers also highlight the specific position of Northern Ireland “in that it is the only part of the UK which has a land border with an EU member state”, and note the UK Government’s “stated determination that the border will not become an impediment to the movement of people, goods and services”. They also expressed their concern that “the border does not create an incentive for those who would wish to undermine the peace process and/or the political settlement”. However, in their concluding remarks where they refer to their wish to play their part in engagement between the UK and Irish Governments “on the unique aspects of negotiations that arise from the border” they do so “recognising the possibility that it cannot be guaranteed that outcomes that suit our common interests are ultimately deliverable”.

An additional issue raised is how “the absence of EU programmes in the future is of real concern to a range of sectors”, with the recognition that “EU funds have been hugely important to our economy and the peace process”.

²⁴ See Centre for Cross Border Studies, “Submission to the House of Lords European Union Select Committee’s Brexit: Devolution Inquiry”, pp.7-10.

²⁵ The Executive Office, Letter to the Prime Minister, The Rt Hon Theresa May MP, <https://www.executiveoffice-ni.gov.uk/publications/letter-prime-minister-rt-hon-theresa-may-mp> [last accessed 18/06/2017].

2. Approaches to the Negotiations: The European Union

Our analysis of the European Union's approach to the negotiations with the United Kingdom is based on the principle documents published by the European Parliament, the European Council and the European Commission, considered here as the existing basis for the European Union's position as it enters those negotiations. We do not consider commentary by Ministers from the EU's Member States, individual Members of the European Parliament or its political groupings, or officials from the EU's institutions made outside these documents.

2.1 The European Parliament

Following the UK Prime Minister's letter to the President of the European Council triggering Article 50, the European Parliament passed a resolution on the 5th of April 2017 expressing its views on the upcoming negotiations on the UK's withdrawal.²⁶ Bearing in mind that the European Parliament will have to approve any agreement between the UK and the EU, the resolution it adopted makes a number of specific references to Northern Ireland, including to the fact that along with Scotland "a majority [...] voted to remain in the European Union" (paragraph N). It notes, for example, its concerns on the impact of the UK's withdrawal from the EU on Northern Ireland's relations with the Republic of Ireland and on the 1998 Good Friday/Belfast Agreement, stating:

the European Parliament is especially concerned at the consequences of the United Kingdom's withdrawal from the European Union for Northern Ireland and its future relations with Ireland; whereas in that respect it is crucial to safeguard peace and therefore to preserve the Good Friday Agreement in all its parts, recalling that it was brokered with the active participation of the Union (paragraph O).

Having expressed its concerns, the resolution calls for any solutions that would mitigate the impact of Brexit on the border and North-South relations to be consistent with the 1998 Belfast/Good Friday Agreement. It states how the European Parliament:

Recognises that the unique position of and the special circumstances confronting the island of Ireland must be addressed in the withdrawal agreement; urges that all means and measures consistent with European Union law and the 1998 Good Friday Agreement be used to mitigate the effects of the United Kingdom's withdrawal on the border between Ireland and Northern Ireland; insists in that context on the absolute need to ensure continuity and stability of the Northern Ireland peace process and to do everything possible to avoid a hardening of the border (paragraph 20).

From the outset, the European Parliament's resolution stresses that its approach to the negotiations will be based on the protection of the interests of the citizens of the remaining 27 EU Member States, but also does so highlighting the particular needs of the Republic of Ireland. It states its belief that "that the [EU's] mandate and the negotiating directives applying throughout the whole negotiation process must fully reflect the positions and interests of the citizens of the EU-27, including those of Ireland, since that Member State will be particularly affected by the withdrawal of the United Kingdom from the European Union" (paragraph 8).

²⁶ European Parliament, "European Parliament resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union", <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0102+0+DOC+XML+V0//EN> [last accessed 18/06/2017].

In its view, however, the potential for Brexit to produce negative impacts has been increased in light of the UK Government's stated position on the UK's future relations with the European Union. It suggests that "continued membership of the United Kingdom of the internal market, the European Economic Area and/or the customs union would have been the optimal solution for both the United Kingdom and the EU-27", but notes how this is not possible "as long as the United Kingdom Government maintains its objections to the four freedoms and to the jurisdiction of the Court of Justice of the European Union, refuses to make a general contribution to the Union budget, and wants to conduct its own trade policy" (paragraph 1).

Notwithstanding this, and just as the resolution noted the importance of the Good Friday/Belfast Agreement in mitigating Brexit impacts on the Northern Ireland-Ireland border and on North-South relations, it also points to existing EU Treaty provisions that could be supportive of positive post-Brexit relations between the EU and the UK. In this regard it "notes that Article 8 of the Treaty on European Union, as well as Article 217 of the Treaty on the Functioning of the European Union, which provides for 'establishing an association involving reciprocal rights and obligations, common action and special procedures', could provide an appropriate framework for such a future relationship" (paragraph 22).²⁷

However, although the European Parliament identifies some possible avenues to overcome the potential impacts of Brexit, its resolution also makes clear the importance of maintaining the integrity of the European Union and its Single Market and Customs Union. Whereas the United Kingdom Government, as noted previously, may have suggested in its White Paper some limited participation in the Single Market and/or the Customs Union, the European Parliament declares that it "Opposes any future agreement between the European Union and the United Kingdom that would contain piecemeal or sectorial provisions, including with respect to financial services, providing United Kingdom-based undertakings with preferential access to the internal market and/or the customs union" (paragraph 25). It also voices its opposition to any bilateral arrangements between the UK and individual Member States of the European Union, warning "that any bilateral arrangement between one or several remaining Member States and the United Kingdom, in the areas of European Union competence, that has not been agreed by the EU-27, relating to issues included in the scope of the withdrawal agreement and/or impinging on the future relationship of the European Union with the United Kingdom, would [...] be in contradiction with the Treaties" (paragraph 7). This would obviously include any bilateral arrangements between the United Kingdom and the Republic of Ireland, unless they met with the agreement of all Member States. Emphasis is placed by the European Parliament on the fact that "after its withdrawal the United Kingdom will fall under the third-country regime provided for in Union legislation" (paragraph 25), and that it will be treated as such post-Brexit.

²⁷ Article 8(1) of the Treaty on European Union states: "The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation". Article 8(2) states: "For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly". Article 217 of the Treaty on the Functioning of the European Union reads: "The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure".

2.2 The European Council

On the 29th of April 2017, one month after the UK triggered Article 50, the European Council published its guidelines for the negotiations on the UK's withdrawal from the European Union.²⁸ Like the European Parliament's resolution, the European Council's guidelines emphasise the importance of the integrity of the European Union and its Single Market and Customs Union, stating in its introductory remarks 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" (p.2). It adds that "Preserving the integrity of the Single Market excludes participation based on a sector-by-sector approach" (paragraph 1), while any future trade agreement between the UK and the EU "cannot [...] amount to participation in the Single Market or parts thereof, as this would undermine its integrity and proper functioning" (paragraph 20). The guidelines also make clear that "there will be no separate negotiations between individual Member States and the United Kingdom on matters pertaining to the withdrawal of the United Kingdom from the Union" (paragraph 2).

However, just as the European Parliament's resolution and the UK Government's White Paper had done, the European Council's negotiating guidelines also give central priority to the impact of Brexit on the island of Ireland. Paragraph 11 states:

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

Of crucial importance here is the European Council's proposal that the European Union should recognise post-Brexit the bilateral arrangements and agreements that exist between the UK and Ireland (which implicitly include the Common Travel Area), as well as its recognition of the need for "flexible and imaginative solutions" that would address the "unique circumstances on the island of Ireland".

However, the European Council's guidelines also place the resolution of the situation on the island of Ireland within a first phase of negotiations whose progress will be determined by the European Union, after which a second phase will seek to arrive at an "overall understanding on the framework for the future relationship" (paragraph 5) between the UK and the EU. According to the guidelines the first phase of the negotiations aim to "provide as much clarity and legal certainty as possible to citizens, businesses, stakeholders and international partners on the immediate effects of the United Kingdom's withdrawal from the Union", and to "settle the disentanglement of the United Kingdom from the Union and from all the rights and obligations the United Kingdom derives from commitments undertaken as Member State" (paragraph 4).

²⁸ European Council, "European Council (Art. 50) guidelines following the United Kingdom's notification under Article 50 TEU (29 April 2017)", <http://www.consilium.europa.eu/en/press/press-releases/2017/04/29-euco-brexit-guidelines/> [last accessed 18/06/2017].

The European Council's position on the framework for the negotiations is a rejection of what the UK Prime Minister had proposed in her letter to the European Council's President that triggered Article 50. In her letter, the Prime Minister had stated the United Kingdom's desire "to agree with the European Union a deep and special partnership that takes in both economic and security cooperation", but added that "To achieve this, we believe it is necessary to agree the terms of our future partnership alongside those of our withdrawal from the EU".²⁹ The UK Government's suggested approach has, therefore, been rejected by the European Council.

2.3 The European Commission

In seeking formal approval from the European Council to represent the European Union in the negotiations over the UK's withdrawal, the European Commission set out draft directives for those negotiations on the 3rd of May 2017.³⁰ Closely informed by the European Council's guidelines, the explanatory memorandum for the draft directives confirms "There will be a phased approach to the negotiations" (p.2), and that "Preserving the integrity of the Single Market excludes participation based on a sector-by-sector approach" (p.3). Given the phased approach, the draft directives recommended for approval by the European Council only cover the first phase, and do not address "transitional arrangements under the withdrawal agreement, including bridges towards the foreseeable framework for the future relationship" (p.3) between the UK and the EU. Moreover, they follow the negotiating principle laid down in the European Council guidelines that "nothing is agreed until everything is agreed, individual items cannot be settled separately" (p.3), which would suggest that any resolution regarding post-Brexit future relations between the two jurisdictions on the island of Ireland, between the island of Ireland and Great Britain, and between these islands and the European Union will be dependent on the UK and the EU coming to an agreement on all other issues.

Nevertheless, the situation on the island of Ireland is once again given specific attention in the European Commission in its draft directives, which reflect and expand on the language used by both the European Parliament and the European Council. Paragraph 14 states:³¹

In line with the European Council guidelines, the Union is committed to continuing to support peace, stability and reconciliation on the island of Ireland. Nothing in the Agreement should undermine the objectives and commitments set out in the Good Friday Agreement and its related implementing agreements; the unique circumstances and challenges on the island of Ireland will require flexible and imaginative solutions. Negotiations should in particular aim to avoid the creation of a hard border on the island of Ireland, while respecting the integrity of the Union legal order. Full account should be taken of the fact that Irish citizens residing in Northern Ireland will continue to enjoy rights as EU citizens. Existing bilateral agreements and arrangements between Ireland and the

²⁹ "Prime Minister's letter to Donald Tusk triggering Article 50", p.3.

³⁰ European Commission, "Recommendation for a Council Decision authorising the Commission to open negotiations on an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union", https://ec.europa.eu/info/sites/info/files/recommendation-uk-eu-negotiations_3-may-2017_en.pdf [last accessed 18/06/2017].

³¹ EU Commission, "Annex to the Recommendation for a Council Decision authorising the Commission to open negotiations on an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union", https://ec.europa.eu/info/sites/info/files/annex-recommendation-uk-eu-negotiations_3-may-2017_en.pdf [last accessed 20/06/2017].

United Kingdom, such as the Common Travel Area, which are in conformity with EU law, should be recognised. The Agreement should also address issues arising from Ireland's unique geographic situation, including transit of goods (to and from Ireland via the United Kingdom). These issues will be addressed in line with the approach established by the European Council guidelines.

There is again an expression of the European Union's commitment to the peace and reconciliation process on the island of Ireland, concern not to undermine the 1998 Agreement, acknowledgement of the unique circumstances pertaining to the island due to Brexit and of the need for "flexible and imaginative solutions", as well as a desire not to create a hard border between Ireland and Northern Ireland. However, there is also specific reference to the need to reflect the fact that citizens in Northern Ireland with Irish citizenship will continue to be EU citizens, as well as explicitly including the Common Travel Area as a UK-Ireland bilateral arrangement that should be recognised post-Brexit. Finally, paragraph 14 of the draft directives highlights how a solution must be found for Irish goods or goods bound for Ireland transiting through a post-Brexit UK.

The negotiating directives for the European Commission were agreed by the European Council on the 22nd of May 2017 which,³² among other things, confirmed that "Safeguarding the status and rights of the EU27 citizens and their families in the United Kingdom and of the citizens of the United Kingdom and their families in the EU27 Member States is the first priority for the negotiations" (paragraph 11), and that "An orderly withdrawal of the United Kingdom from the Union requires settling the financial obligations resulting from the whole period of the UK membership in the Union" (paragraph 12). However, the agreed negotiating directives for the European Commission also include a small but perhaps important addition to the paragraph dedicated to the island of Ireland. In its final version, where Paragraph 14 refers to the 1998 Agreement, it now reads: "Nothing in the Agreement should undermine the objectives and commitments set out in the Good Friday Agreement *in all its parts* and its related implementing agreements" (emphasis added).

On the 29th of May 2017 the European Commission published two working papers circulated to the EU27,³³ which became position papers sent on the 12th of June to the UK Government prior to the commencement of negotiations.³⁴ Among the guiding principles the Commission sets out in its position paper on citizens' rights is that of "Equal treatment amongst EU27 citizens by and in the UK in all matters covered by the Withdrawal Agreement", but with the proviso that this should be "without prejudice to Common Travel Area arrangements between the UK and Ireland" (p.2). This would presumably allow for Irish citizens to be treated by and in the UK in ways that would privilege

³² European Council, "Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union", <http://www.consilium.europa.eu/en/press/press-releases/2017/05/22-brexit-negotiating-directives/> [last accessed 20/06/2017].

³³ European Commission, "Working paper 'Essential Principles on Citizens' Rights'", https://ec.europa.eu/commission/sites/beta-political/files/citizens-rights-essential-principles-draft-position-paper_en.pdf [last accessed 20/06/2017]; "Working paper 'Essential Principles on Financial Settlement'", https://ec.europa.eu/commission/sites/beta-political/files/financial-settlement-essential-principles-draft-position-paper_en.pdf [last accessed 20/06/2017].

³⁴ European Commission, "Position paper on 'Essential Principles on Citizens' Rights'", https://ec.europa.eu/commission/sites/beta-political/files/essential-principles-citizens-rights_en_0.pdf [last accessed 20/06/2017]; "Position paper 'Essential Principles on Financial Settlement'", https://ec.europa.eu/commission/sites/beta-political/files/essential-principles-financial_settlement_en_0.pdf [last accessed 20/06/2017].

them over other EU citizens. However, in one of its concluding paragraphs the position paper states that “The Commission should have full powers for the monitoring and the Court of Justice of the European Union should have full jurisdiction corresponding to the duration of the protection of citizen's rights in the Withdrawal agreement” (p.4). This implies that the UK would still be answerable to the Court of Justice of the European Union for some time after its departure from the EU.

3. Approaches to the Negotiations: The Irish Government

Shortly after the European Council meeting that agreed its negotiating guidelines, the Irish Government published *Ireland and the negotiations on the UK's withdrawal from the European Union: The Government's approach*.³⁵ From the outset, in the document's executive summary the Irish Government notes how "The UK's decision to leave the EU has raised a number of specific and very significant issues which are unique to Ireland, in particular in relation to Northern Ireland, the border and the Common Travel Area", and that it "will ensure that the Good Friday Agreement is fully respected and protected in the withdrawal process" (p.7). It is also highlighted how the UK Government and the EU have both raised the same issues in the context of their own approaches to the negotiations pointing to, for instance, how the UK Prime Minister's letter triggering Article 50 "reiterates the UK's wish to address the unique circumstances that pertain to Ireland" and its "strong emphasis on the 'unique relationship' between these two islands" (p.13). More specifically, the Irish Government recalls that "the letter confirms: 'we want to avoid a return to a hard border', as well as committing to the maintenance of the Common Travel Area, and to upholding the Good Friday Agreement" (p.13). In terms of the EU's stated approach to the negotiations, the Irish Government notes "there have been welcome initial statements from the EU institutions and our EU partners recognising that the unique circumstances of the island of Ireland should be reflected in negotiated outcomes from the exit process" (p.20).

The nature of the Northern Ireland-Ireland border is of course one of those unique circumstances and, like the UK Government, the European Parliament, the European Council and the European Commission, the Irish Government states that the "avoidance of a hard border will require flexibility and creativity on the part of both the UK and the EU" (p.22). It makes clear that "Within the EU, Ireland will make clear its expectation that there will need to be a political and not just a technical solution and a recognition that this issue of the land border represents a unique and unprecedented set of circumstances" (p.22).

There are a wide range of other concerns and issues raised in the document that will inform how the Irish Government will, as an EU Member State, approach the negotiations with the UK and its interactions with other Member States and the EU's institutions. Among those that relate specifically to the post-Brexit context of relations between Ireland and Northern Ireland, and between the island of Ireland and the UK, are: the increased relevance of the North-South and East-West institutions established under the 1998 Belfast/Good Friday Agreement; concerns over the role of EU funding to support cross-border cooperation and the peace and reconciliation process in Northern Ireland; obstacles to North-South and East-West trade and supply chains; and the need for a withdrawal agreement to be reached.

In terms of future relations with Great Britain, the Irish Government affirms that "Ireland will retain its uniquely close economic, political, cultural and people-to-people links with Great Britain" (p.19). However, with "official Irish-UK interaction within the EU coming to an end, the fullest use will be made of the various structures for dialogue between administrations, including the annual summits between the Taoiseach and the UK Prime Minister, the British-Irish Intergovernmental Conference

³⁵ Irish Government, *Ireland and the negotiations on the UK's withdrawal from the European Union: The Government's approach*, http://www.merrionstreet.ie/en/EU-UK/Key_Irish_Documents/Government_Approach_to_Brexit_Negotiations.pdf [last accessed 21/06/2017].

and the British-Irish Council (both established under the 1998 Good Friday Agreement), links with devolved UK administrations and other relevant arrangements” (p.19). Similarly, and noting that “Cooperation on our island is ever more crucial in the context of Brexit”, it is stressed that the institutions created by the 1998 Agreement “provide frameworks for cooperation between both parts of the island, including the North South Ministerial Council and the North South bodies” (p.19). Reflecting the importance the Irish Government has attached to the relevance of the institutions established under the Belfast/Good Friday Agreement in maintaining post-Brexit North-South and East-West relations, it concludes that “As this Agreement is the foundation for the settlement in Northern Ireland, active measures will be required to safeguard it and its institutions after the UK departure from the EU” (p.20).

Continued cross-border cooperation beyond the formal institutions under the 1998 Agreement is also raised as a core issue whose resolution requires inclusion in any agreement on the UK’s withdrawal from the EU. The current and historic importance of such cooperation is summarised as follows:

The EU has played a vital role in the peace process and this should be recognised and preserved in the context of a UK exit. The unique constitutional, historic and geographic circumstances, as well as the particular citizenship issues, all point to the need for continued EU engagement in Northern Ireland beyond the UK’s withdrawal from the EU. Ireland and the UK are currently partners in three EU-funded cross-border Cooperation Programmes with a total value to €650 million over the period 2014-2020. The programmes are important drivers of regional development in a cross-border context and allow for practical support of the peace process and the advancement of the Good Friday Agreement. EU involvement has allowed for the realisation of projects that may otherwise have become mired in political disagreement. Removal of this constructive influence and of the funding itself would have a significant impact on the ongoing reconciliation work in Northern Ireland and the border region (p.23).

Reflecting the fact that the EU and its Member States are currently planning its future budget priorities, the Irish Government suggests that “Work beginning on successor programmes under the next Multiannual Financial Framework (MFF) also needs to ensure that they will allow for continued participation by Northern Ireland in a range of EU-funded programmes with a cross-border dimension” (p.23). In light of the importance it places on cross-border cooperation, the Irish Government’s recommendation is that “the withdrawal agreement should provide for continued EU support for and contribution to the Northern Ireland Peace Process and to future development of the region [which] includes providing for the continuation of UK and EU support to PEACE and INTERREG, as well as support for the range of EU-funded programmes” (p.23). Importantly, the Irish Government calls not only for the EU to continue financial support for the cross-border cooperation programmes, but also for the UK to do so. The UK Government’s own position on its future participation in EU-funded programmes does not make specific reference to either the PEACE or INTERREG programmes. Instead, underlining the view that after having left the EU “decisions on how taxpayers’ money will be spent will be made in the UK” and that outside the Single Market the UK

“will not be required to make vast contributions to the EU budget”, the UK Government poses the possibility that “There may be European programmes in which we might want to participate”.³⁶

The UK’s future regulatory direction of travel is also identified by the Irish Government as a potential obstacle to trading relations between the two countries. It poses the question “as to how far the UK, which will not be bound by EU law once it departs and which will not be part of the EU decision-making process, will wish to over time exercise its own right to legislate and regulate in ways which could mean divergence between UK and EU regulations” (p.33). As a result, it concludes that “The smoothest possible trading relationship will therefore require mechanisms to monitor and, if possible, resolve such regulatory divergence” (p.33). However, this would not simply be in order to support continuing trading relations between the UK and Ireland, but also “to ensure that UK businesses do not gain an unfair competitive advantage over EU, including Irish, businesses” (p.33).

From the Irish Government’s perspective, the core factor dictating post-Brexit North-South and East-West economic links will be the future relationship of the UK with the EU. Noting that the “significant levels of trade between North and South on the island often involve highly integrated supply chains, especially in the agri-food sector”, the Irish Government reflects the “considerable concern that these supply chains and cross-border trade would be affected by the imposition of any border controls, the establishment of tariff or non-tariff barriers or other additional administrative arrangements” (p.36). A sign of the UK’s future proximity to the EU will be the border between Northern Ireland and the Republic of Ireland, and the extent to which it becomes an obstacle. “The closer the trading relationship between the UK and the EU, including Ireland”, therefore “the less challenging the task of avoiding a hard border should be” (p.22). In order to achieve this, the Irish Government urges “All possible avenues in the EU acquis [...] be explored to facilitate free movement of people, goods and services on the island and it may be necessary to consider additional measures” (p.22).

Failure to reach a withdrawal agreement whereby the UK and the EU – including Ireland – would mean reverting to World Trade Organisation rules. “Such a scenario”, according to the Irish Government, “would have serious implications for Ireland in terms of our trade with the UK, above all in regard to agricultural products, where much higher tariffs would apply than on many other goods, but also with regard to how the border on the island of Ireland was managed in terms of custom controls as well as controls with regard to animal and plant health” (p.17). Therefore, the Government declares that “Ireland supports the objective of the EU that the withdrawal negotiations should result in a withdrawal agreement and that a disorderly exit must be avoided” (p.18). However, it also cautions that “the UK also shares this objective and acts responsibly” (p.18).

In light of its concerns and priorities for the negotiations over the UK’s withdrawal from the EU, a core element of its negotiating strategy is:

To leverage our position within the EU27 negotiation team, to shape the EU27 approach to negotiations which includes aiming for the closest possible future relationship between the EU and the UK. A key part of this strategy will be to promote the need for effective transitional

³⁶ *The United Kingdom’s exit from and new partnership with the European Union*, p.49. In outlining its vision for post-Brexit science and innovation, it concludes by stating it “would welcome agreement to continue to collaborate with our European partners on major science, research and technology initiatives” (p.59).

arrangements, to allow for a smooth phasing in from old to new arrangements, in order to minimise disruption for citizens, businesses and the wider economy and society. The withdrawal agreement should recognise the unique geographic situation of the island of Ireland including in terms of the volume of goods travelling to and from Ireland and should ensure access to the Single Market for goods which transit through the UK, while respecting the integrity of the Union legal order (p.40).

4. Convergences and divergences in approaches to the negotiations

While there may be a significant number of areas where the main actors' approaches to the negotiations over the UK's withdrawal from the EU reveal the potential for agreement and others where that appears more difficult, we will focus briefly here on those seen as most relevant to the future of relations within and between these islands. It is where there is a greater degree of convergence that will inform the suggested framework for supporting those relations in the post-Brexit context outlined in the next and concluding section of this report.

One issue that could have given rise to disagreement was over the sequencing of the negotiations. Whereas the UK Prime Minister had indicated in her letter triggering Article 50 that it would be necessary to agree the terms of the UK's future relationship with the EU alongside those of its withdrawal, the EU determined that discussions over future relationships could only take place after an initial phase addressing the UK's exit. The situation of the island of Ireland was one of the issues to be addressed in the initial phase, alongside the question of citizens' rights and the financial settlement. However, the opening round of the negotiations that took place on the 19th of June 2017 revealed that the UK Government had agreed to the EU's suggested sequencing as set out in the Terms of Reference.³⁷ These report that initial negotiating groups have been established to address, respectively, citizens' rights, the financial settlement, and other separation issues. Importantly, the Terms of Reference also state that "a dialogue on Ireland/Northern Ireland has been launched under the authority of the Coordinators" (p.1), which may suggest an added degree of attention will be given to this issue, or even that this dialogue could continue into the second phase of negotiations.

If the EU judges that sufficient progress has been made on the issues to be addressed in the opening phase – and where there is significant potential for disagreement, particularly in terms of citizens' rights and the financial settlement – then another area that could present considerable challenges in the second phase is the nature of the UK's future relationship with the EU. The UK Government's approach to the negotiations, which suggests the possibility of a degree of partial post-Brexit involvement in elements of the Single Market and Customs Union arrangements, does not correspond with the EU's stated position that there can be no sectoral or partial participation in these structures.

This is further complicated by the UK Government's repeated insistence that it will no longer be within the jurisdiction of the Court of Justice of the European Union, visible once again in its 26th of June position paper on the post-Brexit status of EU citizens in the UK and UK nationals in the EU. Having outlined that the UK Government will create new post-Brexit rights for qualifying EU citizens in the UK, the paper makes clear not only that "Those rights will be enforceable in the UK legal system", but also that "The Court of Justice of the European Union (CJEU) will not have jurisdiction in the UK".³⁸ This position is in contradiction with that of the EU as stated in its own position paper on this issue published on the 12th of July.³⁹ Failure to resolve this divergence in positions could have

³⁷ European Commission, "Terms of Reference for the Article 50 TEU negotiations" (19 June 2017), https://ec.europa.eu/commission/publications/terms-reference-article-50-treaty-european-union-negotiations_en [last accessed 21/06/2017].

³⁸ HM Government, "The United Kingdom's Exit from the European Union: Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU", p.4.

³⁹ The role envisaged by the EU for the CJEU in the oversight of any withdrawal agreement can also be seen, for example, in the Commission's 12th of July "Position paper on Governance",

serious implications for future trading relations between the UK and the Republic of Ireland, and for the nature of the border between Ireland and Northern Ireland.⁴⁰

Nevertheless, although these and many others may become areas for disagreement, there are also a number of points of convergence between the approaches to the negotiations. These include:

- recognition of the specific circumstances pertaining to the island of Ireland;
- the retention of the Common Travel Area and existing bilateral arrangements between the UK and the Republic of Ireland;
- the need to avoid the emergence of a hard border between Northern Ireland and Ireland;
- and protection of the 1998 Belfast/Good Friday Agreement.

Although inclusion of these issues in the approaches to the negotiations by the UK Government, the Irish Government and the European Union does not of itself guarantee their resolution, the retention of the Common Travel Area and existing bilateral arrangements is one issue that appears to be less contentious. While it is clear why both the UK and Irish Governments should include the Common Travel Area as a negotiating priority in their respective approaches, the European Council's negotiating guidelines, and even more so the European Commission's directives for the negotiations and its position paper on citizens' rights point to a readiness on the part of the EU's institutions to find an early accommodation of this issue. Indeed, the Irish Government's own analysis finds no "obvious legal barrier to the CTA being maintained bilaterally in a manner consistent with Ireland's EU obligations".⁴¹

However, reaching an agreement capable of accommodating all of the specific circumstances of the island of Ireland and retaining the current nature of the border between Northern Ireland and the Republic of Ireland will be a more challenging task. The size of that challenge will increase according to the reluctance of the UK Government to be bound by solutions for the border that would tie the UK to either the Single Market or the Customs Union, in a way that would force it to accept the principle of free movement and/or the jurisdiction of the Court of Justice of the European Union. This would directly contradict its approach to the negotiations and the UK Government's stated aims. Similarly, the European Parliament, the European Council, the European Commission and the Irish Government have repeatedly stressed in their approaches to the negotiations the need to preserve the integrity of the Single Market. However, as was referred to in the previous section of this report, the Irish Government also suggested that "it may be necessary to consider additional measures" in order to facilitate the free movement of people, goods and services specifically on the island of Ireland. This would not only require a degree of flexibility from the EU institutions and the other Member States in interpreting the integrity of the Single Market and the Customs Union, but

https://ec.europa.eu/commission/sites/beta-political/files/essential-principles-governance_en_0.pdf [last accessed 21/07/17].

⁴⁰ On the 20th of July 2017, a "Joint technical note on EU-UK positions on citizens' rights after second round of negotiations" was published. Using a "traffic-light system", this document outlines where there are areas of convergence, divergence or where it is considered further discussions are necessary to "deepen understanding"; https://ec.europa.eu/commission/publications/joint-technical-note-eu-uk-positions-citizens-rights-after-second-round-negotiations-0_en or <https://www.gov.uk/government/publications/joint-technical-note-on-the-comparison-of-eu-uk-positions-on-citizens-rights> [last accessed 21/07/17].

⁴¹ *Ireland and the negotiations on the UK's withdrawal from the European Union: The Government's approach*, p.24.

also from the UK Government whose approach to the negotiations does not favour geographically-targeted solutions that would affect the integrity of the United Kingdom. Any attempt to arrive at a solution that, whilst preserving the current openness of the border between Ireland and Northern Ireland, created a border between the latter and Great Britain would also be politically unacceptable to many in Northern Ireland. This is a concern addressed explicitly by the Irish Government:

In seeking practical solutions, with our EU partners and with the UK, to the challenges that Brexit poses, we will need to be mindful of considering fully the needs and concerns of the main unionist and nationalist communities in Northern Ireland, and of the need to ensure that any proposed solutions will be in line with Ireland's obligations, interests and rights as a Member State of the EU (p.20).

Balancing these needs and obligations will be the principal challenge to the Irish and UK Governments, as well as to the EU and its other Member States.

All sides in the negotiations have also recognised their obligations in protecting the 1998 Belfast/Good Friday Agreement, and included this as one of their negotiating priorities. From the EU's side, the final version of the European Commission's negotiating directives make it clear that any agreement on the UK's withdrawal should not undermine the 1998 Agreement:

Nothing in the Agreement should undermine the objectives and commitments set out in the Good Friday Agreement in all its parts and its related implementing agreements (paragraph 14).

The addition of the phrase "in all its parts" which was absent from the draft directives could be interpreted as relating specifically to a statement added to the minutes of the European Council's meeting of the 29th of April 2017. Reproduced in the Irish Government's document outlining its approach to the negotiations, the statement reads:

The European Council acknowledges that the Good Friday Agreement expressly provides for an agreed mechanism whereby a united Ireland may be brought about through peaceful and democratic means; and, in this regard, the European Council acknowledges that, in accordance with international law, the entire territory of such a united Ireland would thus be part of the European Union.⁴²

It is the view of the Centre for Cross Border Studies that while it is important to specify the 1998 Agreement's provision for a future constitutional possibility, it is also important to ensure that all other provisions contained within the Agreement are safeguarded. Crucially, the 1998 Belfast/Good Friday Agreement is also made up of three central strands, all of which should be regarded as elements all parties to the negotiations over the withdrawal of the United Kingdom from the European Union have committed themselves to protecting. Moreover, by avoiding a selective interpretation, instead of the 1998 Agreement being regarded simply as a problem to be solved

⁴² *Ireland and the negotiations on the UK's withdrawal from the European Union: The Government's approach*, p.21. It should be noted that, as outlined by the European Parliamentary Research Service, "Two statements, the texts of which were not made public, were added to the minutes. Following a request from the Irish Government, the European Council agreed on Northern Ireland's membership of the EU in the event of reunification with the rest of Ireland"; <https://epthinktank.eu/2017/05/10/outcome-of-the-special-european-council-article-50-meeting-of-29-april-2017/> [last accessed 22/06/2017].

during the negotiations, it could also become a potential solution to the challenges posed by Brexit to future relations within and between these islands.

5. “Flexible and imaginative solutions”: The 1998 Belfast/Good Friday Agreement as a framework for post-Brexit relations within and between these islands

This concluding section proposes that the 1998 Agreement is an ideal vehicle for maintaining the current socio-economic relations between Northern Ireland and Ireland, and between the island of Ireland and Great Britain following the UK’s exit from the European Union.⁴³ It does so in light of the importance attached to it by all sides involved in the negotiations on the UK’s withdrawal, and the fact that one of its co-guarantors will continue to be a Member State of the European Union.

However, it is important to understand from the outset that this is an outline proposal for a *framework* – one that is not currently populated by technical solutions or legal arguments relevant to a post-Brexit environment, although the Centre for Cross Border Studies will provide further detail in subsequent Briefing Papers. Undoubtedly there will be reasons put forward why such a framework is technically and/or legally unfeasible; but the Centre for Cross Border Studies underlines the need for flexibility and imagination to be employed in finding technical solutions and interpreting existing legislation – the flexibility and imagination called for by the main actors in the negotiations and by the Centre for Cross Border Studies on previous occasions.⁴⁴

It is also possible that this framework’s purpose will be exceeded by an outcome to the negotiations that not only secures the relationships it supports, but also relationships that go beyond the island of Ireland and Great Britain. However, if this is deemed to be unachievable, then the framework provided for by the 1998 Belfast/Good Friday Agreement must be a *minimum* conclusion to the negotiations. We should also be reminded of existing provisions within the Treaty on European Union that allow for the development of relations between the EU and third countries, as was highlighted by the European Parliament in its resolution on the negotiations for the UK’s withdrawal. Article 8(1) of the Treaty states: “The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation”.

However, before setting out our proposal it is important to note calls made prior to the triggering of Article 50 by the Centre for Cross Border Studies along with a number of other organisations involved in cross-border cooperation.⁴⁵ Those calls were contained in the Centre for Cross Border Studies’ submission to the House of Lords European Union Select Committee inquiry on Brexit and UK-Irish relations:

⁴³ This proposal published in a separate Briefing Paper by CCBS on the 5th of July 2017, <http://crossborder.ie/the-centre-for-cross-border-studies-publishes-brexit-briefing-paper-flexible-and-imaginative-solutions/>.

⁴⁴ In its October 2016 submission to the Northern Ireland Affairs Committee, for example, the Centre for Cross Border Studies stated that to achieve the objective of “retaining (at least to the greatest extent possible) the free movement of people, goods and services, avenues should be explored to obtain flexible arrangements that could simultaneously accommodate the specific needs of Northern Ireland and of the Republic of Ireland”; <http://crossborder.ie/site2015/wp-content/uploads/2016/11/2016-10-21-Submission-NI-Affairs-Committee-Inquiry-on-the-land-border-with-the-Republic-of-Ireland.pdf>.

⁴⁵ The other organisations were: Cooperation and Working Together (CAWT), Cooperation Ireland, Derry and Strabane District Council, Donegal County Council, East Border Region, Irish Central Border Area Network, and the North West Regional Working Group.

We are concerned [...] to ensure that the interests of the border region remain central to the deliberations of both the UK and Irish Governments and the Northern Ireland Executive prior to and following the notification of Article 50. In particular, it is essential that:

- measures be taken to ensure the sustainability of cross-border and transnational projects that are currently funded under EU 2014-2020 programmes. It is important that project promoters and participants be reassured that projects will continue to be financially supported until 2020;
- existing EU directives and regulations that have been transposed into UK/Northern Ireland law should remain in place until such time as any proposed changes have been subject to comprehensive territorial, equality and environmental impact assessments;
- means should be found to ensure the eligibility of continued participation by Northern Ireland (and those parts of Wales and Scotland currently involved in INTERREG programmes with Ireland) in the European Territorial Cooperation Programmes and transnational programmes such as Horizon 2020, Erasmus+, Life and Europe for Citizens (which would require a financial commitment from the UK Government);
- whether or not the UK is excluded from EU programmes and projects, the Irish and UK Governments must take steps to ensure new and sufficient resources are available for the social and economic development of the border region, including local authority and civic society-led projects. On the UK side, additional funding allocations should be derived from the UK's current contribution to the EU budget that will revert to HM Treasury post-withdrawal from the EU, and not from the "block grant";
- additional funding be allocated by the UK and Irish Governments to the PEACE IV programme specifically to address the challenges of inter-community conflict and cross-border relationships in the context of political and economic uncertainty and instability arising in the post-referendum context; and
- a "PEACE V" programme, funded by the UK and Irish Governments should be developed – in consultation with civil society organisations and local authorities – specifically to address the challenges of inter-community conflict and cross-border relationships in the context of uncertainty and instability arising in the post-Brexit context.

Noting that the first of the above has been addressed by the UK Government,⁴⁶ we envisage the framework we are proposing capable of accommodating the other points raised, which would be essential to maintaining and developing relations within and between these islands.

The 1998 Belfast/Good Friday Agreement, then, as a framework with the capacity to support the current socio-economic relations between Northern Ireland and Ireland, and between the island of Ireland and Great Britain following Brexit, needs to be seen in its three interdependent strands, the geographical spaces they encompass, and their respective institutions:

⁴⁶ See *The United Kingdom's exit from and new partnership with the European Union*, p12.

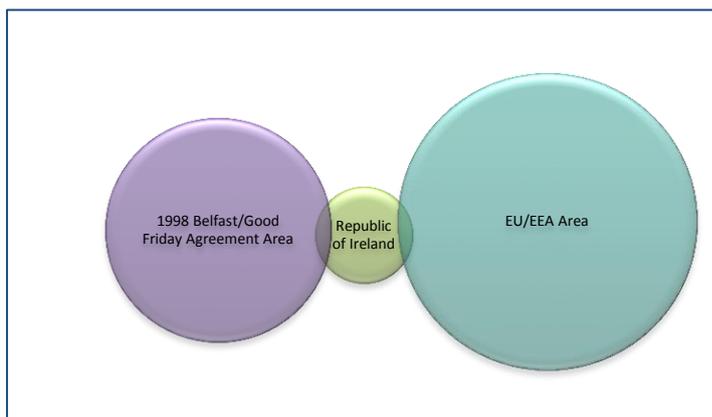
Strand	Geographical scope	Institutions
I		<ul style="list-style-type: none"> • The Northern Ireland Assembly
II		<ul style="list-style-type: none"> • The North South Ministerial Council
III		<ul style="list-style-type: none"> • British-Irish Council • British-Irish Intergovernmental Conference

Where the European Union, in the European Commission’s negotiating directives, states that, “Nothing in the [withdrawal] Agreement should undermine the objectives and commitments set out in the Good Friday Agreement in all its parts”, we urge that this commitment should encompass the entire geographical scope of the 1998 Agreement. To reach a negotiating outcome that undermines any one of the Strands of the Belfast/Good Friday Agreement and the geographical spaces they represent would be to undermine the entire Agreement given that they are all interlinked. Moreover, whilst recognising it is the UK’s decision to leave the EU that has prompted these considerations, the Centre for Cross Border Studies nevertheless calls for all parties involved in the withdrawal negotiations not to satisfy themselves by regarding the post-Brexit integrity of the institutions that underpin it as sufficient evidence that the 1998 Agreement has not been undermined. It can only be regarded as not having been undermined if the social and economic relations that currently flow between both jurisdictions on the island of Ireland, and between the island of Ireland and Great Britain, are not interrupted. This means not only ensuring the continuing free movement of Irish and UK citizens between their jurisdictions, but also the free movement of goods and services – something that will require maximum application of all parties’ flexibility and imagination as they negotiate the UK’s withdrawal.

Given the recognition of EU institutions such as the European Parliament that Ireland, as a Member State, “will be particularly affected by the withdrawal of the United Kingdom from the European

Union”,⁴⁷ accommodation will have to be reached to meet its specific needs. This not only means taking into account the Irish Government’s continuing responsibilities as a co-guarantor of the 1998 Belfast/Good Friday Agreement, but also the potential economic consequences faced by Ireland. Those consequences are explicitly assumed by the Irish Government in its approach to the Brexit negotiations, declaring that it will be “making a strong case at EU level that the UK’s withdrawal represents a serious disturbance to the Irish economy overall and that we will require support”.⁴⁸ Although essential to respecting the integrity of the 1998 Agreement, achieving an outcome over the UK’s withdrawal from the EU that ensured cross-border trade on the island of Ireland, but not between Ireland and Great Britain, would not significantly reduce the disturbance to the Irish economy and would require Ireland receiving greater support from the EU. This is because Ireland’s volume of trade with Great Britain is far greater than that with Northern Ireland.

In light of the above, the Centre for Cross Border Studies proposes that the following two models be considered, which both incorporate the 1998 Agreement framework, but where the first would see the Republic of Ireland within two distinct areas; in the second, Northern Ireland and the Republic of Ireland share an area that is linked to two others. Both assume that the United Kingdom will not be within the Single Market or the Customs Union. However, it should be understood that the use of terms such as “area” or “membership” is simply meant to communicate conceptual spaces and should not be taken as intending to become formal entities.



Model 1

In this first model, the Republic of Ireland is within the EU/EEA area through its membership of the European Union, but is also within another area as a co-guarantor of the 1998 Belfast/Good Friday Agreement and its membership of the institutions under Strands II and III of that Agreement. The two areas do not themselves overlap.

The 1998 Agreement area comprises the two sovereign governments of the United Kingdom and the Republic of Ireland, as well as the devolved administrations of Northern Ireland, Scotland and Wales. The other area comprises the Republic of Ireland and all other Member States of the European Union and those EFTA countries within the EEA, and is governed by the relevant institutions

⁴⁷ “European Parliament resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union”, paragraph 8.

⁴⁸ *Ireland and the negotiations on the UK’s withdrawal from the European Union: The Government’s approach*, p.9.

according to the Treaties in force. Neither the United Kingdom or any of the devolved administrations would be within this area.

Although acutely conscious of the fact that the EU's institutions and its Member States – including Ireland – have repeatedly asserted the need to safeguard the integrity of the Single Market, the Centre for Cross Border Studies nevertheless proposes that within this model goods and services, as well as people, should be able to flow freely between the Republic of Ireland and the United Kingdom. Goods and services from the United Kingdom would not, however, be able to travel further than the Republic of Ireland, and they would have to adhere to all relevant EU regulations and standards. That adherence would, of course, be more easily achieved if, in the wake of the Great Repeal Bill, the UK were not to introduce legislation that resulted in lower standards, protections or in regulatory divergence.

Crucially, however, for this model not to result in economically adverse effects for the Republic of Ireland by damaging its indigenous businesses, the UK would have to impose certain restraints on its approach to Free Trade Agreements with what would be third countries from an EU perspective. If the UK were to reach agreements with other countries that included a significant reduction or elimination of tariffs, the introduction of goods from such countries into the Irish market could threaten indigenous businesses and in many cases, such as the agri-food sector, could also damage enterprises in Northern Ireland. To prevent this, either the UK continues to largely mirror EU tariffs with third countries (which would not prevent it from striking Free Trade Agreements), or rigorous customs controls would have to be put in place between the UK and the Republic of Ireland, including between the two jurisdictions on the island of Ireland. The latter option would make the model proposed here unviable.

Under this model, the existing institutions under Strands II and III would gain greater prominence as coordinating bodies and spaces for significant dialogue between the UK and Irish Governments, as well as between these and the devolved administrations. It is also important to recall that Ireland, as a Member State of the European Union and within the jurisdiction of the Court of Justice of the European Union, would have to continue to discharge its responsibilities to ensure the integrity of the Single Market and to uphold the values of the EU. The British-Irish Council and the North South Ministerial Council, for example, were created by the 1998 Belfast/Good Friday Agreement with remits that could allow the Irish Government to ensure that its obligations as a Member State of the European Union are being discharged, and to report to the other administrations where it or the EU feel that the operation of this model is unsatisfactory and, indeed, if it has to be terminated.

Specifically, article 5 of Strand III of the 1998 Agreement states that the British-Irish Council will:

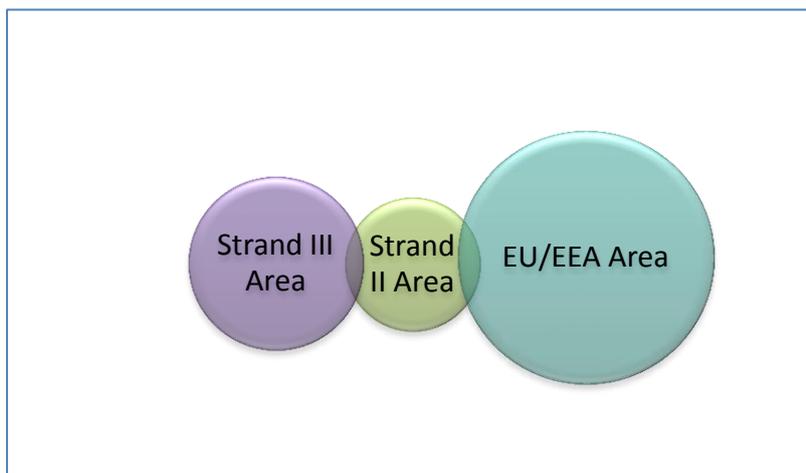
exchange information, discuss, consult and use best endeavours to reach agreement on co-operation on matters of mutual interest within the competence of the relevant Administrations. Suitable issues for early discussion in the BIC could include transport links, agricultural issues, environmental issues, cultural issues, health issues, education issues and approaches to EU issues.

Article 17 of Strand II includes amongst the North South Ministerial Council’s responsibilities the coordination of EU matters between the Irish Government and the Northern Ireland administration in relation to policy areas within both their competence:

The Council to consider the European Union dimension of relevant matters, including the implementation of EU policies and programmes and proposals under consideration in the EU framework. Arrangements to be made to ensure that the views of the Council are taken into account and represented appropriately at relevant EU meetings.

The Centre for Cross Border Studies also believes that the British-Irish Council and/or the British-Irish Intergovernmental Conference could become useful vehicles under this model to enable the continuation of EU cross-border cooperation programmes involving Scotland, Wales and both jurisdictions on the island of Ireland. This would necessitate either the required financial contribution from the UK Government directly to the relevant EU budget, or indirectly through the Irish Government, which is a member of both the British-Irish Council and the British-Irish Intergovernmental Conference.

These institutions would also serve the same roles in the second model we are outlining here. However, in this model goods from Northern Ireland would have access to the EU/EEA area, but without establishing any disruption to the flow of goods between Northern Ireland and the rest of the United Kingdom or undermining its constitutional position.



Model 2

While both Northern Ireland and the Republic of Ireland are the only members of the “Strand II Area” in this model, they nevertheless remain separate jurisdictions. The “Strand III Area” comprises the members of the “Strand II Area”, along with Great Britain. This brings together the two sovereign governments of the United Kingdom and the Republic of Ireland, as well as the devolved administrations of Northern Ireland, Scotland and Wales. As in the first model, the Republic of Ireland occupies both these areas given its role as a co-guarantor of the 1998 Belfast/Good Friday Agreement and its membership of the institutions under Strands II and III of that Agreement.

Also similarly to the previous model, the “EU/EEA Area” comprises the Republic of Ireland and all other Member States of the European Union and those EFTA countries within the EEA, and is governed by the relevant institutions according to the Treaties in force. Neither the United Kingdom

or any of the devolved administrations would be within this area, although unlike the first model Northern Ireland would have access to it through its position within the “Strand II Area”.

Within this model, as in the first, goods and services should be able to flow freely between the Republic of Ireland and the United Kingdom, and the UK would have to adhere to all relevant EU regulations and standards. It would also have to impose certain restraints on its approach to Free Trade Agreements with third countries and largely mirror EU tariffs in order not to prejudice Irish businesses. However, in order for Northern Ireland goods to have access to the “EU/EEA Area”, an additional mechanism would have to be put in place in order to distinguish them from goods originating from elsewhere in the UK.

Both the proposed models require UK adherence to relevant EU regulations and standards, and this could also involve the devolved UK administrations ensuring this is the case in relation to policy areas within their competence, particularly as certain powers are “repatriated” from the EU to the UK. The harmonisation of regulations and standards would not only support the continued flow of goods and services between the Republic of Ireland and the UK, but it would also facilitate the operation of the cross-border implementation bodies created under Strand II of the 1998 Belfast/Good Friday Agreement.

One of those bodies, the Special EU Programmes Body (SEUPB), would be ideally placed to continue to manage European Territorial Cooperation programmes on the island of Ireland that have contributed to the ongoing peace and reconciliation process. The EU’s support for that process has already shown how it is able to demonstrate flexibility in order to accommodate specific circumstances and, therefore, how it could do so again to avoid undermining the 1998 Belfast/Good Friday Agreement in all its parts as the UK withdraws from the EU. Illustrating this is the EU’s regulation 1299/2013 on European Territorial Cooperation programmes, which contains derogations applicable to the island of Ireland, as in article 18:

Within the thematic objective of promoting social inclusion and combating poverty and taking into account its practical importance, it is necessary to ensure that, in the case of the PEACE cross-border programme between Northern Ireland and the border counties of Ireland in support of peace and reconciliation, the ERDF should also contribute to promoting social and economic stability in the regions concerned, in particular through actions to promote cohesion between communities. Given the specificities of that cross-border programme, certain rules on selection of operations in this Regulation should not apply to that cross-border programme.⁴⁹

Such existing flexibility within the regulation should be interpreted as enabling the post-Brexit continuation of EU cross-border programmes on the island of Ireland, especially since the “specificities” referred to are applicable to Ireland as a continuing Member State. This should enable the UK to make the necessary financial contributions either directly to the relevant EU budget, or indirectly through the Irish Government, which is a member of the North South Ministerial Council and with joint responsibility along with the Northern Ireland Executive over the SEUPB.

⁴⁹ Regulation (EU) No 1299/2013 of the European Parliament and of the Council of 17 December 2013 on specific provisions for the support from the European Regional Development Fund to the European territorial cooperation goal; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:347:0259:0280:EN:PDF> [last accessed 23/06/2013].

To conclude, the Centre for Cross Border Studies believes that the 1998 Belfast/Good Friday Agreement should not be regarded simply as an issue to be resolved during the negotiations over the UK's withdrawal from the EU, but also as a potential solution to at least part of the problems raised by Brexit, and especially as a means of safeguarding the relations between Northern Ireland and the Republic of Ireland, and between the island of Ireland and Great Britain. We therefore have outlined a proposal that employs the 1998 Agreement as a framework receptive to the flexible and imaginative solutions required for the post-Brexit context – and a framework that has been identified as a priority in the negotiations by all the parties involved. It is also a framework that already contains institutions with representation from the administrations and governments of all parts of these islands, including from a continuing Member State of the European Union.

Under that framework we have proposed two conceptual models that facilitate the movement of people, goods and services within and between the island of Ireland and Great Britain, avoiding the creation of new or hardening of existing borders between any part of these islands. Our proposal does not cover every possibility – not least that of some or all of the devolved administrations in the UK being given powers that would allow immigration from EU Member States other than Ireland – nor does it detail the technical or legal arrangements that would make it a reality. We will, however, work to provide some of that detail, but we also hope that others will expend some of their creative energies in imagining technical and legal solutions appropriate to the 1998 Belfast/Good Friday Agreement as it enters a post-Brexit reality.