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# Brexit: The Irish Dimension



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## Introduction

The negotiations for the UK's withdrawal from the EU have been greatly complicated by the unique relationship between the UK and the Republic of Ireland. The two countries, though often at loggerheads in the past, have enjoyed a closer and more constructive relationship since they both joined the European Communities in 1973.

Mutual membership of the EC/EU has fostered increasing economic integration and underpinned the co-operative handling of past disagreements. It has thus paved the way for a more positive relationship. In particular, EU membership has enabled the often contentious issue of the border between Northern Ireland and the Republic of Ireland, (notwithstanding the fact that there was the Common Travel Area for people and the Anglo-Irish Free Trade Area Agreement for goods before we joined the EC), to be managed in a way that has eased community divisions and stimulated economic growth in both countries.

The prospect of Brexit has led to fears that the improved cross-community relations that followed the signing of the Good Friday/Belfast Agreement in 1998 could be undermined. This is partly because the British Government has decided that the UK will not remain in the EU's Single Market or Customs Union after Brexit, which would ordinarily mean the restoration of customs and other checks on what will become an external border of the EU.

In addition, the EU is specifically referred to in the text of the Good Friday Agreement. Northern Ireland voted to Remain in the EU in the 2016 referendum while the UK as a whole voted to Leave. The situation was further complicated by the outcome of the 2017 general election, which resulted in a hung parliament with Mrs. May's Conservative Government dependent for its working majority on a confidence and supply arrangement with the Democratic Unionist Party (DUP). The DUP is the largest of the Northern Ireland political parties and it had campaigned for the UK to leave the EU.

In this briefing we examine the issues at stake in the Brexit negotiations specific to the island of Ireland, including the implications for the Good Friday/Belfast Agreement.

## The Issues

There are three key issues at stake for Northern Ireland and the Republic of Ireland in the Brexit negotiations: the border; security and the Good Friday/Belfast Agreement; and trade. These are inter-twined in multiple and complex ways; they are separated out here for ease of discussion.

### The border & free movement of people

The border between north and south in Ireland, which runs for almost 500 kilometres and has around 250 crossing points, has been an international border between the two

countries since 1922 but it was originally a border between counties. As such, it runs through private properties, even the middle of people's houses. A joint boundary commission was set up after partition to propose changes to the border but its report was later shelved by agreement between the two governments. However, the British and Irish governments did agree that there should be a Common Travel Area (CTA) in the British Isles consisting of the UK, the Republic of Ireland, the Isle of Man and the Channel Islands. People travelling within the CTA do not have to show their passports and the UK and the Republic of Ireland operate similar immigration policies (including freedom of movement for EU nationals and non-membership of Schengen).

The CTA means that people living in the two parts of Ireland are able to travel freely across the border. However, until 1993, although the EU was a customs union, there were still customs checks at the border. These customs checks were much resented and customs border posts were attacked during the Troubles. The abolition of customs checks across the EU from 1<sup>st</sup> of January 1993 helped to improve the atmosphere around the border as it reduced one of the main sources of tension but security checks continued at some border crossings (with other crossing points closed off) until the Good Friday/Belfast Agreement.

Although the EU has accepted that the CTA can continue after Brexit, the border between north and south in Ireland will form the external border of the EU. EU rules would normally require – in any situation other than Ireland – the Republic of Ireland to maintain controls along the border, including stopping and searching vehicles and possibly checking identification documents. Such controls are considered necessary to protect the EU against the smuggling of goods, people, drugs and weapons across borders. The UK might also wish to have immigration controls at the border to avoid the risk of EU and third country nationals entering the Republic of Ireland and then crossing into the UK unhindered.

#### Security & the Good Friday Agreement

Throughout the 30 years of the Troubles the border was a constant cause of problems. Its meandering nature made it difficult for security forces on both sides to prevent terrorists from crossing back and forth. They also found it difficult to prevent the smuggling of goods, often in order to evade VAT, which was a major source of finance for terrorist organisations.

Security co-operation between United Kingdom and the Republic of Ireland was, for much of the Troubles, problematic. Political difficulties in both countries prevented effective co-operation between the two countries' police forces and extradition between them was highly politicised. But growing co-operation within the EU against cross-border crime, people smuggling and terrorism (particularly after the 1992 Maastricht Treaty) enabled the gradual normalisation of the British-Irish security relationship. In particular, the introduction of the European Arrest Warrant brought to an end political disputes about extradition between the two countries that had enabled terrorists to evade justice.

The improved security cooperation reduced cross-border terrorist activity and thus put pressure on the provisional IRA and other terrorist organizations, which in turn encouraged them to seek political routes to solve their grievances. But the security infrastructure along the border, including check points and watch towers used by the British security forces, were a symbol of the divisions in the community and much resented by part of it.

The 1998 Good Friday/Belfast Agreement makes the UK and the Republic of Ireland guarantors of the new settlement between the two communities but it also gives a role to the EU.<sup>1</sup> It is important to note too, that the agreement was made in the context of the UK and the Republic of Ireland being (in the language of the agreement) “friendly neighbours and partners in the European Union”.<sup>2</sup> Although the Good Friday/Belfast Agreement was an agreement between the British and Irish governments, its implementation took advantage of the common legal and policy framework deriving from their mutual membership of the EU. This means that the day-to-day operation of the institutions and bodies established under the agreement routinely relies on EU membership.<sup>3</sup>

Once security checks at the border were removed under the agreement, and with the free movement of people and goods under the Single Market and the Customs Union, an open border was fully restored for the first time since 1922.

### Trade

The initial trading relationship between the UK and the Republic of Ireland after partition was confrontational because of a dispute which was not resolved until 1938. Once the UK and the Republic of Ireland got beyond that however, trade between the two countries grew considerably. By 1961, when the UK and the Republic of Ireland both applied to join the then European economic community, two-thirds of Irish exports went to the UK. The Anglo-Irish Free Trade Area Agreement of 1965 facilitated this growing trade.<sup>4</sup>

For the UK, the Republic of Ireland is an important trading partner with the UK exporting more in goods and services to Ireland than it does to China, both in terms of value and total export share.<sup>5</sup> The UK is the largest destination for Irish services exports and the second largest destination for Irish goods exports after the USA.<sup>6</sup> In terms of agri-food, the UK is the Republic of Ireland’s largest trading partner at about 40 per cent (by value).<sup>7</sup> In fact, Ireland faces greater economic problems as a result of Brexit than any of the other 26 Member States.

An important issue for the Republic of Ireland is that a significant proportion of its imports and exports pass through the UK. Estimates of the share of imports and exports affected vary as official trade statistics are based on countries of origin and final destination. One study has found that over 50 per cent of the Republic of Ireland’s exports go via the UK and about 10 per cent of its imports come in through the same route.<sup>8</sup> Continuing this arrangement after Brexit would mean increased cost and complexity for business as additional documentation would be required and tariffs might be due.

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<sup>1</sup> *The Belfast Agreement*, 10 April 1998, Strand Two, para 17

<sup>2</sup> *Ibid.*, Annex: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland

<sup>3</sup> European Commission, *Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union*, TF50 (2017) 19, 8 December 2017, p. 7, para 47

<sup>4</sup> Mary E. Daly, *Brexit and the Irish Border: Historical Context*, British Academy/Royal Irish Academy, October 2017, p. 3

<sup>5</sup> Matthew Ward, *Statistics on UK trade with China*, House of Commons Library Briefing Paper 17/7379, 10 November 2017, p. 7

<sup>6</sup> ‘Reality check: How much trade is there between the UK and Ireland?’, *BBC News*, 4 December 2017

<sup>7</sup> ‘UK remains Ireland’s top trading partner, despite 6 pc drop in exports’, Margaret Donnelly, *Irish Independent*, 27 July 2017

<sup>8</sup> Martina Lawless & Edgar L. W. Morgenroth, *Ireland’s international trade and transport connections*, Economic and Social Research Institute, Working Paper, No. 573, 12 October 2017, pp. 21-22

For Northern Ireland, the Republic of Ireland is the destination for 37 per cent of its goods exports.<sup>9</sup> In particular, 55 per cent of Northern Ireland's food and drink exports go to the Republic.<sup>10</sup> In addition, there are complex supply chains operating on the island of Ireland which mean that many agricultural and other exports cross and re-cross the border between north and south at different stages in the production cycle. For example, dairy farmers in Northern Ireland may well sell their milk to a processing plant in the south for bottling or for cheese production. Similarly, many farmers in the Republic of Ireland export raw materials to the north of Ireland for processing in food plants, including roughly 10,000 pigs a week.<sup>11</sup>

There are other important aspects to the trading relationship which will be impacted by Brexit. These include the developing all-Ireland market in gas and electricity which is important to both sides of the border for ensuring security of supply.<sup>12</sup> Another example would be the all-Ireland approach to animal health which underpins cross-border trade in livestock and animal products.

Mutual membership of the EU has facilitated this developing trading relationship between the two countries. The Single Market has meant regulatory alignment between the UK and the Republic, with the free movement of goods, capital, services and people between the two states and they both participate in EU negotiations on trading relationships with third countries. The UK and the Republic have often found themselves in agreement on overall EU economic and trade policies as the countries share a broadly free market approach.

The EU Customs Union removed expensive and time-consuming checks on the border and it also abolished rules of origin, which are some of the most complex of customs rules both to comply with and to enforce.

## **Northern Ireland & the Brexit negotiations**

### Positions of negotiating parties

It was quickly apparent that the issue of the border would be one of the most difficult issues in the Brexit negotiations. There was concern Brexit might damage the peace process and that it could have serious economic consequences for both parts of Ireland.

The UK Government made a commitment to avoiding a hard border on the island of Ireland in its letter triggering the Article 50 process.<sup>13</sup> The UK has chosen not to highlight the security issues in the Anglo-Irish relationship but they are a factor behind the Government's stated desire to achieve a comprehensive security agreement with the EU post Brexit.

For its part, the European Council stated in its negotiating directives for the withdrawal agreement between the UK and EU that, "continuing to support and protect the achievements, benefits and commitments of the peace process will remain of paramount importance". These directives also highlighted the potential problem of a "hard border",

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<sup>9</sup> *BBC News, supra* n. 6

<sup>10</sup> Mark Allen, *Northern Ireland's agri-food sector – background and possible Brexit considerations*, Northern Ireland Assembly Research and Information Service Paper 66/16, 22 September 2016, p. 8

<sup>11</sup> Cited in HM Government, *Northern Ireland and Ireland: Position Paper*, 16 August 2017, p. 13, para 38

<sup>12</sup> The Republic of Ireland imports about half of its natural gas and three-quarters of its oil products via the UK; see Energy Institute, 'How will Brexit affect Ireland's energy sector?', 22 November 2017

<sup>13</sup> HM Government, *Prime Minister's letter to Donald Tusk triggering Article 50*, 29 March 2017

that is, one which would no longer allow the free movement of people and goods without routine checks and said that it would take “imaginative solutions” to avoid this.<sup>14</sup> The EU made the Irish border issue and the safeguarding of the Good Friday/Belfast Agreement one of its top three priorities to settle in the first part of the UK-EU negotiations. In doing so, it made it clear that it would not proceed with an agreement on the withdrawal issues unless it satisfied the Irish Government; and would not proceed with negotiations on the future UK/EU framework unless these concerns had been respected. It is also an important consideration for the EU to ensure a secure external border that safeguards the Single Market from imports of products that do not conform to EU regulations or have not been subject to appropriate import duties.

### The December agreement

By December 2017, the two parties had not reached agreement on a way to prevent the restoration of a hard border. In part this was because the UK saw the solution to avoiding a hard border as being bound up in the future trading relationship between the UK and the EU.

As a result of the issue being unresolved, the parties agreed to include in their joint report on the negotiations two provisions to address the border problem. The first states that the UK “remains committed to protecting North-South co-operation and to its guarantee of avoiding a hard border”<sup>15</sup> and that, should it not be possible to achieve this in the context of the overall EU-UK relationship, then the United Kingdom:

will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement.<sup>16</sup>

Secondly, the agreement goes on to say, however, that the UK:

will ensure that no new regulatory barriers develop between Northern Ireland and the rest of the United Kingdom, unless, consistent with the 1998 Agreement, the Northern Ireland Executive and Assembly agree that distinct arrangements are appropriate for Northern Ireland. In all circumstances, the United Kingdom will continue to ensure the same unfettered access for Northern Ireland's businesses to the whole of the United Kingdom internal market.<sup>17</sup>

The two paragraphs reflect the difficulties of the UK Government in balancing its commitment to avoiding a hard border and to avoiding new border controls being established between Northern Ireland the rest of the UK (often called a “sea border”). It was this latter issue that led to the rejection of an earlier draft by the Democratic Unionist Party. The development of a border between Northern Ireland and Great Britain would also be a problem for Scottish Conservative MPs. Nonetheless, the text agreed with the EU will stand in the absence of any other agreement.

<sup>14</sup> European Council, *Special meeting of the European Council (Art. 50) (29 April 2017) - Guidelines*, XT 20004 2017 INIT, 29 April 2018, p. 6, para. 11

<sup>15</sup> European Commission, *supra* n. 3, p. 8, para 49

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*, para 50

**Next steps**

The UK Government initially considered two options for a customs relationship with the EU with the potential to avoid a hard border. These were:

- A customs partnership – in which the UK would follow EU rules on imports from third countries destined for the EU, and collect customs duties on those goods on the EU's behalf; this would reduce checks on goods at the border but would require some kind of tracking mechanism to make it work; such an arrangement would be unprecedented, indeed the Government has described it as “innovative and untested”; for the EU, this approach would require the segregation of UK goods and a differential duty regime for goods from outside the EU at EU ports, such as Rotterdam and Hamburg;
- Maximum facilitation – the UK would negotiate a trade facilitation agreement with the EU to streamline customs checks; the UK would also adopt its own measures to remove the need for customs checks on or near the UK-EU border, partly through technology (e.g. number plate recognition systems) and through extending established arrangements such as the “authorised economic operator” system of approved importers and exporters which at the moment covers around 60 per cent of the UK's imports and 74 per cent of its exports (but only 0.2 per cent of UK traders).<sup>18</sup> Trade facilitation arrangements are common between countries but the scale and complexity of what the UK is seeking is something the EU has not agreed to before. The Treasury has estimated that it will cost businesses £17-£20 billion a year to comply with customs checks post-Brexit;<sup>19</sup>

The Government has adopted a slightly different approach in which the UK would continue to align its tariff rates with those of the EU for an as yet undefined period after the end of the transition in 2020 and then introduce the maximum facilitation policy.<sup>20</sup> It is not clear whether this proposal, which would effectively keep the UK in the Customs Union and would not fully address Single Market regulatory issues, will be acceptable to the EU or to the Irish Government. At the moment the only agreed position between the UK and the EU is that set out in the draft Withdrawal Treaty last December.

While all these options might reduce or even eliminate physical customs checks on the border in Ireland, they would not remove the requirement for other checks, needed by the absence of any legally-binding UK commitment to regulatory alignment after 1 January 2021 and to deter crime and prevent illegal migration. In addition, monitoring equipment would be needed at or near the border to enforce customs rules. Any such checks or surveillance at the border is difficult to reconcile with the Good Friday/Belfast Agreement and the existence of such measures could provoke an aggressive response if community relations deteriorated. Part of the difficulty is that although Northern Ireland as a whole voted Remain in the 2016 referendum, the communities were divided with nationalists voting overwhelmingly for Remain and unionists voting by a smaller margin to Leave.<sup>21</sup>

<sup>18</sup> These options were set out in some detail in HM Government, *Future customs arrangements: A Future Partnership Paper*, 15 August 2017; see also Miriam Gonzalez, Andrew Hood, Roger Matthews & Richard Tauwhare, ‘Brexit: Authorised Economic Operators (AEO)’, *Lexology*, 20 November 2017

<sup>19</sup> ‘Brexiters’ favoured customs model could cost businesses £20bn a year, HMRC warns’, Benjamin Kentish, *The Independent*, 23 May 2018

<sup>20</sup> ‘May to table new Ireland border deal’, Oliver Wright, John Walsh & Sam Coates, *The Times*, 18 May 2018

<sup>21</sup> ‘How Northern Ireland voted in the EU referendum – and what it means for border talks’, John Garry, Brendan O’Leary & John Coakley, *The Conversation*, 27 April 2017, citing a study commissioned by the Northern Ireland Assembly

The difficulty for the UK is that the arrangements for the border need to be settled so that talks on the broader UK-EU relationship can progress. The slowness of the UK Government in defining its position has hampered these negotiations. Postponing a resolution, such as by extending the UK's participation in the customs union beyond the transition period, raises difficult legal and political issues for both the UK and the EU and does not address the regulatory, immigration and security questions around the border that arise with the UK leaving the EU.

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## Senior European Experts

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