

## BREXIT AND THE IRISH BORDER

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*The question of the Irish land border was the most problematic aspect of the negotiations on the United Kingdom's (UK) withdrawal from the European Union (EU). The Irish border aspects of the Brexit negotiations have demonstrated that the border and the maintenance of the Good Friday Agreement is not just an issue for British-Irish relations, but one that now has a strong EU dimension. This article analyses the political impact of alternative proposals tabled during the Brexit negotiations on Northern Ireland and the question of the Irish Border. It places this discussion in the post-conflict context and in the highly politicised nature of the Brexit referendum debate in Northern Ireland. It examines how the issue was framed, following a tortuous negotiation process, in the draft Withdrawal Agreement of 2018 and the ultimate failure of the UK government to ratify that agreement in Parliament. It evaluates the political impacts of the crisis in British politics caused by Brexit and the way in which Brexit has undermined the political stability created by the Good Friday Agreement and at the same time changed the discourse on Irish unity. It argues that failure of the British Government to accurately assess the EU27 position is at the heart of their failure to negotiate a Withdrawal Agreement, for which they could build UK parliamentary support. It is this failure of political judgement that has led to the rejection of the negotiated Withdrawal Agreement and continued to block agreement on a way forward, in the period prior to the October 2019 deadline.*

**Keywords:** Brexit, Northern Ireland, peace, Good Friday Agreement, conflict

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## I. INTRODUCTION

The question of the Irish land border was the most problematic aspect of the negotiations on the United Kingdom's (UK) withdrawal from the European Union (EU). This issue had not been part of the 2016 referendum campaign debate outside of Ireland, but from the beginning of the negotiation process, in 2017, it became an increasingly prominent aspect of the mainstream Brexit debate.<sup>1</sup> It was the inclusion of a 'backstop' provision to address the problem of a hard border on the island of Ireland in the draft Withdrawal Agreement that ultimately led to the defeat of the draft Withdrawal Agreement in the UK Parliament. For the Irish government, and the nationalist parties in Northern Ireland, the threat of Brexit for the maintenance of peace in Northern Ireland, the quality of life in the border communities, and for economic development, was clear from the time of the 2016 referendum campaign. Following the referendum vote, the Irish Government proactively conducted a strong diplomatic campaign in the EU institutions and amongst the other Member States, seeking support for its position that there could be no negotiated hard border on the island of Ireland. The Irish government's case was that Brexit challenged the basis of the peace process by raising the possibility that the frontier could again become a customs, regulatory and security border, a site of armed attacks, and an indication that the Good Friday Agreement had been reversed. The British government's negotiating strategy appeared to some of those closely involved to rest on the key assumptions that they did not accept that there was a threat to the peace process and that the EU as a whole would prioritise achieving a trade

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<sup>1</sup> See John Doyle and Eileen Connolly, 'Brexit and the Northern Ireland Question' in Federico Fabbrini (ed), *The Law and Politics of Brexit* (Oxford University Press 2017).

agreement with the UK over any EU commitment to the Irish Government.<sup>2</sup> The Irish border aspects of the Brexit negotiations have demonstrated that the border and the maintenance of the Good Friday Agreement is not just an issue for British-Irish relations, but one that now has a strong EU dimension. The failure of the British Government to accurately assess the EU27 position is at the heart of their failure to negotiate a Withdrawal Agreement, for which they could build UK parliamentary support, with the resultant political chaos in parliament and widening divisions in UK society.

The border on the island of Ireland will be the only significant post-Brexit land border between the EU and the UK, and at the core of the disagreement on the form the border should take are the contested views on the desired relationship between Northern Ireland, Ireland and the British state.<sup>3</sup> The 1998 Good Friday Agreement, an international treaty lodged with the United Nations that ended 30 years of armed conflict, had redefined this set of relationships and shifted both the reality, and the perception, of British sovereignty in Northern Ireland. The Irish government proposed that customs and security infrastructure on the Irish land border could be avoided by leaving the border open while having the necessary regulatory and customs checks for the UK/EU border at the airports and seaports – in effect a de-facto 'border' in the Irish Sea. This makes economic sense for a small island economy, and it would be particularly beneficial for Northern Ireland's underdeveloped post-conflict private sector. While exports from Ireland to the UK as a whole have been declining as a proportion of all Irish exports for many years and now represent less than 10 per cent of total exports, cross-border trade between the two parts of the island increased substantially after the 1994 ceasefires, from €1.6 billion to €3.7 billion per annum. While the growth was evenly shared in both directions, it was more significant for the

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<sup>2</sup> Perspectives of Irish and EU officials involved in the process, as articulated in discussion with the authors during 2017, 2018 and 2019 – multiple discussions and different officials.

<sup>3</sup> There is one other land border, Gibraltar, which has however, because of the very different context, not become a major issue. See Maria Mut Bosque, 'Ten Different Formulas for Gibraltar Post-Brexit' (2018). DCU Brexit Institute - Working paper N. 6 - 2018 <<https://ssrn.com/abstract=3212246>> accessed 14 October 2019.

much smaller Northern Ireland economy.<sup>4</sup> The British government's refusal to support this solution has its roots in the long-term relationship between Britain and Ireland and the political divisions in Northern Ireland that were the basis of the 20<sup>th</sup> century conflict. In its negotiations to find a way of keeping the Irish border open while strengthening the place of Northern Ireland in the UK, the UK government did not give sufficient weight to the EU's absolute requirement to ensure that the UK's future single market access does not provide more favourable terms than those available to Member States and that, in this regard, the enforcement of regulatory issues was as important as the control of customs. The UK government also miscalculated the primary motivation of the EU's support for the Good Friday peace agreement, in that it would support a Member State against a departing state, but also that the EU has a strongly internalised view of its own history as a peace project.<sup>5</sup> The EU has its own interests in supporting the peace process in general and the open border as a central part of the peace agreement. The EU was never likely to agree to a Withdrawal Agreement, or a future trade deal, that impacted on the core interests of a Member State, and which was perceived to pursue a narrow trade interest at the expense of peace.

This article analyses the political impact of alternative proposals tabled during the Brexit negotiations on Northern Ireland and the question of the Irish Border. Section 2 discusses the post-conflict context and the highly politicised nature of the Brexit referendum debate in Northern Ireland. Sections 3, 4 and 5 then proceed to analyse how the border was dealt with in the various phases of negotiations between the EU and the UK, how the issue was framed in the draft withdrawal agreement of 2018 and the ultimate failure to ratify that agreement in the UK Parliament. Finally, section 6 explores the political impacts of the crisis in British politics caused by Brexit and how Brexit has undermined the political stability created by the Good Friday Agreement and changed the discourse on Irish unity.

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<sup>4</sup> See 'Inter-Trade Ireland statistics' <<https://intertradeireland.com/insights/trade-statistics/>> accessed 15 October 2019.

<sup>5</sup> See, for example, Gëzim Visoka and John Doyle, 'Neo-Functional Peace: The European Union Way of Resolving Conflicts' (2016) 54(4) *Journal of Common Market Studies* 862.

## II. THE THREAT OF BREXIT FOR THE IRISH PEACE PROCESS

After the signing of the Good Friday Agreement in 1998, British army security installations were gradually removed and closed cross-border roads were re-opened so that within a few years no hard border existed on the island of Ireland. This is one of the most visible and also the most symbolic outcomes of the peace process. It is the potential loss of the open border that is seen as the greatest threat resulting from Brexit by the majority of the population of Ireland. Although Ireland and the UK have operated a common travel area since Irish independence in 1922, given the tensions that followed the partition of the Ireland and different customs rules (until 1992), the border, while porous in many respects, did act as a tangible barrier to cross-border social and economic cooperation. This was heightened by the sporadic conflict that existed through the mid-twentieth century and in particular the intensified levels of conflict from the end of the 1960s. That meant that the border was closely monitored, with over 200 cross-border roads barricaded by the British Army and large-scale military posts on the main 'official' crossing points. The disruption of the road closures and border checks, with frequent delays at crossing points, and the negative experience of the heavy British Army security presence, severely curtailed cross-border traffic and trade. Even following the implementation of the EU single market from 1992, which removed customs posts, the security installations on the border were a significant barrier to cross-border trade.<sup>6</sup>

The 1998 Good Friday Agreement changed this situation and allowed an open border, as envisaged by the EU's ongoing integration project, as well as reflecting the Irish nationalist community's strong political desire for greater all-island cooperation. Re-imposing a border, as a result of Brexit, will have a negative impact on Northern Ireland's already weak economy. As a post-conflict economy, the public sector still provides approximately 60 per cent of Gross Value Added,<sup>7</sup> while direct EU funding, including subsidies from the Common Agricultural Policy and the designated Peace Funds, was equivalent

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<sup>6</sup> Donnacha Ó Beacháin, *From Partition to Brexit: The Irish Government and Northern Ireland* (Manchester University Press 2018).

<sup>7</sup> Nevin Economic Research Institute, 'Quarterly Economic Observer' (2017) 9-11 <[http://www.nerinstitute.net/download/pdf/qeo\\_spring\\_2017\\_final\\_version.pdf](http://www.nerinstitute.net/download/pdf/qeo_spring_2017_final_version.pdf)> accessed 15 October 2019.

to approximately 8.4 per cent of Northern Ireland's GDP in the period 2007-13.<sup>8</sup> Northern Ireland is more reliant on the EU as an export market than the rest of the UK and will be more affected by a withdrawal from the EU and from the single market. The Republic of Ireland is Northern Ireland's largest single destination for exports, accounting for 21 per cent of all exports and 37 per cent of EU exports.<sup>9</sup> The combination of the disruption to the slowly emerging post-conflict, all-island economic integration and the loss of EU subsidies will have a significant impact on the economy of Northern Ireland that may have serious consequences for political stability. There were significant levels of politically related violence in Northern Ireland in the summer of 2019 in both working class Irish nationalist and unionist areas.<sup>10</sup> An economy in recession is likely to see unemployment rise in these communities. The impact of a recession in working class communities is likely to be amplified in the specific circumstances of Northern Ireland, as in the absence of an agreement to restore the power-sharing executive, Northern Ireland's specific deal postponing the implementation of British Governments cuts to social services spending in the rest of the UK, will expire in March 2020, leading to substantial cuts in welfare spending.<sup>11</sup>

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<sup>8</sup> Leslie Budd, 'The Consequences for the Northern Ireland Economy from a United Kingdom exit from the European Union' (2015) Briefing Note: Committee for Enterprise, Trade and Investment <<http://crossborder.ie/site2015/wp-content/uploads/2015/11/2015-03-22-brexite-ceti-specialist-advisor.pdf>> accessed 15 October 2019.

<sup>9</sup> UK Parliament Northern Ireland Affairs Committee, 'Northern Ireland and the EU Referendum' (2016) <<http://www.publications.parliament.uk/pa/cm201617/cmselect/cmniaf/48/4804.htm#footnote-104>> accessed 15 October 2019.

<sup>10</sup> See for example Mahita Gajanan 'A Journalist's Killing in Northern Ireland Comes as Tensions Threaten to Boil Over' *Time* (24 April 2019) <<https://time.com/5574194/northern-ireland-violence-lyra-mckee/>> accessed 15 October 2019 and Patrick Cockburn, 'The English are Blindly Driving Northern Ireland to Conflict – The Fear Is That They Are Too Stupid to Care' *Independent (UK)* (1 March 2019) <<https://www.independent.co.uk/voices/northern-ireland-backstop-the-troubles-theresa-may-brexite-european-union-red-lines-a8803336.html>> accessed 15 October 2019.

<sup>11</sup> Northern Ireland Audit Office, 'Report on Welfare Reform' (2019) <<https://www.niauditoffice.gov.uk/publications/welfare-reforms-northern-ireland-0>> accessed 15 October 2019.

In political terms, the Good Friday Agreement defined a bi-national polity, with a system of consociational power-sharing in its internal governance structures. The bi-national nature of the settlement was also demonstrated in the special position accorded to the Irish government in the affairs of Northern Ireland and in the legal commitment from the UK government to legislate for Irish unity should concurrent majorities vote for unity in Ireland, North and South.<sup>12</sup> The success of the Good Friday Agreement was premised on the fact that it did not establish an end point but began a process, which had no predetermined outcome. This meant that the Irish government, and the Irish nationalist community, were not asked to abandon their political objective of Irish unity, but they agreed to pursue it by exclusively peaceful means. The unionist population were not asked to abandon their desire to remain part of the UK, but they were required to acknowledge that if a majority of the population of Northern Ireland voted for Irish unity, they would acquiesce to this while also retaining their British citizenship. This fluidity is essential to the on-going success of the peace process, as it has allowed both unionists and nationalists to work within its framework.<sup>13</sup> It has also resulted in the border areas becoming more integrated, both socially and economically. Local communities now fear the imposition of a hard land border, both for the disruption that this will entail in their personal lives and also because they fear that the inevitable border infrastructure will become a focus of attacks by dissident republican groups that have opposed the peace process, and that this will result in a spiral of renewed violence.<sup>14</sup>

Brexit also has the potential to disrupt the high level of cross border collaboration that has developed in a number of areas of public provision, such as emergency ambulance services, as well as in economic development.

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<sup>12</sup> Good Friday Agreement (1998). Annex: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, Annex A, Schedule 1.

<sup>13</sup> Jennifer Todd, 'Nationalism, Republicanism and the Good Friday Agreement' in Jennifer Todd and Joe Ruane (eds), *After the Good Friday Agreement* (University College Dublin Press 1999).

<sup>14</sup> Peter Mandelson 'EU exit risks peace process and return to violence' *Belfast Newsletter*, (15 March 2016), 'Brexit: Protests held along Irish border' (BBC, 30 March 2019) <<https://www.bbc.com/news/uk-northern-ireland-47761230>> accessed 15 October 2019.

For Irish nationalists it will raise fears that the gradual process of reform and integration at the heart of the 1998 Agreement has ended. For hard-line unionists, in contrast, the reversal of North-South cooperation and integration would be a welcome aspect of Brexit. From their perspective, a hard border will weaken the link to Ireland and to the EU and strengthen links to the UK. They are willing to risk disruption along the border, and the possibility of a return to violence, as the price for the reassertion of the Britishness of Northern Ireland. The EU negotiation team argued in a published report that reversing North-South cooperation in Ireland would risk a return to violence, indicating that the public position of the EU team reflected the analysis of the Irish Government on this point.<sup>15</sup>

### III. THE REFERENDUM AND ITS EFFECTS ON NI POLITICS

In the debate on Brexit, the threat to the Good Friday Agreement was recognised in both parts of the island of Ireland from the beginning and it played a key part in the campaign in Northern Ireland, in contrast to the rest of the UK, where the impact of Brexit on the peace process was very rarely discussed by the main political actors in the referendum campaign.<sup>16</sup> In Northern Ireland, the campaign was dominated by the specific impacts of Brexit on the peace process and on the economy, rather than immigration and the regulatory aspects of the EU that dominated the debate in Britain.

The two major Irish nationalist parties, Sinn Féin and the Social Democratic and Labour Party (SDLP), called for a vote to remain in the EU, as did the smaller pro-union party, the Ulster Unionist Party (UUP) and the centrist (but traditionally pro-union) Alliance Party. The largest unionist party, the Democratic Unionist Party (DUP), and the small and more conservative Traditional Unionist Voice campaigned to leave. Sinn Féin and the SDLP

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<sup>15</sup> See for example, European Commission, 'Mapping of North-South Cooperation and Implementation Bodies: Report and Key Findings of the Exercise' (2019) <[https://ec.europa.eu/commission/publications/mapping-north-south-cooperation-implementation-bodies-report-and-key-findings-exercise\\_en](https://ec.europa.eu/commission/publications/mapping-north-south-cooperation-implementation-bodies-report-and-key-findings-exercise_en)> accessed 15 October 2019.

<sup>16</sup> Gerard McCann and Paul Hainsworth, 'Brexit and Northern Ireland: the 2016 referendum on the United Kingdom's membership of the European Union' (2017) 32(2) *Irish Political Studies* 327.

focused on the negative economic impact of leaving and the undermining of the peace process.<sup>17</sup> As the largest unionist party and the largest party actively campaigning for Brexit, the DUP reflected its long-standing opposition to European integration and from this position its campaign strategy was to deny the potential threats to the economy or to the peace process.<sup>18</sup> As early as 2016 the possibility of a de-facto 'border' between the EU and the UK situated in the Irish Sea was discussed as a response to the need for regulatory and customs checks. Those in favour of this solution argued that, notwithstanding the political sensitivities, introducing additional checks on goods in two airports and two ports was achievable, and less politically disruptive, than seeking to carry out such checks along the 499km land border. The prominence of this question from the beginning of the Brexit debate in Northern Ireland meant that the question of the location of the future border-checks between the UK and the EU single market was a key issue for unionists during the referendum. The UUP, whose official position was to support remaining in the EU, argued that the experience during the conflict meant that 'it is not possible to fully secure the border' and that Brexit could result in a border that was at 'Great Britain's ports and airports – Cairnryan, Gatwick, Heathrow', which in their view had the potential to weaken the Union.<sup>19</sup> Pro-Remain unionists feared that this 'existential threat to the United Kingdom' would be strengthened if Scotland looked for a second referendum on independence as a way of staying in the EU in the context of Brexit.<sup>20</sup> Sinn Féin also identified Irish unity as the route through

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<sup>17</sup> Statement from Party President Gerry Adams TD (Sinn Féin, 9 June 2016) <<http://www.sinnfein.ie/contents/40268>> accessed 15 October 2019; 'Sinn Féin Launches Campaign against UK Brexit' (RTE, 3 June 2016) <<https://www.rte.ie/news/2016/0603/793106-brexit-campaign/>> accessed 15 October 2019.

<sup>18</sup> See, for example, party adverts and statements by party leader Arlene Foster, *Belfast Telegraph* (17 June 2016).

<sup>19</sup> 'UUP Manifesto for 2016 NI Assembly Election' (Ulster Unionist Party 2016). See also post Brexit call from SDLP leader Colum Eastwood for any border controls imposed post-Brexit to be imposed between the islands of Ireland and Great Britain, 'Eastwood: Impose Border with Britain, Not on Island', *Londonderry Sentinel* (24 June 2016) <<http://www.londonderrysentinel.co.uk/news/eastwood-impose-border-with-britain-not-on-island-1-7448357>> accessed 15 October 2019.

<sup>20</sup> See <[http://uup.org/news/4128#.WNuq\\_BIrK-o](http://uup.org/news/4128#.WNuq_BIrK-o)> accessed 15 October 2019.

which Northern Ireland could remain in the EU, arguing that in the event of a UK referendum result for leaving the EU, with a Northern Ireland majority for remaining, 'there would then be a democratic imperative for a border poll to provide Irish citizens with the right to vote for an end to partition and to retain a role in the EU'.<sup>21</sup> Some civil society groups and individuals from the unionist community in Northern Ireland campaigned for the UK to remain in the EU. In 2016, the level of campaigning was low, as these groups did not think Brexit was likely; however, they became much more vocal and visible as the chances of a 'no-deal' Brexit increased.<sup>22</sup>

In the 2016 referendum vote, the 'remain' vote in Northern Ireland was 56 per cent, with a major divide between the two main political traditions, reflecting their views on the 'national question'. This division was demonstrated by a survey of 4,000 adults in Northern Ireland by the Northern Ireland Assembly Election Study<sup>23</sup>. This survey found that 88 per cent of self-defined Irish nationalists voted to remain in the EU, while 66 per cent of self-defined unionists voted to leave; 70 per cent of those who chose to identify as 'neither' voted to stay in the EU.<sup>24</sup> This voting behaviour largely reflects the positions of the Northern Ireland political parties<sup>25</sup>, but the results also show that a significant bloc of unionist voters did not follow their parties' lead, while a much smaller proportion of nationalist voters deviated from the parties' positions and voted to leave. Although the UUP had called for a vote to remain, 58 per cent of their voters voted for Brexit and the party changed to being pro-Brexit after the poll. 25 per cent of DUP supporters also voted to remain, despite their party being the leading voice in the local Brexit campaign.

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<sup>21</sup> Gerry Adams, *Irish Independent*, (18 June 2016).

<sup>22</sup> Gerard McCann & Paul Hainsworth. Brexit and Northern Ireland: the 2016 referendum on the United Kingdom's membership of the European Union, (2017) 32:2 *Irish Political Studies*, p. 333.

<sup>23</sup> John Garry, 'The EU referendum Vote in Northern Ireland: Implications for our understanding of citizens' political views and behaviour', (2016) *Northern Ireland Assembly Knowledge Exchange Seminar Series*.

<sup>24</sup> John Garry, 'The EU referendum ...'

<sup>25</sup> All of the significant political parties in Northern Ireland are local and none of the mainstream UK parties have any significant electoral support in Northern Ireland.

The changing dynamics of underlying political party support was also demonstrated in the Northern Ireland elections of March 2017, precipitated by the collapse of the Northern Ireland Executive in January following the resignation of the Deputy First Minister Martin McGuinness of Sinn Féin. This resignation was a response to the DUP's refusal to negotiate on a range of equality-related matters including Irish language rights, marriage equality for gay couples, and the question of how to deal with legacy issues from the conflict. The DUP used a technical provision called a Petition of Concern, designed to prevent the abuse of majority rule, to veto legislative changes that had the support of a majority of the NI Assembly, even though the issues could not reasonably be argued to represent a fundamental threat to the unionist community as a whole. The on-going tensions in the Assembly moved to a total collapse of the Executive following new allegations of widespread corruption in the handling of a subsidy scheme for renewable energy, which had been run by the department led by Arleen Foster before she became First Minister and leader of the DUP.

The elections that followed in March 2017 produced for the first time since partition a representative assembly in Northern Ireland that did not contain a majority of members who could be described as unequivocally unionists, that is, committed in every circumstance to Northern Ireland remaining in the UK. Only 45 per cent of the population voted for traditional unionist parties, while 40 per cent voted for parties committed to Irish unity, with just under 15 per cent voting for smaller parties and independents who did not prioritise the national question but many of which had been supportive of EU membership during the referendum.<sup>26</sup> The fact that for the first time less than 50 per cent of the population of Northern Ireland voted for parties for whom opposition to Irish unity is a core policy demonstrates the way in which on-going demographic change has intersected with the debates on EU membership and open-borders, shifting the dynamics of public sentiment on the national question.<sup>27</sup> The elections did not, however, lead to a new

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<sup>26</sup> See full results Northern Ireland Assembly, 'Election Report: Northern Ireland Assembly Election, 2 March 2017' Research and Information Service Research Paper <<http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2017-2022/2017/general/2217.pdf>> accessed 15 October 2019.

<sup>27</sup> Northern Ireland Executive, 'Statistical - Labour Force Survey Religion Report 2015' (2017).

Executive being formed as the same issues that led to its collapse remained unresolved, and the capacity of the parties in Northern Ireland or the sovereign governments to negotiate an agreed way forward was further weakened by the deep divisions on Brexit.

#### IV. NEGOTIATING THE IRISH BORDER

There had only been a very limited discussion on the Irish border issue in the mainstream debate within Britain during the referendum campaigns, with both sides ignoring the issue.<sup>28</sup> However, the question of the land border between Ireland and the UK quickly became central to the post-referendum Brexit debate and to the negotiations with the EU, and it was the major stumbling block in the British government's attempts to get the negotiated Withdrawal Agreement passed through the British parliament.

The initial post-referendum public stance of the UK government was to minimise the significance of the question of the Irish border. Although the relationship between the UK and Ireland was one of the 12 key points of a major speech by Prime Minister Theresa May in January 2017, it only contained a commitment to 'the maintenance of the Common Travel Area with the Republic, while protecting the integrity of the United Kingdom's immigration system'.<sup>29</sup> The UK government's opening position in negotiations had made it clear that they wished to leave both the EU single market and the customs union, and were also not willing to allow free movement of workers between the EU and the UK following their withdrawal. That these objectives 'require a hard border between north and south in Ireland' was confirmed by Peter Sutherland, a former Secretary

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<sup>28</sup> Matt O'Toole, 'Ireland an Afterthought During Brexit Campaign When I Was Cameron Adviser' *The Irish Times* (4 October 2017) <<https://www.irishtimes.com/opinion/ireland-an-afterthought-during-brexit-campaign-when-i-was-cameron-adviser-1.3242732>> accessed 15 October 2019.

<sup>29</sup> Speech by Theresa May, Lancaster House (17 January 2017) <<https://www.independent.ie/business/brexit/theresa-mays-brexit-speech-in-full-35374214.html>> accessed 15 October 2019.

General of the WTO,<sup>30</sup> and by Michel Barnier, the EU's chief negotiator.<sup>31</sup> Prime Minister May's Article 50 TEU letter of March 2017, which triggered the two-year negotiation period, stated that the UK wanted to 'avoid a return to a hard border' on the island of Ireland and 'to make sure that nothing is done to jeopardise the peace process in Northern Ireland'. While reiterating her determination to leave the customs union, May also stated that a hard border between Northern Ireland and the rest of the UK was 'unacceptable',<sup>32</sup> proposing a range of technical solutions, none of which had been successfully deployed in other contexts.<sup>33</sup>

The Irish Government had from September 2016 lobbied intensely on the negative impact that a post-Brexit hard border would have on Ireland and on the Northern Ireland 'peace process'.<sup>34</sup> The success of this lobbying was demonstrated on 29 April 2017, when the European Council agreed that the EU's Article 50 negotiation guidelines would include the Irish border question as one of three key issues to be addressed in the initial phase of

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<sup>30</sup> Harry McGee, 'Sutherland Rejects Claim Brexit Would Not Bring Hard Border' *The Irish Times* (2 September 2016) <<https://www.irishtimes.com/news/politics/sutherland-rejects-claim-brexit-would-not-bring-hard-border-1.2776397>> accessed 15 October 2019..

<sup>31</sup> Michel Barnier, EU Chief Negotiator with the United Kingdom, in a speech to the Irish *Oireachtas* (parliament) on 11 May 2017 said 'Customs controls are part of EU border management. They protect the single market. They protect our food safety and our standards'. See <<https://static.rasset.ie/documents/news/michel-barnier-address-to-the-oireachtas.pdf>> accessed 15 October 2019.

<sup>32</sup> Theresa May's speech on future UK-EU relations (2 March 2018) <<https://www.bbc.com/news/uk-politics-43256183>> accessed 15 October 2019.

<sup>33</sup> 'Irish Border Technology "Not Answer to Trade"' (BBC, 11 April 2019) <<https://www.bbc.com/news/uk-northern-ireland-47895982>> accessed 15 October 2019.

<sup>34</sup> See formal Government of Ireland press release on Brexit strategy, 2 May 2017 – referencing as priorities the land-border, the common travel area with the UK, and the peace process (para 2) <[http://www.taoiseach.gov.ie/eng/News/Government\\_Press\\_Releases/Government\\_Statement\\_on\\_Brexit\\_Preparations.html](http://www.taoiseach.gov.ie/eng/News/Government_Press_Releases/Government_Statement_on_Brexit_Preparations.html)> accessed 15 October 2019; see also European Council statement on Article 50 negotiation guidelines of 29 April 2017, which also include references to these three issues. <<http://www.consilium.europa.eu/en/press/press-releases/2017/04/29-euco-brexit-guidelines/>> accessed 15 October 2019.

negotiations.<sup>35</sup> The guidelines defined the phased nature of the EU's approach, with a requirement to finalise the Withdrawal Agreement before any discussion on the future EU-UK relationship. This meant that there had to be substantial progress on the arrangement to avoid a hard border on the island of Ireland before the negotiations could move to the framework of future EU-UK relations.<sup>36</sup> The EU also expressed concerns about the impact of Brexit on Northern Ireland: its negotiation directives published on 22 May 2017 explicitly stated that nothing in the final agreement with the UK should 'undermine the objectives and commitments set out in the Good Friday Agreement' and that negotiations should 'in particular aim to avoid the creation of a hard border on the island of Ireland', while respecting the Union's legal order.<sup>37</sup> The position of the Irish government was also strengthened by the formal decision of the European Council that in the event of a future vote in favour of Irish unity, Northern Ireland would be deemed to be automatically within the EU, without the need for a Treaty agreement or a vote of other members.<sup>38</sup> This decision relied heavily on the German precedent, whereby former East Germany became part of the EU as a result of its unification with West Germany. For the Irish government, this was a long-term safety net and not a short-term priority. The UK government was surprised at these decisions and was even more surprised that both the

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<sup>35</sup> Council of The European Union, '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' (22 May 2017) <[https://ec.europa.eu/commission/publications/negotiating-directives-article-50-negotiations\\_en](https://ec.europa.eu/commission/publications/negotiating-directives-article-50-negotiations_en)> accessed 15 October 2019.

<sup>36</sup> Etain Tannam, 'Brexit and the British-Irish Relationship' (2018) DCU Brexit Institute Working Paper <<http://dcubrexitinstitute.eu/2018/01/brexit-and-british-irish-relationship/>> accessed 15 October 2019.

<sup>37</sup> Council of The European Union (n 35) para 14.

<sup>38</sup> European Parliament, 'Outcome of the special European Council (Article 50) meeting of 29 April 2017' <[http://www.europarl.europa.eu/RegData/etudes/ATAG/2017/603226/EPRS\\_ATA\(2017\)603226\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2017/603226/EPRS_ATA(2017)603226_EN.pdf)> accessed 15 October 2019.

EU negotiation team and the wider EU27 remained united on this issue even when the talks became difficult.<sup>39</sup>

In April 2017, Theresa May announced that there would be an early general election in June of that year, which she called in a bid to secure a larger parliamentary majority for her Brexit negotiation strategy. This decision backfired; she lost her majority in parliament and in order to form a government had to enter a 'confidence and supply' agreement with Northern Ireland's DUP. This gave the DUP a privileged position in Downing Street and a disproportionate influence on the Brexit negotiations. In practice this meant that any solution that would avoid a hard border on the island of Ireland, which would inevitably entail a 'special status' for Northern Ireland, could be vetoed by the DUP, along with hard-line elements of the Conservative Party.

The UK Government issued a position paper on Northern Ireland in August 2017.<sup>40</sup> It reiterated its desire to avoid a hard land border on the island of Ireland but also strongly ruled out any 'customs border' between Northern Ireland and Britain. The UK proposed a number of approaches which they believed could resolve the apparent contradictions in their positions.<sup>41</sup> These included the idea of a 'customs partnership', which would have involved the UK acting on the EU's behalf, applying the EU's own tariffs and rules of origin to all goods arriving in the UK intended for the EU, and suggested that new technology could be used to track whether items eventually ended up in the UK or crossed into the EU; tariffs would be charged accordingly. There was no commitment in this proposal to ensure that single market regulations were protected on issues such as food safety and, though unstated, it was

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<sup>39</sup> "'Entire territory" of Ireland Would Be Part of EU if Unity Referendum Passed' (RTE, 28 April 2017) <<https://www.rte.ie/news/2017/0428/871185-brexit-northern-ireland-eu/>> accessed 15 October 2019.

<sup>40</sup> UK Government, 'Position Paper on Northern Ireland' (2017) <<https://www.gov.uk/government/publications/northern-ireland-and-ireland-a-position-paper>> accessed 15 October 2019.

<sup>41</sup> For a good summary see 'Brexit: Customs and Regulatory Arrangements' House of Commons Research Paper (2018) <<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8309#fullreport>> accessed 15 October 2019.

assumed that the EU would introduce an equivalent system for third-country goods moving from the EU into the UK.

The EU rejected this proposal on the grounds that it was simply impractical and met none of the EU's own requirements. The EU's collective starting position was that a non-member could not have more advantageous access to the single market than EU Member States. The UK proposal was not considered viable as it would have been both expensive and administratively complicated, but most importantly because it did not include a mechanism to ensure UK goods met single market regulatory standards.<sup>42</sup>

A second UK proposal, called 'maximum facilitation' or 'max-fac', sought to utilise new technologies to automate procedures and remove the need for physical customs checks wherever possible.<sup>43</sup> This was also rejected by the EU as being impractical, as the proposed technological solutions had not been deployed or proved workable on any other international border. Furthermore, they did not meet the requirements of keeping the Irish land border open or dealing with the issue of checks to ensure compliance with single market regulations.

The EU made it clear that they would be willing to support a long-term arrangement whereby Northern Ireland was in de-facto terms treated as being within the single market. This followed a similar logic to the Republic of Cyprus accession agreement,<sup>44</sup> which recognised the government of the Republic of Cyprus as the sovereign power for the island as a whole, but pragmatically allows goods produced in Northern Cyprus to enter EU markets as 'EU goods' once they are certified as being produced in Northern Cyprus by the Turkish Cypriot Chamber of Commerce.<sup>45</sup> EU special status for Northern Ireland was acceptable to the EU as a response to needs of the

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<sup>42</sup> Patrick Smith and Pat Leahy, 'EU leaders reject Theresa May's Brexit proposals' *The Irish Times* (21 September 2018).

<sup>43</sup> 'Brexit: The Government's Customs Options' (BBC, 2 May 2018) <<https://www.bbc.com/news/uk-43979180>> accessed 15 October 2019.

<sup>44</sup> Art. 2, Protocol 10 to the Act of Accession.

<sup>45</sup> Nikos Skoutaris, 'From Britain and Ireland to Cyprus: Accommodating "Divided Islands" in the EU Political and Legal Order' (2016) EUI Working Papers AEL 2016/02 <[http://cadmus.eui.eu/bitstream/handle/1814/42484/AEL\\_2016\\_02.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/42484/AEL_2016_02.pdf?sequence=1)> accessed 15 October 2019.

peace process, the particular circumstances of Northern Ireland, and the UK's international commitments under the Good Friday Agreement. The very small size of Northern Ireland's private sector also means that it is not an economic threat to the EU. This would also have been in line with the a wide range of other flexible territorial arrangements, from Greenland to the French Overseas Territories, that have previously been agreed by the EU.<sup>46</sup> The geographical context would also make any agreement between the UK and the EU likely to be judged as compatible with the 'frontier traffic exception' of Art. XXIV. 3 of GATT.<sup>47</sup> In practice this approach would have kept the Irish land border completely open but would require Northern Ireland to maintain regulatory equivalence with the single market. It would also require the introduction of checks on goods crossing the Irish Sea in order to ensure compliance with the customs union and the single market. The UK government objected to any approach that would, in its view, introduce an element of separation between Northern Ireland and the rest of the UK and make the international status of Northern Ireland ambiguous.<sup>48</sup>

In the face of UK opposition, and in the absence of any other concrete proposals, the EU proposed, in the Joint Report of 2017, to postpone a decision on the precise model to be adopted, while legally committing both sides to keeping the border open.<sup>49</sup> This commitment to keep the Irish land border open, regardless of what future relationship the UK had with the single market, was agreed between the EU and the UK and became known as the 'Irish backstop'. Initially the EU proposed in the draft Withdrawal

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<sup>46</sup> Dimitry Kochenov (ed), *On Bits of Europe Everywhere. Overseas Possessions of the EU Member States in the Legal-Political Context of European Law* (Kluwer Law International 2013).

<sup>47</sup> See Giorgio Sacerdoti, 'The Prospects for the UK after Brexit: How can Britain trade with the EU and the World?' in Federico Fabbrini (ed), *The Law and Politics of Brexit* (Oxford University Press 2017).

<sup>48</sup> Prime Minister Theresa May's spokesperson, *The Guardian* (15 October 2018).

<sup>49</sup> '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' (2017) <[https://ec.europa.eu/commission/publications/joint-report-negotiators-european-union-and-united-kingdom-government-progress-during-phase-1-negotiations-under-article-50-teu-united-kingdoms-orderly-withdrawal-european-union\\_en](https://ec.europa.eu/commission/publications/joint-report-negotiators-european-union-and-united-kingdom-government-progress-during-phase-1-negotiations-under-article-50-teu-united-kingdoms-orderly-withdrawal-european-union_en)> accessed 15 October 2019.

Agreement of March 2018 that the backstop would only apply to Northern Ireland but, in order to reach a draft agreement, they reluctantly agreed to extend this provision to the whole of the UK at the suggestion of the British government, who wanted to avoid the accusation that they were agreeing to the differential treatment of Northern Ireland.<sup>50</sup>

## V. THE DRAFT WITHDRAWAL AGREEMENT

The draft withdrawal agreement, finalised in November 2018, included a lengthy Protocol on Northern Ireland, the 'backstop' to avoid a hard border on the island of Ireland.<sup>51</sup> The agreement also allowed for the continuation of the Common Travel Area between Ireland and the UK and of the Single Electricity Market on the island of Ireland. It set out a framework involving a transition period, to the end of 2020, during which time all EU single market and customs rules would continue to apply to the UK as a whole and not only to Northern Ireland. It also allowed for the extension of the transition period, once only for a time-limited period; a decision to extend would have to be made by July 2020. During the transition period, both sides would 'use their best endeavours' to negotiate a new trade relationship between the EU and the UK, part of which would be measures to avoid a hard border on the island of Ireland. If no long-term trade deal had been agreed by the end of 2020, or by the end of an agreed extension period, then a backstop would be triggered. The backstop would consist of 'a single customs territory between the (European) Union and the United Kingdom'. Within this single customs territory, Northern Ireland would remain aligned with the rules and regulations of the EU single market in order to avoid regulatory checks on

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<sup>50</sup> European Commission, 'Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union' (2018) <[https://ec.europa.eu/commission/sites/beta-political/files/draft\\_withdrawal\\_agreement\\_o.pdf](https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_o.pdf)> accessed 15 October 2019.

<sup>51</sup> European Union, 'Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as Agreed at Negotiators' Level on 14 November 2018' (2018) <[https://ec.europa.eu/commission/files/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-agreed-negotiators-level-14-november-2018\\_en](https://ec.europa.eu/commission/files/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-agreed-negotiators-level-14-november-2018_en)> accessed 15 October 2019.

the Irish border, even if the regulatory framework in place in the rest of the UK deviated from that of the EU. In these circumstances, some checks on Irish Sea crossings could be required, in addition to those already in place regarding animal and plant health and safety. Under this agreement, the UK would be required to meet 'level playing field conditions', to ensure it could not gain a competitive advantage by increasing state aid to industry or by dropping environmental standards or social protections. Those level playing conditions would continue as new regulations are passed. Either side would be able to request a review of the backstop, but it would require a joint decision of both the UK and the EU to end it.

The Protocol was the most difficult section of the draft agreement to negotiate and once agreed it resulted in a number of resignations from the British government.<sup>52</sup> It continued to be a source of contention for the DUP and elements of the pro-Brexit lobby of the Conservative Party, who argued, correctly, that the 'backstop' tied the UK for an indefinite period into a customs union with the EU, preventing it from having an independent trade policy. From the perspective of the EU, extending this special position to the whole of the UK was a major concession to UK sensitivity, something which has not been recognised in the British political discourse.<sup>53</sup>

The support given to the Irish Government's position by the other EU Member States and the mechanism to avoid a hard border drew intense criticism from pro-Brexit MPs, who made the special 'backstop' arrangement for Northern Ireland, and its implications for the rest of the UK, the focus of their attacks on the Prime Minister's negotiating position and on the draft agreement. It also led to a series of highly charged anti-Irish attacks by leading Conservative MPs, including a statement that '[t]he Irish really should know their place' and even a threat to impose food export restrictions from the UK to force Ireland to reconsider.<sup>54</sup> Ireland's ambassador to the

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<sup>52</sup> 'Brexit: What is the Withdrawal Agreement?' (BBC, 25 November 2018) <<https://www.bbc.com/news/uk-46237012>> accessed 15 October 2019.

<sup>53</sup> James Forsyth, 'Divide and Rule: How the EU used Ireland to Take Control of Brexit' *The Spectator* (20 October 2018) <<https://www.spectator.co.uk/2018/10/divide-and-rule-how-the-eu-used-ireland-to-take-control-of-brexit/>> accessed 15 October 2019.

<sup>54</sup> 'Brexit: Tory resentment of Irish power within EU' (BBC, 11 December 2018) <<https://www.bbc.com/news/uk-politics-46528952>> accessed 15 October 2019;

UK, Adrian O'Neill, wrote a public letter to the Spectator magazine stating that the 'prevailing tone and tenor' of articles about Ireland and Brexit had been 'with the occasional exception' anti-Irish.<sup>55</sup>

The Withdrawal Agreement was widely welcomed in Northern Ireland as a pragmatic solution that could preserve the peace process in the context of Brexit, even though the preferred position of the majority was that the UK remain in the EU. This majority included Irish nationalists, the centrist pro-UK Alliance Party of Northern Ireland, most business organisations, and the main civil society networks in Northern Ireland. However pro-Brexit unionists in the DUP rejected the Withdrawal Agreement based on their opposition to the Irish backstop. Although the DUP had stated that it did not want to see a closed border, they also do not support all-Ireland integration and cross border cooperation. The DUP believe that the Withdrawal Agreement would create a context where business, public policy and trade ties to the EU would be strengthened, as in these circumstances Northern Ireland would have a comparative advantage over the rest of the UK. The DUP leadership feared that in these circumstances political interests, and even perhaps political identity in Northern Ireland, would be increasingly shaped by that European focus, strengthening the case for Irish unity in the future.

An opinion poll in December 2018 asked respondents in Northern Ireland if they agreed that the 'main business organisations in Northern Ireland (including the Ulster Farmers Union) are correct to back the UK government's current EU Withdrawal Agreement'. 54 per cent agreed with this statement, 37 per cent disagreed, and 9 per cent were unsure. When broken down by community, 86 per cent of self-defined Irish nationalists, 25 per cent of self-defined unionists, and 46 per cent of those who said they were neutral on the constitutional question agreed with the statement.<sup>56</sup>

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Bobby McDonagh, 'Priti Patel's Boorish Brexit Comments Showed Ignorance About Ireland: She's Not Alone' *The Guardian* (10 December 2018).

<sup>55</sup> Ronan McGreevy, 'Irish Ambassador to UK Accuses British Magazine of Anti-Irish Bias over Brexit' *The Irish Times* (12 April 2019).

<sup>56</sup> <<https://www.lucidtalk.co.uk/single-post/2018/12/07/LT-NI-Tracker-Poll---Winter-2018>> accessed 15 October 2019.

As the debate developed, with a possible 'Northern Ireland-only backstop' proposed (with consequent checks on the Irish Sea crossing), public opinion on the 'backstop' solution largely reflected the referendum result. 58.4 per cent of respondents said they would support a Northern Ireland-only backstop, with NI more closely aligned with the EU than the rest of the UK.<sup>57</sup> Broken down by party support, an NI-backstop and checks in the Irish Sea were supported by 98 per cent of supporters of the two major Irish nationalist parties, Sinn Féin and the SDLP, 89 per cent of Alliance Party voters, 86 per cent of Green Party voters, 27 per cent of Ulster Unionist voters, and 5 per cent of DUP voters. By self-defined community membership, this represented approximately 93 per cent of self-defined Irish nationalists, 20 per cent of self-defined unionists, and 71 per cent of those who do not self-define as nationalist or unionist. This pattern of Irish nationalists and 'others' strongly supporting a Northern Ireland backstop largely reflects the breakdown of the 2016 referendum vote.

When the UK parliament failed in early 2019 to approve the Withdrawal Agreement, or any other approach to managing their withdrawal, the EU and the Irish government re-affirmed that an open Irish border was not negotiable, with Michel Barnier saying that the

backstop is currently the only solution we have found to maintain the status quo on the island of Ireland ... Let me be very clear. We would not discuss anything with the UK until there is an agreement for Ireland and Northern Ireland.<sup>58</sup>

The EU also insisted that even in the event of 'no deal', the question of Northern Ireland would be reflected in EU terms for any future trade agreement. These views are also reflected in the US, where the Speaker of the House of Representatives, Nancy Pelosi said in a speech to the Irish parliament that 'if the Brexit deal undermines the Good Friday accords there

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<sup>57</sup> <<https://www.lucidtalk.co.uk/single-post/2019/08/20/LT-NI-Opinion-Panel-Quarterly-Tracker-Poll-%E2%80%93-August-2019>> accessed 15 October 2019.

<sup>58</sup> Rory Carroll, 'Barnier Pledges EU Support for Backstop in Event of No-Deal Brexit' *The Guardian* (8 April 2019) <<https://www.theguardian.com/world/2019/apr/08/barnier-eu-support-backstop-ireland-no-deal-brexit>> accessed 15 October 2019.

will be no chance of a US-UK trade agreement'.<sup>59</sup> At the same time, the EU repeatedly sought to 'de-dramatise' the backstop in their public statements and documents by emphasising their determination to find a commonly agreed long-term solution. This was explicitly done, for example, in the Joint Interpretative Instrument of 11 March 2019.<sup>60</sup> In spite of this clarification, the Withdrawal Agreement was defeated in the UK Parliament on 15 January 2019 and subsequently on 12 and 29 March 2019. Parliament was also unable to find any agreement on alternative ways forward. One proposal on which there was majority agreement, which became known as the 'Brady amendment', rejected the backstop in the Withdrawal Agreement and called on the Government to negotiate 'alternative arrangements', without specifying what those arrangements would be. European newspapers reported the House of Commons' decisions using terms like 'madness', 'crisis' and 'uncertainty'.<sup>61</sup> In the wake of the failure of these motions, the British government continued negotiations with the EU, focusing on finding an agreement that would allow the backstop provision to be removed and therefore enable the agreement to achieve majority support in the British Parliament. The EU, however, remained united on its agreed position as reflected in the Withdrawal Agreement, including on the Northern Ireland provisions.

Opposition to the backstop focused on the grounds that it limited British sovereignty and freedom to negotiate trade deals. However, the UK government did not accept a more limited 'Northern Ireland-only backstop' as proposed by the EU, on the grounds that it might appear to diminish UK sovereignty over Northern Ireland and that it was opposed by the DUP, who

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<sup>59</sup> *Financial Times* (17 April 2019).

<sup>60</sup> European Commission, 'Instrument Relating to the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community' (2019 <<https://ec.europa.eu/commission/sites/beta-political/files/instrument.pdf>> accessed 15 October 2019).

<sup>61</sup> See for example summaries of major European newspapers' coverage in *The Guardian* on 28 and 30 March 2019 <https://www.theguardian.com/politics/2019/mar/28/european-press-view-on-brexite> and <<https://www.theguardian.com/politics/2019/mar/30/from-shock-to-shrugs-europes-press-react-to-third-brexite-deal-defeat>> accessed 15 October 2019.

were giving parliamentary support to the minority Conservative government. In a reputable opinion poll of Conservative Party members, almost 60 per cent of respondents said they would choose to proceed with Brexit even if it led to Northern Ireland and Scotland leaving the UK, suggesting a more England-focused sense of sovereignty and a prioritisation of state agency, rather than traditional territorial state sovereignty.<sup>62</sup> The lack of clarity on what the UK parliament would support in practice made it very difficult for the EU to respond with concrete proposals.

During debates on the Withdrawal Agreement in the UK Parliament and in the Conservative Party leadership contest from early June 2019, the articulation of what was meant by 'alternative arrangements' was frequently vague and when specifics were itemised they had already been demonstrated to be unacceptable to the EU. A repeated demand throughout these debates was to make the backstop time-limited. But as the only purpose of the backstop was to provide clarity in the event of no other agreement, a time-limited backstop does not fulfil this function and is therefore unacceptable to the EU. The discussion in the Conservative party, both around the response to the failure to pass the Withdrawal Agreement and in the leadership contest, has demonstrated an apparent lack of awareness of the negotiating position of the EU and the diplomatic position of the Irish Government within the EU. A vague technological solution was again repeatedly raised in the Conservative Party leadership contest, with one Conservative Party candidate offering to pay for the infrastructure on the border, as though the cost of construction rather than the political and economic impact of the infrastructure was the key factor in the debate.<sup>63</sup> This failure to positively engage with the EU is further demonstrated by the interim report, published in June 2019, of a conservative-linked think tank, the Alternative Arrangements Commission. This report again focused on technological solutions and also proposed a single regulatory area covering the UK and Ireland for agri-food as a means to deal with the border issue.

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<sup>62</sup> 'You Gov Poll of Conservative Party Members' 19 (YouGov, 19 June 2019) <<https://yougov.co.uk/topics/politics/survey-resultse>> accessed 15 October 2019.

<sup>63</sup> See BBC summary of leadership candidates positions: <<https://www.bbc.com/news/uk-northern-ireland-48583352>> accessed 15 October 2019.

This would in effect mean Ireland leaving the single market, a prospect unacceptable to both Ireland and the EU as a whole.<sup>64</sup>

The EU agreed to extend the deadline for the UK to leave the EU with a negotiated agreement to 31 October 2019 and, following this decision, the focus of the debate in UK has been on both the failure of the Government and Parliament to find a majority for any possible way forward and on the internal divisions in both the Conservative government and party. But at the core of this impasse is the apparent impossibility of achieving parliamentary support for the negotiated Withdrawal Agreement while it contains the Northern Ireland backstop and the failure of the political parties to come up with an alternative proposal that would be acceptable to the EU.

The UK Parliament re-convened in September 2019 with a very clear position from Prime Minister Boris Johnson that the UK would leave the EU on 31 October 2019, with or without a Withdrawal Agreement. This meant that the question of final negotiations was at the heart of the debate for the UK. The Prime Minister reiterated that he wanted a deal and that he would not build infrastructure on the Irish Border. However according to EU sources, no new proposal of any kind was tabled which could replace the Irish backstop and meet the EU requirements of protecting the EU single market while also keeping the Irish border fully open.<sup>65</sup> Prime Minister Johnson suggested he might accept an all-island agri-food area if the DUP did, but this

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<sup>64</sup> <<https://www.prosperity-uk.com/aacabout/>>. For reaction see Tony Connelly, 'Report Suggests New Agri-food Area for Ireland, UK (RTE, 24 June 2019) <<https://www.rte.ie/news/brexit/2019/0624/1057201-alternative-arrangements/>> and Lisa O'Carroll 'Brexit: Alternative to Irish Backstop "Feasible in Three Years"' *The Guardian* (24 June 2019) <<https://www.theguardian.com/politics/2019/jun/24/irish-border-kept-open-within-three-years-after-no-deal-brexit-says-report>> accessed 15 October 2019.

<sup>65</sup> 'Brexit: How the EU is Responding to Latest Uncertainty' (DW, 5 September 2019) <<https://www.dw.com/en/brexit-how-the-eu-is-responding-to-latest-uncertainty/a-50294103>> accessed 15 October 2019; Kitty Donaldson, Robert Hutton and Nikos Chrysoloras 'EU Says UK Has Failed to Deliver New Proposals: Brexit Update (Bloomberg, 4 September 2019) <<https://www.bloomberg.com/news/articles/2019-09-04/johnson-readies-for-more-defeats-in-parliament-brexit-update>> accessed 15 October 2019.

was not developed into a concrete proposal.<sup>66</sup> The *Telegraph* newspaper reported on 2 September that two separate sources had confirmed that senior UK government advisor Dominic Cummings had said the discussions with the EU were a sham. The paper also reported that the UK Attorney General, Geoffrey Cox had warned Prime Minister Johnson on 1 August that his insistence on dropping the Northern Irish backstop was a 'complete fantasy'. By September 2019, a clear majority in the House of Commons was seeking to block a no-deal exit, while the majority of the Conservative Party were publicly saying that the UK should leave without a deal if its demands were not met.<sup>67</sup>

## VI. BREXIT, THE BORDER AND THE POLITICAL IMPACTS

Brexit, and particularly the debate on the Irish border, has had an on-going political impact on the island of Ireland, on the British state and on the international response to the political relationship between Ireland and the UK. In her keynote speech of January 2017, Theresa May had expressed her intention of working with the devolved administrations of the UK as part of the Brexit negotiations, but in Northern Ireland this engagement was not possible as Northern Ireland has not had a functioning power-sharing Executive or Assembly since January 2017. It is, however, unlikely that a functioning Assembly or Executive in Northern Ireland could have had a significant impact on the wider political challenges of Brexit. The Assembly collapsed when Sinn Féin withdrew from government as a result of a political dispute over alleged corruption by their partners in government, the DUP, and also in response to the DUP's continued use of a veto to block legislation on same sex marriage and on Irish language rights. Restoring the Executive was made more difficult following the UK general election in 2017, when the DUP agreed to support the Conservative government in parliament. From this point there was no incentive for the DUP to re-enter government in Northern Ireland as they now had direct access to the British Prime

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<sup>66</sup> 'Brexit: Boris Johnson Open to All-Ireland Food Zone as Backstop Solution' (BBC, 3 September 2019) <<https://www.bbc.com/news/uk-northern-ireland-49566657>> accessed 15 October 2019.

<sup>67</sup> UK Parliament, 'House of Commons Debates' (4 September 2019) <<https://hansard.parliament.uk/commons/2019-09-04>> accessed 15 October 2019.

Minister, who needed their votes to stay in office. Furthermore, even if the Assembly could not procedurally force an Executive response, the DUP would have been politically embarrassed by a pro-Remain majority using the Assembly to highlight the limited public support for the DUP's hard-line pro-Brexit position. The DUP had opposed the Good Friday Agreement in 1998 and had later only agreed to enter the power-sharing Executive as an alternative to some form of informal power-sharing between the British and Irish Governments.<sup>68</sup> While the Executive had functioned well under the leadership of former DUP leader Ian Paisley, the party was not ideologically committed to a power-sharing government in Northern Ireland. As Sinn Féin and the DUP hold diametrically opposed positions on EU membership, on the border and on the Withdrawal Agreement, even if the Northern Ireland Executive had been functioning they could not have agreed a common 'Northern Ireland' position on Brexit and therefore they could not have made an input into the negotiations or provided a coherent voice representing the interests of Northern Ireland, because such a voice does not exist.

The major political impact in Northern Ireland of the Brexit debate is the shift of political opinion as a result of the threat of a 'hard' border. The Irish nationalist population in Northern Ireland prior to Brexit was divided on the timing of a vote on a united Ireland, given that, following the 1998 agreement, most Irish nationalists were willing to take a long-term perspective on constitutional change, with only a minority supporting the holding of a border poll in the short-term. Following the Brexit referendum, the Irish nationalist community in Northern Ireland has become both more unified and more militant in their views on the question of unity. Opinion polls show Irish nationalists much more willing to positively support a referendum on Irish unity, marking a distinct break with previous polling trends, with the qualification that polling data on support for a united Ireland is very sensitive to the precise wording of the questions, to the methodology, and to the political context at the time of polling.

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<sup>68</sup> Eileen Connolly and John Doyle 'Ripe Moments for Exiting Political Violence: An Analysis of the Northern Ireland Case' (2015) 26 *Irish Studies in International Affairs* 147.

In the aftermath of the Good Friday Agreement, opinion polls suggested that many Irish nationalists in Northern Ireland were content with the evolving status quo. They were not seeking a border poll in the short term and would not vote for unity if such a referendum was held.<sup>69</sup> In response to a 2002 opinion poll, which asked respondents how they would vote if a referendum was held 'tomorrow', only 58 per cent of Catholics said they would vote yes, 20 per cent would vote no and the rest were either undecided or did not reply. In the same poll, only 3 per cent of Protestants and 18 per cent of those who did not identify with either of the main religious communities said they would vote for unity 'tomorrow'. By comparison, following the Brexit referendum a December 2018 poll found that 35 per cent of nationalists wanted a border poll to be held in 2019, 79 per cent wanted one within 5 years, and 89 per cent wanted a poll within 10 years.<sup>70</sup> In the same survey, 93 per cent of nationalists said they would vote to leave the UK, and a further 5 per cent of nationalist 'probably would', if the poll was held in 2019 in the context of 'no deal'.<sup>71</sup> In another opinion poll in January 2019, 94 per cent of nationalists, 32 per cent of unionists, and 71 per cent of 'others' thought Brexit would make a united Ireland 'more likely in the next 10 years'.<sup>72</sup> This shift in nationalist opinion – in seeking a border poll in a relatively short time span; in their own declared voting intentions; and in their predictions about constitutional change – are all radical departures from pre-Brexit referendum polling, which showed a more divided nationalist community.

There is also evidence that a majority of the centrist 15 per cent of the population, who do not vote for mainstream Unionist or Irish nationalist parties, would, in the context of a 'hard' or 'no-deal' Brexit, shift their support from the status quo within the UK and would consider voting for Irish unity

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<sup>69</sup> See for example 'NI Life and Times 2002 poll' <[https://www.ark.ac.uk/nilt/2002/Political\\_Attitudes/REFUNIFY.html](https://www.ark.ac.uk/nilt/2002/Political_Attitudes/REFUNIFY.html)>

<sup>70</sup> <[https://docs.wixstatic.com/ugd/024943\\_b89b42d32364461298ba5fe7867d82e1.pdf](https://docs.wixstatic.com/ugd/024943_b89b42d32364461298ba5fe7867d82e1.pdf)> accessed 15 October 2019.

<sup>71</sup> <[https://docs.wixstatic.com/ugd/024943\\_b89b42d32364461298ba5fe7867d82e1.pdf](https://docs.wixstatic.com/ugd/024943_b89b42d32364461298ba5fe7867d82e1.pdf)> accessed 15 October 2019.

<sup>72</sup> <[https://docs.wixstatic.com/ugd/024943\\_b195541bffa647a7882be133023ff803.pdf](https://docs.wixstatic.com/ugd/024943_b195541bffa647a7882be133023ff803.pdf)> accessed 15 October 2019.

in order to stay in the EU.<sup>73</sup> This shift is driven by the potentially very negative economic outcomes of Brexit for Northern Ireland in particular, but it has also been facilitated by the liberalisation of the Irish state, which on the basis of referenda passed legislation to legalise same-sex marriage in 2015, to liberalise access to legal abortions in 2018, and liberalise divorce laws in 2019.<sup>74</sup> In 2018, 37 per cent of 'others' in Northern Ireland wanted a border poll within 5 years, with 68 per cent wanting this within 10 years. If there was no deal, 70 per cent of such voters said they were certain or likely to vote for Irish unity, whereas if Brexit did not proceed their responses moved to 'uncertain' or 'probably remain in the UK'.<sup>75</sup>

The overall picture from post-referendum opinion polls is that Northern Irish nationalists have become more supportive of Irish unity in the context of Brexit, even in the short term, while the traditionally pro-UK union bloc has become more fragmented at the margins. This fragmentation is reflected in the publicly stated views of individuals from a unionist background, involved in business, trade or cross-border engagement, who campaigned in Northern Ireland for the UK to remain in the EU.<sup>76</sup> It also reflects the views of the major economic interest groups including the Ulster Farmers Union and the Confederation of British Industry (CBI) in Northern Ireland, who supported the draft Withdrawal Agreement of November 2018, and specifically the 'Irish backstop', if the alternative was a hard Brexit rather than a vote to remain in the EU.<sup>77</sup> The volatility in the 2018 and 2019 polls is

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<sup>73</sup> Lucid Talk, 'Tracker Polling in Northern Ireland' (2018) <<https://www.lucidtalk.co.uk/single-post/2018/12/07/LT-NI-Tracker-Poll---Winter-2018>> accessed 15 October 2019.; *Irish Times* (7 March 2019).

<sup>74</sup> For a good summary of recent economic reports, see Tony Connelly 'Double Whammy: A No-deal Brexit and Northern Ireland' (RTE, 15 June 2019) <<https://www.rte.ie/news/analysis-and-comment/2019/0614/1055418-double-whammy-a-no-deal-brexit-and-northern-ireland/>> accessed 15 October 2019.

<sup>75</sup> <[https://docs.wixstatic.com/ugd/024943\\_b89b42d32364461298ba5fe7867d82e1.pdf](https://docs.wixstatic.com/ugd/024943_b89b42d32364461298ba5fe7867d82e1.pdf)> accessed 15 October 2019.

<sup>76</sup> Gerard McCann and Paul Hainsworth, 'Brexit and Northern Ireland: The 2016 Referendum on the United Kingdom's Membership of the European Union' (2017) 32(2) *Irish Political Studies* 333.

<sup>77</sup> 'Brexit Deal: PM Thanks NI Business Leaders for Support' (BBC, 22 November 2018) <<https://www.bbc.com/news/uk-northern-ireland-46296605>> accessed 15 October 2019.

significant compared to the relative stability of previous polling, but for the first time since modern polling has been conducted in Northern Ireland, credible opinion polls are showing that in the event of a 'hard Brexit', a majority of the population could vote to join a united Ireland in order to re-join the EU.<sup>78</sup>

The Irish Government does not want the debate on the Brexit negotiations to become complicated by a call for a border poll and its policy is to defend the Good Friday Agreement as providing the framework for the peaceful development of the island of Ireland by preventing a hard border.<sup>79</sup> It anticipates that in a post-Brexit world, if there is a negotiated agreement that does not impose a hard border, then the demand for Irish unity will again become more muted. Others, including former President of Ireland Mary McAleese, have argued that the Brexit referendum was an example of how *not* to conduct serious constitutional reform and that before any referendum on Irish unity there should be a full and lengthy public debate.<sup>80</sup> In the circumstances where there is an increased demand for a united Ireland, under the terms of the Good Friday Agreement, the British Secretary of State for Northern Ireland is obliged to call a referendum, if it appears to them that 'a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland'.<sup>81</sup> The Agreement also commits the British government in the event of a vote for Irish unity to legislate for a united Ireland.<sup>82</sup> The British Secretary of State has some discretion and can use their judgement on the question of whether or not the level of public support for a united Ireland justifies the calling of a referendum, but when a majority clearly exists they are bound by the Agreement to hold a referendum.

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<sup>78</sup> Lucid Talk poll data <<https://www.lucidtalk.co.uk/>> accessed 15 October 2019.

<sup>79</sup> Foreign Minister Simon Coveney, quoted in Elaine Edwards 'Coveney Says Calls for Border Poll "Not Wise and Not Welcome"' *Irish Times* (30 May 2018) <<https://www.irishtimes.com/news/politics/coveney-says-calls-for-border-poll-not-wise-and-not-welcome-1.3514226>> accessed 15 October 2019.

<sup>80</sup> Speech by former President of Ireland Mary McAleese to the DCU Brexit Institute on 29 March 2019. See <<http://dcubrexitinstitute.eu/official-speeches/>> accessed 15 October 2019.

<sup>81</sup> Good Friday Agreement (1998) Annex A.

<sup>82</sup> Good Friday Agreement (1998) Annex A.

During the Brexit negotiations the UK government experienced the practical diplomatic impact which the Good Friday Agreement has had on Northern Ireland's status. The international recognition of the agreement has changed how UK sovereignty over Northern Ireland is perceived internationally, shifting it from one of unqualified UK sovereignty over Northern Ireland to the international recognition of an agreement between the UK and Ireland. The Good Friday Agreement reformulated the legal basis of British sovereignty over Northern Ireland, with the recognition that British rule rested on the consent of the people of Northern Ireland. The Good Friday Agreement gave a legal basis to the recognition of the rights of Irish nationalists in Northern Ireland and the rights of the Irish government as a signatory to the treaty. During the negotiation process, this shift was seen in the support given by the EU to Ireland's demand that there should be no hard border on the island.

The experience of the referendum, the Brexit negotiations, and the failure to pass the Withdrawal Agreement through the UK parliament, have fractured and undermined the British state and the strength of the union between its component parts. The decision by the British government to refuse to consider the option of an 'Irish Sea' border and the entrenched conservative nationalism of the DUP and sections of the Conservative Party made an agreement with the EU difficult to achieve. It has therefore been impossible to find a parliamentary majority willing to support the draft Withdrawal Agreement. While the imposition of a land border on the island of Ireland will be problematic for security, social and economic reasons, it also could bring a 'united' Ireland closer as a means of dealing with these problems. While this new situation will also have potential difficulties, it is unlikely to undermine the Irish state or hinder its economic development. However, it seems unlikely that the UK will easily recover from the deep divisions and political upheavals engendered by the Brexit process, whatever the final outcome is. The failure to reach agreement has heightened internal political tensions in Northern Ireland and the EU remains determined that it will not accept a Withdrawal Agreement which disrupts cross-border travel and cooperation prior to the withdrawal date of 31 October 2019.

## VII. CONCLUSION

The draft Withdrawal Agreement finalised in November 2018 would minimise the risks for Ireland compared to a unilateral withdrawal by the UK from the EU, as it would keep the border open; a hard border is the most immediate and serious threat. Even if the current Withdrawal Agreement was accepted by the UK parliament there would still be negative underlying trends: the UK 'post-Brexit' would become a more insular society, increasingly detached from the rest of Europe, and in those circumstances Northern Ireland would be likely to face a period of economic and political decline and new political tensions. With the UK outside the EU, the management of the peace process will be significantly weakened, as the UK would no longer be part of the framework of EU regional cooperation and policy development that underpins the cross border integration aspects of the peace process. It will also reduce the potential for ongoing informal meetings between Irish and UK ministers at the margins of EU meetings. This lack of regular interaction post-Brexit is unlikely to be addressed by the same level of bi-lateral contacts and will potentially weaken inter-governmental cooperation. This will in turn inhibit the development of measures to promote the economic development of the border regions and the management of the peace process in the difficult context of adjustment post-Brexit.

A disruption to cross-border cooperation would reflect the *de facto* policy aims of the DUP by stopping or slowing the process of neo-functional cooperation by erecting barriers, physical and cultural, between the two parts of the island of Ireland and seeking to cement Northern Ireland's dependency on Britain. In these circumstances, Irish nationalists, rather than working within the framework of the Good Friday Agreement for a gradual process of change, may instead mobilise for a referendum on Irish unity. The political outcome of these pressures and their capacity to undermine the peace process depends on the disposition of the political middle ground in Northern Ireland, in terms of how much they prioritise re-joining the EU and whether they would be willing to support Irish unity to achieve EU membership. The Brexit debate and the divisions on the location of the 'border' have already increased internal political tensions in Northern Ireland, as evidenced by the failure to restore the devolved power-sharing

government during the pre-withdrawal period. These dynamics can also be seen in the escalation of inter-communal tensions compared to the peace process era and in a return to divisive political relationships, with the potential this has for a resumption of armed conflict.

While the bleak post-Brexit scenario explains the determination of the Irish government to avoid a hard border on the island of Ireland, the reasons why the British government so trenchantly opposed the 'Irish Sea border' solution and a Northern Ireland-only backstop are more complex. The insistence of the DUP that it would not continue to provide support for the minority Conservative party government if they agreed to any solution that involved a special status for Northern Ireland, even one that was to their economic advantage, is only part of the explanation. A significant number of Conservative MPs, including leading figures in the party, also opposed any change in the status of Northern Ireland which would weaken its position as an integral part of the UK or diminish British sovereignty over the region. While a Northern Ireland-only backstop would allow the UK to pursue an independent trade policy for Great Britain, for this element of the Parliamentary Conservative Party such trade opportunities are seemingly not as important as keeping Northern Ireland fully within the UK. This is the case even though the majority of the wider rank and file membership of the Conservative Party prioritise achieving Brexit over keeping Northern Ireland within the UK.<sup>83</sup> The UK cabinet rejected a Northern Ireland-only backstop, either believing a UK-wide backstop would receive parliamentary support or assuming that the EU would drop the backstop completely once the threat of no-deal became imminent. However, although the Withdrawal Agreement had the support of Prime Minister Theresa May and other leading members of the party, it did not have the support of the majority of the party. Underlying the refusal of Conservative MPs to support the negotiated agreement seemed to be the belief that the EU would not hold firm on this issue. As the debate progressed during 2019, the overwhelmingly majority of the Parliamentary Conservative Party were willing to leave the

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<sup>83</sup> See 'Most Conservative members would see party destroyed to achieve Brexit' (YouGov, 18 June 2019) <<https://yougov.co.uk/topics/politics/articles-reports/2019/06/18/most-conservative-members-would-see-party-destroye>> accessed 15 October 2019.

EU without a deal rather than accept the Withdrawal Agreement negotiated during May's term as Prime Minister.

Ultimately, many UK policy-makers expected that the EU, as a result of internal divisions, would drop its support for Ireland and abandon the backstop provision from the Withdrawal Agreement (or agree a 'time-limited' backstop). This strategic miscalculation reflects a core part of what a section of the UK's political elites believe it means to be British and their perception of the place the UK occupies in the world. The UK government never believed that the EU's own interests required a backstop and during the leadership contest following Theresa May's resignation most candidates framed the issue as a bi-lateral one between the UK and Ireland. That this view was not shared by the EU Member States, and the EU collectively, was not internalised by the UK government or the Conservative Party. It was the central issue that made the negotiations so frustrating and inexplicable for the EU negotiators and the governments of the other Member States. The EU's initial position was for a Northern Ireland-only backstop, allowing the rest of the UK to move outside of the customs union and single market. The EU<sub>27</sub> reluctantly agreed to a UK-wide backstop at the insistence of UK negotiators. It has been difficult for the EU to understand why the UK was unable to deal with the question of the Irish border and the requirements of the single market in a manner which did not escalate the language to one of state sovereignty. The EU's own experience of sharing and occasionally fudging sovereignty in order to reach agreements may have led them to underestimate the strength of this traditional view within the Conservative Party. However, even when it became absolutely clear in August/September 2019 that the EU would not shift their position on the Irish border, the Conservative Party did not table any substantial proposal to resolve the issue. As a result, apart from the negative political impacts in Northern Ireland, the Brexit negotiations have also led to an increased negativity towards the UK position across the EU<sub>27</sub> and a shift from a widespread hope that Brexit could be reversed towards a growing view that continued UK membership of the EU, with repeatedly postponed decisions on its final status, is bad for Europe.

If the UK leaves the EU without a withdrawal agreement, it remains unclear what will happen on the Irish border. Both the Irish government and the EU refrained from speculation on this issue during the period of negotiation and

while the draft Withdrawal Agreement remains on the table. The Irish government's priority has been to secure a withdrawal agreement that ensures that there will not be a hard border between Ireland and Northern Ireland and it has not engaged in a discussion of other scenarios. In response to the increased likelihood that the UK will leave the EU without a deal, Taoiseach Leo Varadkar stated that a Withdrawal Agreement without a backstop is just as bad for Ireland as a no-deal exit by the UK and that Ireland, therefore, has no interest in agreeing to have the backstop weakened or removed to allow the UK parliament to pass the draft Withdrawal Agreement.<sup>84</sup> If Ireland did agree to the removal of the backstop provision, this would end that phase of negotiations. It would cement the idea of a hard international border on the island and future negotiations would be focused on how to technically deal with this and not how to re-open the border. Undesirable as a no-deal exit would be for Ireland, it would still leave the Irish border as an open question in future negotiations between the UK and the EU. Since Johnson became Prime Minister, the UK government, in framing the issue as a bi-lateral one and in suggesting a joint Irish-UK agri-food market, requiring Ireland to leave the EU single market,<sup>85</sup> has not understood the Irish position and it has also not appreciated that Ireland's interests, even in the worst case scenario of a no-deal Brexit, are linked to remaining a full part of the EU and its single market. On the questions of a backstop-type provision and of support for the peace process in any Withdrawal Agreement, or indeed any future trade deal, the UK Government has from 2016 onwards consistently underestimated the degree of EU solidarity with Ireland and the degree to which the EU's own interests were reflected in its negotiation stance. It is this failure of political judgement that has led to the rejection of the negotiated Withdrawal Agreement and continues to block agreement on a way forward.

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<sup>84</sup> 'No Backstop as Bad for Ireland as No Deal – Varadkar' (RTE, 15 June 2019) <<https://www.rte.ie/news/brexit/2019/0615/1055513-ireland-brexit/>> accessed 15 October 2019.

<sup>85</sup> Tony Connelly, 'Report Suggests New Agri-Food Area for Ireland, UK' (RTE, 24 June 2019) <<https://www.rte.ie/news/brexit/2019/0624/1057201-alternative-arrangements/>> accessed 15 October 2019.