

MUTUAL INTEREST - HOW THE UK AND EU CAN RESOLVE THE IRISH BORDER FOR BREXIT

Austen Morgan, Shanker Singham, Victoria Hewson and Alice Brooks

1. Executive Summary

- 1.1 The problems which Brexit will cause for the island of Ireland in general, and at the border in particular, are serious but not insoluble. This paper considers solutions that enable the Common Travel Area (CTA) to be upheld and for a low-visibility, low-friction land border to operate between the United Kingdom (UK) and the Republic of Ireland (ROI). It is clear that every attempt should be made to ensure as soft a border as possible.
- 1.2 The political and legal issues in connection with the Irish border break down into three conceptual areas: goods/customs; people/immigration; and security. Any arrangement to manage these three areas will need to satisfy not only the UK and ROI authorities, but also the European Union (EU) side, which must be assured that the border is secure and any agreed arrangements respect the freedom of movement of goods and people from the European Economic Area (EEA) to the ROI.
- 1.3 The degree to which controls need to be reinstated on this border is largely down to the future customs arrangements in place between the UK and the EU and future policies on immigration. Special status, by way of customs union or single-market membership or otherwise, does not work for Northern Ireland (NI), as this would inevitably introduce a goods border between NI and the Great Britain (GB) mainland; the latter is, by a distance, NI's biggest trade partner, so economically frictionless trade with GB remains the priority. Special

status and the introduction of an internal border are also politically untenable for the Unionist community.

1.4 Staying in the EU customs union (either the UK as a whole or NI alone) does not remove the need for a hard border, because much border activity is not connected with enforcement of customs duties. Staying in either the customs union or the single market, or both, surrenders all the benefits of leaving the EU in terms of trade policy and domestic competitiveness (and in any event is not a scenario that the EU has offered), although retaining tariff consistency and the EU *acquis* on goods regulations for a period could form the basis of a short and time-limited interim arrangement.

1.5 Modern customs procedures in the EU are largely carried out online, and most formalities are completed electronically in advance of goods reaching the border. Physical checks at the border are by exception only. At present, the UK authorities physically inspect 4 percent of consignments from outside the customs union, and ROI authorities inspect 1 percent.¹

Contrary to conventional wisdom, volumes traded between NI and the ROI are relatively low compared to those between the ROI and mainland UK. The kind of trade involved, such as shipments of milk from NI for processing in the ROI, is dominated by a small number of operators who would be candidates for the Authorised Economic Operator (AEO) scheme, a trusted trader programme set up to expedite customs clearance; this scheme is already available under the EU Unified Customs Code (UCC), which the UK is expected to mirror. This could be adapted further for the Irish situation to minimise the compliance burden, if the Irish government is able to agree to this as an exception to the standard requirements of the UCC. Audit and compliance enforcement can be carried on away from the border by HMRC and the Irish Revenue Commissioners. The UK government position paper published in

¹ World Bank Logistics Performance Index 2016.

August 2017² confirms that the UK favours such a liberal approach, with no physical controls at the border for goods, and the CTA to continue in its current form.

- 1.6 By way of comparison, the Norway–Sweden border operates very effectively with goods crossings at set points of the border only; electronic submission of documentation and remote surveillance by cameras and number-plate recognition are being tested. In order to avoid creating unnecessary barriers to movement across the border as a result of excessive security concerns, the UK and ROI may seek to implement a similar process at the border. Technology should be implemented as far as possible in four key areas: intelligence, surveillance, customs management, and command and control. A focus on these areas should drive continuity of free movement without compromising security.
- 1.7 Free ports could be established on both sides of the border, or potentially in a contiguous cross-border zone, both as a border facilitation measure for cross-border supply chains and as a stimulus to local economies. Such ports could boost rest-of-the-world trade, an area where NI currently lags behind the rest of the UK.
- 1.8 Immigration controls are likely to be a key consideration. It would be impossible for the UK to reach a bilateral agreement with the ROI, formalising the existing CTA, as the ROI will remain a member of the EU and subject to restrictions as a result of its membership. A possible way to regulate immigration across the border would be for the UK to permit visa-free travel for other EU nationals and continue to rely on checks made at the Irish border. Any immigration issues arising in relation to work and overstaying would be dealt with by the Home Office and domestic policy, as would be the case for visitors from any other territories granted visa-free access to the UK. Alternatively, a practical (but politically untenable) solution would be to continue free movement of people from the European Economic Area

² Northern Ireland Office and Department for Exiting the European Union, *Northern Ireland and Ireland, Position paper by the United Kingdom* *ibid.*

(EEA) within the island of Ireland, but to require immigration controls on any EEA visitors travelling from NI into mainland UK.

- 1.9 The existing cross-border bodies established under the Belfast Agreement, including the Special EU Programmes Body (SEUPB), will be fractured on the UK's exit from the EU.

Unless otherwise agreed, NI will no longer need to be involved with discussions related to EU structural funds. Under the Belfast Agreement, the Irish government will require the UK to agree another set of functions, which the SEUPB could be used to regulate. By way of an international agreement, the body could alternatively be used to deal with trade co-operation across the Irish border. Other existing cross-border co-operation bodies may have roles following the exit date to ensure cohesion between the parties in key sectoral areas.

- 1.10 Electricity on the island of Ireland is supplied through a single electricity market. This has brought reliability and efficiency benefits and should be maintained. At present, it operates pursuant to bilateral arrangements, within the framework of EU regulation to which both the EU and the UK are subject. We have proposed measures whereby this could be continued.

2. Introduction

- 2.1 Throughout this paper we will use the following abbreviations as shorthand to describe the territories involved:³

| | |
|------------------------|-----|
| Common Travel Area | CTA |
| European Union | EU |
| European Economic Area | EEA |
| Great Britain | GB |
| Northern Ireland | NI |

³ See Chapter 7 of Austen Morgan, *The Belfast Agreement: A Practical Legal Analysis* (London 2000), where a working solution to terminological problems is put forward.

there is domestic law in each in a similar relationship with international (including EU) law,⁷ because in both states international law must be nationalised in some way to have legal effect. The bilateral relationship between the UK and ROI should therefore be easier to manage.

2.4 On March 29, 2017 the UK government issued its notification to Brussels pursuant to Article 50 of the Treaty on European Union (TEU). Article 50 reads:

(1) Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements. (2) A Member State which decides to withdraw shall notify the European Council of its intention ... (3) The Treaties shall cease to apply to the State in question after the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend the period ... (5) If a State which has withdrawn from the Union asks to rejoin,

its request shall be subject to the procedure referred to in Article 49.⁸

2.5 In the lead-up to negotiations starting between the UK and the EU, both sides publicly acknowledged the “special situation” of the Irish border, and stated that any measures in the negotiation process will be prioritised to protect the peace process.⁹ In her letter giving notice under Article 50, UK prime minister Theresa May said: “we must pay attention to the UK’s unique relationship with the Republic of Ireland and the importance of the peace process in Northern Ireland ... we want to avoid a return to a hard border between [the UK and the Republic of Ireland], to be able to maintain the common travel area between us, and to make sure the UK’s withdrawal from the EU does not harm the Republic of Ireland”. In its guidelines issued in response (the “Guidelines”), the European Council stated that it “welcomes and shares the UK’s desire to establish a close partnership between the [EU] and

⁷ In the Supreme Court Brexit case, dualism is mentioned only three times in the majority judgment: R (Miller) v. SoS [2017] UKSC 5, paras 55, 57, and 79.

⁸ Para 5 was not cited in the Supreme Court Brexit case: R (Miller) v. SoS [2017] UKSC 5, paras 25 and 153.

⁹ See the UK government’s Article 50 letter to Donald Tusk

(www.gov.uk/government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf); and “Draft guidelines following the United Kingdom’s notification under Article 50 TEU” (g8fip1kplyr33r3krz5b97d1.wpengine.netdna-cdn.com/wp-content/uploads/2017/03/FullText.pdf).

the UK after its departure". It also reiterated the aim of avoiding a hard border ("while respecting the integrity of the Union legal order") and noted that the EU should "recognise existing bilateral agreements and arrangements between the United Kingdom and Ireland which are compatible with EU law". This was followed by the negotiation directives given by the Council to the Commission (the "Directives"), which state that "the unique circumstances and challenges on the island of Ireland will require flexible and imaginative solutions. Negotiations should in particular aim to avoid the creation of a hard border on the island of Ireland."

2.6 It is important to note that the Guidelines provide for negotiations to determine "transitional arrangements which are in the interests of the Union and ... bridges towards the foreseeable framework for the future relationship", rather than a full and final free trade agreement (FTA). They also set out a phased approach, reflected in the Directives, which provide for dealing first with withdrawal arrangements, comprising financial settlement, rights of citizens, certain matters in relation to goods already placed on the market, and administrative and governance matters. According to the Directives, the framework for the future relationship and transition to it will be discussed "only after sufficient progress has been achieved" under new negotiating directives. It is, as the UK's Secretary of State for Exiting the European Union David Davis has commented,¹⁰ difficult to see how the Irish border issues can be addressed separately from the future trading relationship, as the solutions required for the border will be driven by the agreements on tariffs, rules of origin, product standards, sanitary and phytosanitary measures (SPS: food safety and animal and plant health), and mutual recognition of conformity assessment and market surveillance. Therefore, unless the EU opens up negotiations to include these aspects at an early stage, it will not be possible for it to achieve its objectives of finding solutions for the Irish border and avoiding the creation of a "hard border".

¹⁰ Interviewed on ITV's *Peston on Sunday*, on May 14, 2017, he described this as "wholly illogical" (www.bbc.co.uk/news/world-europe-39915364).

2.7 This inconsistency was underlined by the statement of Michel Barnier at the end of the first negotiation session between Barnier and David Davis on June 19, 2017, where the two sides agreed on priorities for the negotiation.¹¹ In effect, the UK agreed to the EU's position on a phased approach; however, it was also agreed that "a dialogue on Ireland" would be started to urgently discuss the protection of the Belfast Agreement and maintenance of the CTA.

Interestingly, Barnier referred to "the question of the borders, in particular in Ireland" as part of the objective of agreeing on "key challenges" as soon as possible. While he maintained that negotiations would move on to "scoping the future relationship on trade and other matters" only after sufficient progress had been made on the financial settlement, it remains to be seen how agreeing on the "question of the borders" can be achieved without including trade matters in the discussion.

2.8 In any event, it is clear that there is a high level of agreement in principle that the Irish border presents a unique set of circumstances that warrant bespoke arrangements, and broadly that a "hard border" is to be avoided. The challenge will be to achieve this while "respecting the integrity of the Union legal order", as required by the Guidelines. This constraint applies principally to the measures that the ROI side can deploy,¹² as it will be open to the UK to unilaterally recognise EU standards, conformity assessment, and AEOs, and even unilaterally eliminate tariffs, which would substantially reduce the burdens of border clearances for imports into NI. Clearly tariff elimination, in particular, would be a significant policy undertaking for the UK, as under the "most favoured nation" rules under the World Trade Organization (WTO) General Agreement on Tariffs and Trade (GATT), this would have to be applied to all imports, not just goods from the EU. As set out in our paper *Brexit, Movement*

¹¹ Speech by Michel Barnier, the European Commission's chief negotiator, following the first round of Article 50 negotiations with the UK (europa.eu/rapid/press-release_SPEECH-17-1704_en.htm).

¹² Although there are instances of member states operating non-standard border arrangements with their neighbours, such as Estonia/Russia, Romania/Moldova and Spain/Morocco, it may be difficult for ROI to sustain material departures from the acquis dues to the circumstances and high profile of Brexit.

of Goods and the Supply Chain,¹³ this may be a necessary and beneficial measure, for at least some goods, especially if no zero-tariff deal is agreed with the EU. This would also have the advantage of reducing the requirements to prove the origin of imported goods, which can be burdensome under preferential trade arrangements.

2.9 The Irish government has noted¹⁴ that it is for member states voting in Council to determine whether “sufficient progress” has been made and that the Taoiseach will therefore have a say in this; it is their intention to “leverage [their] position within the EU27 negotiation team, to shape the EU27 approach to negotiations which includes aiming for the closest possible future relationship between the EU and the UK”.¹⁵ Other member states (in particular, for example, the Netherlands, Belgium, Cyprus, and Malta) are similarly incentivised to move forward expeditiously to trade matters in order to build alliances to advocate their positions.

2.10 The UK, and other member states that wish to prioritise progress on trade, could argue that progress has been sufficient when agreement in principle has been reached establishing a methodology for calculating the financial settlement. In respect of citizens’ and acquired rights, the EU’s negotiating paper¹⁶ included some aggressive positions on the scope of the settlement and the role of the Court of Justice of the European Union (CJEU), but here at least there is agreement at a high level that the rights and interests of citizens exercising their treaty rights in the respective territories should be protected, so the benchmark for progress could be reached in short order.

2.11 Any withdrawal agreement pursuant to negotiations under Article 50 (“Withdrawal Agreement”) will be between the UK and the EU (excluding the UK). The ROI will be a party

¹³Shanker Singham and Victoria Hewson, *Special Trade Commission: Brexit, Movement of Goods and the Supply Chain*, February 2017 (available at www.li.com/activities/publications/special-trade-commission-brexit-movement-of-goods-and-the-supply-chain), which gives more details on tariff elimination and other measures.

¹⁴*Ireland and the Negotiations on the UK’s Withdrawal from the European Union: The Government’s Approach*, May 2017, page 31 (www.merrionstreet.ie/MerrionStreet/en/EU-UK/Key_Irish_Documents/Government_Position_Paper_on_Brexit.pdf).

¹⁵*Ibid.*, page 40.

¹⁶*Position Paper Transmitted to the EU27: Essential Principles on Citizens’ Rights*, European Commission, Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU, May 2017 (ec.europa.eu/commission/sites/beta-political/files/citizens-rights-essential-principles-draft-position-paper_en.pdf).

to the Withdrawal Agreement as a continuing EU member. Given the nature of the trade relationship between the UK and ROI, it is in the interests of both countries to find ways to cooperate proactively to assist in delivering a positive outcome in the Withdrawal Agreement. The UK prime minister and the Irish Taoiseach have held bilateral meetings, and the Irish government has met with EU lead negotiator Michel Barnier at an early stage, which should place the ROI in a position to play an influential role.

- 2.12 When the Withdrawal Agreement takes effect, or the UK leaves the EU without such an agreement, the Irish border, having previously been an internal frontier, will become part of the external frontier of the EU. The ROI will remain part of the internal market. And the UK will become (as it was before 1973) a third country,.
- 2.13 We have not analysed here the wider constitutional implications for the NI settlement and the role of the NI Assembly in post-Brexit legislative processes, although we do consider at a high level some of the implications for the Belfast Agreement.
- 2.14 In this paper we are not projecting outcomes, but rather identifying practical solutions and consequences of some approaches proposed by others.
- 2.15 We have not considered services in detail in this paper, as the considerations in respect of services are largely the same for GB and NI. However, as local services providers will continue to travel across the Irish border to provide services (comprehensive Mode 4 and potentially Mode 3 services¹⁷), access will be required by businesses in the ROI and NI. This will probably not cover financial services, however, where a more bespoke arrangement will be necessary.¹⁸ Specific arrangements for border regions, which would not require the same conditions to apply on a most favoured nation basis, are permitted under the WTO General Agreement on Trade in Services (GATS), Article II (3).

¹⁷As defined in the WTO General Agreement on Trade in Services.

¹⁸See Paul Edmondson, Shanker Singham, and Victoria Hewson, *A New UK/EU Relationship in Financial Services: A Bilateral Regulatory Partnership*, May 2017 (www.cms-lawnow.com/regzone/articles/2017/march/cms-li-brexit-and-financial-services?cc_lang=en).

3. The Irish Border

- 3.1 The Irish border is an international frontier between two states, the UK and the ROI. It is relatively long-established and certain (except in one respect, on which see the next section). Geographically, it is also long, at 499 km (310 miles) from end to end. This international frontier existed before 1973; it continued during the period when the UK and the ROI were EU member states; and it will persist after Brexit.
- 3.2 The Irish land border stops at a northern end, Lough Foyle (near Londonderry), and at an eastern end, Carlingford Lough (near Dundalk). There is an element of uncertainty regarding both Lough Foyle and Carlingford Lough. Despite the 1998 Belfast Agreement (see below), the UK and the ROI continue to dispute these two estuaries due to conflicting interpretations of applicable international law.¹⁹
- 3.3 Neither state appears willing, or able, to determine finally this international frontier, to the north or to the east. UK and Irish ministers agreed in 2011 to try and resolve the disputes.
- “Like the Irish government,” the secretary of state for NI, James Brokenshire, has stated recently, “we do not anticipate these issues forming part of the negotiations over the UK’s exit from the European Union.”²⁰

Administrative Boundary

- 3.4 The line of the border lies in the Irish system of county councils and borough councils (based on medieval administrative counties), provided for in the Local Government (Ireland) Act 1898. These were related, in turn, to parliamentary constituencies. The idea of partition before World War I, in which the UK government excluded four, and then six, Ulster counties from Irish home rule, was based upon this administrative arrangement.²¹ Then, the Government of

¹⁹James Brokenshire, secretary of state for NI, written parliamentary answers, November 16, 2016 and November 28, 2016

²⁰Brokenshire, written parliamentary answers, November 28, 2016 and December 13, 2016.

²¹Thus Churchill’s “dreary steeples of Fermanagh and Tyrone”: HC, *Hansard*, vol. 150, col. 1270, February 16, 1922.

Ireland Act 1920 provided for a parliament for six counties:²² the origin of NI (and a Dublin parliament for the remaining 26 counties—which existed briefly in 1921–2, as Southern Ireland, within the UK).

State Creation

3.5 Home rule did not interfere with the UK's territorial seas. Neither did the creation of the Irish Free State (IFS) as a dominion, within the British Empire or Commonwealth (with the same status as Canada), on December 6, 1922. However, the IFS became a state, in international law, through international recognition, probably between 1925 and 1931.²³ As a state, it acquired its own territorial seas.

An International Frontier—The Land Border

3.6 The Irish land border as an international frontier serves to delineate the territorial jurisdictions of the UK and the ROI. It is there even if there is no signage (“you are now entering ...”), save for road traffic regulation.²⁴ Since the EU referendum, the idea of a soft or a hard border has come into play. The reasons for the current softness are often not identified clearly. And the fears of hardness are asserted rather than reasoned. There is currently a border between NI and the ROI. All international frontiers perform a number of functions, regarding the transnational movement of goods and services, people, and—unfortunately—criminals, including smugglers and terrorists. It may be argued that there are three principal Irish borders: a trade border; an immigration border; and a security border. It is the interaction of these three conceptual borders that will determine the degree of softness/hardness, when crossing between NI and the ROI, principally by private or public road vehicle. This, in turn, will depend on the willingness of the EU, acting in negotiations through the Commission under

²²Section 1 (2) reads: “For the purposes of this Act, Northern Ireland shall consist of the parliamentary counties of Antrim, Armagh, Down, Fermanagh, Londonderry and Tyrone, and the parliamentary boroughs of Belfast and Londonderry, and Southern Ireland shall consist of so much of Ireland as is not comprised within the said parliamentary counties and boroughs.”

²³Austen Morgan, *The Belfast Agreement: A Practical Legal Analysis* (London 2000), pages 62–6.

²⁴Miles in NI; kilometres in the ROI.

instruction from the European Council, to agree that any agreement is secure (including in terms of revenue protection and regulatory compliance) and does not impede free movement of goods, services, and people into the ROI from the EEA.

4. The Trade Border

1922–72

4.1 Upon the creation of the IFS on December 6, 1922, Belfast and Dublin quickly sought to protect their internal markets. Cross-border trade diminished, against a background of little economic integration in pre-partition Ireland. North–south trade did not benefit from World War II, then there was a London–Dublin trade agreement in 1948, and, in December 1965, an FTA between the two states; quotas and tariffs were to be abolished over ten years.

1972–Present

4.2 The 1965 FTA readied both states for the European Economic Community, on January 1, 1973. However, it was to be another 20 years before the European Community finally abolished border controls on goods between member states. Since January 1, 1993, there has, of course, been no trade border. After more than four decades of joint membership, the economy of NI (treating it as a national economy for the moment) remains, to a surprising extent, bound in to the UK economy, with little north–south integration in the EU single market. We describe the trade relationship in more detail below.

Trade Data—The Economic Context

4.3 In recent years, the NI Statistics and Research Agency has produced broad economy sales and exports statistics. They remain “experimental” as they are a new measure under development by the Agency. Figures are available from 2011, and the last—for 2015—were published in February 2017. The data are based upon annual turnover in NI (or total sales), of goods and services. In 2015, NI had a total gross output of £66,699 million. The sales took place in NI, but also in GB. There was trade with the ROI, but also with the rest of the EU. “External

sales” means everything outside NI (including GB), while “exports” (with the UK as the real national economy) means everything outside the UK.

- 4.4 The structure of the turnover of the NI economy in 2015 is summarised below, using the most recently available figures:

Turnover of NI economy, 2015²⁵

| Destination | £ million | Percentage (%) of turnover |
|--------------------------------------|-----------|----------------------------|
| Turnover | 66,699 | 100.0 |
| <i>NI sales</i> | 43,745 | 66.0 |
| <i>GB sales</i> | 13,848 | 21.0 |
| <i>ROI sales</i> | 3,377 | 5.0 |
| <i>Rest of EU sales</i> | 1,927 | 3.0 |
| <i>Rest of world sales</i> | 3,803 | 6.0 |
| <i>Total external (non-NI) sales</i> | 22,955 | 34.0 |
| <i>Total exports (non-GB and NI)</i> | 9,106 | 14.0 |

Looking at percentages only, 66.0 percent of sales are within NI and 21.0 percent in GB, making a total of 87 percent—nearly all—within the state. A further 6 percent is NI’s share of UK exports to the rest of the world. The figures for the ROI and the rest of the EU are a great deal less: 5 percent to the ROI; and 3 percent to the rest of the EU. Agricultural produce that is processed in the ROI and returned to NI for sale there or elsewhere accounts for some of the 5 percent of sales made to the ROI. Broadly, the pre-1973 trade pattern, with roots in the 19th century, has proved remarkably resilient.

²⁵ Source: NI Research and Statistics Agency (www.nisra.gov.uk/publications/current-publication-broad-economy-sales-exports-statistics).

4.5 The ROI has also recently published figures relating to its 2015 imports and exports of goods with GB and NI, summarised below. At a high level, these tables show how reliant the ROI is on GB both as an export market and an import supplier, and how in most sectors NI trade is a relatively small proportion of the ROI total:

ROI goods exports to GB and NI, classified by commodity, 2015²⁶

| | | €000 | | | | |
|----------|--|--------------------|-------------------|------------------|---------------|------------------|
| | | 2015 Exports | | | % of which: | |
| | | Total | Great Britain | Northern Ireland | Great Britain | Northern Ireland |
| 0 | <i>Food and live animals</i> | 9,877,833 | 3,914,147 | 594,844 | 39.6 | 6.0 |
| 1 | <i>Beverages and tobacco</i> | 1,287,469 | 243,999 | 89,355 | 19.0 | 6.9 |
| 2 | <i>Crude materials, inedible, except fuels</i> | 1,770,659 | 393,744 | 74,370 | 22.2 | 4.2 |
| 3 | <i>Mineral fuels, lubricants and related materials</i> | 772,924 | 418,289 | 27,119 | 54.1 | 3.5 |
| 4 | <i>Animal and vegetable oils, fats and waxes</i> | 57,142 | 11,681 | 6,042 | 20.4 | 10.6 |
| 5 | <i>Chemicals and related products</i> | 64,224,048 | 3,900,022 | 193,990 | 6.1 | 0.3 |
| 6 | <i>Manufactured goods classified chiefly by material</i> | 2,105,212 | 915,357 | 233,006 | 43.5 | 11.1 |
| 7 | <i>Machinery and transport equipment</i> | 16,808,258 | 2,557,527 | 154,937 | 15.2 | 0.9 |
| 8 | <i>Miscellaneous manufactured articles</i> | 14,298,763 | 1,120,212 | 200,811 | 7.8 | 1.4 |
| 9 | <i>Commodities and transactions not classified elsewhere</i> | 1,205,305 | 335,168 | 169,651 | 27.8 | 14.1 |
| | Total | 112,407,343 | 13,810,147 | 1,744,125 | 12.3 | 1.6 |

Source: Goods exports and imports, CSO

¹ SITC is the Standard International Trade Classification.

²⁶ Central Statistics Office, Ireland, *Brexit Ireland and the UK in Numbers*, December 2016 (available at www.cso.ie/en/media/csoie/releasespublications/documents/statisticalpublications/Brexit.pdf).

ROI goods imports from GB and NI, classified by commodity, 2015²⁷

| | | €000 | | | | |
|--------------|--|---------------------|----------------------|-------------------------|----------------------|-------------------------|
| | | 2015 Imports | | | % of which: | |
| | | Total | Great Britain | Northern Ireland | Great Britain | Northern Ireland |
| 0 | Food and live animals | 6,686,796 | 2,842,473 | 483,907 | 42.5 | 7.2 |
| 1 | Beverages and tobacco | 876,066 | 305,119 | 32,452 | 34.8 | 3.7 |
| 2 | Crude materials, inedible, except fuels | 854,625 | 162,864 | 59,948 | 19.1 | 7.0 |
| 3 | Mineral fuels, lubricants and related materials | 5,104,270 | 3,140,700 | 33,296 | 61.5 | 0.7 |
| 4 | Animal and vegetable oils, fats and waxes | 244,545 | 45,463 | 17,357 | 18.6 | 7.1 |
| 5 | Chemicals and related products | 13,977,824 | 2,391,244 | 64,523 | 17.1 | 0.5 |
| 6 | Manufactured goods classified chiefly by material | 4,697,709 | 1,796,843 | 127,536 | 38.2 | 2.7 |
| 7 | Machinery and transport equipment | 27,890,812 | 2,963,996 | 89,698 | 10.6 | 0.3 |
| 8 | Miscellaneous manufactured articles | 8,166,076 | 2,443,560 | 75,986 | 29.9 | 0.9 |
| 9 | Commodities and transactions not classified elsewhere | 1,612,285 | 810,744 | 106,622 | 50.3 | 6.6 |
| Total | | 70,111,009 | 16,903,005 | 1,091,343 | 24.1 | 1.6 |

Source: Goods exports and imports, CSO

¹ SITC is the Standard International Trade Classification.

4.6 Exports of goods from the ROI to NI are only 1.6 percent of total ROI exports. Although the figures do not precisely match the NI turnover figures (partly because the NI figures include services), together these indicate that this trade is less than might generally be expected.²⁸

4.7 From the ROI perspective, it will be as important to secure beneficial trade and customs arrangements for its trade with GB, which accounts for 12.3 percent of goods exports and 24.1 percent of goods imports. There is also a high volume of services trade between the ROI and

²⁷ Ibid.

²⁸ The Irish ambassador to the UK illustrated this noting that he thought trade levels were high but should be higher: in one answer to the House of Lords EU Committee: "I cannot remember the figure, but quite a high percentage of Northern Ireland exports come to the south. Our economic links in Ireland are below the level they should be for two neighbouring jurisdictions on an island." (Oral and written evidence, Q8, September 6, 2016)

the UK. Equally, the ROI is a key trading partner for GB, so while managing the land border is vitally important for political, cultural, and security reasons, a trade solution for trade between the ROI and GB is of critical importance for the ROI. Research by Open Europe suggested that the GDP losses that the ROI could be exposed to range from a best-case scenario of 1.1 percent to a worst-case scenario of 3.1 percent²⁹ (which is worse than the projected outcomes for the UK), and some Irish businesses are already suffering as a result of the depreciation of sterling.³⁰ The ROI clearly has a strong incentive to push for progress on trade aspects of the Article 50 negotiations and to advocate a zero-tariff agreement with maximum market access.

4.8 The sectors of key importance to NI trade are agriculture, manufacturing, and chemicals. The nature of such products means that recognition of standards and SPS measures will be key to ensuring that trade of goods in these sectors between GB, NI and the ROI encounters minimal disruption.

4.9 Apart from the ROI, the UK accounts for significant shares of the trade of several other member states, both as an export market and as an import supplier, as shown in the two tables below.³¹ These countries will also be looking to prioritise their own interests in the ongoing Brexit negotiations and with whom ROI might look to form alliances with in negotiations.³²

Share of exports to the UK, by EU member state, 2015

| Country | Value (as % of total trade) |
|-------------|-----------------------------|
| Ireland | 14 |
| Cyprus | 10 |
| Netherlands | 9 |
| Belgium | 9 |
| Spain | 7 |

²⁹Raoul Ruparel, *How Would Brexit Impact Ireland?* Open Europe, April 2015 (openeurope.org.uk/today/blog/how-would-brexit-impact-ireland).

³⁰For example, see *Irish Times*, "Enterprise Ireland Report Reveals Brexit Impact on Irish Exports", May 15, 2017 (www.irishtimes.com/business/economy/enterprise-ireland-report-reveals-brexit-impact-on-irish-exports-1.3083605).

³¹This analysis uses 2015 data from UN Comtrade, accessed via the World Integrated Trade Solution database.

³²The Legatum Institute Special Trade Commission is carrying out detailed work to assess the impacts of tariffs and trade disruptions on other member states.

| | |
|----------|---|
| Germany | 7 |
| Sweden | 7 |
| France | 7 |
| Poland | 7 |
| Portugal | 7 |

Share of imports from the UK, by EU member state, 2015

| Country | Value (as % of total trade) |
|-------------|-----------------------------|
| Ireland | 25 |
| Cyprus | 9 |
| Malta | 7 |
| Netherlands | 6 |
| Sweden | 5 |
| Belgium | 5 |
| Spain | 5 |
| Denmark | 5 |
| France | 4 |
| Germany | 4 |

5. Trade Operations

The Goods Border

5.1 The UK has not negotiated its own trade agreements since 1973, because the EU exercises that competence. An FTA, between the UK and the EU, remains to be negotiated. Negotiations between the UK and the EU will start from the premise that, absent agreement otherwise, the UK will be able to impose its tariffs at the Irish border (and the rest of its external frontier), while the ROI—regardless of its all-Ireland concerns—will have to impose the EU’s Common External Tariff (CET). The UK has signalled that in the first instance its tariffs will mirror the CET.³³As the UK leaves the EU, the rights and responsibilities conferred under WTO rules will apply, including the non-discrimination and reciprocity principles.³⁴

³³Confirmed by Liam Fox, Secretary of State for International Trade, in a statement to the House of Commons on December 5, 2016 (www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2016-12-05/HCWS316).

³⁴The UK and the ROI both joined the WTO on January 1, 1995 as EU members, but were founding members of its predecessor, GATT.

5.2 The reintroduction of customs controls on the Irish border does not, however, mean a return to the 1960s, or even the 1990s, with two border posts and uniformed customs officers. In current practice, in admitting imports from outside the customs union, in compliance with the UCC, the UK border authorities physically inspect only 4 percent of consignments, and the Irish authorities only 1 percent.³⁵ To replicate this level of efficiency (or better) at the Irish border, an integrated system is possible. It can, and should, be largely remote, using electronic technology at the border and ongoing inspections and audits by authorities away from the border. Operators of commercial vehicles would be required to log journeys and loads online in advance of travel.³⁶ Automatic number-plate recognition is already used by the Police Service of Northern Ireland in crime prevention and detection.³⁷ The network of static cameras could be expanded to record all cross-border transit—something that never happened with human controls (which did not operate on back roads at night). There would inevitably be false declaring. But that could be deterred by spot checks away from the border, and enforcement achieved through criminal sanctions and/or civil penalties (again, practices that are common under existing EU customs regulation). The Norway–Sweden border implements a similar model for the routes across the border permitting freight,³⁸ and the congestion charge for drivers in central London is another analogous example. However, the extent to which the Irish border can be regulated in this way will be determined by how it can be accommodated within the framework of EU law and whether technology solutions will be cost-effective for all border crossings. The majority of freight is likely to be carried along main routes; however, agricultural products and livestock are likely to be less restricted to such routes.

5.3 It has been suggested in various quarters that NI alone should stay either in the EU customs union (by unspecified legal mechanisms) or in the single market, in order to avoid the need

³⁵World Bank Logistics Performance Index 2016.

³⁶Advance electronic submission of customs declarations is already required in the vast majority of cases for imports from outside the customs union.

³⁷Police Service of Northern Ireland, Automatic Number Plate Recognition (www.psni.police.uk/inside-psni/our-policies-and-procedures/automatic-number-plate-recognition).

³⁸Protocol 10 EEA Agreement.

for a hard land border. Aside from the reality that modern customs borders are both efficient and low-impact,³⁹ the proposition that staying in the customs union would mitigate the border measures misunderstands the functions of a customs border and the features of a customs union.

5.4 A customs union involves uniform external tariffs applying to imports, which removes the need for duties to be paid and origin proved when goods move between member countries. Monitoring and enforcement of tariff compliance is only one part of the operation of a border. Other policies covering security, SPS and technical barriers to trade (such as product regulation compliance), treaty obligations such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and anti-fraud and counterfeiting are also controlled at a goods border. None of these matters are affected by membership of a customs union as such. Customs unions membership for NI alone would be damaging, therefore, to its most important trading relationships (with GB and third countries) and would not remove the need for border controls at the Irish border. Similarly, membership of the single market would mitigate the need for controls on SPS and product regulation to be in place at the Irish border, but unless combined with a customs union, there would still need to be border controls for tariff compliance. It would also have the effect of establishing a border with the UK, to control entry into the NI market of imports from the UK, and depriving NI of the advantages of being able to move away from the EU's SPS regime, which is restrictive and arguably violates WTO rules.⁴⁰ As well as being economically counterproductive, this is politically untenable. The Democratic Unionist Party, for example, have specifically rejected internal borders between NI and GB.⁴¹

³⁹Technology solutions and legal mechanisms are used in Canada and Australia that enable these countries to clear huge volumes of goods with their neighbouring territories—the USA and New Zealand, respectively—in the absence of customs union or single-market arrangements. For more details, see Shanker Singham and Victoria Hewson, *Brexit, Movement of Goods and the Supply Chain*, February 2017 (available at www.li.com/activities/publications/special-trade-commission-brexit-movement-of-goods-and-the-supply-chain).

⁴⁰As described further in Section 5.19-5.22 below.

⁴¹See the manifesto of the Democratic Unionist Party, May 2017 (www.mydup.com/publications/view/2017-westminster-manifesto).

5.5 In order to benefit from the opportunities of leaving the EU, both in domestic policy and in the sphere of international trade, the UK as a whole needs to leave both the customs union and the single market.⁴² The objective of the UK government, which is shared by the EU, is to achieve this with as little disruption as possible, and to enter into a new, close, and ambitious trading relationship. This will probably be preceded by an interim agreement to enable trade to continue while legal matters are resolved and systems and policies are put into operation with the UK as a third country. The interim measures in such an agreement, applicable to the generality of the UK–EU relationship, could include:

5.5.1 the UK and the EU agreeing to maintain zero tariffs and no quotas on trade between them; and

5.5.2 the UK and the EU agreeing comprehensive mutual recognition of regulations, conformity assessment and accreditation bodies,⁴³ and SPS measures, for so long as the UK agrees to maintain the *acquis* in the relevant fields (with a view to agreeing longer-term mutual recognition and managing of divergence from the *acquis*).

5.5.3 The UK could further consider agreeing to maintain the CET as its bound rates on imports from third countries, and preferential arrangements for countries where the EU has agreed an FTA (subject to any negotiations required with such third countries), to enable a zero-tariff deal between the UK and the EU with no need for origin to be proved.⁴⁴

5.6 At the same time, the UK may wish to continue to participate in (and fund) agencies like OLAF⁴⁵ in respect of its work on customs duties, until such time as it has been able to replicate

⁴²These arguments are set out in greater detail in Shanker Singham and Victoria Hewson, *Brexit, Movement of Goods and the Supply Chain*, February 2017 (www.li.com/activities/publications/special-trade-commission-brexit-movement-of-goods-and-the-supply-chain) and Shanker Singham, *A Blueprint for UK Trade Policy*, April 2017 (www.li.com/activities/publications/a-blueprint-for-uk-trade-policy).

⁴³As, for example, the EFTA members have done; see Annex I to EFTA Convention.

⁴⁴If no such agreement is in place, rules of origin will have to be applied to support any preferential arrangement on tariffs and quotas, which would have a material impact on businesses which trade with the EU, to be balanced against the interests of the vast majority of businesses (which various sources estimate to be around 95 percent) which do not.

⁴⁵The European Anti-Fraud Office.

systems and implement a co-ordinated approach on customs controls and anti-fraud and counterfeiting with the EU.

5.7 These measures (which are outlined here at a high level only; there is flexibility around the available approaches) would effectively maintain the status quo for a fixed period,⁴⁶ to be replaced with permanent measures that enable the UK to diverge in its policies and regulations, within the parameters of a comprehensive FTA. The arrangement would give customs authorities sufficient time to allow technology solutions and logistics facilities to be established to facilitate the soft border desired at the Irish border and at all other ports of entry for trade between the UK and the EU. The interim period in respect of this logistical work, completion of which would enable the UK to depart from the CET and implement full customs controls on trade with the EU, need not be tied to the duration of a zero-tariff interim agreement. However, as the UK lowers its applied tariff rates against the rest of the world, rules of origin must inevitably be applied between the UK and the EU, so a programme of education and advice will be required to support businesses to make any necessary changes to their supply chains and to obtain necessary certification so they can continue to take advantage of any preferential tariff deal agreed with the EU and other FTA partners.⁴⁷ It will also be vital for the authorities in the ROI, in NI, and at Westminster to undertake consultations with, and provide training to, businesses on the customs facilitation measures available to them. Assuming that the UK largely mirrors the EU customs code (which seems

⁴⁶ It is important that this is a defined period in order to qualify as an interim agreement under Article XXIV of GATT, although both parties would probably look to a much shorter period for certainty and, in the UK's case, to enable the operation of its independent trade policy. The European Council Guidelines state that "transitional arrangements must be clearly defined, limited in time and subject to effective enforcement mechanisms".

⁴⁷ Utilisation of EU preferential trading arrangements by partner countries importing from EU member states has been estimated at around 75 percent; *EU Export and Uptake of Preferences: A First Analysis* (work in progress), Nilsson, September 2015.

likely and desirable),⁴⁸ the uptake of schemes like AEO recognition should be promoted and supported.⁴⁹

5.8 There will also need to be comprehensive treatment of movement of workers (separately from the matter of citizens who are already exercising treaty rights at the exit dates), both to accommodate EU demands and to fulfil UK labour market needs. This could be achieved by way of a chapter on Mode 4 services,⁵⁰ recognition of qualifications and similar measures, and a programme in the UK for skilled and seasonal/sectoral worker visas for EEA nationals.

5.9 Clearly the legal and governance arrangements underpinning these arrangements will be contentious, as it is clear that the EU will be expecting to maintain a role for the CJEU and other institutions. These are matters of wider impact than the Irish border, and will be for negotiation between the UK and the EU.

Technology Solutions for a Soft Border

5.10 Nicholas Fisher and Stephen Talbot of UES Advisory have produced a white paper⁵¹ for the purposes of this paper, to expand and develop the idea of using technology on the Irish border in order to drive accuracy and efficiency in border security. They recommend that, by treating border security as an intelligence- and surveillance-driven task, persistent surveillance over the entire border can be delivered while not unnecessarily inhibiting the movement of entitled people and goods across the border. Fisher and Talbot identify four particular areas in which technology can be used to enhance delivery of these objectives—namely, intelligence,

⁴⁸ See the notes on the Customs Bill accompanying the Queen's Speech, June 21, 2017 (www.gov.uk/government/uploads/system/uploads/attachment_data/file/620838/Queens_speech_2017_background_notes.pdf).

⁴⁹ For more details on this scheme and other measures, see Shanker Singham and Victoria Hewson, *Brexit, Movement of Goods and the Supply Chain*, February 2017 (www.li.com/activities/publications/special-trade-commission-brexit-movement-of-goods-and-the-supply-chain).

⁵⁰ Defined in GATS as services supplied by a service supplier of one WTO member, through the presence of natural persons of a member in the territory of any other member.

⁵¹ Nicholas Fisher and Stephen Talbot, *Technology Solutions for UK/EU Land Border Security Post-Brexit*, White Paper, UES Advisory, dated March 13, 2017.

surveillance, customs management, and command and control. We have included their recommendations below.

- 5.11 Implementing these kinds of solutions will require an integrated approach from the UK and ROI/EU, but would reflect a shared commitment to flexible and imaginative solutions. They will also take time to design and implement, emphasising the need to move quickly to the EU's envisaged Phase 2 of negotiations and the necessity to have an interim period holding close to the status quo while the border systems and policies are implemented. It should be borne in mind in this context that technology and logistical solutions can only implement and facilitate the enforcement and monitoring of rules. A legal architecture needs to be in place in the first instance.⁵²

Intelligence

From an intelligence standpoint, it is key that information-sharing must continue between security, customs, and law enforcement agencies both in the ROI and the UK to maintain a current and relevant series of watch lists to guide border operations. Access to a single intelligence and case-management platform, drawing and correlating data from all stakeholders, would greatly aid this process.

Surveillance

Persistent surveillance of the border region can be achieved in a number of ways, ranging from aerial-based solutions such as patrols by Unmanned Aerial Vehicle (UAV) assets through to the deployment of aerostats. These solutions, however, are subject to a number of limitations, not least weather and cost. Ground-based solutions also range significantly and can incorporate a series of sensors such as

⁵² See the analysis of this aspect in the written evidence submitted to the Northern Ireland Affairs Committee Future of the Land Border with the Republic of Ireland Inquiry by Katy Hayward and Milena Komarova of Queen's University Belfast, December 5, 2016

(<https://www.qub.ac.uk/home/EUReferendum/Brexitfilestore/Filetoupload,735708,en.pdf>)

unattended ground sensors, cameras, and ground-wave radar. Another sensor option is a solution similar to that developed to provide ground-based wide-area persistent surveillance on large mining sites.

This solution blends components from both the aerial and traditional ground-based offerings to deliver the target detection and tracking capabilities associated with an aerial platform but with the cost and maintainability benefits of a ground-based solution. The system automatically detects movement and changes in electro-optical full-motion video imagery captured by platforms such as stationary vehicles and surveillance towers. The system processes the real-time video feed from a stationary, panoramic camera; as the camera sweeps the area of observation, the system automatically detects moving targets in the camera's field of view.

Designed to ignore environmental effects such as the waving of trees, moving cloud shadows, and changes in lighting effects, the solution detects and highlights targets that are effectively invisible to the human observer. In addition, a maritime variant is available, able to identify small craft on waterways and at sea. Having been designed and deployed commercially, it has the added benefit of being a commercial off-the-shelf solution; however, the core detection and tracking software is based on a technology broadly deployed in strategic UAV programs across NATO and other allies.

In terms of border crossing controls, this can be achieved through a range of automated and manual solutions. For regular border users, pre-clearance can be given for registered and security-checked individuals and associated vehicles, allowing them to use automated border crossing points deployed using a package of analytics including automated number-plate recognition (ANPR) and biometric solutions such as facial recognition (including through-window capabilities to identify vehicle occupants). This allows for prioritisation to be given to other irregular border users whereby similar analytics can be applied to stream border crossers and more thorough checks can be carried out both manually and via other technologies such as iris-imaging, 3D ultrasonic fingerprint, and under-vehicle scanning (motor vehicles and trains).

| |
|---------------------------|
| Customs Management |
|---------------------------|

The advances in blockchain technology allow a border to remain invisible while still meeting customs requirements. Goods passing through the border will have an existing unique blockchain identifier assigned to them. Their passage through the border can be securely monitored, in a similar way to the surveillance systems described above, and remotely verified to meet customs requirements. Verification, which can, for example, take place through the completion of a funds transfer, adds a permanent new block to the blockchain. Owing to the distributed ledger-based technology of blockchain, many layers of verification can be brought in simultaneously and the ongoing life cycle of the good can continue to be monitored if required.

To improve convenience, particularly for regular freight carriers, each carrier could be allocated a unique user number, which would then (following first-time registration) be used to log on for pre-clearance. In this way, previous data entry can be stored and the application form pre-filled as far as possible, to reduce the level of input required by the carrier each time they make an application.

Command and Control

In order to consolidate all the data collected from the various components of the border solution and to disseminate these in a timely and usable fashion to the various stakeholders, a comprehensive command-and-control solution is critical. Well-proven products exist on the global market that are able to seamlessly merge multiple data sources, static and dynamic, to deliver user-specific interfaces representing and prioritising data based on customisable standard operating procedures in a range of formats from mapping to dashboard on a range of devices from video walls to hand-held, off-the-shelf units. In addition, many of these solutions integrate data communications (VoIP, video, text, etc.) to allow real-time situational awareness for border security forces.⁵³

⁵³ Nicholas Fisher and Stephen Talbot, *Technology Solutions for UK/EU Land Border Security Post-Brexit*, White Paper, UES Advisory, dated March 13, 2017.

- 5.12 In its position paper on the matter⁵⁴, the UK government has proposed that no physical infrastructure at all will be required at the border, and all compliance checks will be carried out electronically or at premises inside the border. Small and medium sized enterprises (SMEs), which it defines as business with up to 250 employees, would be exempt from customs formalities, and thus spared the cost of border frictions. Its position seems to be that false declaring and smuggling can be deterred by spot checks and audits away from the border, and enforcement achieved through criminal sanctions and/or civil penalties (again, practices that are common under existing EU customs regulation).
- 5.13 The UK's approach is bold, but given the historical and political context, and the amount of trade carried out by smaller businesses, understandable. It would require either the EU to agree derogations from the UCC, or for ROI to apply a very liberal enforcement of it. If the ambition of a border with no physical presence is not ultimately achievable, technology solutions are available to implement low visibility border surveillance, which would address concerns that ROI could become a 'back door' for goods to enter the EU market as UK and EU tariffs and regulatory standards diverge in coming years, while minimising the costs and other impacts.
- 5.14 The question of smuggling must be addressed, but it should be noted that smuggling takes place at all borders, and in fact takes place under the current border arrangement. The Irish border and smuggling have been synonymous since the 1920s. Fuel, tobacco, and cigarettes

⁵⁴Northern Ireland Office and Department for Exiting the European Union, *Northern Ireland and Ireland, Position paper by the United Kingdom* (August 2017) (available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/638135/6.3703_DEXEU_Northern_Ireland_and_Ireland_INTERACTIVE.pdf).

have been smuggled across the Irish border on industrial scales, with consequential revenue losses.⁵⁵

- 5.15 If a zero-tariff deal is not agreed between the UK and the EU, there will be potential evasion of tariffs at the Irish border. Success in that area will depend upon the customs regime created by the two states. If the ROI is required to impose the CET on imports from the UK, that could encourage illegal trade from NI and/or GB. The destination would principally be the ROI, but such trade could move further into the EU. If the UK also applied the CET, which will be its opening position as at the exit date, there could be a flow of goods into the ROI, from the rest of the EU, destined for NI or—more likely—for GB, in order to evade these duties. Smuggling into the UK, through a “soft” Irish border, would require counter-measures to be imposed by Belfast and/or London (some of these measures are outlined above). On the other hand, if a zero-for-zero tariff deal were agreed between the UK and the EU,⁵⁶ then the tariff evasion incentive would be removed, at least in the short term until the UK’s external trade policies materially diverge from the EU’s (although other incentives for smuggling would remain, such as the existing issue of excise duty fraud).
- 5.16 Existing successful borders between the EU and third countries include the EU–Norway border and the EU–Switzerland border. Key features of how these borders function are summarised below; they are regulated in practice by formal agreement between the relevant contracting countries.⁵⁷
- 5.17 The agreements in place between the EU and Switzerland and the EU and Norway are, in substance, very similar. However, there is some divergence. For example, the EU–Swiss agreement contains additional provisions dealing with dispute resolution by way of arbitration, which the EU–Norway protocol does not cover (by virtue of sufficient coverage

⁵⁵ NI Affairs Committee, *Fuel Laundering and Smuggling in Northern Ireland*, Third Report of 2010–12, HC 1504, March 27, 2012.

⁵⁶ See Singham and Hewson, *Brexit, Movement of Goods and the Supply Chain*, cited above.

⁵⁷ Agreement between the European Community and the Swiss Confederation on the simplification of inspections and formalities in respect of the carriage of goods and on customs security measures L199, July 31, 2009; and Protocol 10 on simplification of inspections and formalities in respect of the carriage of goods of the EEA Agreement.

of this area in the main body of the EEA Agreement). Similarly, the EU–Norway protocol deals separately with veterinary and plant health rules, which the EU–Swiss agreement does not.

- 5.18 The agreements apply to inspections and formalities concerning the carriage of goods between the customs territories of each contracting party. The parties are obliged to carry out such inspections and formalities with the minimum delay necessary and, in so far as possible, in one place, while implementing measures to ensure the free flow of traffic as far as possible. There is a focus on making customs facilitation technology-based and with minimal disruptions, with inspections to be carried out by way of random checks on a consignment-by-consignment basis or otherwise based on computerised risk analysis. Similarly, there is an express obligation on the contracting parties to use simplified procedures and data-processing and data-transmission techniques for the purpose of export, transit, and import of goods. The parties agree to recognise each other's custom checks and certifications.
- 5.19 There is emphasis on co-operation and close consultation between the contracting parties, particularly in relation to customs security matters. Administration of the EU–Switzerland agreement and the EU–Norway protocol rests on joint committees, which are made up of representatives from the EU and Switzerland, and the EU and European Free Trade Association (EFTA) members, respectively. The committees are responsible for ensuring proper implementation of the agreements, as well as deciding matters under question or seeking to agree resolution to disputes.
- 5.20 The UK should seek to agree a similar agreement with the EU regarding inspections and formalities of goods crossing the UK–EU border, whether at the NI–ROI border or elsewhere. It should be noted, however, that the simplification process may be frustrated in the event that EU and UK standards regulation diverges. In such a case, and in the absence of any other mutual recognition agreement, the EU or the UK may insist on additional inspections and certification of certain goods crossing the border (for example, agriculture or chemicals).

Considerations for Trade in Agriculture

5.21 Agriculture is a key sector traded between the ROI, NI, and GB. This includes not just products for placement on the market but also intermediate processing—for example, currently, livestock (particularly bovine) is regularly moved across the Irish border for dairy and slaughtering, and milk for processing. In our view, the only barrier preventing such practice from continuing would be if the EU refused to mutually recognise the UK's agricultural products standards and claimed risk of a transfer of disease, for example, bovine tuberculosis. The UK should seek to address this as a priority, as it will apply equally to agricultural exports to all other EU member states.

5.22 A baseline for these discussions will be the WTO SPS Agreement. Article 4 of the SPS Agreement provides that:

Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.

5.23 Since European and British standards for the production of agricultural products are presently identical, determining equivalence should be a relatively straightforward process after exit from the EU, and it is likely that any blocking of UK exports would be a violation of these equivalence provisions. The EU has, however, been historically reluctant to grant equivalence to other major agricultural producers in the first world, notably the US. As well as the cost of trade disruption to importers and consumers in member states, the UK has two forms of leverage in this area:

5.23.1 The UK (once it is outside the EU) will be able to bring WTO cases on violations of the SPS Agreement, as other WTO members have done in respect of the EU's

policies in this area, many of which have already been found to be violations.⁵⁸ This could ultimately involve costs and retaliatory measures being taken against the EU.

5.23.2 The UK will also be in a position to liberalise its own requirements for imports of agricultural products, both by way of tariff reduction and by according recognition to the SPS standards of other countries currently locked out of the EU market, thus increasing competition to EU producers and lowering prices. If the UK's SPS measures are not recognised by the EU, we would not recommend that the UK reciprocate, which would only compound the damage.⁵⁹ Unilateral equivalence recognition of the EU would be a strong signal of openness to the rest of the world and would put the UK in a strong position to bring action against the EU as outlined above. The EU would have lost leverage over the UK, as it would not be able to withdraw recognition on the grounds of non-compliant third-country products being allowed into the UK market. Ultimately, SPS and technical-barriers-to-trade (TBT) measures would form an integral part of an eventual UK–EU FTA.

5.24 In the longer term, the UK may wish to diverge from the EU's SPS standards and regulations that are currently in operation, both to liberalise trading arrangements with third-country trading partners and to improve innovation and productivity in the sector. As long as the measures in place continue to meet the EU's overall objectives of SPS protection, access to the EU market should continue under the terms of the SPS Agreement, even if the substance of the measures changes. In time, it could be that the opportunity cost of maintaining alignment with EU standards outweighs the benefits of market access, if export markets to third countries can be improved and products can be imported more cheaply from them, but this is a determination that can be made over time. A more detailed sectoral analysis will be required to establish whether the retention of the EU SPS measures in NI might be of more

⁵⁸ See, for example, WTO Case D26 *EC Hormones* (www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm).

⁵⁹ And, logically, would itself violate Article 4 of the SPS Agreement.

value than preservation of borderless trade in agriculture between NI and GB. Analysis by Oxford Economics suggests that, in light of prevailing market conditions in beef and dairy farming, establishing appropriate support payments post-CAP may be more critical than market access.⁶⁰

Free Zones—A Stimulus for Export Trade

- 5.25 Another measure available to both reduce border frictions and provide a stimulus to local economies is the establishment of free zones, or free ports. Free ports are areas that, although inside the geographical boundary of a country, are considered outside the country for customs purposes. This means that goods can enter and exit the port without incurring usual import procedures or tariffs, thereby incentivising domestic manufacturing and exporting.⁶¹ Although historically and commonly focused around ports, there is no reason why such zones should not be at inland locations, or indeed geographically dispersed and simply bound together by the participants complying with the rules of the zone, which may enable farmers and intermediate processors in the agricultural sector to take advantage of such a solution.
- 5.26 Establishing free ports on either side of the Irish border would allow goods to be processed within these locations without attracting tariffs (in the event that no zero-tariff deal is agreed, or in the case of goods imported from third countries), and traders within the zones would benefit from automatic expedited customs clearance, with compliance checks being carried out away from the border in the zone. The zones could also be supported by infrastructure investment, corporation tax incentives, and service-oriented facilities such as superfast broadband. Free ports could be established on both sides of the border, or potentially in a contiguous cross-border zone.

⁶⁰ *The Economic Implications of a UK Exit from the EU for Northern Ireland: A Briefing Paper*, Oxford Economics, February 2016 (d1iydh3qrygeij.cloudfront.net/Media/Default/Brexit/Brexit-NI-Report.pdf).

⁶¹ Rishi Sunak, *The Free Ports Opportunity*, Centre for Policy Studies (www.cps.org.uk/publications/reports/the-free-ports-opportunity).

5.27 It has been estimated that establishing free ports in the UK could create 86,000 jobs,⁶² and NI would be a leading candidate location for such a scheme. NI currently exports less than the rest of the UK to the rest of the world outside the EU,⁶³ so this kind of export-focused measure could progress the NI economy towards greater diversity.

6. An Immigration Border

6.1 The Irish border will be a part of the EU external frontier. Whether there is a withdrawal agreement or not, the question of the CTA, which remains—despite its age—remarkably uncodified, will need to be addressed.

6.2 When Ireland was divided in 1920–2, policymakers did not talk about emigration or immigration. Most people across the British Empire were British subjects, under recent statutory law on citizenship: the British Nationality and Status of Aliens Act 1914. People came and went as they wished, though increasingly passports were required to cross international frontiers.

6.3 The creation of the IFS in 1922, out of the UK, did not see a transfer of immigration and nationality powers. Travel between the IFS and the UK continued as if it had remained a part of the UK. This is the origin of the so-called CTA, which applies throughout the British Islands.⁶⁴ The *locus classicus* of this arrangement followed a trilateral political acceptance of the Irish border, by Dublin, Belfast, and London, in 1925.⁶⁵ As for Irish citizenship law, this developed slowly (with the Irish government providing administratively for Irish passports only in 1935): the main legal instrument was the Irish Nationality and Citizenship Act 1956

⁶² *Ibid.*

⁶³ Based on 2004–2014 data, *The EU Referendum and Potential Implications for Northern Ireland*, NIAR32-16, Northern Ireland Research and Information Service, January 2016.

⁶⁴ The British Islands comprise the UK, the Channel Islands, and the Isle of Man: Interpretation Act 1889 s 18 (1); Interpretation Act 1978, sch 1.

⁶⁵ Aliens Order 1925 (IFS); Aliens Order 1925 (UK).

(with extra-territorial effect in NI). The two states provided for reciprocal citizenship rights, and the ROI and the UK both deemed the other's citizens not to be aliens in their law.⁶⁶

6.4 The CTA may be presumed (disregarding the Channel Islands and Isle of Man) to have existed from shortly after December 6, 1922.⁶⁷ There is no express London–Dublin agreement, whether a treaty or otherwise. It was first acknowledged in Dáil Éireann on June 4, 1925, by the minister for justice.⁶⁸ The CTA was largely a matter of administration, and agreement between ministers in two national governments. In 1953 the UK referred to the CTA for the first time in legislation—in the Aliens Order 1953. If someone landed in the UK, including NI, they were permitted to travel on to the ROI. Equally, if someone landed in the ROI, they could travel on to NI and GB. Each state acted as an agent for the other. Contemporary UK immigration control dates from the Commonwealth Immigrants Acts 1962 and 1968. The Irish enacted the Aliens Order 1962. In 1999 the two legal systems were largely aligned: Aliens (Exemption) Order 1999 (ROI). UK law today is based upon the Immigration Act 1971 (and a succession of statutes), while the British Nationality Act 1981 (amended by immigration statutes) still deals with nationality.

6.5 The CTA—generally considered to be a success⁶⁹—has had a mixed history in the past ten years. First, in 2008–9, on the back of the plan to introduce identity cards,⁷⁰ the UK Home Office tried (unsuccessfully) to set up electronic immigration controls between Irish (including NI) and British sea- and airports. Technology drove this policy, which was defeated in the House of Lords. Second, following a change of government (and repeal of the identity cards law), the UK and the ROI signed a non-legally binding agreement, on December 20, 2011, committing to a joint programme of work on “measures to increase the security of the

⁶⁶ Aliens Act 1935 (Éire); Ireland Act 1949 (UK).

⁶⁷ There is reference to an informal agreement of February 1923.

⁶⁸ Dáil Éireann, *Debates*, vol. 15, cols. 316–18. His questioner, Tom Johnson, leader of the Irish Labour Party, had been born in Liverpool.

⁶⁹ As evidenced by all sides signalling that they want to maintain it.

⁷⁰ Following the Identity Cards Act 2006.

external Common Travel Area border” (there was also a non-binding memorandum of understanding, on visa data exchange).⁷¹ And third, on the back of this public affirmation, the two states have, since 2014, provided for the mutual recognition of visas for Chinese and Indian nationals,⁷² (again, with each state acting as agent for the other). These existing bilateral programmes to deal with third-country immigration, should be maintained and expanded where possible.

6.6 The CTA is, after nearly 100 years, a profound basis for UK–Irish co-operation, where the smaller state is, if anything, the more enthusiastic partner. This is how the Irish justice minister justified the 2011 agreement:

The CTA came into being in the 1920s and is based on the principle of free movement for nationals of the UK and Ireland. The CTA reflects ties of history and kinship and also labour market and business needs. It continues to be of immense importance to the economic, social and cultural wellbeing of both jurisdictions.⁷³

6.7 Maintenance of the CTA is one of the 12 negotiating priorities of the UK government as set out in its Brexit White Paper⁷⁴ and a core feature of the proposals in the August position paper, including a suggestion that it could be formally recognised in the Withdrawal Agreement.. Technically, because it may require amendment to the treaty protocol recognising it, other member states could resist this, but given the Council’s published position on constructive solutions for the Irish border, this would seem to be unlikely.

⁷¹Joint Statement by Mr Damian Green, Minister of State for Immigration, The United Kingdom’s Home Department and Mr Alan Shatter, Minister for Justice and Equality, Ireland’s Department of Justice and Equality, regarding co-operation on measures to secure the external common travel area border, December 20, 2011 (www.gov.uk/government/uploads/system/uploads/attachment_data/file/99045/21197-mea-sec-trav.pdf)

⁷²UK Government, British–Irish Visa Scheme Guidance (www.gov.uk/government/publications/british-irish-visa-scheme/british-irish-visa-scheme).

⁷³Department of Justice and Equality, press release, December 20, 2011.

⁷⁴The United Kingdom’s Exit from and New Partnership with the European Union White Paper, February 2017 (www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper)

The Implications of the ROI's Free Movement Obligations

- 6.8 The CTA can only work if both, or neither, of the UK and ROI participate centrally in the Schengen Area; at present, neither party does. The bilateral CTA long antedates European free movement of persons. The two have co-existed since 1973, and—in the absence of any express Irish desire to end the CTA—it is likely that this largely unwritten agreement will continue.
- 6.9 The Schengen system began to operate within the EU in 1985 with the Schengen Agreement, covering the five member states which wished to establish a borderless territory between themselves and a common external border. Under the agreement, border controls on persons were abolished. The Schengen Area (or Zone) now covers nearly all EU member states, EEA member states, and Switzerland. Under the 1997 Amsterdam Treaty, the Schengen *acquis* became a part of EU primary law,⁷⁵ and there are a number of regulatory measures that establish systems and rules to operate the controls and the external border (see, for example, the summary of the Schengen Information System set out below). For present purposes, there are three relevant protocols to the current treaties: first, the protocol on the Schengen *acquis* integrated into the framework of the EU; second, the protocol on certain aspects of Article 26 of the Treaty on the Functioning of the European Union (TFEU); and third, the protocol on the position of the UK and the ROI in respect of the area of freedom, security, and justice. The second protocol above, which refers expressly to the CTA, permits the UK and the ROI (for as long as the CTA remains in place) to exercise border controls against essentially EEA nationals (verification). This control is open to reciprocity by other member states against the UK and the ROI if they should so choose.
- 6.10 When the UK leaves the EU, the treaties will no longer apply to it. They will apply to the ROI, and that includes the (second) protocol on certain aspects of Article 26 of the TFEU. In EU law, the ROI will be the only state permitted to control immigration from the EEA (with

⁷⁵ The legal base is now in TFEU, Articles 67 and 77 and TEU, Article 3.

Irish emigration subject to possible reciprocal control in the other 26 member states). Those controls will not just be against third-country immigrants (including asylum-seekers), but will also include EEA nationals exercising treaty rights. It is, of course, the case that one set of laws will apply to the former, while EEA nationals will be able to rely upon the principle of the free movement of persons.⁷⁶ Nevertheless, the UK will be able to assert that, as long as the ROI continues to affirm the CTA (and it does⁷⁷), then the ROI will be controlling movement of third-country nationals into the ROI and the UK, and EEA nationals into the ROI pursuant to ROI's treaty obligations, and onward to the UK as third country nationals.

6.11 Provided that the UK permits visa-free entry into the UK for EEA nationals, it may be feasible to continue to rely on checks on entry at the Irish border with a process for random checks at the crossings to NI and GB to counter illegal immigration into the UK (which already occur in practice at ports and airports, and, in theory at least, at the land border). Issues with working and overstaying will remain a matter for the Home Office inside the UK border. This element would be no different for EEA nationals than for visitors from any other territory where nationals are permitted visa-free entry, but resourcing and enforcement may need to be intensified. This will be a wider concern, not just with reference to entrants to the UK via the ROI. The situation would become more complicated if visa requirements were introduced for visitors who are EEA nationals, or if the UK sought to restrict entry to the UK on grounds of criminal convictions or other grounds on which the ROI would not be permitted to exclude EEA nationals, such as previous immigration violations or refusal of entry to the UK.

6.12 The Home Office will no doubt be considering other measures to deter illegal immigration, including, for example, introduction of a requirement on UK employers to provide a register of their employees' National Insurance numbers on a regular basis. Failure to supply such information would be considered a secondary offence (alongside the existing civil and

⁷⁶TFEU, Articles 45–8.

⁷⁷See, for example, the address by the taoiseach to the Institute of European Affairs, "Ireland at the Heart of a Changing European Union", Dublin, February 15, 2017.

criminal penalties that employers currently face in the event that they fail to satisfy themselves of an employee's right to work in the UK). Such registers would be subject to audit by the Home Office.

6.13 Again, in-country checks in NI and GB will be required. This could include spot checks on routes from NI to the mainland, but this would be politically difficult as it would inevitably involve British nationals being required to prove their status. The House of Commons Northern Ireland Affairs Committee has noted that requiring checks on people travelling between different parts of the UK would be "highly undesirable".⁷⁸ In reality, to counter crime, smuggling, illegal immigration, and human trafficking, this is already done. The number and spread of crossing points mean that a determined immigrant would be unable to pass unchecked, but this is already a known issue with the current operation of the CTA.

6.14 The Irish ambassador to the UK told the House of Lords EU Committee:

It is of course true that an EU citizen could come to Ireland after Brexit, settle in Ireland and then decide to go across the border to Northern Ireland and then to Britain, but they would be illegal immigrants. As I understand it, most Europeans are not interested in being illegal in any European country ... It seems to me that only a relatively small number of European citizens would want to come to the UK illegally.⁷⁹

Whether or not this prediction turns out to be true remains to be seen. In any event, depending on the UK's future immigration policy, EU citizens are unlikely to be illegal immigrants simply by crossing the border. For an EEA citizen determined to stay or work illegally in the UK, a simpler route would be to fly to a UK airport or cross the channel as a visitor, and not return home, as is the case for any foreign national visiting the UK.

6.15 It may be conceivable that Irish immigration officials could ask EEA nationals whether they intend to travel onward to the UK, and if so, whether they intend to work, study, or stay; or if

⁷⁸Northern Ireland Affairs Committee, *Northern Ireland and the EU Referendum*, May 26, 2016.

⁷⁹Oral and written evidence, Q4, September 6, 2016.

they have ever been denied access to the UK before or have a criminal record, which would mean a visa may be required. Such officials could then pass intelligence on to the UK Border Force, but they could not, as things stand—barring agreement otherwise with the EU—prevent them from entering the ROI.

7. A Security Border

- 7.1 The Irish border demarcates the territories of two states. States, in international law, are entrusted with preserving external security. Domestically, the state seeks to guarantee internal security. An external threat, by legal or illegal movement, may become an internal one.
- 7.2 The ROI deals with internal security through its police (An Garda Síochána). In NI, the Royal Ulster Constabulary was rebranded and re-established in 2001 as the Police Service of Northern Ireland.
- 7.3 The NI Troubles, which may be dated from 1968/9 to 1999, are generally in the past. Operation Banner in NI—the British army's longest continuous deployment in its history—is dated from August 1969 to July 2007. The police in NI played a leading role in dealing with republican and loyalist paramilitary violence. The Irish police sought to defend its state, with co-operation from the NI police in dealing with a sectarian conflict.
- 7.4 Generally, it is unrealistic to suggest there might be a return to violence in NI, but that does not mean that security concerns, regarding crime and terrorism, have not had an impact on the immigration border, or that all efforts should not be made to ensure that peace is maintained, irrespective of trade considerations.
- 7.5 In 1997, the ROI empowered its immigration officers to begin checking the identity of passengers entering from, and leaving for, the CTA: Aliens (Amendment) (No. 3) Order 1997.⁸⁰ The underlying reason was the wave of migration in the 1990s, which, in Irish political discourse, saw the problem of Irish emigration replaced by that of foreign immigration. These

⁸⁰ See, further, Immigration Act 2004.

identity checks applied to Irish and UK nationals, in the sense that their CTA rights had to be verified. But they also applied to all passengers within the CTA, mainly those travelling by air, to a lesser extent by sea, and only occasionally, and initially, by land. Checking identity, as might have been foreseen, elided with immigration control, and significantly undermined the CTA. In December 2011, one Irish High Court judge (Gerard Hogan), referring to the requirement of passengers from the UK to show their passports at Dublin Airport despite the existence of the CTA, was provoked to comment: “Whatever about anyone else, Joseph Heller [author of *Catch-22*] certainly would have approved.”⁸¹ In practice, we understand that the inspection of passports is advised but rarely carried out.

7.6 Similarly, Operation Gull, a UK initiative dating from 2005 and supported by the ROI, seeks to bear down on illegal immigrants in the CTA. It is implemented mainly by the police in NI.

The Schengen System

The Schengen Information System (SIS) is an electronic database system which aims to preserve security in the absence of internal border checks, through creation of security co-operation between participating countries. Although the UK and the ROI are not members of the Schengen Area, they both participate in SIS within the context of law enforcement co-operation. Both countries have opted out of the common border control and visa provisions applicable to the Schengen Area. This means that EU citizens are subject to passport control on entry to the UK and the ROI (and vice versa for UK and Irish citizens travelling to the EU).

SIS permits competent authorities (for example, police) to consult and enter alerts on SIS regarding people and objects wanted under six specified categories. Such categories include persons wanted for arrest, missing persons, and objects wanted for seizure or use as evidence in criminal procedures. The alert system also provides information concerning the action required once the person or object is found.

⁸¹ Pachero v. Minister for Justice [2011] IEHC 491, para 18.

In this way, participants in SIS can communicate with each other on matters of security and crime prevention and co-operate to reach a resolution.

It is open to the ROI to become a full Schengen member; however, this would significantly undermine the CTA. Should the ROI join the Schengen Area, strict border control would probably need to be implemented for travel between the UK (including NI) and ROI, creating a hard immigration border between the two countries, as the ROI would no longer implement passport control on entry by EEA citizens.

In reality, the ROI and the UK obtain equal benefit from the existing bilateral co-operation and the existence of the CTA. The UK's participation in SIS and other security and justice programmes following the exit date will be a matter for the wider negotiations, but would clearly assist in maintaining the CTA at an adequate level of security on both sides of the Irish border. This would also need to be supported by the UK and the ROI actively using SIS and (in the ROI's case, at least) exercising their rights to exclude individuals who pose a risk to security.⁸²

8. The Belfast Agreement

8.1 The 1998 Belfast Agreement (also known as the Good Friday Agreement), between the UK and the ROI, involving political parties in NI, does not materially impact on the question of the Irish border. After the EU referendum, claims were made by NI legal parties, with support from Scotland, to the effect that the constraints of the settlement provided for under the Belfast Agreement prevented the UK government from issuing notification under Article 50. These claims were rejected by the High Court in Belfast, and did not impress the justices in the Supreme Court: by 11 to nil, they held that the Belfast Agreement, and the resultant Northern Ireland Act 1998, had no effect on the question of Article 50 notification to the EU.⁸³

8.2 However, there is some relevance in the Strand Two (north–south) part of the multi-party agreement, annexed to the British–Irish agreement. That led to another international

⁸²Under Article 27 (1) of Directive 2004/38.

⁸³R (Miller) v. SoS [2017] UKSC 5, paras 126–52 & 242, 243, and 277.

agreement, of March 8, 1999 (which entered into force on December 2, 1999), establishing six north–south implementation bodies, or international organisations created out of the two states. They are, however, under a Belfast–Dublin ministerial council, another creation of the Belfast Agreement as it developed. The bodies deal, respectively, with: inland waterways; food safety; trade and business development; special EU programmes; language; and aquaculture and marine matters.⁸⁴

8.3 It will be beneficial for NI and ROI authorities to continue to work together using existing bodies as vehicles where relevant. Co-operation across the border in this way will be key to devising, implementing, and then overseeing and developing measures to minimise disruption and maximise opportunities for the UK and the ROI following the exit date, as well as preserving the existing co-operation and interdependence between the ROI and NI in key sectoral areas.

8.4 The Special EU Programmes Body, in particular, is important, less for what it does and more for what it might do. Its concern was, and is, EU structural funds. These were spent in the ROI, and also in NI. The idea was that a north–south body could co-ordinate departments in Belfast and Dublin. When the UK withdraws from the EU, this body will be fractured (unless, as some—including the Irish government⁸⁵—have called for, NI continues to participate in some EU programmes that entail continued funding). If there are no structural funds destined for NI, the UK continuing to sit on a co-ordination body with Irish government would be unnecessary and, for the Irish government, undesirable.

8.5 However, the body will then occupy a space which needs to be filled. The ROI will require the UK, under the Belfast Agreement, to agree another set of functions, whether connected

⁸⁴This body is called the Foyle, Carlingford and Irish Lights Commission. London and Dublin have failed to agree regarding Irish lighthouses (which were never transferred by the UK to the ROI). The UK's recent response to questions concerning Foyle and Carlingford is to refer to this body. But co-operation regarding aquaculture does not address the two aspects of the territorial dispute.

⁸⁵*Ireland and the Negotiations on the UK's Withdrawal from the European Union: The Government's Approach*, May 2017, page 23 (www.merrionstreet.ie/MerrionStreet/en/EU-UK/Key_Irish_Documents/Government_Position_Paper_on_Brexit.pdf).

with the EU or not. The ROI will have support within NI. The Special EU Programmes Body could, through another international agreement, also involving the government of NI (after its restoration subject to the ongoing negotiations between the Democratic Unionist Party and Sinn Fein), become a body dealing with trade over the Irish border and oversee co-operation on border facilitation and enforcement.⁸⁶ The North South Ministerial Council can continue to fulfil its role under the Belfast Agreement of “considering the EU dimension of relevant matters including implementation of EU policies and programmes” (the policies and programmes in this case being trade and customs facilitation).⁸⁷ Its other functions of co-operation on “matters of mutual interest within the competence of the Administrations, North and South” will, of course, continue. The meetings required to “consider cross-sectoral matters (including in relation to the EU) should continue, and the reference to the EU will remain relevant due to the ongoing importance of EU trade policy and regulation”.

9. The Single Electricity Market

- 9.1 The Single Electricity Market (SEM) was implemented in 2007 and created a wholesale electricity market across NI and the ROI. The SEM is designed to be a competitive and efficient market that has at its core the aim of delivering reliability and affordability for users.
- 9.2 The SEM is operated by the Single Electricity Market Operator (SEMO), which is a joint venture between EirGrid plc (the electricity system operator for the ROI) and SONI Limited (the electricity system operator for NI and part of the EirGrid group). SEMO is licensed and regulated cooperatively by the Commission for Energy Regulation in ROI and the Utility Regulator for Northern Ireland in NI.
- 9.3 The SEM allows a free trade of power across the island, with all generators and suppliers trading through a central mandatory wholesale market. It involves the physical sharing of electricity across the NI and ROI grids, with commercial sharing of the same pool of power

⁸⁶The existing trade and business development body—InterTradeIreland (www.intertradeireland.com)—is basically concerned with joint promotion, which should continue.

⁸⁷Section 17 of Strand Two of the Belfast Agreement.

by all industry participants in both jurisdictions. Mandated and maintained by national laws in both NI and the ROI, the SEM stems from a desire shared by NI and ROI regulators and governments to co-operate in this field. While consistent with EU law, the arrangements were not required by overarching EU directives. As a result, the foundations and legal basis of the SEM would remain unchanged on the UK's exit from the EU. While the UK and ROI governments could in principle seek to withdraw from the SEM, it seems unlikely that there would be any desire to consider such an outcome in the absence of an irresolvable incompatibility with the post-Brexit arrangements between the UK and the EU.

9.4 An accurate analysis of any proposed and related changes is made more complicated by the proposed Integrated Single Electricity Market (I-SEM). The I-SEM is a new wholesale electricity market designed to integrate the all-island electricity market with European electricity markets, enabling the free flow of energy across borders. I-SEM redesigns the existing SEM to bring it in line with EU energy regulation, specifically the EU Target Model. The EU Target Model was proposed under the EU's 2009 Third Energy Package of directives with the aim of achieving a liberalised EU energy market, prioritising the efficient trading of energy across borders. It is expected that I-SEM will be implemented by 2018. The aspects of the mandate for implementation of I-SEM deriving from EU law could potentially cease to apply to NI on UK withdrawal. However, such a mandate may be inextricable from other policy drivers for I-SEM, and I-SEM may be seen as a beneficial change in any event. I-SEM largely acts to correct existing deficiencies in the SEM. It remains to be seen whether the UK will maintain energy legislation aligned to that of the EU following withdrawal, although many experts in the sector consider it likely. Many of the EU's Third Energy Package directives mirror the UK's energy strategy as a whole, and the UK had previously announced prioritisation of the Third Energy Package as part of its own energy strategy. The EU had modelled some elements of the Third Energy Package and previous energy directives on the UK market design. Relevantly, the recent Government's White Paper in May 2017 recommended that Government protect the continued operation of SEM and implementation

of the I-SEM project through the UK's wider access to the Internal Energy Market or alternatively through special arrangements for the island of Ireland.

9.5 In order to preserve the unique electricity market on the island of Ireland, certain practicalities will need to be considered. For example, if the UK government does not accept that any disputes in this respect should fall within the jurisdiction of the European Court of Justice, a solution for the SEM (or I-SEM) will need to be found. Similarly, the UK's withdrawal from the EU internal energy market may cause difficulties for NI if UK law and EU law begin to diverge to the extent that the SEM (or I-SEM) can no longer be maintained for reasons of regulatory and state aid differences between NI and the ROI. In order to avoid this risk to the stability of the SEM (or I-SEM), the UK might seek to agree an exception for NI from withdrawal from the EU internal energy market, though this would need to be agreed by the EU, and it is likely that any perceived separation of NI from the UK would be politically sensitive (although in reality the NI energy market is already separate from the rest of the UK). Alternatively, NI might be able to remain in the SEM (or I-SEM) and aligned to the UK, if it is prepared to implement a dual regulatory system reflecting both EU and UK laws. The disadvantages of such an approach are the cost and complexity for industry of compliance with two regulatory systems. Such costs would probably be passed on to NI and ROI consumers in higher electricity prices, further heightening any existing issues of affordability in the region. In reality, as the ROI will continue to be bound by EU law for as long as it remains a member of the EU, in the event of a conflict between EU and GB law, it is inevitable that EU law would prevail. In addition, it is questionable whether the substantial disadvantages of complexity and cost in maintaining such a dual approach are proportionate to any benefit for NI in being aligned to the laws governing the separate GB energy market.

9.6 Given the unique nature of the SEM, the UK government could choose to increase the devolution of energy legislative powers to the NI government. Historically, legislation implemented by the UK government has been criticised for failing to take into account potential adverse impact on the SEM. For example, when the carbon price floor was

introduced in 2013, the original proposal was that it would apply equally to NI. Such application would have rendered NI unable to maintain the SEM. As a result, NI regulators and companies lobbied extensively to obtain an exception for NI, which was eventually granted by the UK government. It would be prudent to ensure early engagement of the NI government in energy regulation matters in order to minimise any disruption to the SEM (or I-SEM). In any event, UK energy regulators should be invited to meet together in a regular forum to discuss strategy and regulation to ensure it remains coherent nationwide.

9.7 Gas and refined oil has historically been an important import for ROI from the UK.⁸⁸ In recent years, ROI has been less dependent on UK gas imports due to the discovery of the Corrib gas field. However, the reserves in the Corrib gas field are estimated to equate to only 3.5 years of total gas usage in ROI⁸⁹. Once the field has been depleted, it is likely that ROI will need to revert back to importing most, if not all, of its gas from the UK. In light of this, all efforts to maintain a close trading relationship between the two states should be exercised.

9.8 In light of the interoperability of the energy networks of NI and the ROI and the historical success of, and political will behind, the SEM, it is likely that the governments of both regions will be keen to preserve it in its current form.

North–South Interconnector

9.9 Security of supply remains a concern for NI and the ROI, and it is key to prioritise this to ensure economic stability and growth in both regions. The concern for the ROI, in particular, is likely to be that, following the UK's exit from the EU, it will find itself reliant on interconnection via the UK, which will then constitute a third country.

⁸⁸ In 2012, UK imports accounted for 92% of the total gas used in Ireland and 93% of refined oil products. Energy Supply Security 2014, International Energy Agency (https://www.iea.org/media/freepublications/security/EnergySupplySecurity2014_Ireland.pdf)

⁸⁹ Ray Bassett, Policy Exchange, *After Brexit: Will Ireland be next to exit?*, June 2017 (<https://policyexchange.org.uk/wp-content/uploads/2017/07/After-Brexit-will-Ireland-be-next-to-exit-1.pdf>)

- 9.10 There is only one existing interconnector that has sufficient capacity to share large volumes of electricity between the two networks. For this reason, the Tandragee–Louth (275 kV line) interconnector is central to continuation of the SEM and necessary (because of safety protocols) for the two smaller interconnectors of 110 kV lines to remain in place. A significant additional interconnection has been proposed, involving the instalment of a 400 kV line between County Tyrone and County Meath.
- 9.11 Precautionary measures have been taken in respect of the existing 275 kV interconnector to minimise the risk of issues and loss of supply—for example, by capping capacity at 300 MW of power in either direction. However, this clearly has a detrimental impact on the efficiencies of the existing networks and reduces the effectiveness of the existing network infrastructure. With the introduction of a second interconnector, the pressure on the 275 kV interconnector is reduced and efficiency of the existing infrastructure will be maximised to ensure that electricity may flow between the regions without limitation. It has been predicted that a blackout caused by the existing limitations of the present interconnectors would cost the local economy in NI up to €164.5 million per day.
- 9.12 A 2014 study found that an additional North–South interconnector would result in a reduction in system costs of approximately 1.5 percent. Such a reduction in costs will enable suppliers to offer more competitive pricing to NI consumers. Should this be the case, it has been estimated that users will make savings in excess of €20 million per annum in total on their electricity bills (provided that such cost savings are passed through).⁹⁰
- 9.13 In terms of status, SONI reports that it expects the NI planning decision on the North–South interconnector to be announced in Q3 2017. Planning approval was granted for the section of the project that falls within the ROI on December 21, 2016. The estimated construction

⁹⁰ Grant Thornton, *Strengthening the all island electricity network by 2020: The benefits of increasing grid interconnection between Northern Ireland and the Republic of Ireland*, February 2017

([https://www.ibec.ie/IBEC/Press/PressPublicationsdoclib3.nsf/vPages/Newsroom~north-south-interconnector-needed-ahead-of-brexit-threat-10-04-2017/\\$file/North-South+Interconnector+report.pdf](https://www.ibec.ie/IBEC/Press/PressPublicationsdoclib3.nsf/vPages/Newsroom~north-south-interconnector-needed-ahead-of-brexit-threat-10-04-2017/$file/North-South+Interconnector+report.pdf))

timeline is estimated by SONI to be approximately three years from the date of planning consent. As NI will no longer sit within the EU by the anticipated completion date, it will be key for the NI and UK governments to work to ensure that the project is completed (for example, by working to preserve the integrity of the SEM).

Additional Interconnection

- 9.14 Although not in current plans, as a consequence of the existing issues outlined above, NI might benefit from construction of an additional interconnector to a third country. One such possible interconnection would be to the Icelandic energy network. Such an interconnection would help safeguard NI's electricity supply in the event that attempts to retain the SEM with the ROI fail and spread the risk of reliance on interconnection with a third country. In any event, since early 2014, NI has consistently imported more power from the ROI than it has exported. Iceland has a unique energy position, being the only country in the world to generate 100 percent of its energy from renewable sources (through hydropower and geothermal generation). An interconnection between the two countries would reassure existing businesses in NI and encourage new businesses to locate themselves in NI, by spurring economic growth and providing a guarantee of an unwavering supply of electricity in the region. Similar pro-competitive benefits would arise for consumers as in the case of the North–South interconnector.
- 9.15 A similar project was proposed (although subsequently delayed by the Brexit vote), known as IceLink. IceLink is a project to run an interconnector between Scotland and Iceland, with a projected operational date of 2027. Whether or not this project will go ahead has not yet been confirmed. This would have the further advantage of building on ties with Iceland, for whom the UK is a key trading partner, and with whom the UK will need to work on other issues such as fishing rights.

UK Energy Market

9.16 In the recent Queen's Speech, the UK government indicated that one of its legislative goals over the next couple of years aligns with this recommendation. Specifically, the UK government stated that it would be creating a fairer market for consumers, to include a focus on measures to tackle unfair practices in the energy market to help reduce energy bills, and any solution for NI and the SEM should also look to achieve this.⁹¹

10. Conclusion

10.1 Drawing together the threads above, we show how the Irish border might be managed in a way to minimise disruption and enable the UK as a whole to pursue opportunities from the date it formally leaves the EU, on 28 March 2019 or before. The issues in connection with the Irish border are complex and varied, but they are capable of resolution; and such resolution does not require broad derogations for NI from wider UK–EU arrangements, which would have negative effects on the much more important trade between NI and GB.

10.2 There is a broad consensus for maintaining the soft border of recent years, even on top of its solid foundation in international law. How hard the border needs to become depends upon:

10.2.1 the extent to which the ROI implements EU policy (however flexible that policy might be); and

10.2.2 the interaction of the three conceptual borders discussed above: trade; immigration; and security.

While we have looked at each of these borders alone, it is the interplay of all three which determines how hard the Irish border needs to be.

10.3 Free trade across geographical Ireland has prevailed since the 1965 Anglo–Irish FTA. The EU built on that foundation, and although the ROI now trades widely with the rest of the EU and the world, the trade links between the ROI, NI, and GB are important to all three territories.

⁹¹ Queen's Speech 2017 (www.gov.uk/government/speeches/queens-speech-2017).

There is therefore strong bilateral commitment to maintaining a soft trade border. The key issues are: what will the nature of the UK–EU agreement be,⁹² as both the UK and the EU have affirmed UK withdrawal from the customs union and single market? And will mechanisms specific to the Irish border be worked into the withdrawal agreement and any ultimate FTA between the UK and EU that would allow an integrated approach to be adopted, within the parameters of EU law?

- 10.4 We have recommended a number of measures (legislative and technological) to deal with the goods border, first on an interim basis and ultimately as part of a deep and wide-ranging FTA, including projects that would deliver wider economic benefits and jobs to the region, such as the establishment of free zones. We have also outlined mitigating steps that the UK can take if the EU insists that the ROI puts trade barriers in place. Ultimately, the balance of trade and structure of the NI economy are such that the ROI (being unable to unilaterally take mitigating steps) is likely to be damaged more by such barriers (on account of its trade with GB).
- 10.5 The CTA is key to the Irish border after the UK's exit from the EU. It rests on Irish and British self-interest—namely, the desire to travel freely across the border and trade without impediment. Paradoxically, given its longevity (since 1923), there is no international agreement; it rests on ministerial co-operation, which has taken different forms at different times. The CTA has also appealed to UK self-interest, not least having the Irish state act as its agent on the immigration front. There are a number of issues: (1) Could the CTA be articulated as a bilateral international agreement on the occasion of Brexit (with or without any reference to the EU)? (2) While the principle of reciprocity has been important, could this be maintained by London and Dublin with the EU external frontier shortly to intrude? Indications from the EU so far in its Guidelines and Directives indicate that it can.
- 10.6 The ROI and the UK have rights to internal security, and legitimate additional international security concerns. Looking at the CTA with reference to the immigration border, it is

⁹² Every FTA has an extensive customs and trade facilitation chapter, and the EU–UK agreement will have such a chapter.

unfortunate that it was accentuated by security (namely identity) concerns, first by the ROI in 1997, and then by the UK in 2008–9. Arrangements around the Irish border with respect to immigration should continue to manage these security concerns while allowing the CTA to function properly. In practice, this is an issue that the ROI and the UK have been dealing with for many years, and they will continue to do so.

10.7 With respect to the SEM, it is highly likely that the governments of the ROI and NI will continue to work closely together in efforts to ensure its continuity. As referenced in this paper, there are a number of possible interconnection projects that may increase security of supply for NI and the ROI, as well as resulting in a reduction of costs for consumers. In the UK as a whole, the UK government should seek to address existing barriers to entry and anti-competitive practices with the ultimate goal of reducing energy pricing for consumers.

10.8 Finally, it is the argument of this paper that, with the ROI remaining in the EU, the key to managing the Irish border (as part of the EU's external frontier) will be the UK proposing that the CTA comes under a bilateral international agreement, which will continue to have effect through the EU treaties. Further, it is argued that freedom of movement for UK and Irish nationals will not be undermined by excessive security concerns provided that both the UK and the ROI are able to continue their participation in the SIS and other security co-operation mechanisms, at both EU and bilateral level. On this basis, and on the assumption that the UK does not introduce visa requirements for visitors from EEA members, there would be no practical difference in border controls within the CTA, although behind-the-border monitoring and enforcement would need to be increased.