



# **BrexitLawNI**

# **Policy Report:**

Brexit and North-South Relations

[brexitlawni.org](http://brexitlawni.org)



# BrexitLawNI

Brexit and Northern Ireland: The Constitutional, Conflict Transformation, Human Rights and Equality Consequences.

## About BrexitLawNI:

BrexitLawNI is a collaborative ESRC-funded research project between the Law Schools of Queen's University Belfast and Ulster University, and the region's leading human rights organisation, the Committee on the Administration of Justice (CAJ). Our project examines the constitutional, conflict transformation, human rights and equality consequences of Brexit.

Northern Ireland (NI) (along with Scotland) voted to remain in the European Union (EU); it is the region of the United Kingdom (UK) most likely to be negatively affected by the decision to leave the EU. Many complex questions have been arising, with significant legal and constitutional consequences that demand considered reflection. This initiative has aimed to meet this need by disentangling the legal elements of Brexit with regard to Northern Ireland, and presenting and communicating the related implications for policy and practice in user-friendly formats.

The main outputs for this project are the policy reports covering the 6 themes of the project: the peace process; north-south relations; border controls and free movement in and between Northern Ireland, the Republic of Ireland and Britain; xenophobia and racism in Northern Ireland; the impact on socio-economic rights; and wider human rights and equality issues.

**ESRC:** (Grant Reference ES/R001499/1)

## Authors

The following reports were authored by the members of the BrexitLawNI team: Professor Colin Harvey (QUB), Dr Amanda Kramer (QUB), Professor Kieran McEvoy (QUB), Dr Anna Bryson (QUB), Professor Rory O'Connell (UU), Brian Gormally (CAJ Director), Daniel Holder (CAJ Deputy Director), Fidelma O'Hagan (CAJ), Emma Patterson-Bennett (CAJ), Gemma McKeown (CAJ).

## For further information

**Website:** [www.brexitlawni.org](http://www.brexitlawni.org)

**Twitter:** @BrexitLawNI

**Facebook:** [www.facebook.com/brexitlawni/](http://www.facebook.com/brexitlawni/)

**Email:** [brexitlawni@qub.ac.uk](mailto:brexitlawni@qub.ac.uk)

**ISBN:** 978-1-909131-75-0

© 2018

Reports published 14 September 2018

The Reports were designed by  
Colin Slack: [www.csgwd.com](http://www.csgwd.com)

## Funded By:



## Project Partners:



# Executive Summary

## Severe Consequences for North-South Relations

Brexit is already having a significant impact on North-South relationships. When the process of exiting the EU is complete, it will turn the border on the island of Ireland into an external border of the EU. NI will face Ireland as part of a 'third country', in a context where the majority voted to remain and where there are extensive arrangements for North-South engagement and cooperation. EU membership has assisted in rendering the border on the island virtually invisible for most practical purposes and this has helped to ease tensions.

Brexit will make the task of maintaining North-South cooperation considerably more difficult and determination, flexibility and imagination will be required to address the problems that will arise. Concern was consistently expressed during our project about the implications and consequences of Brexit for North-South relations by interviewees, stakeholders and those who participated in our Townhall meetings.

## An Invisible Border?

One of the great achievements of recent times has been the increasing invisibility of the border and the scale and extent of good relations and close cooperation on the island. While this is most evident in the areas of trade and the economy, it is plain in other contexts too, such as policing, security and justice.

## Negotiating the Fear of a Hard Border

The negotiations on the Withdrawal Agreement, Protocol and future relationship between the EU and the UK are vital. In principle at least all participants agree that a hard border should be avoided and that the progress on the island of Ireland should be nurtured and built upon. Serious disagreements have emerged though in the translation of these aspirations into practical commitments and legally binding text. There are genuine tensions in these discussions. Many have highlighted the need for full alignment on the island of Ireland if the overall objectives are to be achieved (whether this is delivered via the UK-EU relationship or a special arrangement designed for NI). However, this has conflicted with the UK government's desire to leave the single market and the customs union.

The proposals advanced on the future relationship have not inspired confidence that North-South cooperation will continue in the form it currently takes and there is considerable anxiety that even if unintended, a hardening of the border will be the practical result.

### Recommendations:

- BrexitLawNI agrees that the emphasis placed on North-South cooperation in these discussions is appropriate and **our research reveals widespread concern about the long-term impact of Brexit on relationships on the island of Ireland.**
- We conclude that **there is a need for a Protocol that fully respects the commitments given in the EU-UK Joint Report** in order to ensure that the unique circumstances of NI are reflected in the future EU-UK relationship and any specific solutions that are proposed.
- In our view, **it is difficult to see how anything short of full alignment on the island of Ireland will secure the objectives sought by participants**, and in the absence of a UK-wide solution, we see merit in agreeing a package of measures or special arrangements that are respectful of NI's challenging circumstances. Such an outcome would be protective of existing North-South cooperation but also carry significant economic, social and political advantages for NI.
- We also note that the B/GFA contains solutions to some of the challenges presented by Brexit and **underline the role that institutions such as the North-South Ministerial Council** might play in the future. However, these mechanisms were designed before Brexit and thought will need to be given to further reform to ensure they are able to withstand and absorb the pressures and strains that will arise.

# Table of Contents

<b>A. Context</b> .....	<b>7</b>
<b>B. Themes</b> .....	<b>11</b>
<b>Nurturing North-South Cooperation</b> .....	<b>11</b>
<i>The North-South Ministerial Council</i> .....	11
<i>Sharing the Island: All Island Civic Dialogue</i> .....	12
<i>Thinking about East-West Cooperation</i> .....	13
<i>Impact of the EU on North-South Relations</i> .....	13
<i>European Funding</i> .....	16
<b>Cross Border/All-Island Programmes</b> .....	<b>16</b>
<i>Energy</i> .....	17
<i>Healthcare</i> .....	17
<b>Trade and Economy</b> .....	<b>18</b>
<i>All-Island Supply Chains and the Agri-Food Sector</i> .....	19
<b>Memorandums of Understanding</b> .....	<b>19</b>
<b>C. Impact of Brexit</b> .....	<b>20</b>
<b>Nurturing North-South Cooperation</b> .....	<b>21</b>
<i>The Constitutional Status of NI</i> .....	21
<i>North-South Ministerial Council</i> .....	24
<b>East-West Relations</b> .....	<b>26</b>
<b>EU Funding</b> .....	<b>27</b>
<b>Cross Border/All-Island Programmes</b> .....	<b>28</b>
<i>Energy</i> .....	28
<i>Healthcare</i> .....	29
<b>Trade and Economy</b> .....	<b>30</b>
<i>All-Island Supply Chains and the Agri-Food Sector</i> .....	32
<b>Memorandums of Understanding</b> .....	<b>33</b>
<b>D. Ways Forward</b> .....	<b>34</b>



# BrexitLawNI

# Policy Report

Brexit and North-South Relations

## A. Context

Common membership of the EU has been a basic building block of improved relations across these islands and on the island of Ireland in particular.<sup>1</sup> Brexit has therefore promoted deep anxiety about future cooperation and the period since the referendum has witnessed a deteriorating situation (including relationships between the unionist parties and the Irish government). During the negotiation process the NI/Ireland issues moved to the centre of the discussions, including disagreements over a proposed Protocol. All sides however appeared to agree on the need to avoid a hard border and to ensure North-South cooperation continues.<sup>2</sup>

The institutions designed to deal with these relationships were carefully crafted within the Belfast/Good Friday Agreement (B/GFA).<sup>3</sup> It has been argued that the B/GFA 'set out to manage conflict by re-defining three sets of relations central to the conflict: relations between the NI parties (Strand 1); North/South relations (Strand 2) and East-West or British-Irish relations (Strand 3).<sup>4</sup> This is accomplished through a number of measures, including (but not limited to) agreement on the constitutional status of NI (with the possibility of a referendum on Irish unity), British-Irish identity, power-sharing and North-South institutions, and equivalence guarantees.<sup>5</sup> It has been argued that the continued development of cross-border relations is not only central to the B/GFA, but also more generally to maintaining peace.<sup>6</sup> Some have expressed concern that Brexit has prompted the reopening of conversations that were long considered to be settled. Thus, debates about the role of established institutions, but also more broadly about what level of cooperation should exist, have re-emerged – particularly amongst nationalist and unionist politicians in NI.

1 BrexitLawNI, Interview with Martina Anderson, Sinn Féin MEP (Derry, 16 February 2018): 'every facet of strategic planning in this area now is ... done with a view that this is a north-west region, it's not Derry or Donegal anymore, we're part of the same region and that's the way this was before partition arrived and all that's been developing and growing and working. People cross the border daily for everything, every facet, petrol through to work, healthcare, education all that is ... done as if there's no border.' BrexitLawNI, Interview with Claire Hanna, SDLP MLA (Belfast, 20 February 2018): 'I think ... regulatory alignment and all that ... removed the kind of practical barriers to further integration and that coupled with the Good Friday Agreement just allowed North-South to be a lot easier.'

2 It is notable, for example, that the EU (Withdrawal) Act 2018, s 10: attempts to provide protection for North-South cooperation as well as the avoidance of a hard border.

3 Tom Mullen, 'East-West and North-South: Northern Ireland's relationship with the UK and Ireland' (21 June 2017) University of Glasgow, Slide 21 <[https://www.gla.ac.uk/media/media\\_548139\\_en.pdf](https://www.gla.ac.uk/media/media_548139_en.pdf)>.

4 Research and Information Service (RiSe) of the Northern Ireland Assembly and of the Library & Research Service of the Houses of the Oireachtas, 'Paper 1: Impact of Brexit on Cross-Border Activity' (Paper 88/16, 18 November 2016) North/South Inter-Parliamentary Association, 19 <<http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2016-2021/2016/northsouth/8816.pdf>>.

5 *ibid.*

6 *ibid.*, 26.

Cross-border relationships have been a strong feature of the peace agreements, 'all successor agreements to the Good Friday Agreement include strong-cross border dimensions and clear roles of leadership for the Irish government alongside that of the UK'.<sup>7</sup>

Jennifer Todd argues that although the B/GFA was concluded in 1998, it took over a decade for relations to improve between the North and the South.<sup>8</sup> Her research carried out in the early 2000s found that, South of the border, perceptions of NI tended to be quite negative and people were hesitant and often unwilling to engage with people from the North. Follow-up research conducted in 2014 found that these trends had changed drastically, but that this progress was often limited to the border region. Much of this progress is due to the fact that, since the end of the conflict, there had been a significant amount of effort focused on encouraging people to live cross-border lives.<sup>9</sup> The removal of border infrastructure made it easier for people to travel to work, go to school, visit friends and family, and do their shopping. Through the provision of EU funding, such as the INTERREG programmes, initiatives have been developed to support local economies by, for example, helping businesses to expand their work across the border, and assisting with the development of specific cross-border industries like geo-tourism.<sup>10</sup>

While receiving very little attention in the lead up to the Brexit Referendum,<sup>11</sup> the issues related to North-South relations have gained prominence since then. Together, the EU Commission and UK have conducted a mapping exercise of the potential impacts of Brexit and have identified 142 areas of North-South cooperation.<sup>12</sup> As outlined by Tony Connelly in an interview with BrexitLawNI, in this exercise, it has become clear that EU law and regulations have been central to this cooperation,

once that mapping exercise was brought to Brussels, then of course Irish and British and European Commission officials began to go through it forensically to see at what point of these North-South cooperation areas does it intersect with EU law and regulations. And the Task Force view was, well it's immediate you know, nearly everything you touch, or every part of those North-South areas of cooperation have some implication or some requirement for mutual EU membership for it to function properly and effectively.<sup>13</sup>

7 David Phinnemore, Katy Hayward, and Lisa Whitten, 'UK Withdrawal ('Brexit') and the Good Friday Agreement' (PE 596.826, November 2017) Policy Department for Citizens' Rights and Constitutional Affairs, 18 <[http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596826/IPOL\\_STU\(2017\)596826\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596826/IPOL_STU(2017)596826_EN.pdf)>.

8 Jennifer Todd, 'Lessons from along the Irish border on north-south relations after Brexit' *The Conversation* (20 September 2017) <<http://theconversation.com/lessons-from-along-the-irish-border-on-north-south-relations-after-brexit-82297>>.

9 Katy Hayward, 'Bordering on Brexit: Views from Local Communities in the Central Border Region of Ireland/Northern Ireland' Centre for International Borders Research & Queen's University Belfast (November 2017) 12 <<https://www.qub.ac.uk/brexit/Brexitfilestore/Fileupload,780606,en.pdf>>.

10 *ibid*, 25.

11 Cathy Gormley-Heenan and Arthur Aughey, 'Northern Ireland and Brexit: Three Effects on 'the border in the mind' (2017) 19 *British Journal of Politics and International Relations* 508.

12 Lisa O'Carroll, 'Hard Brexit would hit 142 Irish cross-border agreements' *The Guardian* (27 November 2018) <<https://www.theguardian.com/politics/2017/nov/27/hard-brexit-would-hit-142-irish-cross-border-agreements>>.

13 BrexitLawNI, Interview with Tony Connelly, RTE Europe Editor and Brexit Author (Belfast, 21 May 2018).



Katy Hayward argues that ‘generations of severe social, political, and economic challenges in the Central Border Region, not to mention the experience of violent conflict ... has begun to prove the viability and value of cross-border cooperation.’<sup>14</sup> Although these relationships and connections have been carefully constructed, Hayward argues that they remain vulnerable. She contends that Brexit will pose a major challenge to these cross-border relationships, a challenge which will be felt most acutely in the border regions due to its periphery from the centre and history of deprivation.<sup>15</sup> These themes were also reflected in many of our interviews and Townhall meetings. For example, in our interview with Martina Anderson, Sinn Féin MEP, she emphasised the complexity of the North-South issues,

... Blue tongue could not have been tackled other than it was when there was an all-Ireland animal health strategy. You know the whole issue of Foot and Mouth, the damage that that caused to the island, if that happened in a post-Brexit situation where you had two different regulatory standards you know you can just imagine what that would do by way of impact. Altnagelvin hospital, a critical mass of the hospital is the looking at Sligo, Donegal, so they’ve captured that geographical mass, and if we had been arguing for such a facility post-Brexit you wouldn’t have that critical mass to be able to make that case. The Children’s Heart Surgery in Dublin ... tens of millions that was put into that. Patients travelling, aviation, the whole issue of people were talking about Brexit and the removal of the EU from the rules and regulations but there’s very little focus or attention being given ... I’m looking at the problems of this is just every area you look at and this is alarming! And we’re trying to talk to ... people who have cancer, people who are struggling, people have had enough, you’re conscious about how you would say this to a community of people who are probably in themselves everyday of their lives it’s a struggle, and they shouldn’t have to even worry or think about that as well ... Transport, road, communication, the list is endless. I don’t think there is you know, any area of life that’s not particularly affected. Lone parents here in the North can access in the South a childcare facility, if you were to take a sector, take anyone in society, young people, our young people who want to go to university will be international students paying international fees ... So there’s just all-Ireland, it’s there, it’s happening, the all-Ireland economy, communication, relationship, has been there and is built on, and what Brexit is going to do is just going to, not just undermine all of that but damage the entire island and the services that people get. It is unforgiving.<sup>16</sup>

14 Hayward (n 9) 9.

15 *ibid.*, 15 and 19.

16 Anderson (n 1).

Given the threats to North-South relations, a key point here, as outlined by Phinnemore and Hayward is 'how will such cooperation be sustained in a context where one party to the Good Friday Agreement remains in the EU and the other leaves, thus raising the prospect for regulatory divergence?'.<sup>17</sup> A number of the threats emanate from this possibility. For example, there are threats to the continuation of institutions promoting North-South relationships, the likelihood of regulatory divergence and a changing human rights landscape between the North and the South creates risks, and the threats to the peace process may also limit the amount of cooperation.<sup>18</sup>

Brexit is already having an impact on North-South relations. For example, respondents in Hayward's study stated that the Brexit vote has had an impact on their thinking about future plans for moving across the UK/Ireland border.<sup>19</sup> Indeed, one of the core findings of Hayward's study is that any kind of physical manifestation of a border would act as a 'symbol of regression in cross-border and British-Irish relations'.<sup>20</sup>

The importance of North-South cooperation on the island has been recognised by the negotiating parties as a key issue to be resolved. For example, the recital of the EU Draft Withdrawal Treaty Protocol on Ireland/NI states:

Recognising that cooperation between Northern Ireland and Ireland is a central part of the 1998 Agreement and is essential for achieving reconciliation and the normalisation of relationships on the island of Ireland, and recalling the roles, functions and safeguards of the Northern Ireland Executive, the Northern Ireland Assembly, and the North-South Ministerial Council (including cross-community provisions), as set out in the 1998 Agreement; Acknowledging that this cooperation across the full range of political, economic, societal and agricultural contexts relies to a significant extent on common Union legal and policy frameworks, as confirmed in the joint mapping exercise conducted by the Union and the United Kingdom, and that accordingly the United Kingdom's withdrawal from the Union gives rise to substantial challenges to the maintenance and development of North-South cooperation.<sup>21</sup>

17 Phinnemore, Hayward and Whitten (n 7) 29.

18 Todd (n 8).

19 Hayward (n 9) 85.

20 *ibid*, 12.

21 TF50, 'Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland and the European Union and the European Atomic Energy Community' (19 March 2018) Protocol on Ireland/Northern Ireland.

## B. Themes

### Nurturing North-South Cooperation

#### *The North-South Ministerial Council*

As discussed above, North-South relationships have been carefully cultivated within the overall constitutional context created by the B/GFA. A significant aspect of this development was the implementation of institutional structures, such as the North-South Ministerial Council and the British-Irish Council, to provide a formal arena for cooperation within and across these islands. Given the centrality of these relationships and institutions to the peace process, they will be discussed below.

The North-South Ministerial Council (NSMC) was established under Strand Two of the B/GFA.<sup>22</sup> It represents a central element of the compromise achieved in the negotiations regarding cooperation between the North and South of Ireland.<sup>23</sup> It was established to:

bring together those with executive responsibilities in Northern Ireland and the Irish Government, to develop consultation, co-operation and action within the island of Ireland – including through implementation on an all-island and cross-border basis – on matters of mutual interest within the competence of the Administrations, North and South.<sup>24</sup>

Cooperation areas are divided into two categories: (1) areas where policies are agreed together but implemented separately; and (2) areas where policies are agreed together and implemented on an all-island basis.<sup>25</sup> The first category of NSMC cooperation has six areas: agriculture, education, environment, health, tourism, and transport.<sup>26</sup> Within these six areas, there are a number of more specific capacities for cooperation, such as 'milk production, cancer treatment, and cultural activities for young people'.<sup>27</sup> These include significant overlap with EU areas of influence.<sup>28</sup> The second area for NSMC cooperation includes food safety; InterTrade Ireland; the Lights Commission and coastal lights; the Special EU Programmes Body (SEUPB);

22 Belfast/Good Friday Agreement, 1998, Strand Two.

23 RaISe (n 4) 26.

24 B/GFA (n 22) Strand Two (1).

25 Phinnemore, Hayward and Whitten (n 7) 29.

26 North South Ministerial Council, 'Areas of Cooperation' <<https://www.northsouthministerialcouncil.org/areas-of-cooperation>>.

27 Cathal McCall, 'The Travails of the North/South Ministerial Council' (*Political Studies Association*, 10 April 2018) <<https://www.psa.ac.uk/insight-plus/blog/travails-north/south-ministerial-council>>.

28 Cited by the Human Rights Consortium, 'Rights at risk: Brexit, human rights and Northern Ireland' (2018) 36 <<https://brexitlawni.org/assets/uploads/HRC-Rights-at-Risk-Report.pdf>>.

and Waterways Ireland.<sup>29</sup> Another key part of the NSMC's duties include the implementation of EU policies and programmes.

Some view the NSMC as the most significant institutionalisation of North/South relations since partition.<sup>30</sup> For example, a report authored by Hayward, Phinnemore and Whitten for the European Parliament's Committee on Rights and Constitutional Affairs stated:

The institutions established by the Good Friday Agreement fundamentally altered the nature of cross-border working on the island of Ireland. The administrative cooperation precipitated by the Agreement was no longer restricted to a few civil servants involved in specific policy areas as in the early 1990s. Under the terms of the Agreement, Irish and Northern Irish ministers are responsible for designated areas of cross-border cooperation thus necessitating dedicated teams in each civil service department overseeing policy relevant to the activities of the NSMC. The Agreement therefore catalysed support for cross-border cooperation at the highest level and strengthened the infrastructure to facilitate its effectiveness.<sup>31</sup>

But not all view the institution as a valuable contribution. For example, the current leader of the DUP, Arlene Foster, has 'voiced the DUP's concern that such North/South institutionalisation contributed to a feeling of threat in the unionist community'.<sup>32</sup>

### ***Sharing the Island: All-Island Civic Dialogue***

In recognition of the importance of North-South specific issues, former Taoiseach Enda Kenny felt that a new all-Ireland forum was needed as part of a wider effort on the part of the Irish government to respond to the challenges of Brexit.<sup>33</sup> Thus, shortly after the referendum outcome, he established the All Island Civic Dialogue. The first Civic Dialogue took place on 2nd November 2016 in Dublin. Invitations were sent to civic society groups, trade unions, business groups, non-governmental organisations, and political party representatives from all major parties on the island of Ireland.<sup>34</sup> In his speech, the former Taoiseach outlined the Irish government's Brexit priorities as being 'the economy and trade; Northern Ireland and the peace process; the border and the Common Travel Area as well as the future of the EU itself'.<sup>35</sup>

29 Phinnemore, Hayward and Whitten (n 7) 30.

30 McCall (n 27).

31 Phinnemore, Hayward and Whitten (n 7) 18-19.

32 McCall (n 27).

33 Gormley-Heenan and Aughey (n 11) 501.

34 RalSe (n 4) 15.

35 *ibid*, 16.

It is notable that none of the unionist parties attended the meetings. In relation to the first Civic Dialogue, they argued that it is 'beyond the remit of cross-border cooperation established by the Agreement and therefore lacks unionist consent'.<sup>36</sup> The second was dismissed by the DUP for being 'a talking shop which has produced little of substance on the occasions it has met'.<sup>37</sup> The UUP made a very similar argument for avoiding the event, stating that the UUP 'regularly engages across all stakeholders in the UK, Europe and in Dublin. There is no need for us to make our point within a talking shop that has been primarily set up to foster an all-Ireland agenda'.<sup>38</sup>

## Thinking about East/West Cooperation

All the relationships in the B/GFA are 'interlocking and interdependent'. This means that good East-West structures and interaction will assist with the development of North-South cooperation. Brexit presents a challenge to this thinking precisely because the British-Irish dynamic will now have to bridge the gap opened up by the UK's new 'third country status'.

To improve British-Irish relations, the British-Irish Council (BIC) and British-Irish Intergovernmental Conference (BIIGC) were created under Strand Three of the B/GFA.<sup>39</sup> The BIC aims to 'promote harmonious and mutually beneficial development of the totality of relationships among the peoples of these islands'.<sup>40</sup> It includes representatives from the British and Irish governments, executives and governments of the devolved nations and regions, and representatives from the Isle of Man and Channel Islands.<sup>41</sup> It also aims to provide a space where bilateral and multilateral agreements can be reached.<sup>42</sup> The areas envisaged for discussion included transport, environment, agriculture, culture and approaches to the EU. The Council responds to changing policy priorities and it currently focuses on twelve different work sectors across a range of social, economic, and environmental topics.<sup>43</sup>

## Impact of the EU on North-South Relations

Major reports completed by leading academics and human rights organisations have emphasised the role of the EU in North-South relations. Hayward and Phinnemore highlight the pivotal role that the EU has played in facilitating and maintaining an open border on the island; for example, they point to the EU principle of free movement of people, goods, capital

36 Gormley-Heenan and Aughey (n 11) 501.

37 Brendan Hughes, 'Unionists stay away from Michel Barnier speech in Dundalk' *Irish News* (1 May 2018) <<https://www.irishnews.com/news/brexit/2018/05/01/news/unionists-stay-away-from-michel-barnier-speech-in-dundalk-1317731/>>.

38 *ibid.*

39 B/GFA (n 22).

40 British-Irish Council, 'About Us' (2016) <<https://www.britishirishcouncil.org/about-council>>.

41 *ibid.*

42 Phinnemore, Hayward and Whitten (n 7) 16 & 18.

43 British-Irish Council, 'Areas of Work' (2016) <<https://www.britishirishcouncil.org/areas-work>>.

and services. One of our interviewees, Alliance Party MLA Stephen Farry, highlighted the extent and impact of EU membership:

Well in the sense that it has empowered things to take place, the agreement is very specific around the area of cooperation, then also areas of structured North-South cooperation, but beyond those there's a host of other things that happen on a North-South basis, so the Common Travel Area didn't really address all those interactions. It was only through the single market coming live in the early 90s that things really transformed ... today is completely unfettered for people to engage in business and other aspects of life on a North-South basis.<sup>44</sup>

More broadly, the Human Rights Consortium maintains that 'mutual EU membership and the platform of common EU standards and legislation was seen to be the "grease" that would enable cross-border bodies and cooperation to work'.<sup>45</sup> Hayward argues that common membership of the EU has 'brought about normalisation and de-politicisation of cross-border cooperation'. She contends that membership in the EU has helped border communities to see the value of cooperation, regardless of the political or cultural affiliation of those participating. The argument is that practical benefits have encouraged cooperation by politicians and people from all backgrounds.<sup>46</sup> Memorandums of Understanding, discussed below, provide a good illustration of how the benefits of cooperation have been realised and put into practice.

As illustrated in the quote above by Tony Connolly, common EU frameworks and law have also been an important part of developing strong relationships across the border. They have enabled and encouraged cooperation on a wide variety of issues, from the environment, to the single market and the agri-food industry.<sup>47</sup> For example, EU environmental policy matters means that many environmental programmes have addressed 'the specificity of the interlinked environment of Northern Ireland and the Republic of Ireland'.<sup>48</sup> When dealing with environmental matters, the EU recognises that no country can act alone – something which is particularly true on the island of Ireland. The island has 'common geology, waterways, flora and fauna and any withdrawal agreement will need to address the need for continued collaborative working at the border and across Ireland and NI on the environment'.<sup>49</sup> Through both funding<sup>50</sup> and policy development, the EU has greatly progressed environmental protection on the island. The role of the EU in relation to the regulation of waste management provides a prime example.

44 BrexitLawNI, Interview with Stephen Farry, Alliance MLA (Belfast, 21 March 2018).

45 Human Rights Consortium, 'Rights at risk: Brexit, human rights and Northern Ireland' (2018) 36 <<https://brexitlawni.org/assets/uploads/HRC-Rights-at-Risk-Report.pdf>>.

46 Hayward (n 9) 88.

47 Connolly (n 13); Consortium (n 45) 44.

48 *ibid*, 96. See also: 'a big thing for me is environmental rights ... and conservation too because, actually just in this county, we have ... one major UNESCO world heritage site, which crosses the border, and there's another site that just got funding in Pettigo.' BrexitLawNI, Respondent 18, Enniskillen Townhall (Enniskillen, 10 January 2018).

49 Consortium (n 45) 96.

50 See discussion below in 'EU Funding'.

Divergence on waste policies in the early 2000s - particularly in relation to the increased costs of landfill in the Republic of Ireland - led to illegal dumping and fly tipping. It is estimated that over 250,000 tonnes of waste was illegally dumped in NI. After the discovery of illegal waste in 2007, the Irish and Northern Irish governments worked together to develop a framework for tackling illegal movement of waste. EU law facilitated this cross-border waste repatriation plan through the 2006 EU Shipment of Waste Regulation.<sup>51</sup>

In terms of the economy, EU membership has helped to encourage cross-border cooperation, programmes, and business initiatives. This has been facilitated through UK and Irish membership in the EU single market and customs union, which 'removed customs tariffs, harmonised regulation and indirect taxation, and created a more level playing field for trade and competitiveness across the border.'<sup>52</sup> An important trade relationship has developed between the North and South of Ireland. For example, the Republic of Ireland is NI's second most important export partner (behind the rest of the UK).<sup>53</sup> Cross-border trade is vital for small and medium sized enterprises, which dominate the private sector. The threat to NI's continued membership in the single market and the customs union is a significant risk to the future trade relationship between the North and South. Furthermore, the EU's principle of the mutual recognition of professional qualifications (MRPQ) allows professionals from countries within the EU, particularly the Republic of Ireland, to work in NI.<sup>54</sup>

The EU also plays a vital role in the lives of children on the island of Ireland.<sup>55</sup> For example, EU free movement rules assist in allowing children to attend the school nearest to them, even if it is on the other side of the border. Official records of children attending school across the border are not kept, but estimates have been made that this impacts at least 600 children.<sup>56</sup> The same rules have helped children to attend clubs, join sports teams, and visit their friends and families across the border; thereby allowing children to live cross-border lives. Beyond free movement, the EU has also played a key role in safeguarding children.<sup>57</sup> Cross-border mechanisms protecting children include, 'gathering and sharing of information across member states and security mechanisms and agencies, such as European Arrest Warrants, Eurojust, EUROPOL, ECRIS, and Schengen Information System.'<sup>58</sup> This also raises larger questions about the current scale and extent of cross border security and policing cooperation, an area where North-South cooperation has mutual advantages for both states.<sup>59</sup>

51 Suzie Cave, 'Background paper on Waste Management in Northern Ireland', NI Assembly Research and Information Service (Paper 10/17, 17 November 2016) 16 <<http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2016-2021/2017/aera/1017.pdf>>.

52 Hayward (n 9) 88.

53 Hayward (n 9) 88.

54 British Medical Association, 'BMA Briefing: Northern Ireland' 1 (14 March 2018) <<https://www.bma.org.uk/collective-voice/influence/europe/brexit/bma-brexit-briefings/northern-ireland>>.

55 Consortium (n 45) 71.

56 *ibid*, 71.

57 *ibid*.

58 *ibid*.

59 See BrexitLawNI, Written evidence (PST0007) (May 2018) <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-home-affairs-subcommittee/brexit-the-proposed-ukeu-security-treaty/written/83495.html>; also see BrexitLawNI report on the peace process.

## European Funding

EU INTERREG funds are essential for facilitating cross-border initiatives.<sup>60</sup> The INTERREG programme was introduced in 1991.<sup>61</sup> It was designed to tackle issues resulting from the existence of a border, such as 'access to transport, health and social care services, environmental issues and enterprise development'.<sup>62</sup> Recognising the relative disadvantage often experienced in border regions, it has funded 'thousands of projects that support strategic cross-border co-operation in order to create a more prosperous and sustainable region'.<sup>63</sup> In total, 85% of programme money is provided by the European Regional Development Fund (ERDF), and the remaining 15% is match-funded by the Irish government and Northern Ireland Executive.<sup>64</sup>

The SEUPB was set up under the British-Irish Agreement. It is responsible for administering the EU's PEACE IV and INTERREG VA Programmes, with funds totalling over £550 million.<sup>65</sup> Arguably, the most significant of the North-South bodies has been the SEUPB, which has been responsible for administering billions of pounds of cross-border funding in NI. The EU's contribution to the peace process, particularly through funding administered by the SEUPB, has been praised for its 'neutrality'.<sup>66</sup> The EU and SEUPB are viewed as bodies that are independent from the conflict and have maintained this stance successfully.

## Cross-Border/All-Island Programmes

Cross-border and all-island initiatives continue to have a role in strengthening North-South relations. They have also been helpful in the development of infrastructure and the economies in both NI and the Republic of Ireland. As discussed above, the EU facilitated these programmes both through funding and by providing common regulatory frameworks. All-Island programmes have been developed across a variety of areas, including, but not limited to: transport, telecommunications, education, energy, and health. The focus here, for illustrative purposes, is on two key cross-border programmes: energy and health.

60 Hayward (n 9) 24.

61 Special EU Programmes Body, 'The Impact of EU funding on the Region' (2016) 5 <[https://www.seupb.eu/sites/default/files/styles/file\\_entity\\_browser\\_thumbnail/public/PEACE%20Content%20Type/The\\_Impact\\_of\\_EU\\_Funding\\_in\\_The\\_Region.sflb.pdf](https://www.seupb.eu/sites/default/files/styles/file_entity_browser_thumbnail/public/PEACE%20Content%20Type/The_Impact_of_EU_Funding_in_The_Region.sflb.pdf)>.

62 Special EU Programmes Body, 'INTERREG VA Programme' (2016) <<https://seupb.eu/iva-overview>>.

63 *ibid.*

64 *ibid.*

65 Special EU Programmes Body, 'What is the SEUPB?' (2016) <<https://www.seupb.eu/aboutus/SEUPB>>.

66 Marc Hall, 'Northern Ireland peace fund faces EU budget uncertainty' (Euractiv, 4 February 2013) <<https://www.euractiv.com/section/regional-policy/news/northern-ireland-peace-fund-faces-eu-budget-uncertainty/>>.



## Energy

The Single Electricity Market (SEM) is a wholesale electricity market.<sup>67</sup> It came into being in 2007 due to a recognition by the UK and Irish governments that the challenge of providing both NI and the Republic of Ireland with 'access to safe, secure and sustainable energy supplies, obtained through competitive energy markets ... can be met more effectively and to our mutual benefit if we work together'.<sup>68</sup> It is based on a Memorandum of Understanding between the UK and Irish governments and is regulated by the Commission for Regulation of Utilities (CRU) and its equivalent in Belfast.<sup>69</sup> It was pursued within the broader context of an EU initiative to create an EU-wide internal market in electricity and natural gas, though it is still an entirely unique arrangement within the EU.<sup>70</sup> Robin Walker, a Conservative MP stated that the SEM 'created opportunities to drive competition, increase liquidity, access a wider range of generation on the island, and share costs, including information-technology systems'.<sup>71</sup> He also confirmed that the SEM 'has helped to contribute to downward pressure on prices and improved energy security across the island'.<sup>72</sup>

Energy was not one of the areas of mutual interest explicitly referenced in Strand Two of the B/GFA, but the Institute of International and European Affairs (IIEA) argues that 'the SEM could be viewed as one of the most tangible successes in economic cross border co-operation, and may not have materialised so rapidly in the absence of the momentous 1998 peace agreement'.<sup>73</sup>

## Healthcare

The development of all-island healthcare services has been important for both NI and the Ireland. For NI, with a population of just over 1.8 million, it would not be possible to provide certain specialised medical services in the region.<sup>74</sup> For the population in the North-West of Ireland, the all-island healthcare regime has also facilitated the removal of many lengthy journeys to Galway, Dublin or Belfast for treatment.<sup>75</sup> Brexit risks the continuation of this vital partnership in several ways, including EU funding, regulatory alignment, the mutual recognition of qualifications, and the practical challenges of the prospect of a hard border.

67 Department of Communications, Climate Actions & Environment, 'Single Electricity Market (SEM)' *Government of Ireland* (2018) <[https://www.dccae.gov.ie/en-ie/energy/topics/Electricity/commission-for-energy-regulation-\(cer\)/Pages/Single-Electricity-Market-\(SEM\).aspx](https://www.dccae.gov.ie/en-ie/energy/topics/Electricity/commission-for-energy-regulation-(cer)/Pages/Single-Electricity-Market-(SEM).aspx)>.

68 Department of Enterprise, Trade and Investment and Department of Communications, Marine and Natural Resources, 'All-Island Energy Market: A Development Framework' (November 2004) 1 <<https://www.dccae.gov.ie/documents/All%20island%20Energy%20Market%20Development%20Framework.pdf>>.

69 *ibid.*

70 *ibid.*

71 Denis Staunton, 'Single Irish electricity market must continue after Brexit, UK minister says' *The Irish Times* (2 February 2018) <<https://www.irishtimes.com/business/energy-and-resources/single-irish-electricity-market-must-continue-after-brex-it-uk-minister-says-1.3378039>>.

72 *ibid.*

73 Paula Higgins and Roisin Costello, 'What does Brexit Mean for the Energy Sector in Ireland?' *Institute of International and European Affairs* (2016) 3 <[https://www.iiea.com/ftp/Publications/2016/IIEA\\_PolicyBrief\\_Energy.pdf](https://www.iiea.com/ftp/Publications/2016/IIEA_PolicyBrief_Energy.pdf)>.

74 BMA (n 4) 4.

75 *ibid.*

EU funding has played a vital role in the development of cross-border and all-island health and social care partnerships. For example, together with the EU, the Departments of Health in NI and Ireland fund the Cooperation and Working Together (CAWT) programme. Developed in 1992, CAWT 'seeks to add value to health and social care activity by bringing a cross border dimension to on-going collaboration between the health systems in both jurisdictions'.<sup>76</sup> Between 2003 and 2015, over €40 million was invested in cross-border health initiatives through CAWT, most of which has come from the EU.<sup>77</sup>

## Trade and Economy

Prior to the early 1990s, Hayward and Phinnemore characterise all-island economic activity as 'fragmented and the poor integration of the economies of Ireland and Northern Ireland meant a lost opportunity for growth in each jurisdiction'.<sup>78</sup> According to Edward Burke, the EU single market and harmonisation of customs procedures through the customs union removed many of the obstacles to trade that previously existed between the North and the South.<sup>79</sup> He argues that the differences that existed in terms of market and customs regulations acted as a barrier to trade and created structural disadvantages for Ireland, which has a much smaller economy. In practical terms, this often resulted in lengthy delays at the border to allow for customs checks.<sup>80</sup>

Currently, the UK is Ireland's largest trade partner, and Ireland is the UK's fifth largest trading partner.<sup>81</sup> Trade relationships between NI and Ireland are also significant. In 2015, approximately one third of Northern Irish goods went to the Republic, and one quarter of NI's imports came from the Republic of Ireland.<sup>82</sup> Reports from InterTrade Ireland state that 'Northern Ireland accounts for between ten and twelve percent of total exports from Ireland to the UK and accounted for seven to eight percent of imports'.<sup>83</sup> Considering the fact that NI's population accounts for less than 3% percent of the total UK population, this trade relationship is significant. Burke argues that 'there has been a significant increase in trade between the North and South of Ireland since the Good Friday Agreement, partly-funded by North-South bodies and programmes funded by the EU aimed at stimulating economic co-operation and investment'.<sup>84</sup>

76 Cooperation and Working Together (CAWT), 'What we do' (2018) <<http://www.cawt.com/about-us/what-we-do/>>.

77 BMA (n 4).

78 Phinnemore, Hayward and Whitten (n 7) 22.

79 Edward Burke, 'Who Will Speak for Northern Ireland?' (3 March 2016) 161 RUSI Journal 6.

80 Phinnemore, Hayward and Whitten (n 7) 22.

81 Burke (n 79) 7.

82 RalSe (n 4) 48.

83 InterTrade Ireland 'Cross-Border Trade and Supply Chain Linkages Report, (23 March 2018) 3.

84 Burke (n 79) 7.

Simon Coveney, Tánaiste, has been careful to emphasise not only North-South links, but also the close relationship between the economies of the UK and Ireland.<sup>85</sup> To evidence the interconnected nature of the economies, he pointed out that ‘there are now more than 60,000 Irish-born directors on the boards of UK companies ... and the trading relationship worth over £55 billion a year, sustaining more than 400,000 jobs.’<sup>86</sup> He also stated that it is these strong connections between the East and West that have helped to make the Dublin-London air corridor the second busiest in the world.

## ***All-Island Supply Chains and the Agri-Food Sector***

There is a high level of integration of supply chains on the island of Ireland. Studies completed by InterTrade Ireland point ‘towards a strong level of interconnectedness in terms of cross-border supply chain integration.’<sup>87</sup> These links are particularly strong in the meat and dairy sectors.

The agri-food sector is comprised of farming, food and drinks, and wood processing.<sup>88</sup> The integrated nature of agriculture and supply chains on the island has been a key element of economic North-South relations and is threatened by Brexit. There are almost 140,000 farms in the Republic of Ireland and 25,000 in the North.<sup>89</sup> While the overall employment levels and gross value added from agriculture is small in both the North and the South, it is vital for the future of rural communities.<sup>90</sup> Trade in food and drinks - and particularly dairy, beef and sheep meat - accounts for approximately one-third of all manufacturing cross-border trade.<sup>91</sup>

## **Memorandums of Understanding**

Another way that North-South relations have been fostered is through Memorandums of Understanding (MOU) between local councils and authorities on each side of the border. As one Councillor communicated in Hayward’s report, having these Memorandums means that ‘they don’t do anything in isolation – they run it past their other partners in the wider Region. All these things help considerably’.<sup>92</sup>

85 Simon Coveney, ‘Brexit must not endanger the Good Friday Agreement’ *The Guardian* (31 January 2018) <[https://www.theguardian.com/commentisfree/2018/jan/31/brexit-good-friday-agreement-britain-eu-ireland?CMP=Share\\_iOSApp\\_Other](https://www.theguardian.com/commentisfree/2018/jan/31/brexit-good-friday-agreement-britain-eu-ireland?CMP=Share_iOSApp_Other)>.

86 *ibid.*

87 InterTrade Ireland (n 83) 30.

88 RaISe (n 4) 53.

89 *ibid.*

90 Hayward (n 9) 80.

91 InterTrade Ireland (n 83) 54.

92 Hayward (n 9) 25-26.

By way of example, following a long history of cooperation since 1976, a formal Strategic Alliance was developed between the Newry and Mourne District Council and the Louth Local Authorities in 2011.<sup>93</sup> This Alliance was designed to promote cooperation and 'seek to support and promote the economic development and competitiveness of the region'.<sup>94</sup> Some of the key objectives are 'to promote, strengthen and stimulate social, cultural and economic links, ... further opportunities for the sharing of services and coordinated management of key resources, [and] ... coordinate core functions of the parties'.<sup>95</sup> The Louth and Newry and Mourne Joint Committee was established through the MOU, and is made up of elected members from the Parties. This MOU has been held up by Brussels as an example of best practice that can be used as model for other EU Member States.<sup>96</sup>

## C. Impact of Brexit

Through our research and engagement activities, it has become clear that North-South and East-West relations have already been negatively impacted by Brexit. For example, as alluded to above, at a political level, the relationship between the DUP and the Irish government is the worst it has been in a long time. This was elaborated upon in an interview we conducted with Tony Connelly, who specified that,

Well I think they [North-South relations] have definitely suffered politically. Even within days of the referendum you had a move by the Irish government to have an all-island civic dialogue, and of course the DUP came out, they were very upset about that and I think there was a lot of anger in the DUP that the Irish government had sort of flagged this without running it by them first. A telephone hadn't been picked up to let them know, and so that got things off to a bad start. And then of course, the DUP supported Brexit so that meant that they were looking at the problem entirely differently ... And then of course you had, once the negotiations started in June last year, you had a new Prime Minister, and he was much more direct in his tone and style and then you had this narrative building up on the DUP-side saying that he was much more aggressive towards them and then once this idea of Northern Ireland staying in the single market and customs union ... appeared on the negotiating table, then the DUP felt extremely betrayed and angry.

93 AgendaNI, 'Brexit and the border corridor' *AgendaNI Magazine* (8 February 2018) <<http://www.agendani.com/brexit-border-corridor/>>.

94 'Memorandum of Understanding between Newry and Mourne District Council and the Louth Local Authorities' (2011) 3 <<https://www.louthcoco.ie/en/Services/Economic-Development/Memorandum-of-Understanding.pdf>>.

95 *ibid.*

96 AgendaNI, (n 93). See also the work being undertaken by Donegal County Council and Derry City and Strabane District Council as part of the North West Strategic Growth Partnership. Derry City and Strabane District Council, 'North West strategic growth priorities top the agenda' (28 June 2018) <<http://www.derrystrabane.com/Council/News/North-West-strategic-growth-priorities-top-the-age>>.

And the problem was that, because they weren't in a formal coalition with the British government, Theresa May wasn't under any sort of really legal pressure to keep them entirely in the loop and because it was only a confidence and supply agreement, if they had gotten information about the drift of the negotiations, then other parties would have wanted that as well. So I think the DUP were feeling very frustrated towards the inclusion of the Joint Report in December and I think this built up and that's why once they saw the detail, they kind of walked away from it and forced Theresa May into rejecting the agreement. And I think relations between the DUP and Dublin sort of were at rock bottom around that point and they haven't really improved much ever since ... So all of this is not conducive to solving this problem and I think that's the main worry.<sup>97</sup>

Furthermore, it has become clear that cooperation between the British and Irish governments has also been strained. Part of this is due to the fact that individual countries are not allowed to negotiate outside of the official Brexit negotiations, so Ireland and the UK have had to exercise caution in how they interact.<sup>98</sup> The other part of this is due to the directions that have been taken during the negotiations. For example, as summarised by Tony Connelly, the British government's reaction to the backstop has been received with frustration by the Irish government,

And of course, the British response to that [the backstop] was explosive, they said 'what? No, we didn't sign up to this' but the Irish government said 'this should have been obvious to you all along, and you just either didn't see it or you refused to see it.' And then of course the British response the day after was to say this threatened the constitutional integrity of the United Kingdom and the Irish government's response to that was downright fury because they felt that Britain was kind of poisoning the well at that point, because they said there's no way that this undermines the constitutional integrity because that integrity is guaranteed by the Good Friday Agreement whereas this customs union idea is simply a pragmatic solution to the problem of the border. Now obviously you have two sides to that debate and the British will argue differently, but that was certainly the Irish government's view at the time.<sup>99</sup>

## Nurturing North-South Cooperation

### *The Constitutional Status of NI*

Before reflecting on the impact on the areas noted above, it is worth highlighting one striking feature of Brexit that became more evident as this project advanced. Brexit has resulted in heightened discussion of the constitutional status of NI within the UK, and this will continue to

<sup>97</sup> Connelly (n 13).

<sup>98</sup> *ibid.*

<sup>99</sup> *ibid.*

frame debates on the future of North-South relations. Although attempts have been made to confine the conversation to areas of 'practical cooperation' it is plain that Brexit has unleashed questions about the constitutional fundamentals of the peace process and tensions have increased as a result.<sup>100</sup> The overriding fear is of the return of a hard border on the island of Ireland, increased separation between both jurisdictions, and a loss of rights for those living in NI. It has also encouraged the development of a now mainstream debate on Irish unity as attention has turned to all possible solutions to the constitutional crisis that Brexit has generated.<sup>101</sup> One of the unique features of NI within a UK context is that it enjoys a 'constitutional' right to leave the UK in circumstances carefully set down in the B/GFA and one way to remain in the EU would be to leave the existing 'union state'.

The codification of a 'backstop Protocol' within the Draft Withdrawal Agreement, in particular, has raised questions and sparked debates about NI's constitutional status, among other things.<sup>102</sup> The 'backstop' states that:

this protocol is based on the third scenario of maintaining full alignment with those rules of the Union's internal market and customs union which, now or in the future support North-South cooperation, the all-island economy and the protection of the 1998 Agreement, and that it applies unless and until an alternative arrangement implementing another scenario is agreed.<sup>103</sup>

In response, Theresa May rejected the plan and argued that,

the draft legal text the commission have published would, if implemented, undermine the UK common market and threaten the constitutional integrity of the UK by creating a customs and regulatory border down the Irish Sea, and no UK prime minister could ever agree to it.<sup>104</sup>

100 For example, between the unionist parties and the Irish Government: 'I mean obviously politically there's more tension between the Irish government and unionist parties, people are now more suspicious and less willing to click on the unionist side, to engage on certain things ... In talks it's been fairly evident compared to even a couple of years ago. There's always a certain dance around what was strand one and what wasn't, but both unionist parties were more dismissive of the Irish government recently' Farry (n 44).

101 Colin Harvey, 'Leaving the Union?' (*QPOL*, 3 July 2018) <<http://qpol.qub.ac.uk/leaving-the-union/>>; Colin Harvey, 'Sharing the Island: Brexit, Constitutional Imagination and the Right of Self-Determination' (*QPOL*, 12 December 2017) <<http://qpol.qub.ac.uk/brexit-constitutional-imagination-self-determination/>>; Colin Harvey, 'Uniting and Sharing the Island: Normalising Good Friday Agreement Constitutionalism?' (*QPOL*, 23 August 2017) <<http://qpol.qub.ac.uk/normalising-gfa-constitutionalism/>>.

102 Nikos Skoutaris, 'On Secessions, Constitutions and EU Law' (*Blog*, 6 March 2018) <<http://www.skoutaris.eu/blog/2018/3/5/why-the-eus-backstop-option-for-northern-ireland-doesnt-threaten-the-uks-constitutional-integrity>>ss.

103 TF50 (n 21) p 98.

104 BBC, 'Theresa May rejects EU's draft option for Northern Ireland' *BBC News* (28 February 2018) <<https://www.bbc.co.uk/news/uk-politics-43224785>>.

The UK government continues to believe that its proposals on the overall future relationship with the EU will address the concerns about a hard border, for example.<sup>105</sup>

Reflecting on the Irish government's view, in an interview with BrexitLawNI, Tony Connelly picked up on a number of these themes, stating that

The Irish government's view is that the constitutional status of Northern Ireland is, has been settled by the Good Friday Agreement. But of course, the Good Friday Agreement itself, it's almost like an interim settlement because it leaves open the possibility of a border poll at some point. So, I guess the in the background it's kind of not settled in a way. But the Irish government view would be very much that the idea of a backstop or Northern Ireland staying in the customs union does not and should not undermine the constitutional integrity of the UK because these would be, just simply the pragmatic solutions in order to preserve the Good Friday Agreement. The problem is now that you can see that the unionist argument is saying well, having a backstop undermines the Good Friday Agreement just as much. And I think there has been a conscious decision by the Task Force to try and get involved in that debate. That's why Michel Barnier went to Northern Ireland two weeks ago to try and, I suppose, reassure people that on the one hand, you know these are just pragmatic solutions and that it may not ever have to be called into question depending on the free trade agreement that emerges. Michel Barnier has talked to COREPER, that's the body of EU Ambassadors, he briefed them a few weeks ago and said to the effect that you know, there are French immigration officers working in London, and British immigration officers in Brussels and Paris and Lisle, but nobody says that's an infringement of sovereignty, it's just a pragmatic solution to a problem.<sup>106</sup>

Some scholars, including Nikos Skoutaris and Colin Harvey have argued that the 'backstop' does not threaten the constitutional integrity of the UK. Skoutaris provides a number of examples illustrating where parts of member states have different relationships with the EU,

these include special territories, such as a set of Swedish-language islands in Finland and Spanish cities in Africa. For either historical, geographical or political reasons these territories have a different relationship with their national governments – and therefore with the EU – than the rest of the member state's territory.<sup>107</sup>

He argues that these arrangements have never been used to question the sovereignty of the member states over these areas and that the UK has also made use of this kind of EU flexibility.

105 HM Government, *The Future Relationship between the United Kingdom and the European Union* (Cm 9593, 2018) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/725288/The\\_future\\_relationship\\_between\\_the\\_United\\_Kingdom\\_and\\_the\\_European\\_Union.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf)>.

106 Connelly (n 13).

107 Skoutaris (n 102)

He cites Gibraltar, the Channel Islands and a number of other overseas territories as examples, arguing that ‘such “differentiated” membership to the EU has not undermined the constitutional relationship of those territories with the UK – and so a similar solution for NI after Brexit would not threaten the UK’s constitutional integrity.’<sup>108</sup> Harvey notes that ‘one of the most notable trends in UK constitutional law in the last 20 years’ has been the ‘significant dispersal of public power around the UK through asymmetrical processes of devolution.’<sup>109</sup> He provides a number of examples of this ‘significant dispersal’ of power, including proposals on the variation in the corporate tax rate for NI and fiscal devolution across the UK. Harvey ultimately uses this to argue that a unique solution for NI (such as the ‘backstop option’) would be compatible with the evolution of the UK constitution since 1997, which he identifies as including ‘respectful and asymmetrical devolution of public power.’<sup>110</sup>

The B/GFA and subsequent agreements have also been used to highlight that NI already enjoys a unique constitutional status within the UK.<sup>111</sup> In particular, and as noted, scholars have pointed to the right of secession through a referendum on Irish reunification as well as the noted cooperation between the UK and Ireland. Skoutaris argues that the ‘backstop’ respects and protects the complex constitutional settlement outlined in the B/GFA. He contends that ‘it’s a pragmatic solution to the specific circumstances of Northern Ireland rather than a staging post towards a united Ireland or an annexation of the region to the EU, as some have claimed.’<sup>112</sup>

Brexit has had consequences for North-South relations in these areas precisely because it raises major constitutional questions about the future of NI. It has simply not proven possible to confine the discussions to matters of ‘practical cooperation’ because the constitutional matters simply cannot be easily avoided.

## ***North-South Ministerial Council***

Unfortunately, for much of the Brexit negotiations, the NSMC has not been in operation and there is a clear sense that even when it was operational it remained underused.<sup>113</sup> It has not met since November 2016, due to the collapse of the NI institutions.<sup>114</sup> The Joint Communiqué

108 *ibid.*

109 Colin Harvey, ‘Brexit and Northern Ireland: Unique Solutions and the Union State’ (QPOL, 6 December 2017) <<http://qpol.qub.ac.uk/brexit-northern-ireland-unique-solutions-union-state/>>.

110 *ibid.*

111 *ibid.*; Skoutaris (n 102).

112 Skoutaris (n 102).

113 Hanna (n 1).

114 Phinmore, Hayward and Whitten (n 7) 18. See also, North South Ministerial Council Joint Secretariat, ‘Paper NSMC PS (16) JC North South Ministerial Council Twenty-Third Plenary Meeting’ (18 November 2016) pp 11 <[https://www.northsouthministerialcouncil.org/sites/northsouthministerialcouncil.org/files/publications/Paper%20NSMC%20P2%20%2816%29%20JC%20-%20Joint%20Communiqu%C3%A9%2018%20Nov%202016\\_0.pdf](https://www.northsouthministerialcouncil.org/sites/northsouthministerialcouncil.org/files/publications/Paper%20NSMC%20P2%20%2816%29%20JC%20-%20Joint%20Communiqu%C3%A9%2018%20Nov%202016_0.pdf)>; See also, North South Ministerial Council Joint Secretariat, ‘Paper NSMC SEU 2 (16) JC North South Ministerial Council Special EU Programmes Meeting’ (2 December 2016) pp 7 <<https://www.northsouthministerialcouncil.org/sites/northsouthministerialcouncil.org/files/publications/SEUPB%20Joint%20Communiqu%C3%A9%202%20December%202016.pdf>>: ‘Ministers noted the importance of the INTERREG and PEACE programmes to cooperation and regional development, which was acknowledged by the NSMC at its Plenary meeting on 18 November 2016.’



from that meeting noted a commitment to ongoing discussion and provides, '[t]he Council was advised that in taking forward their discussions, the Northern Ireland Executive and the Irish Government will be guided by some common principles'.<sup>115</sup> Some have labelled this as a missed opportunity for a space for discussion and cooperation on key issues related to the island of Ireland. For example, Cathal McCall argues that 'with Brexit presented a critical juncture in North/South and British-Irish relations it has been left to others to chart the course for cross-border cooperation on the island of Ireland'.<sup>116</sup>

Others argue that Brexit threatens the institutions, like the NSMC, underpinning North-South relations.<sup>117</sup> For example, as discussed above, the reopening of conversations regarding the relationships that should exist between the North and South of Ireland has caused concern that people are trying to unpick the careful balance struck in the B/GFA.<sup>118</sup> Thus, discussions surrounding the role of the NSMC and what its future should look like have re-emerged – particularly amongst nationalist and unionist politicians in NI.<sup>119</sup> A view is gaining ground that the B/GFA institutions may well provide some of the answers to the dilemmas posed by Brexit. Murray, O'Donoghue, and Warwick contend that the NSMC was envisaged as a body for 'considering the role of the EU and relevant programmes and for communication with the EU'.<sup>120</sup> They therefore foresee a continuing role for the NSMC in any post-Brexit EU funding programmes. Others have argued that Brexit presents 'an opportunity to breathe new life into the institutions of the Good Friday Agreement, including the North-South Ministerial Council and British-Irish Council, as well as to utilise the potential of some of its as-yet-unrealised precepts'.<sup>121</sup> Phinnemore and Hayward argue that the NSMC could be used to provide oversight if all-island regulatory regimes were put in place. For example, if agricultural trade arrangements were concluded for the island of Ireland, the NSMC could facilitate the mechanisms for checking all products entering the island from outside the EU, including GB, as well as ensure that sanitary and phytosanitary arrangements are being adhered to on the island.<sup>122</sup>

Brexit has destabilised institutional arrangements that were already under considerable pressure and it is plainly a factor in the continuing failure to re-establish the political institutions. It was also clear in the various contributions to this research project that the B/GFA institutions might be particularly valuable in the post-Brexit world in encouraging North-South cooperation, promoting bilateral British-Irish engagement and ensuring an ongoing connection to relevant EU matters.

115 NSMC (n 114) pp 11.

116 McCall (n 27).

117 Todd (n 8).

118 RalSe (n 4) 26.

119 *ibid.*

120 Colin Murray, Aoife O'Donoghue and Ben Warwick, *Discussion Paper on Brexit* (Irish Human Rights and Equality Commission and Northern Ireland Human Rights Commission, 2018) 6 <<https://www.ihrec.ie/app/uploads/2018/03/Discussion-Paper-on-Brexit.pdf>>.

121 Phinnemore, Hayward and Whitten (n 7) 10.

122 Phinnemore, Hayward and Whitten (n 7) 46.

## East-West Relations

Although the focus here is on North-South relations, the East-West impact should not be neglected. Scholars hoped that the BIC would provide an environment to discuss areas of mutual interest regarding Brexit.<sup>123</sup> Recently, BIC meetings have featured discussions of Brexit issues, such as the preparations needed for a no-deal scenario.<sup>124</sup> In the absence of EU membership, the BIC has been envisioned as a forum to ensure the continuation of strong British-Irish relations. The BIIGC was to provide the main forum for bilateral cooperation between Ireland and the UK, but prior to its meeting on 25 July 2018 it had not met since 2007.<sup>125</sup> These forums for cooperation and relations 'have arguably never been more important' than in the context of Brexit.<sup>126</sup> One interviewee, DUP MLA Christopher Stalford, suggested that Brexit might even improve relationships between the UK and Ireland:

I suspect where we're heading with the present negotiations will be some sort of bespoke deal that isn't Norway or Canada but is ... UK unique, and in that sense I think the relations between the Republic and the United Kingdom should actually be strengthened by the desire to ensure that not only that no damage is done but that the benefits can accrue.<sup>127</sup>

That said, it has been argued that the EU has provided the environment whereby UK and Irish relations could improve. For example, Burke has argued that 'common membership of the EU served to greatly improve relations between the UK and Ireland'.<sup>128</sup> According to the former Irish Minister for Foreign Affairs and Trade (and now Minister for Justice), Charlie Flanagan, having a space where the countries were working together 'helped us appreciate that we have more in common with one another than with any other member state'.<sup>129</sup>

123 Phinnemore, Hayward and Whitten (n 7) 41.

124 BBC, 'No-deal Brexit plans discussed at British Irish Council' *BBC News* (22 June 2018) <<https://www.bbc.co.uk/news/uk-northern-ireland-44574039>>.

125 Phinnemore, Hayward and Whitten (n 7) 18. See also, British-Irish Intergovernmental Conference, 'Joint Communiqué of the British-Irish Intergovernmental Conference 25 July 2018' (25 July 2018), <<https://www.gov.uk/government/news/joint-communicue-of-the-british-irish-intergovernmental-conference-25-july-2018>> (it was agreed that another meeting would take place in autumn 2018).

126 British-Irish Parliamentary Assembly, 'Inquiry into Brexit and the future of British-Irish relations' (October 2017) 1 <<http://www.britishirish.org/assets/Final-BIPA-Brexit-conclusions-October-2017.pdf>>.

127 BrexitLawNI, Interview with Christopher Stalford, DUP MLA (Belfast, 7 February 2018).

128 Burke (n 79) 7.

129 *ibid.*

These themes were also emphasised within our interview with Brian Doherty, a former civil servant specialising in the legal aspects of European integration,

the EU I think has also been very good for Anglo-Irish relations generally because they have found themselves together in this and in fact the commonality on economic issues and other issues has been quite striking over the years. On trade type things, on taxation, on, I would say very sensible economic policy approaches to various things, they haven't always been the same on all issues but what do you expect? It's a community and they are different nations so I think the EU's been very positive, has had a very positive influence in a broader way than what we've been sketching out up to now.<sup>130</sup>

Further, it is argued that cooperation in this institutional space allowed both to overcome the differences in relation to NI and assisted the peace process. Simon Coveney has also underlined the centrality of the EU in fostering close relationships between the UK and Ireland. He noted that the EU supported cooperation by providing common spaces for interaction, 'we don't want to lose the kind of cooperation that can be fostered by a simple conversation in a corridor or a cup of coffee on the margins of a meeting'.<sup>131</sup> This theme emerged on many occasions during this project. The concern here is that departure from the EU will reduce both formal and informal mechanisms for practical cooperation and dialogue between both governments.

## EU Funding

Pledges have been made by Claude Juncker, the European Commission President, to continue funding for cross-border projects aimed at maintaining peace in NI after Brexit.<sup>132</sup> Despite these promises, many remain worried about the consequences of the potential loss of EU funding. For example, the failure to continue this funding will have a major impact on existing cross-border initiatives and could contribute to NI becoming more inward looking.<sup>133</sup> The potential loss of EU programme funds would also have a devastating impact on rural regions – particularly those along the border.<sup>134</sup> The sustainability of work being undertaken by cross-border groups is threatened by both the potential negative financial implications of Brexit for the island of Ireland, as well as the threat to EU funding.<sup>135</sup> There is concern that without EU funding for cross-border programmes, there is a risk of 'a return to patchy cross-border cooperation with little strategic impact' – something that could undermine the progress made over the last 20 years.<sup>136</sup>

130 BrexitLawNI, Interviewee with Brian Doherty (Belfast, 22 March 2018).

131 Coveney (n 85).

132 John Campbell, 'Cross-border European funding to continue post-Brexit' *BBC News* (2 May 2018) <<https://www.bbc.co.uk/news/uk-northern-ireland-43977811>>.

133 Hayward (n 9) 16.

134 Consortium (n 45) 54.

135 Hayward (n 9) 25.

136 RaISe (n 4) 46.

The financial crisis of 2008 has already taken a toll on the resources of local authorities in the border corridor and the further threats to financing have spread more fear about the ability to continue cross-border initiatives.<sup>137</sup>

Access to EU funding has been essential for maintaining and improving levels of economic prosperity; something which has proven to be a crucial element of upholding peace. It has been argued that continuing access to these funding mechanisms and programmes - such as PEACE, INTERREG, loans from the European Investment Bank, research funding such as Horizon 2020 – would be a valuable way to help to ensure that NI is able to maintain the current levels of economic prosperity.<sup>138</sup> The scale of EU support for NI in funding terms is impressive and the financial implications are serious and the consequences potentially severe.

## Cross-Border/All-Island Programmes

### Energy

The IIEA suggests that, although it is possible that the governments may choose not to continue supporting the SEM after Brexit, that is an unlikely outcome. That said, Brexit does pose challenges. The SEM is established in national law in both the UK and Ireland, something which would not change with Brexit;<sup>139</sup> however, several prominent figures (including Robin Walker and Steve Halliday, a former chief executive of the National Grid) have warned that exiting the EU creates risks to the preservation of the SEM.<sup>140</sup> A report published by the IIEA has outlined a number of potential issues caused by Brexit.<sup>141</sup> This report identifies data protection as a key challenge to the continuation of the SEM due to ‘the implications of running a cross-border market between an EU and a non-EU state’.<sup>142</sup> Although the UK remains aligned with the General Data Protection Regulation (GDPR), if it were to diverge in the future, Ireland may be required under EU law to refuse to share data on ‘customers, employees or market participants’<sup>143</sup> with NI. Furthermore, if the UK does not continue to ensure that its domestic regulation of energy aligns with that of EEA/EFTA members, Ireland may be unable to continue the SEM partnership under EU law.<sup>144</sup>

137 Hayward (n 9) 26.

138 Phinnemore, Hayward and Whitten (n 7) 48.

139 Higgins and Costello (n 73) 2.

140 Margaret Canning, ‘Northern Ireland energy market is facing “huge backward step” without EU deal’ *Belfast Telegraph* (9 March 2018) <<https://www.belfasttelegraph.co.uk/business/brexit/northern-ireland-energy-market-is-facing-huge-backward-step-without-eu-deal-36685215.html>>; Staunton (n 71).

141 Higgins and Costello (n 73) 2.

142 *ibid*, 3.

143 *ibid*.

144 *ibid*, 5.

## Healthcare

Due in part to EU regulations that have helped to facilitate the all-island health care system, researchers on the 'healthy Brexit' project argue that the 'healthcare workforce on the island of Ireland is effectively one workforce'.<sup>145</sup> It is common for doctors to travel between the North and the South to provide medical services, or live on one side of the border and work on the other. Therefore, worry has been expressed by the BMA that a failure to ensure, for example, the continuation of the mutual recognition of qualifications will jeopardise the future of the all-island healthcare regime.<sup>146</sup> The EU's principle of MRPQ has enabled many health and social care professionals to practice in NI from across the EU, but particularly those from Ireland. It is important to note that nearly three quarters of the EEA graduates working in NI have obtained their primary medical degrees in Ireland. Any change to this regime would likely have a negative impact on the 'availability and future staffing of the workforce for Northern Ireland'.<sup>147</sup>

According to Dr Peter Maguire, a consultant anaesthetist who lives and works in Newry and also travels to Monaghan to work in the south of Ireland:

I am one of a number of Northern Irish doctors who regularly work across the border to care for patients. If a hard border is introduced following Brexit, it will present a number of difficulties for both health services and for people who live on the border.<sup>148</sup>

The development of all-island healthcare has improved the quality of care available on the island. Dr Mark Porter, the chair of the British Medical Association (BMA) argues:

As separate health services in Northern Ireland and the Republic often do not have sufficient demand to provide cost-effective, highly specialist medical services ... the only viable way to provide these services to patients is to deliver them across both countries. Over the last two decades, a significant growth in the provision of all-island healthcare has improved care for patients and allowed both Northern Ireland and the Republic to retain highly trained doctors, who otherwise may not have had the patient demand necessary to warrant their full-time expertise.<sup>149</sup>

145 Healthy Brexit, 'Brexit and Health Law: Implications for Northern Ireland' (Dec 2017) 3 <<https://www.healthybrexit.org/wp-content/uploads/2017/12/Attachment-4-Brexit-Background-Briefing.pdf>>.

146 British Medical Association, 'Patient care in Northern Ireland and the Republic of Ireland will be put at risk if the next government fails to maintain a "soft border" following Brexit, warns BMA' (2 June 2017) <<https://www.bma.org.uk/news/media-centre/press-releases/2017/june/patient-care-in-northern-ireland-and-the-republic-of-ireland-at-risk-following-brexit-warns-bma>>.

147 BMA (n 54) 1.

148 BMA (n 146).

149 *ibid.*

The BMA has also warned that ‘patient care in Northern Ireland and the Republic of Ireland will be put at risk if the next government fails to maintain a “soft border” following Brexit.’<sup>150</sup>

Some key examples of the all-island healthcare regime include children’s cardiac services in Dublin, and radiotherapy and cardiology services in Derry. At the moment, paediatric cardiology services are provided on an all-island basis. This service, which is currently based in Our Lady’s Hospital in Dublin, ensures that children needing to undergo heart surgery can do so on the island without having to travel to England for treatment. It came about in 2015, following a review by health ministers in the North and South that decided that providing children’s heart surgery services at the Belfast’s Royal Victoria Hospital was no longer sustainable.<sup>151</sup> Another example of cross-border healthcare is the radiotherapy unit at Altnagelvin Hospital in Derry, which provides radiotherapy to cancer patients. Prior to the development of this initiative, some patients had to make a 200-mile round trip journey to the cancer centre in Belfast.<sup>152</sup> The cross-border cardiology unit at Altnagelvin also provides lifesaving treatment to those experiencing heart attacks in across the North-West region, including Donegal.<sup>153</sup>

Another threat to the provision of all-island healthcare relates to data sharing. According to the Human Rights Consortium, the EU is a ‘global leader in data protection and its current regulatory regime provides for the particularities of data protection in the area of public health.’<sup>154</sup> Concerns have therefore been raised as to how UK agencies will be able to continue to coordinate on health initiatives if a regulatory divergence develops. Relatedly, there are questions about the ability to determine a doctor’s fitness to practice across the EU if the UK no longer has access to the Internal Market Information System (IMI) alert system. This provides a warning if a doctor has had their practice restricted in any EU member state and it is so far unclear whether the UK will continue to have access to this information system after Brexit.<sup>155</sup>

## Trade and Economy

Brexit has been identified as a serious threat to the economy, particularly due to the potential disruption in the existing trade and economic links between the North and the South. The potential changes in regulations and tariffs, the ability to attract cross-border workers, and the disruption to supply chains represent some of the key challenges.<sup>156</sup> In an interview with BrexitLawNI, economist Paul MacFlynn articulated some of the very serious consequences for the all-island economy,

<sup>150</sup> *ibid.*

<sup>151</sup> *ibid.*

<sup>152</sup> *ibid.*

<sup>153</sup> BMA (n 54) 4.

<sup>154</sup> Consortium (n 45) 36.

<sup>155</sup> BMA (n 54) Page: 6.

<sup>156</sup> InterTrade Ireland (n 83) 4.

... my real concern is that if the border issue isn't handled correctly or if whatever solution is designed for the border begins to unravel, that all-island trade and the all-island economy which is in place now but is actually underperforming what it should be in the ideal scenario, that the progress has been made over the last 20 years to build supply chains and links within industry across the island of Ireland, that particularly among small and medium-sized enterprises, which we only just got to sort-of turn around and sort-of face each other, they will now... that firms in the Republic will focus on the Republic and EU trade, and firms in Northern Ireland will focus on a small domestic market with possibility for some sales to Great Britain, and that whatever potential lay in the all-island economy will just slowly begin to wither, and... without ever having realised the potential of it to begin with.<sup>157</sup>

A further concern for both businesses and police on the island of Ireland is the potential for smuggling (in a context where policing cooperation may become difficult). The more significant the economic border between the North and South becomes, the higher the likelihood that it will result in smuggling, as the rewards will be greater.<sup>158</sup> Smuggling of tobacco, fuel, and alcohol is already an issue due to differences in duties and VAT regimes. Further divergence between economic regulations in the North and the South would therefore likely lead to increases in smuggling. Past experience has demonstrated (to people living the border regions in particular) that smuggling can cause significant harm to the 'legal economy'.<sup>159</sup> It creates an environment where legitimate businesses face a competitive disadvantage.

Until the UK exits the EU, it will be difficult to know exactly what the consequences will be in this area, but Brexit is already having an impact on trade, business and the economies of the North and South of the island. For example, the lives of cross-border workers have been impacted by the Brexit vote.<sup>160</sup> Currency fluctuations, and the devaluation of the pound, have meant that many cross-border workers are earning less money than they did before the referendum.<sup>161</sup> Due to this, as well as the possibility of a hard border, respondents in Hayward's study stated that they feel they now have to make different choices as to where to live and work.<sup>162</sup> Concerns have also been raised about changes to regulations and the recognition of qualifications. For example, if regulations change on the island, there may be disparities between rights available to workers.<sup>163</sup> Furthermore, if alterations are made to the recognition of qualifications, or indeed the qualification requirements themselves, people may be forced to discontinue cross-border work.

157 BrexitLawNI, Interview with Paul MacFlynn, NERI (Belfast 28 March 2018).

158 Hayward (n 9) 82.

159 *ibid.*

160 *ibid.*, 83.

161 *ibid.*

162 *ibid.*, 81.

163 *ibid.*, 83.

Another way in which Brexit is already having an impact, is due to the drop in value of the Pound Sterling. InterTrade Ireland statistics have recorded an increase in Irish shoppers travelling to NI to purchase goods due to the fall in sterling. Exports from NI are now less expensive in international markets but it has also made it more difficult to export Irish goods to the UK market.<sup>164</sup> Currency fluctuations are having further impacts on the ability of businesses to survive as well. In our interview with economist Paul MacFlynn, he emphasised that,

the currency issue is underplayed – that had been an issue before, during the financial crisis, a massive devaluation of sterling, and then you had sterling before the referendum up again, and then tanking after. Put it this way, as we start to get closer to the deadline for Brexit and then for the end of the transition period, and this uncertainty keeps at the pace that it is, the damage those kind of swings have for small and medium size enterprises who are not just at the border regions but who... have supply linkages into the Euro area, some of them simply won't survive.<sup>165</sup>

### ***All-island Supply Chains and the Agri-Food Sector***

The threats coming from Brexit to all-island supply chains are significant and concerning.<sup>166</sup> According to Gravey, Hayward and Schiek, 'the possibility of customs checks or tariffs, non-coordinated regulatory changes on either side of the border, for instance in field such as animal welfare or waste management, would present a risk to cross border trade.'<sup>167</sup> The Alliance Party has also expressed concerns about the economic consequences of Brexit for NI, as 'large aspects of our economy, for instance agri-food, are organised on a North-South basis.'<sup>168</sup> Hospitality Ulster has highlighted the all-island nature of the hospitality and tourism industry and its concerns regarding the implications that Brexit may have for this.<sup>169</sup>

Hayward contends that the economic consequences of a disruption to cross-border cooperation will be felt particularly severely in the border regions. She states that '[c]ross-border cooperation has been used as one means of addressing the particular needs of the Central Border Region – needs which can be summarised in terms of its demographic deficit, rurality, geopolitical peripherality and structural deprivation.'<sup>170</sup> The Border Region is characterised by

164 RalSe (n 4) 47.

165 MacFlynn (n 157).

166 A comment from an attendee at the Derry Townhall captured this: 'a lot of the angst, I think, in rural areas in NI is about the agri-foods implications of Brexit, where you get Ulster milk turned into Irish butter and it crosses the border 2 or 3 times in the process.' BrexitLawNI, Respondent 8, Derry Townhall (Derry, 7 December 2017).

167 European Union Committee, 'Brexit: Devolution', House of Lords (HL Paper 9, July 2017) 18 <<https://publications.parliament.uk/pa/ld201719/ldselect/ldcom/9/9.pdf>>.

168 Alliance Party, 'The Case for a Special Deal' (November 2017) 6 <<https://allianceparty.org/page/brexit>>.

169 EU Committee (n 167) 18.

170 Hayward (n 9) 19.



an aging population, weak infrastructure, a proportional lack of skilled labour, a dependence on agriculture, and very few multinational companies invested in the area.

There are a number of challenges raised by Brexit, including customs regulations, the potential imposition of a hard border, the UK's withdrawal from the Common Agricultural Policy, diverging regulations on the island, and pressure on the interdependence of sectors like dairy on cross-border trade.<sup>171</sup> The animal welfare provisions contained in EU law ensure that all meat and food produce meet required standards to be sold within the EU.<sup>172</sup> Having this overarching commonality of standards forms an essential component of the all island agri-food market – something which is threatened by Brexit.

One of the key problems relates to the potential imposition of a hard border. Respondents in Hayward's study commented on 'the fact that farming now is far more complicated – and the agricultural markets and supply chains far more integrated – than at the time there was a hard border'.<sup>173</sup> For example, one respondent in our Derry/Londonderry Townhall meeting stated, that there is 'a lot of the angst, I think in rural areas, in NI is about the agri-foods implications of Brexit, where you get Ulster milk turned into Irish butter and it crosses the border 2 or 3 times in the process'.<sup>174</sup>

## Memorandums of Understanding

The Louth and Newry and Mourne Joint Committee has expressed a number of fears about the potential impact of Brexit on the MOU, and the border corridor more generally.<sup>175</sup> The Committee has voiced particular concern over the 'potential impact on delivery of local services for communities for example health services, ambulances and other emergency services'.<sup>176</sup>

A broader response led by the Newry, Mourne and Down Council (in conjunction with all border local authorities) to Brexit challenges has so far emphasised mitigating risks and being prepared for change.<sup>177</sup> They have encouraged further collaboration with each other, as well as with the central governments, to work out new policies and management strategies for protecting the border region from Brexit.

171 RalSe (n 4) 54.

172 Consortium (n 45) 119.

173 Hayward (n 9) 80.

174 Respondent 8 (n 166).

175 Anonymous, 'Brexit concerns raised at Louth, Newry and Mourne meeting' *Mourne Advertiser* (6 July 2017) <<https://mourne-advertiser.com/brexit-concerns-raised-louth-newry-mourne-meeting/>>.

176 *ibid.*

177 AgendaNI (n 93).

## D. Ways Forward

Brexit poses **considerable challenges for the future of North-South cooperation**. It is advancing at a time when the political institutions in NI are not functioning and therefore the North-South Ministerial Council is not operating. At the time of writing, the return of the institutions did not appear imminent. The near universal call to avoid a hard border raises hard practical questions about how this is to be achieved over the longer term. The EU-UK Joint Report of December 2017 set out a number of options, with the preference being a UK-wide resolution (Option A);<sup>178</sup> in the absence of that outcome, specific solutions would be needed to ensure the unique circumstances of NI are respected (Option B); and in the absence of agreement on those then the UK should maintain full alignment with the rules of the internal market and customs union which support, among other things, North-South cooperation (Option C).<sup>179</sup> As we indicated in December 2017:

Much 'political spin' will surround this document but it is hard to avoid the conclusion that the UK Government accepts that Northern Ireland will, one way or another, maintain regulatory alignment with the rules of the single market and the customs union (however this is achieved). This is welcome and goes some way to alleviating some concerns.<sup>180</sup>

The draft Protocol produced by the European Commission was an attempt to translate the Joint Report into legal text and thus offer a form of 'backstop' if the other options did not materialise or where ineffective. The draft Protocol generated a range of reactions. The UK government insisted the 'backstop' was unacceptable, citing its potential impact on the economic and constitutional integrity of the UK. The Irish government and others welcomed the Protocol and it has continued to insist on the need for its inclusion; in this it is advocating the position of the EU27 that there will be no Withdrawal Agreement without a Protocol on these matters. It is hard to resist the conclusion that the UK government is steadily retreating from the positions advanced in the Joint Report by offering questionable interpretations of what was agreed.

The way forward in this area does appear reasonably clear in principle. First, there is a need to deliver and legally operationalise (on a good faith and enforceable basis) the agreements reached in December 2017 as these relate to Ireland/NI, and second, return to the principles and institutions of the B/GFA and subsequent agreements.

**First, there is a need to adopt a Protocol as part of the Withdrawal Agreement that fully reflects the agreements reached in the Joint Report and that can be enforced.** This includes respecting the significance of protecting North-South cooperation and avoiding a hard border, as well as the ways these objectives might be achieved. In order for these to be meaningful

<sup>178</sup> See BrexitLawNI, 'The New UK-EU Joint Report on Phase 1 of the Negotiations Preliminary Views on the Ireland and Northern Ireland Section' (12 December 2017) <<https://s3-eu-west-1.amazonaws.com/caj.org.uk/2017/12/18132316/BrexitLawNI-Analysis-Phase-1-Report-Final.pdf>>.

<sup>179</sup> *ibid.*

<sup>180</sup> *ibid.*

guarantees they need to be legally enforceable. In this respect, it is plain that in order to be effective, the jurisprudence and jurisdiction of the CJEU should apply to any solutions adopted for the unique situation in NI. There will be a need to ensure that the mechanisms established by the proposed Withdrawal Agreement, including the work of the Joint Committee, are also in full compliance with agreements reached. In the absence of UK-wide or specific solutions to resolve some of the challenges for North-South cooperation then the proposed Protocol becomes even more significant as a tangible, binding and enforceable guarantee that will place North-South relations on a reasonable basis.

**Second, answers to several Brexit-related questions may rest in the B/GFA.** The institutions established on North-South basis must re-emerge effectively as part of any negotiated way forward. The NSMC and the Implementation Bodies will need to be re-imagined for the post-Brexit era and their role will become ever more significant. If the two parts of the island are not to drift further apart as a consequence of Brexit then the effectiveness of all existing institutional frameworks will need to be maximised and re-imagined for this challenging new context.



# BrexitLawNI Policy Report:

Brexit and North-South Relations

## Funded By:

E·S·R·C  
ECONOMIC  
& SOCIAL  
RESEARCH  
COUNCIL



## Project Partners:



TJI  
Transitional  
Justice Institute



QUEEN'S  
UNIVERSITY  
BELFAST

BrexitLawNI

School of Law

Queen's University Belfast

Belfast, BT7 1NN

e: [brexitlawni@qub.ac.uk](mailto:brexitlawni@qub.ac.uk)