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Northern Ireland Affairs
Committee

The Northern Ireland backstop and the border: interim report

Sixth Report of Session 2017–19

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to the report*

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Northern Ireland Affairs Committee

The Northern Ireland Affairs Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Northern Ireland Office (but excluding individual cases and advice given by the Crown Solicitor); and other matters within the responsibilities of the Secretary of State for Northern Ireland (but excluding the expenditure, administration and policy of the Office of the Director of Public Prosecutions, Northern Ireland and the drafting of legislation by the Office of the Legislative Counsel).

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Summary

Political deadlock over the Northern Ireland Protocol, also known as the backstop, has become the major obstacle to the Government securing parliamentary support for the Withdrawal Agreement and an orderly exit from the European Union on 29 March 2019.

The UK, Ireland and the EU unanimously agree that there can be no return to a hard border on the island of Ireland and that the many forms of cross-border cooperation which have developed since the Good Friday/Belfast Agreement must be protected. Irrespective of the profound consensus around this view, disagreement over how to deliver this shared goal has brought the UK's exit negotiations to a standstill and increased the likelihood of the UK leaving without a deal on 29 March 2019 and the possibility of not leaving at all.

The key contention between the UK and EU negotiating positions on the backstop derives from their differing approaches to avoiding a hard border. The UK favours "specific solutions" such as maximum facilitation whereas the EU has advocated that either Northern Ireland or the UK as a whole maintains alignment with EU rules. The backstop arrangements in the Withdrawal Agreement succeed in obviating the need for border infrastructure or related checks and controls on goods travelling across the land border by requiring Northern Ireland to maintain a high degree of alignment with EU rules. As a consequence, goods travelling between Great Britain, which is not required to maintain the same level of EU regulatory alignment, and Northern Ireland will face new trade barriers. This solution sacrifices the integrity of the UK internal market in order to facilitate frictionless cross-border trade between Northern Ireland and Ireland. Concern has also been expressed that the backstop implies a UK-EU customs union will be taken as the baseline for construction of the future UK-EU trading relationship. It is a solution which four of Northern Ireland's pro-Remain political parties describe as a vital insurance policy but has proved unacceptable to the House of Commons in its current form.

We recommend the EU and UK clarify, in legally recognisable terms, before the 12 March 2019, their joint expectations regarding key phrases in the Withdrawal Agreement which set out the conditions any future UK-EU agreement must meet in order to succeed the backstop. This would build trust and ensure both sides share the same understanding of what a future relationship, that can supersede the backstop, could look like. We also recommend that the Political Declaration be amended, and the preamble to the Protocol be clarified, in a judicable form, to make absolutely clear that the backstop arrangements are designed to prevent a hard border only and should not be taken as the baseline starting position for negotiations on the future UK-EU relationship.

The Committee has also examined the availability of technical solutions or alternative arrangements for avoiding a hard border in Northern Ireland. The balance of evidence suggests that a technical and systems based approach to keeping the land border on the island of Ireland much as it is today, far from being a 'unicorn', is achievable within the Implementation Period anticipated by the Withdrawal Agreement. The principal impediment is a lack of political trust and goodwill between the negotiating parties.

1 Introduction

1. Political deadlock over the Northern Ireland Protocol, also known as the backstop, has become the major obstacle to the Government securing parliamentary support for the Withdrawal Agreement and an orderly exit from the European Union on 29 March 2019.
2. During this inquiry, the Northern Ireland Affairs Committee has built on its previous work, examining the land border between Northern Ireland and Ireland. We have scrutinised the backstop proposals and considered models for a future EU-UK relationship that could meet the needs of Northern Ireland. In this interim report, we examine the causes of the current impasse and propose solutions aimed at securing an orderly exit from the EU on 29 March 2019. We also look at the need for building trust between the UK and EU for negotiations on the future relationship.

The current political impasse

3. On 15 January 2019, the House of Commons voted by 432 votes to 202 not to approve the Withdrawal Agreement and Political Declaration on the future UK-EU relationship that the Prime Minister had agreed with the EU. This Agreement followed two years of negotiations.¹ On 29 January 2019, the House of Commons gave its support by 317 votes to 301 for an amendment tabled by Sir Graham Brady MP and Dr Andrew Murrison MP (who is also Chair of the Northern Ireland Affairs Committee) which:

requires the Northern Ireland backstop to be replaced with alternative arrangements to avoid a hard border; supports leaving the European Union with a deal and would therefore support the Withdrawal Agreement subject to this change.²

4. The Prime Minister has since met with EU leaders in Brussels to discuss ways in which “legally binding changes to the backstop” could be achieved.³ President of the European Commission, Jean-Claude Juncker, has said that the EU will not “reopen the Withdrawal Agreement”⁴ but discussions are ongoing to determine “which guarantees could be given with regard to the backstop that underlines once again its temporary nature and give the appropriate legal assurance to both sides.”⁵

5. In a joint statement on 20 February 2019, President Juncker and the Prime Minister “reconfirmed their commitment to avoiding a hard border” and “to respect the integrity of the EU’s internal market and of the United Kingdom”.⁶ Article 50 of the Treaty on European Union provides for an EU Member State to leave the EU with or without a withdrawal agreement or ‘deal’ within a two-year time frame starting from the formal notification of withdrawal by the leaving State.⁷ If there is no UK request, or no EU agreement, to extend the negotiations or if either the UK Parliament or the European Parliament or the other 27 EU Member States do not ratify the negotiated Withdrawal Agreement, there will be no ‘deal’ and the EU Treaties will no longer apply to the UK

1 [Volume 652](#), European Union (Withdrawal) Act, Hansard, 15 January 2019

2 [Tuesday 29 January 2019 Order Paper No.240: Part 1](#)

3 [PM speech in Belfast: 5 February 2019](#), [PM’s statement to the House of Commons on Brexit: 12 February 2019](#)

4 [Joint statement on behalf of President Juncker and Prime Minister May](#), 7 February 2019

5 [Joint statement on behalf of President Juncker and Prime Minister May](#), 20 February 2019

6 [Joint statement on behalf of President Juncker and Prime Minister May](#), 20 February 2019

7 [Article 50](#), Treaty on European Union, 2012

from 29 March 2019. On 26 February 2019, the Prime Minister informed the House of Commons that if the Government has not won parliamentary support for the Withdrawal Agreement by 12 March 2019 it will table a motion “asking this House if it supports leaving the EU without a Withdrawal Agreement and a framework for a future relationship on 29 March.”⁸

6. The UK, Ireland and the EU unanimously agree that there can be no return to a hard border on the island of Ireland and that the many forms of cross-border cooperation which have developed since the Good Friday/Belfast Agreement must be protected. Irrespective of the profound consensus around this view, disagreement over how to deliver this shared goal has brought the UK’s exit negotiations to a standstill and increased the likelihood of the UK leaving without a deal on 29 March 2019 and the possibility of not leaving at all.

The backstop arrangements (Protocol on Ireland/Northern Ireland)

7. The backstop arrangements comprise 170 pages of legal text and make up around one third of the Withdrawal Agreement which was formally agreed by the European Council on 25 November 2018.⁹ The aim of the Northern Ireland backstop is to ensure that, however negotiations on the future UK-EU relationship progress, the open border between Ireland and Northern Ireland will be maintained and the Belfast/Good Friday Agreement respected.

Entry into force and conditions for exiting the backstop

8. The Withdrawal Agreement states that the EU and UK shall use “their best endeavours” to ensure that a future relationship agreement can be agreed and implemented at the end of the transition period, meaning the backstop arrangements never come into effect.¹⁰ However, if a future relationship agreement is not in place by the end of the transition period, the backstop arrangements apply automatically.¹¹ The Attorney General’s legal advice states:

Despite statements in the Protocol that it is not intended to be permanent, and the clear intention of the parties that it should be replaced by alternative, permanent arrangements, in international law the Protocol would endure indefinitely until a superseding agreement took its place, in whole or in part.¹²

9. Article 1.3 of the backstop, in conjunction with the preamble, sets out the following conditions with which any subsequent UK-EU agreement must be compatible, in order to supersede the backstop:

8 [PM statement to the House of Commons: 26 February 2019](#)

9 [The backstop explained](#), House of Commons Library, 12 December 2018

10 [Article 184, Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council](#), 25 November 2018

11 [The backstop explained](#), House of Commons Library, 12 December 2018, Article 184, [Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council](#), 25 November 2018

12 [Attorney General’s legal advice to Cabinet on the Withdrawal Agreement and the Protocol on Ireland/Northern Ireland](#), 13 November 2019

- maintains the necessary conditions for North-South cooperation;
- avoids a hard border between Ireland and Northern Ireland, including any physical infrastructure or related checks and controls; and
- protects the 1998 Agreement in all its dimensions.¹³

Under Article 20 of the Withdrawal Agreement, either the UK or EU may call for an end to the backstop, in whole or in part, by notifying the other party and setting out its reasons.¹⁴ However, the UK can only exit the backstop via the review mechanism if the subsequent relationship between the UK and EU meets the conditions set out in Article 1 of the Protocol, and the EU agrees that it does.¹⁵

10. The Attorney General concluded that these provisions “allow no obvious room for the termination of the Protocol, save by the achievement of an agreement fulfilling these objectives”.¹⁶ If a compatible agreement is not reached, the backstop provisions would apply from 1 January 2021 or, at the very latest following a two-year extension of the transition period, on 1 January 2023.¹⁷ Concern has also been expressed that the backstop implies a UK-EU customs union and that this would be taken as a given in the construction of the future UK-EU trading relationship.¹⁸

Differing trade arrangements for Great Britain and Northern Ireland

11. The backstop contains important provisions on protecting the rights of individuals (Article 4), the Common Travel Area (Article 5), the Single Electricity Market (Article 11) and North-South cooperation (Article 13). However, it is the arrangements for facilitating the movement of goods which have attracted the greatest political and media attention. Although the backstop arrangements apply to the whole of the UK, creating a single customs territory with the EU, the arrangements apply differently in Great Britain and Northern Ireland.¹⁹

12. Under the backstop, the UK as a whole will conform to specific EU legislation on customs, taxation, the environment, labour law, state aid and competition.²⁰ In Northern Ireland, specific additional EU legislation will apply on customs, VAT and excise provisions

13 [Article 1, Protocol on Ireland/Northern Ireland, Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council, 25 November 2018](#)

14 [Article 20, Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council, 25 November 2018](#)

15 [House of Commons Library, CBP-8453](#)

16 [Attorney General’s legal advice to Cabinet on the Withdrawal Agreement and the Protocol on Ireland/Northern Ireland, 13 November 2019](#)

17 [Article 132, Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council, 25 November 2018](#)

18 [Sir Keir Starmer] [Hansard Volume 655, UK’s Withdrawal from the EU, 27 February 2019](#)

19 [Protocol on Ireland/Northern Ireland, Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council, 25 November 2018](#)

20 [Article 6, Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council, 25 November 2018, The UK’s EU Withdrawal Agreement, House of Commons Library, 7 December 2018](#)

and certain technical standards relating to goods. The additional provisions have the effect of essentially keeping Northern Ireland within the EU Customs Union and allow goods from Northern Ireland to pass into Ireland without any additional checks or controls.²¹

13. Goods travelling from Great Britain, which do not have to adhere to these additional EU rules, to Northern Ireland, will be subject to a new declaration process.²² In order to “avoid any additional preventable barriers” within the UK internal market, the Government has committed to ensuring “no divergence in the rules applied in Great Britain and Northern Ireland in areas covered by the Protocol.”²³ Goods travelling the other way, from Northern Ireland to Great Britain will continue to have “unfettered” access to the UK market.²⁴

14. On regulatory compliance and enforcement, UK authorities are responsible for implementing EU law applicable under the backstop arrangement for the UK as a whole but, where additional EU law continues to apply in Northern Ireland, EU institutions and bodies will have the same powers as they have currently under the EU Treaties.²⁵

15. Sir Keir Starmer MP, Shadow Secretary of State for Exiting the EU, has said:

We do have concerns about the backstop. There are concerns about the exit arrangements [...] there are real, deep concerns. Notwithstanding those concerns, though, we accept, because of our commitment to the Good Friday agreement, that at this stage—two years in, with 30 days to go—a backstop is inevitable.²⁶

It has been reported that Lord Trimble may take legal action against the backstop provisions on the basis that they subvert the Belfast/Good Friday Agreement 1998.²⁷

16. Nigel Dodds MP, deputy leader of the Democratic Unionist Party, articulated his party’s opposition to these provisions in the following terms:

Northern Ireland would be in a different regime—the single market regime, subject to enforcement by the European Commission and to oversight by the European Court of Justice [...] On the customs arrangements, it is simply untrue to say that somehow we are all in one big customs union together. Northern Ireland is in the EU customs union [...] Quite frankly, that is unacceptable to me as a Unionist.²⁸

17. Illustrating the political divide over these arrangements, four pro-Remain political parties in Northern Ireland (Sinn Féin, Social Democratic and Labour Party, Alliance, Green Party in Northern Ireland) signed a joint statement stating:

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- 21 [Q4](#) [Victoria Hewson] Oral Evidence to the House of Lords EU Select Committee, 12 February 2019
- 22 [Attorney General’s legal advice to Cabinet on the Withdrawal Agreement and the Protocol on Ireland/Northern Ireland](#), 13 November 2019, [Q4](#) [Victoria Hewson] Oral Evidence to the House of Lords EU Select Committee, 12 February 2019
- 23 [UK Government commitments to Northern Ireland and its integral place in the United Kingdom](#), 9 January 2019
- 24 [UK Government commitments to Northern Ireland and its integral place in the United Kingdom](#), 9 January 2019
- 25 [The UK’s EU Withdrawal Agreement](#), House of Commons Library, 7 December 2018, [Attorney General’s legal advice to Cabinet on the Withdrawal Agreement and the Protocol on Ireland/Northern Ireland](#), 13 November 2019
- 26 [Sir Keir Starmer] [Hansard Volume 655](#), UK’s Withdrawal from the EU, 27 February 2019
- 27 [Lord Trimble raises £10k for Brexit backstop legal challenge](#), Belfast Telegraph, 7 February 2019, [Northern Ireland’s Trimble plans challenge to Brexit Irish backstop](#), Reuters, 19 November 2018,
- 28 [Rt Hon Nigel Dodds] [Volume 650](#), European Union (Withdrawal) Act, Hansard, 4 December 2018

We believe that while the Withdrawal Agreement is imperfect, it will mitigate against a bad Brexit which is being imposed against the democratic will of a majority of citizens here who decisively voted to Remain within the European Union. We believe that the ‘backstop’ contained within the Withdrawal Agreement is a vital insurance policy which avoids a hard border on the island of Ireland.²⁹

18. The backstop arrangements succeed in obviating the need for border infrastructure or any related checks or controls on goods travelling across the land border between Ireland and Northern Ireland. The arrangements achieve this by requiring Northern Ireland to maintain a high degree of alignment with EU rules and, as a consequence, raise new barriers to the flow of goods from Great Britain, which is not required to maintain the same level of EU regulatory alignment, to Northern Ireland. Under this model, goods travelling from Great Britain to Northern Ireland would undergo a new declarations process and, in some cases, regulatory compliance checks. This solution sacrifices the integrity of the UK internal market in order to facilitate frictionless cross-border trade between Northern Ireland and Ireland. It is a solution which four of Northern Ireland’s pro-Remain political parties describe as a vital insurance policy but has proved unacceptable to the House of Commons in its current form.

Differing approaches: regulatory alignment and specific solutions

19. In the Joint Report of December 2017, the EU and UK first set out how they would achieve their shared aims of avoiding a hard border and protecting North-South cooperation under the Belfast/Good Friday Agreement. Paragraph 49 stated:

The United Kingdom’s intention is to achieve these objectives through the overall EU-UK relationship. Should this not be possible, the United Kingdom will propose specific solutions to address the unique circumstances of the island of Ireland. In the absence of agreed solutions, the United Kingdom will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all island economy and the protection of the 1998 Agreement.³⁰

20. This paragraph sets out the key contention between the UK and EU negotiating positions, the UK favouring “specific solutions” and the EU advocating that either Northern Ireland or the UK as a whole maintains alignment with EU rules. Former Secretary of State for Exiting the EU, Dominic Raab MP, told the Committee on 30 January 2019:

In relation to the Withdrawal Agreement and in particular the backstop arrangements in the Northern Ireland Protocol, it is important to understand the two paradigms [...] One is that you avoid what I think we all want to avoid, which is any hard border between the Republic and the North, by a process of high-level legislative and regulatory alignment. That is effectively the approach that the EU has adopted and is reflected in the EU withdrawal

29 [Joint statement from the pro-Remain parties in the NI Assembly](#), 31 January 2019

30 [Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom’s orderly withdrawal from the European Union](#), 8 December 2017

agreement. The second paradigm is to say, “We respect and we understand your equities in protecting the single market regulations, but in the modern world, with technology and with decentralised processes, this can be done away from the border”.³¹

21. The UK has proposed a series of alternative arrangements for how the UK-EU customs and regulatory relationship could be managed without recourse to physical infrastructure at the border in Northern Ireland:

- The ‘Future Partnership Paper’ and ‘Northern Ireland and Ireland’ papers of August 2017;³²
- The ‘Technical Note: temporary customs arrangement’ paper of June 2018;³³ and
- The ‘Future Relationship’ paper, also known as the Chequers Plan, of July 2018.³⁴

22. The EU has stated that it is willing to consider alternatives for the future UK-EU relationship but the backstop arrangements, based on regulatory alignment, must be included in the Withdrawal Agreement as a “safety net”.³⁵ The first iteration of the Withdrawal Agreement, proposed by the EU in February 2018, advocated Northern Ireland alone sharing a common regulatory area with the EU and remaining in the customs union.³⁶ Under this plan Northern Ireland would be separated from the existing customs union with its biggest market, Great Britain.³⁷ EU statements throughout 2018 make clear its view that these backstop arrangements “simply set out” or “reflect” the commitments made in the Joint Report of December 2017.³⁸ The Prime Minister responded that if implemented, these proposals would “undermine the UK common market” and “threaten the constitutional integrity of the UK” by creating “a customs and regulatory border down the Irish sea.”³⁹ In November 2018, the backstop arrangements were amended creating the single customs territory between the UK and EU.⁴⁰

23. Following the vote on 29 January 2019, in which the House of Commons passed an amendment requiring the Prime Minister to replace the backstop with alternative arrangements, President Juncker said:

The concept of ‘alternative arrangements’ is not new. It was discussed in the negotiations. It is referred to in the Political Declaration. And in our

31 [Q96](#) [Rt Hon Dominic Raab MP] Northern Ireland Affairs Committee, 30 January 2019

32 [Future customs arrangements - a future partnership paper](#), 15 August 2017, [Northern Ireland and Ireland](#), 16 August 2017

33 [‘Technical Note: temporary customs arrangement’](#), 7 June 2018

34 [The future relationship between the United Kingdom and the European Union](#), 12 July 2018

35 [Speech by Michel Barnier at the closing session of Eurochambre’s European Parliament of Enterprises 2018](#), 10 October 2018

36 [European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community](#), 28 February 2018

37 [Northern Ireland Broad Economy Sales and Exports Statistics 2017](#), NISRA, published 12 December 2018

38 [Press statement by Michel Barnier following the General Affairs Council \(Article 50\)](#), 18 September 2018, [Statement by Michel Barnier at the plenary session of the European Parliament on the Article 50 negotiations with the United Kingdom](#), 13 March 2018

39 [Rt Hon Theresa May] [Hansard Volume 636](#), 28 February 2018

40 [Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community](#), as agreed at negotiators’ level on 14 November 2018.

letter to Prime Minister May, Donald Tusk and I committed to exploring it further as a matter of priority. But a concept is not a plan. It is not an operational solution.⁴¹

Michel Barnier, EU Chief Negotiator, said:

We are open to alternative arrangements, as discussed by the House of Commons yesterday. The Protocol on Ireland and the Political Declaration mention them. The letter by Presidents Tusk and Juncker made it a priority in the future negotiations. We are ready to work on them immediately after the signature of the Withdrawal Agreement. But nobody today—on either side—is able to clarify precisely what these alternative arrangements are operationally and how they would effectively achieve the objectives of the backstop. That is why, at this current moment and given the Withdrawal Agreement, we need the backstop as it is.⁴²

24. The Prime Minister has since met with EU leaders and proposed the following options:

- First, the backstop could be replaced with alternative arrangements to avoid a hard border between Northern Ireland and Ireland.
- Second, there could be a legally-binding time limit to the existing backstop.
- Third, there could be a legally-binding unilateral exit clause to that backstop.⁴³

The EU, however, has maintained that the Withdrawal Agreement is “the best and only deal possible” and as such it is “not open for renegotiation.”⁴⁴

41 [Speeches by President Juncker and Chief Negotiator Michel Barnier at the Plenary session of the European Parliament on the occasion of the debate on the United Kingdom’s withdrawal from the EU, 30 January 2019](#)

42 [Speeches by President Juncker and Chief Negotiator Michel Barnier at the Plenary session of the European Parliament on the occasion of the debate on the United Kingdom’s withdrawal from the EU, 30 January 2019](#)

43 [PM’s statement to the House of Commons on Brexit: 12 February 2019](#)

44 [Joint statement by President Jean-Claude Juncker and Taoiseach Leo Varadkar, 6 February 2019](#)

2 Solutions

Permanency of the backstop arrangements

25. In advance of the Parliamentary approval vote on 15 January 2019, the Prime Minister wrote to Presidents Tusk and Juncker seeking a commitment that negotiations on the future relationship will consider:

all available facilitative arrangements and technologies for replacing the backstop with permanent arrangements that ensure its underlying objectives continue to be met. These ideas need not replicate the provisions of the protocol in any respect, and the UK is ready to work ambitiously and creatively with the EU on this.⁴⁵

President Juncker's response stated:

Given our joint commitment to using best endeavours to conclude before the end of 2020 a subsequent agreement, which supersedes the Protocol in whole or in part, the Commission is determined to give priority in our work programme to the discussion of proposals that might replace the backstop with alternative arrangements. In this context, facilitative arrangements and technologies will be considered. Any arrangements which supersede the Protocol are not required to replicate its provisions in any respect, provided that the underlying objectives continue to be met.⁴⁶

26. The Attorney General subsequently wrote to the Prime Minister stating that:

The Council's conclusions would have legal force in international law and thus be relevant and cognisable in the interpretation of the Withdrawal Agreement, and in particular the Northern Ireland Protocol, albeit that they do not alter the fundamental meaning of its provisions as I advised them to be on 13 November 2018 [...] It is my opinion, that the balance of risks favours the conclusion that it is unlikely that the EU will wish to rely on implementation of the backstop provisions.⁴⁷

27. In the following section we make two proposals which could build confidence that the backstop arrangements will not become 'base camp' for negotiations on the future relationship:

- Amendments to the Political Declaration and Protocol Preamble;
- Clarification of key conditions in the Withdrawal Agreement.

Amendments to the Political Declaration and preamble to the Protocol

28. On 22 November 2018, the negotiators agreed a Political Declaration setting out the Framework for the Future Relationship between the European Union and the United

45 [Exchange of letters between the UK and EU on the Northern Ireland backstop](#), 14 January 2019

46 [Joint letter of President Tusk and President Juncker to Theresa May](#), Prime Minister of the United Kingdom, 14 January 2019

47 [Letter from the Attorney General to the Prime Minister on the Northern Ireland Protocol](#), 14 January 2019

Kingdom, which expanded on and replaced the earlier outline Political Declaration of 14 November.⁴⁸ The declaration calls on the UK and EU to agree “an ambitious, wide-ranging and balanced future economic partnership” with “a free trade area” and “wider sectoral cooperation” where it is in the mutual interest of both parties.⁴⁹ Unlike the Withdrawal Agreement, the Political Declaration is not a binding legal document and it is unlikely that it could bind the parties to anything beyond a commitment to negotiate for a future relationship in good faith, which is set out in Article 184 of the Withdrawal Agreement.⁵⁰

29. The Political Declaration contains references to a future relationship consistent with the UK’s preferred approach of specific solutions and maximum facilitation:

[The EU and UK] intend to consider mutual recognition of trusted traders programmes, administrative cooperation in customs matters and mutual assistance, including the recovery of claims related to taxes and duties, and through exchange of information to combat customs fraud and other illegal activity. Such facilitative arrangements and technologies will also be considered in developing any alternative arrangements for ensuring the absence of a hard border on the island of Ireland on a permanent footing.⁵¹

30. However, the Political Declaration also contains the following passage at paragraph 23 on tariffs:

The economic partnership should ensure no tariffs, fees, charges or quantitative restrictions across all sectors, with ambitious customs arrangements that, in line with the Parties’ objectives and principles above, build and improve on the single customs territory provided for in the Withdrawal Agreement which obviates the need for checks on rules of origin.⁵²

31. An almost identical passage, referring to the EU and UK’s common objective of establishing “ambitious customs arrangements” that “build on the single customs territory provided for in this Protocol” is also included in the preamble to the backstop.⁵³ Martin Howe QC, Chairman of Lawyers for Britain, told the Committee that this passage is not compatible with a conventional free trade agreement because:

all conventional free trade agreements necessarily involve rules of origin checks on goods that pass between the free trade members. The reason

48 [Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators’ level on 14 November 2018.](#)

49 [The Political Declaration on the Framework for Future EU-UK Relations](#), House of Commons Library Briefing No. 08454 21, December 2018

50 [The Political Declaration on the Framework for Future EU-UK Relations](#), House of Commons Library Briefing No. 08454, 21 December 2018

51 [Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom](#), 25 November 2018

52 [Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom](#), 25 November 2018

53 [Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council](#), 25 November 2018

for having those checks is that they are the necessary counterpart of the freedom of each free trade party partner to set its own tariffs in dealing with third countries.⁵⁴

Similarly, Victoria Hewson, Senior Counsel at the Institute for Economic Affairs, said:

[Paragraph 23] envisages customs arrangements that build on the single customs territory and the regulatory side says that the UK will consider aligning with EU regulations. Actually, the future relationship track is not that far away from the track that the backstop is on anyway, so in an effort to avoid triggering the backstop, as someone who supports leaving the customs union and embarking on an independent trade policy, I would be very worried that in order to avert the backstop we essentially formalise it as the permanent future relationship.⁵⁵

32. We recommend that Paragraph 23 of the Political Declaration be amended and the preamble to the Protocol be clarified in a judicable form to make absolutely clear that the backstop arrangements are designed to prevent a hard border only and should not be taken as the baseline starting position for negotiations on the future UK-EU relationship. These changes, which are compatible with the EU's stated intent, would build confidence for the UK that the EU is genuinely open to a future relationship that will enable it to have an independent trade policy.

Clarifying the conditions required to supersede the backstop

33. The Withdrawal Agreement does not provide a clear definition of the conditions any future UK-EU agreement must meet before it can supersede the backstop. Article 1.3 of the backstop, in conjunction with the preamble, states any future relationship must:

- maintain the necessary conditions for North-South cooperation;
- avoid a hard border between Ireland and Northern Ireland, including any physical infrastructure or related checks and controls; and
- protect the 1998 Agreement in all its dimensions.⁵⁶

34. The Committee questioned the former Secretary of State for Exiting the EU, Dominic Raab MP, on whether he had ever discussed the meaning of the term “hard border” with Michel Barnier. On 30 January 2019, he told us:

Not in abstract conceptual terms, no. Whenever we talked about checks, the EU would say—I paraphrase—“We have to make sure that our rules and equities are respected and that the indivisibility and integrity of the single market is preserved”. We would say, “Of course, you do not need checks at the border for that”.⁵⁷

54 [Q9](#)

55 [Q3](#) [Victoria Hewson] Oral Evidence to House of Lords EU Select Committee, 12 February 2019

56 Article 1, protocol on Ireland/Northern Ireland, [Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council, 25 November 2018](#)

57 [Q135](#)

The Committee questioned experts on their interpretation of these crucial phrases from the Withdrawal Agreement and received a variety of responses. Some witnesses interpreted these commitments as strictly referring to the avoidance of physical infrastructure. David Henig, Director of the UK Trade Policy Project, said:

I try not to use the phrase “hard border”. I try to use the phrase “border infrastructure”, because that is a more helpful definition, so that is how I have been defining it.⁵⁸

Similarly, Martin Howe QC said:

I would have thought the obvious meaning is related to the physical infrastructure on the border, or maybe it means having checks and controls with a van that turns up and places itself on the border.⁵⁹

Dominic Raab told us:

In the worstcase scenario, a hard border envisages or depicts going back to some of the checks that characterised the position before we had the Belfast agreement, with all the Troubles. I prefer to think that the threshold or the litmus test, if you like, is the one Jon Thompson used, which is no additional infrastructure at the border.⁶⁰

35. However, other witnesses gave a much broader definition of what could constitute a hardening of the border in Northern Ireland. Colin Murray, Reader in Public Law at Newcastle University, said:

There was a rather flippant story last week about roaming charges returning as soon as the UK leaves the EU and how that is going to affect holidaymakers. I suppose, at the border in Ireland, that is not a holidaymaker issue; that is a day-to-day, lived reality. Your phone will keep flipping between different providers. Everything that changes the arrangements at the moment and makes life more difficult you could characterise as a hardening.⁶¹

Tony Lloyd MP, Shadow Secretary of State for Northern Ireland, described the ease with which people travel and work across the border today and concluded that “any impediment to the normalcy that has been developed over the last 20 years” could be part of the hard border.⁶² Dr Etain Tannam, Associate Professor of International Peace Studies, Trinity College Dublin, also supported a “holistic definition” which encompasses “the peace process, cultural and work links”. She said:

In terms of the security risk, there has been a focus on the physical side because of dissidents targeting that if there is physical infrastructure, but it is a broader concept.⁶³

36. Isabelle Van Damme, Counsel at Van Bael and Bellis, posited the following analysis for the inclusion of these broad concepts in the Withdrawal Agreement:

58 [Q360](#)

59 [Q98](#)

60 [Q114](#)

61 [Q360](#)

62 [Q176](#), [Q177](#)

63 [Q360](#)

[The EU and UK] might be trying to describe a situation where they are trying to protect the status quo as it is today, in circumstances where the regulatory framework is entirely changing. EU law and free movement facilitated the implementation of these arrangements in the past and now that framework is disappearing, so they are trying to put something in place whereby the status quo, whatever it is today, is somehow maintained.⁶⁴

This point was echoed in the response of Tony Lloyd MP, who described the Government's preparations for Brexit as indicative of "an acceptance that things will change and that there will be a creation, through Brexit, of a changed status".⁶⁵

37. Sir Stephen Laws, First Parliamentary Counsel 2006–2012, encapsulated the spectrum of responses in stating, "I certainly would not say that hard border is an expression that everybody would understand within its natural meaning."⁶⁶ Other commentators have identified differing UK and EU interpretations of these key commitments in the Withdrawal Agreement. A report by Dr Katy Hayward and Professor David Phinnemore of Queen's University Belfast concluded:

The UK in the Joint Report recall a commitment to avoiding 'any physical infrastructure or related checks and controls', although subsequent statements have suggested that this is understood to be 'at the border'—so opening up the possibility of checks near or further away from the border. The EU, on the other hand, understands a hard border in much broader terms of trade friction, referring to, for example, non-tariff barriers to trade. The persistence of such differences highlights the reasons why the decision to exit the terms of the backstop cannot be a unilateral one. It also highlights the need for clarity on the conditions for such an exit or a disapplication, and on the process.⁶⁷

38. In a research note for Policy Exchange, Professor Guglielmo Verdirame and Professor Richard Ekins also raise concern that the EU and UK "may not share a common understanding" of the relationship between the Belfast/Good Friday Agreement and the backstop.⁶⁸ The paper highlights their view that the Withdrawal Agreement leaves "unspecified" the type of agreement which could eventually supersede the backstop and recommends that the Government "hold the EU to a reasonable interpretation" of the type of agreement capable of superseding the backstop.⁶⁹

39. The UK's decision to leave the EU necessitates change. It is understandable that in the context of a post conflict society change to the status quo is met with caution. It is incumbent on all parties to work together to ensure that these changes do not undermine the normalcy of cross-border relationships on the island of Ireland.

40. Establishing an agreed understanding of the terms used to describe the border and North/South cooperation is crucial. These criteria will delimit the possibilities of the future UK-EU relationship. Some witnesses interpret the avoidance of a hard border

64 [Q93](#)

65 [Q176](#), [Q177](#)

66 [Q87](#)

67 [Brexit and the backstop](#), UK in a Changing Europe, 7 November 2018

68 [Strengthening the UK's position on the Backstop](#), Policy Exchange, 29 January 2019

69 [Strengthening the UK's position on the Backstop](#), A Policy Exchange Research Note, Professor Guglielmo Verdirame and Professor Richard Ekins, January 2019

with maintaining, in every detail, the current regulatory and customs environment in Northern Ireland. Under this interpretation, any change, from a switch in mobile roaming charges to increased veterinary inspections, may constitute an unacceptable hardening of the border.

41. **The lack of clarity over key terms in the Withdrawal Agreement, which sets out the conditions any future UK-EU agreement must meet in order to succeed the backstop, is not conducive to trust or transparency. It heightens the scope for misunderstanding. The Withdrawal Agreement must not repeat the mistakes of the Joint Report in allowing differing interpretations of key commitments to persist unresolved into the next stage of negotiations. We recommend the EU and UK clarify, in legally recognisable terms, before the 12 March 2019, their joint expectations regarding these key phrases to ensure that both sides share the same understanding of what a future relationship, that can supersede the backstop, could look like.**

Replacing the backstop with alternative arrangements

42. The amendment passed on 29 January 2019, requiring the Prime Minister to replace the backstop with “alternative arrangements”, has placed a renewed focus on the tension between regulatory alignment and the UK’s preferred option of specific solutions or maximum facilitation.⁷⁰ The Prime Minister subsequently announced the establishment of an Alternative Arrangements Working Group which would investigate other options for avoiding a hard border.⁷¹ The Secretary of State for Exiting the EU, Stephen Barclay MP, and other Ministers have been meeting with backbench MPs to support the work of the group.⁷² One proposal, commonly known as the Malthouse Compromise, advocates replacing the backstop with a free trade agreement. The proposals rely on technology, customs techniques and enforcement away from the border in place of regulatory alignment.⁷³

43. During our previous inquiry, the Committee investigated different border systems across the world, looking for a working model of an infrastructure-free border which could be adapted to meet the needs of Northern Ireland. We visited the Swiss border at Basel, took oral evidence from Norwegian and Gibraltar officials and scrutinised international examples such as US-Canada. None of these share Northern Ireland’s security imperative to avoid infrastructure at the border and, in the case of Switzerland, we heard of plans to streamline border processes further.⁷⁴ However, we were bound in our report, to observe that “we have had no visibility of any technical solutions, anywhere in the world, beyond the aspirational, that would remove the need for physical infrastructure at the border”.⁷⁵ Whilst there was indeed no ‘off- the shelf’ solution, we have heard further evidence on the possibility of designing bespoke arrangements which could meet the requirements of the EU and UK in respect of Northern Ireland.

70 Tuesday 29 January 2019 [Order Paper No.240: Part 1](#)

71 [Prime Minister] [Hansard Volume 654](#), Leaving the EU, 12 February 2019

72 Alternative Arrangements Working Group: Written question – [217470](#)

73 [The Malthouse Compromise – an official explainer in full](#), Conservative Home, 3 February 2019

74 [DaziT transformation programme] [The land border between Northern Ireland and Ireland](#), 16 March 2018

75 [The land border between Northern Ireland and Ireland](#), Northern Ireland Affairs Committee, HC329, 16 March 2018

Availability of technical solutions

44. The Committee questioned two experts, former Director of Capacity Building at the World Customs Organization, Lars Karlsson and, Brexit advisor at SGS Government and Institutions Services, Hans Maessen, to establish the viability of a maximum facilitation approach for the island of Ireland. Both have published papers setting out proposals for managing the flow of goods on the island of Ireland after the UK has left EU.

45. It is notable that although their proposals for managing trade outside the EU differ in substance, both Hans Maessen and Lars Karlsson agree with the fundamental point that leaving the EU means new regulatory and customs controls for goods crossing the land border. Hans Maessen said:

In all scenarios for Brexit, there will be the need for border controls. Only if Brexit does not take place, this will not be necessary. There are fiscal and non-fiscal reasons for border checks. Import duties and VAT need to be administered as goods are exported and imported. Regulatory checks are necessary to secure that all regulations concerning health, safety and environment are met.⁷⁶

Lars Karlsson told us:

Even if you have a free trade agreement it does not remove the responsibility to have some border formalities for other reasons than tariffs—sanitary controls, intellectual property rights, product safety, agricultural reasons and 10 or 15 other types of legislation that are there—that the UK and the EU want to control. That will still be there.⁷⁷

46. Consequently, their proposals both work on the basis that the required documentary and physical controls on goods crossing the land border could be enforced without recourse to traditional physical infrastructure or checks at the border line.

Box 1: Lars Karlsson's proposals

Lars Karlsson was commissioned by the European Parliament's Committee on Constitutional Affairs to write a paper exploring how modern customs techniques could be used to avoid a hard border on the island of Ireland. It is important to note that all the separate elements which make up the proposal "have been tested somewhere in the world just not in one single border" and as such the border in Northern Ireland would be "the first and a leading example in the world of this kind."⁷⁸ The following elements make up his technical solution for the Northern Ireland land border:

⁷⁶ [Drive through borders: a comprehensive UK and EU customs strategy for Brexit](#), Hans Maessen, July 2018

⁷⁷ [Q83](#)[Lars Karlsson] Oral Evidence to Northern Ireland Affairs Committee, Follow-up inquiry, 13 November 2018

⁷⁸ [Q6, Q74](#), [Lars Karlsson] Oral Evidence to Northern Ireland Affairs Committee, Follow-up inquiry, 13 November 2018

- A bilateral EU-UK agreement on advanced customs cooperation;
- Mutual recognition of Authorised Economic Operators (AEO) through use of a trusted trader programme. These systems work on the principle that companies who can meet specific risk and compliance standards are able to benefit from expedited clearance and reduced documentary and physical inspections;
- A technical agreement on exchange of customs risk data;
- Identification system by the border using either the mobile phone network or Radio Frequency Identification (RFID) to enable goods or driver ID to be checked without the need for people to leave a vehicle;
- A digital Single Window creating a single-entry point for traders to fulfil all import, export and transit related requirements;
- A Unique Consignment Reference number (UCR) which follows a consignment through its lifecycle in the global supply chain and enables risk and compliance management;
- Simplified customs declaration system (100% electronic);
- Mobile Control and Inspection Units; and
- Technical surveillance of the border (CCTV, Automatic Number Plate Recognition cameras etc).

47. In our previous report, we noted that Lars Karlsson’s proposals reference automatic “gates” operated using mobile phone technology and border surveillance using cameras. As these elements strongly suggest physical infrastructure at the border, we invited Mr Karlsson to appear before the Committee to clarify the details of his proposals. He told us a border without any infrastructure or gates is possible but would require digital surveillance via the use of Automatic Number Plate Recognition cameras on border roads.⁷⁹ In light of the two-year implementation period set out in the Withdrawal Agreement, we also enquired how long it would take to deliver a smart border model in Northern Ireland. He replied:

If there is a decision that the highest level of trust is there so we do not need any infrastructure, then there is no time limit to put that in place, but the soft infrastructure would not be there for 29 March. That is too short a period to get people to fulfil the obligation, so both sides would be comfortable with a solution like that. We have seen in other places to get the soft infrastructure in place we are talking about something between one and a half to two years. That is what it takes to do it. In the scope of a transition period it would be possible to get a soft infrastructure in place [...] Obviously, there would

79 [Q90](#), [Q96](#), [Q2](#), [Q69](#) [Lars Karlsson] Oral Evidence to Northern Ireland Affairs Committee, Follow-up inquiry, 13 November 2018; [Q1165](#) [Lars Karlsson] Oral evidence to Exiting the EU Select Committee, 20 March 2018

still need to be a lot of work done on education of traders, of building electronic systems, so it is possible for them to fulfil these obligations that are there with minimum cost, with minimum disruption and extra burdens on the private sector.⁸⁰

Box 2: Hans Maessen's proposals

In July 2018, Hans Maessen authored a report entitled 'Drive through borders: a comprehensive UK and EU customs strategy for Brexit' which proposes a toolkit of 13 customs simplification techniques which could be tailored depending on the situation from ports to the Channel Tunnel or the Northern Ireland land border. His solution is based on the following elements:

- Shift customs formalities to inland premises of exporters, importers and logistic services providers;
- Mobile and remote inspections by customs of selected goods at the premises of exporters, importers and logistics service providers;
- Using software to facilitate and standardise repetitive customs declarations, combining export and import customs declarations to cut the documentation requirement down to one process and introducing reverse charging for VAT;
- Mutual acceptance of product inspections for regulatory alignment prior to import, performed by certified companies;
- Waivers for customs clearance between certified business partners in the EU and the UK, assessment for the waivers by Certified Customs Accountants (CCA);
- Voluntary alignment with EU rules by individual businesses for regulatory checks;
- Secure continued participation in EU systems such as 'registered exporter' (REX) to manage Certificates of Origin, the Common Transit Convention for the movement of goods under duty suspension, Trade Control and Expert System (TRACES) for the movement of agricultural products, the Excise Movement and Control System (ECMS) for the movement of excise goods such as tobacco, the Entry into Declarant's Records (EIDR) system which allows for simplified customs declarations and the VAT Information Exchange System (VIES) which digitised the exchange of VAT data between Member States.⁸¹

80 [Q14](#) [Lars Karlsson] Oral Evidence to Northern Ireland Affairs Committee, Follow-up inquiry, 13 November 2018

81 [Drive through borders: a comprehensive UK and EU customs strategy for Brexit](#), Hans Maessen, July 2018, Correspondence, [A general customs solution after Brexit for EU UK trade and the Irish land border](#), Hans Maessen, 12 December 2018

48. Hans Maessen told us that because his solutions already exist in the EU’s Union Customs Code it would be possible to “organise the system within the transition period” and have it “all working fine”.⁸² Hans Maessen also contributed to the ‘Better Deal’ proposals, published 12 December 2018, which underpin the alternative arrangements set out in the Malthouse Compromise below.⁸³

Box 3: Proposals in the Malthouse Compromise

The Malthouse Compromise proposes two options to break the impasse in Parliament over the Withdrawal Agreement. The first option is to replace the backstop arrangements with a free trade agreement based on a maximum facilitation approach. If this option is non-negotiable, securing a two year “transitional stand still period” in which to negotiate further and allow both sides to prepare for the UK leaving on World Trade Organisation terms.⁸⁴ Annex 1 in the blogpost setting out the Malthouse Compromise provides the following details about the free trade agreement it proposes will form “The New Backstop”:

- A free trade agreement in goods: zero tariffs and no quantitative restrictions, providing for tariff-free trade in goods plus UK-EU regulatory cooperation.
- Inter-agency cooperation and information sharing, recognition of the other party’s inspections and conformity certification documents.
- Simplified procedures and data processing at departure and destination for the import, export and transit of goods.
- Expedited procedures for qualifying operators, mutual recognition of trusted trader schemes like authorised economic operator (AEO) programmes.
- Self-assessment for importers to declare imports periodically and account for duties payable, plus support to encourage uptake.
- Inland, in-facility checks and participating in EU systems (such as TRACES). In-facility checks for small businesses (who are already filling out VAT forms). Special facilitations for specific sectors like agriculture.⁸⁵

49. However, David Henig, Director of the UK Trade Policy Project, and Co-Founder of UK Trade Forum, expressed reservations about the evidence the Committee heard from Lars Karlsson and Hans Maessen, he said:

They are not considered by many in the customs field to be representative. There is a lot of scepticism about the evidence they are providing and the solutions they are suggesting. On that basis, I can understand why people are being cautious.⁸⁶

82 [Q142](#)

83 [A better deal](#), Shanker A Singham, Robert MacLean, Hans Maessen, 12 December 2018

84 [The Malthouse Compromise – an official explainer in full](#), Conservative Home, 3 February 2019

85 [The Malthouse Compromise – an official explainer in full](#), Conservative Home, 3 February 2019

86 [Q324](#)

Mr Henig’s main objection to their proposals is regarding the timeframe required to implement a system based on technical solutions. He said:

Let us put realistic timescales on this. There was the e-Borders system that the Home Office commissioned in the early 2000s and admitted in 2014 would never in fact be fully operational.⁸⁷

Building trust

50. A common theme running through the evidence that we have heard on the backstop arrangements and technical solutions is the role of trust. Sir Stephen Laws, First Parliamentary Counsel 2006–2012, characterised this in relation to finding an exit mechanism:

We have discussed various ways in which there might be a legal solution to this, but that does not address the real problem. The problem is not that there is not an exit from the backstop; the problem is that there is a lack of trust on each side that is triggered by the backstop. Finding a solution to the problem of lack of trust is more difficult, perhaps, than finding a solution to the backstop.⁸⁸

51. Lars Karlsson told us that the most important factor for achieving an infrastructure-free border is the level of trust between the countries operating that border:

At the highest level, which is what you are asking about, there would be no infrastructure at all. This is about how much trust there would be on these different levels. If the trust would be on the top level, we do not have any examples like that yet [...] Then you could use the fact that you have a trusted exporter here, a trusted transporter driving, a trusted importer on the other side and you use the timestamp instead of the border at the premises of the importer.

David Henig told us he could envisage “these sorts of solutions” playing a part in ensuring there was no border “in perhaps 10 years or more” but he also admitted, in terms of a timeframe for a technical solution, that this was a “guesstimate” and that “I cannot put an exact number on it”.⁸⁹ He said:

This is not just primarily about technology. This is a process question. How do you actually make sure you go through all the processes, you build up all the trust, you build up all the legal systems possible, such that both sides are completely sure that you can do this? [...] These systems take a long time; the processes take a long time; the trust-building takes a long time. I do not doubt it can be done. That actually puts me at odds with quite a lot of customs experts who say it can never be done. I do not doubt it can be done, but it will take a long time.⁹⁰

87 [Q252](#)

88 [Q15](#)

89 [Q252](#), [Q285](#) [David Henig]

90 [Q252](#) [David Henig]

A no deal Brexit

52. If the UK leaves the EU without a deal on 29 March 2019, there will be no transition period, and trade between the UK and EU will be conducted on World Trade Organisation terms.⁹¹ The Government's analysis of the implications of a no deal scenario for Northern Ireland includes the following points:

- Overall, the cumulative impact from a 'no deal' scenario is expected to be more severe in Northern Ireland than in Great Britain, and to last for longer. This is because of Northern Ireland's unique circumstances, as the only part of the UK with a land border with the EU and the current lack of an Executive in Northern Ireland.
- In a no deal scenario there is an expectation of disruption to closely interwoven supply chains and increasing costs that would affect the viability of many businesses across Northern Ireland. There is a risk that businesses in Northern Ireland will not have sufficient time to prepare. This could result in business failure, and/or relocation to Ireland with knock-on consequences for the Northern Ireland economy and unemployment. Northern Ireland is particularly vulnerable given its high proportion of, and reliance upon SMEs (75% of all private sector employment) and the number of businesses who trade directly with Ireland.
- The agri-food sector is a disproportionately large part of Northern Ireland's economy and located predominantly in border / rural areas. It is particularly vulnerable given its reliance on cross-border supply chains in the production stage and in finished products.
- Disruption could also include impacts for the single electricity market (SEM), cross-border cooperation on areas such as crime and security, and potential for community tensions to be heightened.
- Groups could seek to exploit gaps in law enforcement and any eventual divergence between Northern Ireland and Ireland, which may lead to increases in smuggling and associated criminality.⁹²

53. EU Chief Negotiator, Michel Barnier, told the Exiting the EU Committee on 3 September 2018:

If there is a no deal there is no more discussion. There is no more negotiation. It is over and each side will take its own unilateral contingency measures, and we will take them in such areas as aviation, but this does not mean mini-deals in the case of a no deal. We want a deal. We want an overall agreement; otherwise each will take their own contingency measures on their own side. That is why I want an agreement. I know full well, the worst scenario is indeed the no deal scenario.⁹³

The EU, UK and Ireland have all published contingency planning documents setting out unilateral measures to reduce disruption in a no deal scenario. Irish Taoiseach, Leo

91 [What if there's no Brexit deal?](#) House of Commons Library, CBP08397

92 [Implications for Business and Trade of a No Deal Exit on 29 March 2019](#), 26 February 2019

93 [Q2563](#) [Michel Barnier] Oral Evidence to Exiting the EU Committee, 3 September 2018

Varadkar, has acknowledged that a no deal scenario would require Ireland to have “very difficult discussions with our EU partners” to work out customs and trade arrangements “compatible” with its EU membership.⁹⁴

54. The impasse over future arrangements for Northern Ireland in the Withdrawal Agreement is symptomatic of a fundamental lack of trust between the UK and EU in the negotiations. The UK has committed that any future relationship will avoid a hard border on the island of Ireland and respect the integrity of the EU’s single market. The EU has committed to start work immediately on finding specific solutions for avoiding a hard border. However, mistrust has led both the UK and EU to focus on securing legal guarantees to protect their own positions as they see them, rather than negotiating a future agreement which can deliver on the stated aim of avoiding a return to the UK-Ireland border of the past.

55. All the proposals we have heard for a maximum facilitation approach would require the EU, UK and Ireland to share highly integrated digital systems such as TRACES, ECMS, VIES and the Common Transit Convention, put in place special solutions for agricultural goods and to collaborate in the implementation of highly sophisticated risk-based enforcement measures away from the border. This is not a simple, quick-fix solution and implementing it in Northern Ireland would represent a world-first. The balance of the evidence suggests that, far from being a ‘unicorn’, such a solution is possible and that it could be designed, trialled and piloted within the 21-month implementation period, which would be a substantial achievement. The key obstacle is the lack of trust and goodwill between negotiating parties rather than the absence of systems and technologies. It is not a promising start for the next phase, the determination of the future trading relationship.

94 [No-deal Brexit ‘means hard border’](#), BBC News, 23 January 2019

Conclusions and recommendations

Introduction

1. The UK, Ireland and the EU unanimously agree that there can be no return to a hard border on the island of Ireland and that the many forms of cross-border cooperation which have developed since the Good Friday/Belfast Agreement must be protected. Irrespective of the profound consensus around this view, disagreement over how to deliver this shared goal has brought the UK's exit negotiations to a standstill and increased the likelihood of the UK leaving without a deal on 29 March 2019 and the possibility of not leaving at all. (Paragraph 6)
2. The backstop arrangements succeed in obviating the need for border infrastructure or any related checks or controls on goods travelling across the land border between Ireland and Northern Ireland. The arrangements achieve this by requiring Northern Ireland to maintain a high degree of alignment with EU rules and, as a consequence, raise new barriers to the flow of goods from Great Britain, which is not required to maintain the same level of EU regulatory alignment, to Northern Ireland. Under this model, goods travelling from Great Britain to Northern Ireland would undergo a new declarations process and, in some cases, regulatory compliance checks. This solution sacrifices the integrity of the UK internal market in order to facilitate frictionless cross-border trade between Northern Ireland and Ireland. It is a solution which four of Northern Ireland's pro-Remain political parties describe as a vital insurance policy but has proved unacceptable to the House of Commons in its current form. (Paragraph 18)

Solutions

3. *We recommend that Paragraph 23 of the Political Declaration be amended and the preamble to the Protocol be clarified in a judicable form to make absolutely clear that the backstop arrangements are designed to prevent a hard border only and should not be taken as the baseline starting position for negotiations on the future UK-EU relationship. These changes, which are compatible with the EU's stated intent, would build confidence for the UK that the EU is genuinely open to a future relationship that will enable it to have an independent trade policy.* (Paragraph 32)
4. The UK's decision to leave the EU necessitates change. It is understandable that in the context of a post conflict society change to the status quo is met with caution. It is incumbent on all parties to work together to ensure that these changes do not undermine the normalcy of cross-border relationships on the island of Ireland. (Paragraph 39)
5. Establishing an agreed understanding of the terms used to describe the border and North/South cooperation is crucial. These criteria will delimit the possibilities of the future UK-EU relationship. Some witnesses interpret the avoidance of a hard border with maintaining, in every detail, the current regulatory and customs environment in Northern Ireland. Under this interpretation, any change, from a switch in mobile roaming charges to increased veterinary inspections, may constitute an unacceptable hardening of the border. (Paragraph 40)

6. The lack of clarity over key terms in the Withdrawal Agreement, which sets out the conditions any future UK-EU agreement must meet in order to succeed the backstop, is not conducive to trust or transparency. It heightens the scope for misunderstanding. The Withdrawal Agreement must not repeat the mistakes of the Joint Report in allowing differing interpretations of key commitments to persist unresolved into the next stage of negotiations. *We recommend the EU and UK clarify, in legally recognisable terms, before the 12 March 2019, their joint expectations regarding these key phrases to ensure that both sides share the same understanding of what a future relationship, that can supersede the backstop, could look like.* (Paragraph 41)
7. The impasse over future arrangements for Northern Ireland in the Withdrawal Agreement is symptomatic of a fundamental lack of trust between the UK and EU in the negotiations. The UK has committed that any future relationship will avoid a hard border on the island of Ireland and respect the integrity of the EU's single market. The EU has committed to start work immediately on finding specific solutions for avoiding a hard border. However, mistrust has led both the UK and EU to focus on securing legal guarantees to protect their own positions as they see them, rather than negotiating a future agreement which can deliver on the stated aim of avoiding a return to the UK-Ireland border of the past. (Paragraph 54)
8. All the proposals we have heard for a maximum facilitation approach would require the EU, UK and Ireland to share highly integrated digital systems such as TRACES, ECMS, VIES and the Common Transit Convention, put in place special solutions for agricultural goods and to collaborate in the implementation of highly sophisticated risk-based enforcement measures away from the border. This is not a simple, quick-fix solution and implementing it in Northern Ireland would represent a world-first. The balance of the evidence suggests that, far from being a 'unicorn', such a solution is possible and that it could be designed, trialled and piloted within the 21-month implementation period, which would be a substantial achievement. The key obstacle is the lack of trust and goodwill between negotiating parties rather than the absence of systems and technologies. It is not a promising start for the next phase, the determination of the future trading relationship. (Paragraph 55)

Formal minutes

Wednesday 6 March 2019

Members present:

Dr Andrew Murrison, in the Chair

Mr Gregory Campbell	Kate Hoey
Maria Caulfield	Nigel Mills
John Grogan	Ian Paisley
Lady Hermon	Jim Shannon

Draft Report (*The Northern Ireland backstop and the border: interim report*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 31 read and agreed to.

Motion made, and Question put, That paragraph 32 stand part of the Report.

The Committee divided:

Ayes, 6	Noes, 2
Mr Gregory Campbell	John Grogan
Maria Caulfield	Lady Hermon
Kate Hoey	
Nigel Mills	
Ian Paisley	
Jim Shannon	

Question accordingly agreed to.

Paragraphs 33 to 39 read and agreed to.

On the proposal of the Chair, and with the leave of the Committee, a single Question was put on paragraphs 40 and 41.

Motion made, and Question put, That paragraphs 40 and 41 stand part of the Report.

The Committee divided:

Ayes, 6	Noes, 2
Mr Gregory Campbell	John Grogan
Maria Caulfield	Lady Hermon
Kate Hoey	
Nigel Mills	
Ian Paisley	
Jim Shannon	

Question accordingly agreed to.

Paragraphs 42 to 54 read and agreed to.

Paragraph 55 read.

Amendment proposed, in line 19, to leave out from “The balance of the evidence suggests” to “be a substantial achievement.” in line 21.—(*Lady Hermon.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 2	Noes, 6
John Grogan	Mr Gregory Campbell
Lady Hermon	Maria Caulfield
	Kate Hoey
	Nigel Mills
	Ian Paisley
	Jim Shannon

Question negatived.

Paragraph 55 agreed to.

Motion made, and Question put, That the paragraphs entitled “Summary” stand part of the Report.

The Committee divided:

Ayes, 6	Noes, 2
Mr Gregory Campbell	John Grogan
Maria Caulfield	Lady Hermon
Kate Hoey	
Nigel Mills	
Ian Paisley	
Jim Shannon	

Question accordingly agreed to.

Motion made, and Question put, That the Report be the Sixth Report of the Committee to the House.

The Committee divided:

Ayes, 6	Noes, 1
Mr Gregory Campbell	John Grogan
Maria Caulfield	
Kate Hoey	
Nigel Mills	
Ian Paisley	
Jim Shannon	

Question accordingly agreed to.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Wednesday 13 March at 9.15am

Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the [inquiry publications page](#) of the Committee's website.

Wednesday 23 January 2019

Isabelle Van Damme, Counsel, Van Bael and Bellis, **Martin Howe QC**, Chairman, Lawyers for Britain, and **Sir Stephen Laws**, First Parliamentary Counsel 2006–2012 [Q1–95](#)

Wednesday 30 January 2019

Rt Hon Dominic Raab MP [Q96–159](#)

Wednesday 6 February 2019

Tony Lloyd MP, Shadow Secretary of State for Northern Ireland [Q160–250](#)

Wednesday 13 February 2019

Dr Etain Tannam, Associate Professor of International Peace Studies, Trinity College Dublin, **Colin Murray**, Reader in Public Law, Newcastle University, and **David Henig**, Director of the UK Trade Policy Project, Co-Founder of the UK Trade Forum [Q251–364](#)

Witnesses

The following witnesses gave evidence to the Northern Ireland Affairs Committee Land border between Northern Ireland and Ireland: Follow-up inquiry. Transcripts can be viewed on the [inquiry publications page](#) of the Committee's website.

Tuesday 13 November 2018

Mr Lars Karlsson, CEO of KGH Border Services, Author of Smart Border 2.0. [Q1–111](#)

Wednesday 14 November 2018

Hans Maessen, Brexit adviser at SGS Government and Institutions Services [Q112–203](#)

Published written evidence

The following written evidence was received and can be viewed on the [inquiry publications page](#) of the Committee's website.

EUW numbers are generated by the evidence processing system and so may not be complete.

- 1 The National Pharmacy Association (NPA) ([EUW0017](#))
- 2 British Association of Social Workers Northern Ireland ([EUW0002](#))
- 3 British Veterinary Association ([EUW0009](#))
- 4 Centre for Cross Border Studies ([EUW0011](#))
- 5 Children's Heartbeat Trust ([EUW0008](#))
- 6 David Phinnemore and Dr. Katy Hayward, Queen's University Belfast ([EUW0010](#))
- 7 Dr Sylvia de Mars, Mr Colin Murray, Prof Aoife O'Donoghue and Dr Ben Warwick ([EUW0020](#))
- 8 Federation of Small Businesses NI ([EUW0021](#))
- 9 Howe QC, Martin ([EUW0012](#))
- 10 McConville, Mr Conor ([EUW0016](#))
- 11 National Energy Action (Northern Ireland) ([EUW0018](#))
- 12 NICVA ([EUW0003](#))
- 13 NILGA ([EUW0004](#))
- 14 Northern Ireland Chamber of Commerce and Industry (NI Chamber) ([EUW0023](#))
- 15 Northern Ireland Women's European Platform ([EUW0005](#))
- 16 The Pharmacy Forum NI ([EUW0015](#))
- 17 Quantrill, Mr Adam ([EUW0001](#))
- 18 Skoutaris, Dr Nikos ([EUW0022](#))
- 19 Traditional Unionist Voice - TUV ([EUW0013](#))
- 20 Ulster Farmers Union ([EUW0006](#))
- 21 Ulster Unionist Party ([EUW0007](#))
- 22 Wine and Spirit Trade Association ([EUW0019](#))

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the [publications page](#) of the Committee's website. The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2017–19

First Report	Bombardier	HC 533 (HC 960)
Second Report	The land border between Northern Ireland and Ireland	HC 329 (HC 1198)
Third Report	Devolution and democracy in Northern Ireland – dealing with the deficit	HC 613 (HC 1589)
Fourth Report	Brexit and Northern Ireland: fisheries	HC 878 HC 1812
Fifth Report	Brexit and Agriculture in Northern Ireland	HC 939 HC 1847
First Special Report	HM Government support for UK victims of IRA attacks that used Gaddafi-supplied Semtex and weapons: Government Response to the Committee's Fourth Report of Session 2016–17	HC 331
Second Special Report	Electricity sector in Northern Ireland: Government Response to the Committee's Third Report of Session 2016–17	HC 921
Third Special Report	Bombardier: Government Response to the Committee's First Report	HC 960
Fourth Special Report	The land border between Northern Ireland and Ireland: Government Response to the Committee's Second Report	HC 1198
Fifth Special Report	Devolution and democracy in Northern Ireland – dealing with the deficit: Government Response to the Committee's Third Report	HC 1589
Sixth Special Report	Brexit and Northern Ireland: fisheries: Government Response to the Committee's Fourth Report Sixth	HC 1812
Seventh Special Report	Brexit and Agriculture in Northern Ireland: Government Response to the Committee's Fifth Report	HC 1847