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**WILL THE IRISH BORDER BE SEAMLESS?
The Common Travel Area and the Good Friday
Agreement After Brexit**

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Table of Contents:

Introduction

Chapter 1: The origins of the Irish Question

- 1.1: Irish independence
- 1.2: Northern Ireland & the UK
 - 1.2.1: Nationalists VS Unionists
- 1.3: Northern Ireland & the EU
 - 1.3.1: The 1975 Referendum
 - 1.3.2: Brexit Referendum

Chapter 2: The likely impact of Brexit negotiations on the Irish border

- 2.1: Importance of the Irish border
- 2.2: EU negotiating stance
- 2.3: Backstop clause
 - 2.3.1: Joint UK-EU Report (December 2017)
 - 2.3.2: EU withdrawal agreement (February 2018)
 - 2.3.3: UK proposal (July 2018)
 - 2.3.4: “We have no desire to use the backstop” (January 2019)
 - 2.3.5: May-Juncker understanding (11 March 2019)
- 2.4: British and Irish political positions on the issue

Chapter 3: The Post Brexit Common Travel Area

- 3.1: Origins of the Common Travel Area
- 3.2: CTA arrangements
- 3.3: Post-Brexit: an analysis of the different areas
 - 3.3.1: Free movement
 - 3.3.2: Right to work
 - 3.3.3: Access to education
 - 3.3.4: Other rights
- 3.4: What about the Schengen Area?

Chapter 4: The Post Brexit Good Friday Agreement and the threat posed to the Peace Process

- 4.1: The GFA as a successful peace symbol
- 4.2: The role of the EU
- 4.3: What is changing with Brexit?
 - 4.3.1: North/South cooperation

4.3.3: Citizenship
4.3.2: Rights
4.3.4: Border

Conclusion

Acknowledgments

Bibliography

Abstract

Introduction

As Brexit seems to edge towards a conclusion on 31 October 2019, the contours of the Irish Brexit debate play a dominant role in the scene. This dimension is crucial also for the European authorities, that predetermined and agreed with the UK, the three main objectives of the negotiations of the withdrawal agreement. First, ensuring the rights of EU citizens living in the UK and of British citizens living in the Union. Second, defining the financial obligations of the UK. Third, providing that there will not be a hard border between the Irish Republic and Northern Ireland¹. Indeed, the possibility of establishing a border again after such a long time in which border controls have been minimal represents a threat. In reality, border controls would be inevitable unless a *de facto* customs union is set up between the EU and the UK². Since Northern Ireland is part of the United Kingdom and the Republic of Ireland constitutes another country, there is, of course, a border between the two. However, the most significant economic relationship of Northern Ireland is with the EU and with the Republic of Ireland. Even though in the past there was the need for customs and security, nowadays the barrier does not exist anymore in any political, legal or physical sense. Due to the presence of the Common Travel Area (“CTA”), in fact, people can freely move around the UK, Ireland, the Isle of Man and Channel Islands without the need to show their passport at the frontiers. On one hand, this may have favored illegal immigration through Ireland into the UK. On the other hand, it has been widely recognized that this agreement represents an enormous advantage for citizens within the CTA. In fact, challenging the status quo in any way would destabilize the population.

At present, any prediction on any kind of future border is not reliable. There is mounting evidence, however, that between the 1920s and the 1970s, Ireland was divided and that the attention was focused on the border, which became a reason for political violence³. Moreover, the latter turned into a defining aspect of the relationship between the UK and Ireland and reflected internal identity divisions. The border posed a serious threat to cross-border activities (small businesses, transportation, etc.) and encouraged smuggling. May this happen again with Brexit?

Moreover, may Brexit harm the peace process triggered by the Good Friday Agreement (“GFA”)? The latter allowed for deeper integration of Northern Ireland with the UK and for people living in the region to identify themselves as either Irish or British at birth. Beyond the East-West cooperation, the GFA initiated the North-South cooperation. This brought to significant successes, including cross-border cooperation on tourism, health care and energy across the island.

¹ SACERDOTI (2018: 687).

² Ivi, p. 699.

³ DE MARS, MURRAY, O’DONOGHUE, WARWICK (2018: 13).

This study is going to analyze the relevance and the complexity of the background of the Irish question (Chapter 1), and how it has been taken into account during Brexit negotiations (Chapter 2). Moreover, while the majority is aiming for this border to be seamless and frictionless, it will be assessed how the existing agreements in place, namely the Common Travel Area and the Good Friday Agreement, are going to change after the withdrawal of the United Kingdom from the European Union (in Chapters 3 and 4).

In conclusion, the case of Northern Ireland, Scotland, and Gibraltar present a number of similarities; in fact, these regions voted overwhelmingly to remain, diversely from the rest of the UK. Can a common solution be applied?

Chapter 1

The origins of the Irish Question

Even though the term “Irish Question” dates back to the 19th century, it has been recently used to indicate the issues related to the Irish border and Brexit. However, in the past, it corresponded to the calls for Irish independence.

In 1536, the British conquered the island of Ireland. As a consequence, the latter became subordinated to the government in London and this caused hostility between Catholics, that originally occupied the island, and Protestants, introduced by the British supremacy. The culmination of the tensions is represented by the Irish Catholic Jacobites’ surrender in Limerick, giving space to the dominion of the British Protestant – still celebrated today by the Orange Order in Ulster.

The Acts of Union of 1800 is crucial in this context; it created one State by proclaiming the United Kingdom of Great Britain and Ireland and it abolished the Irish legislature. It incorporated Ireland not only into the direct reach of Westminster but into a common customs union. Anyway, one significant part of the act was the repeal of the Test Act which previously approved measures discriminating Catholics in the application for public office.

In 1829, the Catholic Relief Act, granting full Emancipation for Catholics, was passed in Parliament.

In 1844, the Irish Question was defined by a future British Prime Minister, Benjamin Disraeli, in this way: “That dense population in extreme distress inhabited an island where there was an established church which was not their church; and a territorial aristocracy, the richest of whom lived in distant capitals. Thus they had a starving population, an absentee aristocracy, and an alien Church, and, in addition, the weakest executive in the world. That was the Irish question. [...] The remedy is revolution. But the Irish could not have a revolution; and why? Because Ireland was connected with another and a more powerful country. Then what was the consequence? The connexion with England thus became the cause of the present state of Ireland. If the connexion with England prevented a revolution, and a revolution were the only remedy, England logically was in the odious position of being the cause of all the misery in Ireland. What then, was the duty of an English Minister? To effect by his policy all those changes which a revolution would do by force. That was the Irish question in its integrity”⁴.

A few years later (1845-1849), famines struck Ireland causing millions of deaths and mass emigration towards North America or Great Britain, where people looked for a new life. The impact of the latter was severe up to the point that the population dropped from over 8 million to 4.4 million.

More than one decade later, the founding of the Irish Parliamentary Party by Charles Stewart Parnell (later called Sinn Féin, or rather ‘ourselves alone’) newly shed light on the issue of self-government.

⁴ STATE OF IRELAND (1844).

In 1866, the First Home Rule Bill initiated the leading step towards independence from Great Britain; however, it was definitively granted to Ireland after the First World War.

In 1898 the Local Government (Ireland) Act was introduced, and it established a system of local government for Ireland, similar to the ones in place in Scotland and Wales. Furthermore, it marked the end of the landlord domination. In this context, Ireland became extremely sectarian with tensions between nationalists all over the island and unionists predominantly in the northeast. This gave rise to two dominant movements: the Protestant Orange Order and the Catholic Ancient Order of Hibernians.

1.1 Irish independence

World War I represented a serious challenge for Great Britain and its colonies. Beyond the war itself, both Ireland and India asked for independence from the mother country.

On September 1914, the UK Parliament passed the Third Home Rule Act in favor of self-government for Ireland, but it was suspended for the period of the war. The act gave to Dublin government full control except over foreign and constitutional matters. However, this was opposed by Ulster Unionists, that created their own militia, the Ulster Volunteers, to resist this measure; in response, the Irish nationalists gave life to their own militia, the Irish Volunteers, in favor of the Home Rule. Anyway, the outbreak of the First World War eased the tension and pushed both forces to support Great Britain in the bigger picture.

However, in 1916, Sinn Féin led a massive uprising in Dublin, later repressed by the British army; unfortunately, it caused hundreds of deaths. The revolt has been known with the name of Easter Rising or the Proclamation of the Republic. In the 1918 elections, Sinn Féin won three-quarters of all seats in Ireland, formed a breakaway government and declared Irish independence.

At the end of World War I, the Irish question had to be reopened. In this period the Irish Nationalists organized their own army, the Irish Republican Army (“IRA”). The conflict exploded in a remarkably violent way between the British and the Irish from 1919 to 1921. In mid-1920, republicans won control of several county councils, while the British authority lost territory and introduced emergency powers. This was supported by the events on Bloody Sunday in Dublin and by the introduction of martial law in the majority of southern Ireland. At the same time, Sinn Féin won local government elections in Ireland and upheld functions such as tax collection and law enforcement.

Beyond this, the conflict taking place in Ulster was strongly sectarian, and it saw the Catholics and independentist on one side and the Protestants and unionists/loyalists on the other.

During the war, the Fourth Government of Ireland Act 1920 implemented the Home Rule and partitioned the island into “Northern Ireland” and “Southern Ireland”.

In 1921, the representatives of both governments agreed to a ceasefire and signed the Anglo-Irish Treaty. On one hand, the result was the six-county Northern Ireland, with a limited Home Rule and a separate Parliament, but still with a permanent tie to Britain. On the other hand, the Irish Republic was abolished and the Irish Free State was created as a self-governing region; it comprised 26 counties out of 32, it had its own government, and it enjoyed much more independence. In 1922 both parties ratified the Treaty, but this caused contrasting reactions since this event ended the British rule: the republican and anti-Treaty movement opposed the pro-Treaty one. As a consequence, in 1922-23 the Irish Civil War broke out and caused thousands of deaths.

In 1937 a new Constitution established the Irish State (Éire in Irish), that remained neutral throughout World War II.

In 1949, Ireland became a Republic and broke its link with Great Britain and the Commonwealth. Starting from the 1960s, Ireland sought the EEC membership, but because of the tight relationship with the British market, it had to wait until 1973, year in which the UK acceded to the EEC too.

To sum up, the Irish War of Independence ended with the creation of the Irish Free State and Northern Ireland as two separate jurisdictions (the so-called partition).

1.2 Northern Ireland & the UK

Brexit showed that the UK authorities did not take into account the Irish preemptively, even if Northern Ireland is a part of the UK.

To be more precise, Northern Ireland’s membership and relationship with the United Kingdom has been intense since its beginning in 1921. In the early 20th century, centripetal and centrifugal forces destabilized this union and required the creation of two separate jurisdictions within the island of Ireland. Behind this, there were the sufferings and the division of the population, which held contrasting beliefs and feelings towards religion, ethnicity, and nationalism⁵.

Partition acquired a twofold meaning: it simultaneously divided and remodeled the UK. The context has been consistently shaped by unionism and nationalism and Brexit has destabilized politics, by resurrecting this disjuncture⁶.

⁵ DE MARS, MURRAY, O’DONOGHUE, WARWICK (2018: 3).

⁶ *Ibidem*.

As it will be explained later in this study, the will of the population has always been pivotal, up to the point that, according to the 1998 Good Friday Agreement, people can vote in a poll in order to confirm or dissent to the status of Northern Ireland as part of the UK.

In practice, the status of Northern Ireland has always been peculiar; indeed, it is the only part of the United Kingdom where gay marriage and abortion are illegal, the economy is heavily integrated with the Irish one in the agri-food sector and, at the same time, it receives massive funds from the British State.

1.2.1: Nationalists VS Unionists

In order to deeply understand the current dichotomy between Nationalists and Unionists and its role in the Brexit referendum, there is the need to go back in time.

There are many differences between the two groups, but the main ones are represented by religious beliefs, political ideas, and identity. Generally, Unionism argues for political unity and continuity between Ireland and Great Britain; the supporters of this movement consider themselves as British rather than Irish and are faithful to the Queen. On the other hand, Nationalism aims at the establishment of a sovereign nation-state on the island of Ireland; its followers want one State and strongly believe in their Irish identity, they worship the Pope in Rome and are against a royal family.

Unionism was born from the first political relationship between England and Ireland back in the 12th century with the establishment of the Lordship of Ireland; after four centuries, the Church of England declared independence from the Holy See. In 1542 the Crown of Ireland Act legitimized the continued rule of the English monarch in Ireland, that later culminated in the 1800 Acts of Union.

Diversely, Nationalism has emerged in the occasion of the contrast between the stream of thought of the Protestant Reformation and the Catholic Counter-Reformation. When the Tudor dynasty conquered Ireland in the 16th century, many native Catholic landowners were dispossessed of their plantations in favor of Protestants coming from England or Scotland. In the 1640s, the Confederate Catholics of Ireland argued for the idea of Ireland as an independent State from England, even if under the same monarch. As a consequence, they demanded independence for the Irish Parliament and an end for discrimination against Catholics. However, they were not able to obtain any of this because of the Cromwellian conquest of Ireland that definitely ceased the Confederate cause. Later in the 17th century, the movement of Irish Catholic Jacobites emerged and supported the same cause the Confederates argued in favor of. Unfortunately, they also suffered defeat on the occasion of the Williamite War in Ireland. Some scholars argue that modern Irish nationalism actually

emerged after the Flight of the Earls in 1607 (when people left the Ulster province for Europe) and that it is based on “the indivisibility of Gaelic cultural integrity, territorial sovereignty and the interlinking of Gaelic identity with profession of the Roman Catholic faith”.⁷

Historically, unionists are tied to Protestantism and nationalists to Catholicism. While the latter represented the majority in the part of the island that seceded, the former represented the majority in the North Eastern part of the island, that voted to remain in the UK. These two religious groups, always present on the island, have suffered for years from a siege mentality because of the sectarian violence they both experienced. In other words, both sides believed they were victims, and, in turn, this justified their violence. Partition proved to be a challenge for the two groups and it substantially meant that Ireland was divided. However, it left a large community of Irish Nationalists within Northern Ireland, unhappy with this solution. As a consequence, life in Northern Ireland has been characterized by conflict for more than three decades. The early years of partition were marked by a Free State boycott of goods from Northern Ireland and sectarian violence against Nationalists. Following partition, Unionism was manifested through the support of the place Northern Ireland obtained within the United Kingdom. In other words, partition reflected an internal division.

A further crucial moment is represented by The Troubles, which is an ethno-nationalist conflict that took place in Northern Ireland during the second half of the 20th century. The conflict has been defined as political and nationalistic, with sectarian dimensions, but not strictly religious; once again, it saw Nationalists and Unionists on opposite sides. It broke out in Northern Ireland during a campaign aimed at ending discrimination towards the Catholic/Nationalist minority by the Protestant/Unionist one. Police forces tried to repress the campaign and were accused of brutality. This led to riots in August 1969 and the deployment of British troops, that built several ‘peace walls’ in Belfast to keep the two communities apart. This suggests that violence in the area escalated because of the closeness of the two opposing groups.

The 1998 Good Friday Agreement definitively concluded this period of conflicts and marked the year in which both parties renounced to violence. The transformation of the Royal Ulster Constabulary, Northern Ireland’s Protestant police force, into the Police Service of Northern Ireland represented an attempt to restore peace. This helped to give a different image from the sectarianism of the past and to have more Catholics into the police force. Furthermore, this initiated the process of a slow return to the rule of law in Northern Ireland.

⁷ VALONE, BRADBURY (2008: 39).

Nationalism and Unionism defined two complex ways of looking at Northern Ireland's membership within the EU: Nationalism is often associated with Euroscepticism, while Nationalism entails mixed positions on the issue, ranging from those thinking that it poses a threat to UK power over Northern Ireland to those who disagree with this idea⁸.

As all the historical events mentioned in this paragraph (and many more) challenged the relationship between Nationalists and Unionists, Brexit will surely determine a new equilibrium.

1.3 Northern Ireland & the EU

On 23rd June 2016, Northern Ireland represented an outlier in the Brexit referendum; in fact, it was one of the most pro-European parts of the UK (by a majority of 56% to 44%). Nationalists wanted the UK to remain in the EU, while unionists generally wanted to withdraw⁹.

Going back in time, it can be said that Northern Ireland's membership within the EU has been vital in exacerbating the divide between Nationalists and Unionists (explained in the previous paragraph) and the main parties representing them, respectively Sinn Féin and the Democratic Unionist Party ("DUP"). Furthermore, the European Union contributed to change the dynamic of the relationship between Ireland and the United Kingdom. Specifically, because of the physical proximity of the two States, it was vital that they had to join the Union as equal members on the basis of mutual respect. This also helped them to find shared policy interests, and European summits obliged leaders of both countries to stand in collegial photographs¹⁰.

The EU made possible some substantial changes in the day-to-day life of ordinary people, from the Common Agricultural Policy to the PEACE Programme, etc.

Nevertheless, what happened after the referendum has a deeper root, and it refers to the fact that Northern Ireland has held a special status since the 1998 Good Friday Agreement. Indeed, NI is part of the UK, but at the same time, it is connected to the rest of the island. In this respect, Brexit's DUP backers argue that the withdrawal from the EU ties Northern Ireland more closely to the United Kingdom rather than to the Republic of Ireland. On the other hand, other DUP members underlined that the deal on Irish issues of December 2017 might increase the constitutional differences with the UK and provide for a possible reunification.

⁸ DE MARS, MURRAY, O'DONOGHUE, WARWICK (2018:19).

⁹ Ivi, p. 1.

¹⁰ Ivi, p. 5.

In short, the role of the EU is so pervasive in Ireland and Northern Ireland to the point that Brexit will definitely reshape their relationship and the rights connected to the EU membership, such as the lack of control at the borders, citizenship rights, freedom of movement and access to foreign markets.

1.3.1. The 1975 Referendum

The 2016 Brexit referendum was not the first attempt to exit from the European Union; in fact, this verified way before then. The European Coal and Steel Community was first instituted in 1952 and the UK decided not to join. This also happened on the occasion of the Treaty of Rome in 1957 which created the European Economic Community. The first application by the UK was made in 1963, but the French President Charles de Gaulle imposed a veto on the request. However, talks with the Community were ongoing, and the Conservative Party Leader, Heath, said that further European integration would have happened only with people's consent. In fact, before the formation of the modern EU, the United Kingdom called a referendum in 1975 on whether to stay or leave the European Communities and, in particular, the Common Market. Back then, it was the first national referendum of this kind and it was carried out after two years and a half of membership (that started in 1973). Furthermore, it remained the only national referendum until the one on alternative voting in 2011, and the only one on the relationship with the European Union until Brexit. This happened because some were concerned that the Community's membership robbed the United Kingdom of crucial sovereignty rights. However, the 1975 referendum affirmed the decision to stay within the European Economic Community ("EEC"). In particular, Northern Ireland voted in favor of the membership with a slight majority of 52%. Although many were concerned with the problem of sovereignty rights, many Northern Ireland voters cared more about day-to-day benefits and concerns. Nationally, 67% voted Yes, and the regions voting No were the Western Isles and the Shetland Islands. In comparison, the rest of the country voted in favor by a greater margin.

Euroscepticism has always been a feature of British politics and, in fact, during the late seventies it was extremely diffused; the UK developed stronger ties with Europe only starting from the 1990s.

In 1974 a Labour minority government was in charge, and the most feared consequences of the EEC membership included the difference between the high price of food under the Common Agricultural Policy and the low price under the Commonwealth, the loss of sovereignty and the lack of freedom to engage in social industrial policies. Labour's Harold Wilson promised to renegotiate the terms of the membership and to settle the matter by referendum.

Of course, Brexit echoes the 1975 Referendum.

As long as it regards Northern Ireland, in modern times, unionist Euroscepticism and nationalist pro-Europeanism are entrenched in current politics, but this was not this clear back in the 70s. Trade unions across the country were divided on the issue, but the Yes campaign gained more support. In 1975 politics in Ireland was extremely complex: in fact, it was going through the Troubles and voters had already witnessed seven elections in two years. For this reason, Europe was definitely a secondary concern for people. However, the campaign presented the occasion to discuss crucial topics such as the crisis in Ulster's traditional industries.

Initially, unionism supported the Common Market, but later it began to regard the EEC as a challenge to the constitutional position of Northern Ireland. A similarity can be seen between the Ulster Unionist Party ("UUP") and today's DUP. The UUP definitely had more strict views and opinions on the issue, while today's DUP has shown to be more flexible and acknowledges a plurality of opinions. In 1975, UUP's Ian Paisley acknowledged that, in his opinion, the position of remaining within the Common Market was in opposition to freedom-loving Protestants. Conversely, leading figures in Ulster Vanguard were pro-European and saw with optimism the future of Northern Ireland in the Communities¹¹.

Similarly, the nationalist side was divided on the issue. The Social Democratic Labour Party ("SDLP") had become pro-European and argued that the Community could have helped to smooth the partition and to provide an economic boost. Sinn Féin was in opposition with the Irish membership in the EEC since the beginning, because it took away sovereignty.

Surprisingly, republicans and unionists had the same concerns in 1975; besides the Troubles, many feared that the European project threatened either the Irish State or the UK, depending on the stance.

In other words, it came out as a surprise that Northern Ireland voted Yes in support of the Common Market. This is also contrary to the low turnout (48%), that explained the low enthusiasm for the referendum. On the other hand, the outcome of the referendum gave hope to the Community.

In conclusion, the outcome of the referendum definitely benefitted Northern Ireland in financial terms, and it linked the UK and the Republic of Ireland deeply into Europe. Furthermore, the European Union demonstrated good will towards the area with the aim of unifying the divided community. As a consequence, while Euroscepticism grew in the rest of the UK, the situation in Northern Ireland was different, since it actually improved real-life conditions.

¹¹ GREER (2016).

1.3.2: Brexit Referendum

On November 2015 former Prime Minister David Cameron wrote a letter outlining four major concerns with reference to the relationship with the European Union: the balance of economic governance in the Eurozone, the competitiveness of the UK in the single market, the balance of sovereignty rights between the Member States and immigration matters. On 19 February 2016, the EU replied through the European Council Conclusion and agreed to all of Cameron's requests outlining "a new settlement for the United Kingdom within the European Union"¹². On this basis, the PM believed that the only way to address the question once and for all was to hold a referendum on whether to stay or leave the European Union to silence the euro-skeptics. This culminated in the referendum held on June 23rd, 2016.

As it was previously said, the 2016 referendum underlined the outsider nature of Northern Ireland with respect to the rest of the country. In fact, 56% of local voters did not want to exit from the European Union.

The Brexit referendum in Northern Ireland assumed another nature: it became a plebiscite on migration in a broader Europe¹³. Generally, immigration represented a significant issue for euro-skeptics; in fact, they were convinced that open borders caused downward pressure on wages and a greater burden on local services and made it harder for British citizens to find a job. In this view, immigration is not seen as an opportunity, but as a burden¹⁴. The major parties in the country had opposite positions. Sinn Féin argued that the removal of commonalities between Ireland and the UK (ensured by the European Union) would endanger Northern Ireland's dependence on London rather than on Dublin¹⁵.

On the other side, the danger was represented by the Democratic Unionist Party, which has always been unsupportive of the Good Friday Agreement ("GFA"). Hence, it has always supported a Leave vote. The DUP never backed a soft Brexit; on the other hand, they aim at a hard Brexit and the withdrawal from the Common Market and customs union. However, they are not in favor of a hard border.

Some noted the ambiguity of the Leave campaign; in fact, it was mainly around immigration control and, at the same time, it tried to reassure people that there would be no hard border. Of course, the former is impossible without the latter.

¹² EUROPEAN COUNCIL (2016).

¹³ HOLDER (2017: 91).

¹⁴ BARNARD, BUTLIN (2018: 203).

¹⁵ DE MARS, MURRAY, O'DONOGHUE, WARWICK (2018: 6).

The EU engaged in a long process to favor peace and cross-border links in the area and Brexit is threatening this. After the referendum, Prime Minister Theresa May was pretty sure that the border was inconceivable, but with time, officials and negotiators showed to be unsure.

Moreover, the departure between the DUP and Sinn Féin increased because Northern Ireland's place in the EU became an intermediary to investigate something crucial about Northern Ireland's constitutional status, or better, its dual nature of simultaneously being part of the UK and having a deep connection with the Republic of Ireland¹⁶.

The GFA agreement, which will be described more in detail later in this study, is an international treaty between the UK and Ireland, secured with the United Nations¹⁷. It kept Northern Ireland within the UK, but it provided for isolation between Ireland and Northern Ireland to be ceased; in fact, it made possible for Northern Irish people to identify themselves as Irish or British and, accordingly, obtain the citizenship. In other words, it provided the soft border existing today.

Of course, since the referendum, much of Northern Ireland's politics focused on the implications of Brexit.

Some argue that Brexit acted through an unconstitutional manner; in fact, Northern Ireland actually voted to remain within the EU. NI Deputy First Minister Martin McGuinness outlined the very profound impact Brexit will have on the region and the exit from the EU will definitely affect business, trade, investment and society in general¹⁸.

Chapter 2

The likely impact of Brexit negotiations on the Irish border

Of course, Brexit is going to affect multiple areas. In a way, this was reflected by the result of the referendum, which showed an extremely polarized country geographically, socially, economically, and demographically. However, this also depended from what people feared would be the implications of Brexit.

¹⁶ Ivi, p. 19.

¹⁷ HOLDER (2017: 91).

¹⁸ BBC (2016).

At the European level, Brexit seems to normalize unilateral secession by appealing to article 50 of the Treaty on European Union¹⁹. In addition, the exit of the UK from the EU is going to change domestic law, the legal system and legal thinking, similarly to when the United Kingdom acceded to the European Communities.

Although it is still not clear which type of Brexit will be in place, since the deal has been turned down for the third time in the House of Commons, it is sure that, as the back story in the previous chapter shows, the Irish border question definitely assumed the most significant position in the negotiations. However, quite surprisingly, the issue had not come to the fore during the referendum campaign.

The importance of the border is not valid solely for the Northern Irish and the Irish citizens, but it interested the European Union too. In fact, the EU's Chief Brexit Negotiator, Michel Barnier, assured that the Irish border issue is a priority. In addition, the Republic of Ireland's interests coincide with the EU interests in multiple occasions. The European Union has been crucial in shaping a peaceful relationship between Northern Ireland and the Republic of Ireland. The peace process in Northern Ireland represents one of the EU greatest successes and it is an example for areas facing similar problems; this is why the question embodies a priority in Brexit negotiations. Also, the Irish border is the only land border between the EU and the UK (except the specific situations of Gibraltar and military bases in Cyprus).

Any reintroduction of checks at the border would remind of the 30 years of violence in Northern Ireland and have an annihilating impact on the lives of thousands of people, especially those who conduct a cross-border life. In fact, even though the conflict formally ended in 1998 with the Good Friday Agreement, the region of Northern Ireland still has some deep fractures that Brexit is threatening to bring back. Despite what the European Union has done to apply standard rules on both sides of the border, Brexit could represent an occasion for pronounced divergences – smoothed by the Union – to stand out²⁰.

Additionally, already sixteen members of the Union border with non-EU countries and there are several models that can be replicated: EU-Switzerland, EU-Ukraine, and Norway-Sweden are just some examples. In particular, Norway-Sweden serves as the most appealing option, but it should be considered that it is currently in place after years of bilateral negotiations. Different challenges are involved, such as training people in two legislations, setting up the procedures, and ensure that Northern Ireland respects EU regulations and rules.

¹⁹ COMELLA (2018: 141).

²⁰ DE MARS, MURRAY, O'DONOGHUE, WARWICK (2018).

In the negotiations, the whole question is wrapped up in the so-called ‘back-stop’ clause, meant to avoid any eventual hard border and preserve the conditions of the 1998 Good Friday Agreement. The backstop was a key element in the rejection of the agreement by the British Parliament. This happened because the clause may threaten the constitutional integrity of the United Kingdom and originate a differential treatment between the rest of the UK and Northern Ireland. Accordingly, this issue remains one of the most contentious and uncertain to settle.

However, is it really possible to avoid any kind of hard border?

2.1. Importance of the Irish border

“Why is the Irish border such a big deal with Brexit?”²¹

Differently from England, Scotland and Wales, Northern Ireland is the only region of the UK bordering with an EU country: the Republic of Ireland.

As it was previously mentioned, the EU played a pivotal role in fostering the peace process in the region, and the Union’s membership smoothened the tensions between Unionists and Nationalists.

Furthermore, the issue has been prioritized as one of the three most sensitive areas to handle in the context of Brexit.

Back in time, the Good Friday Agreement removed border checks and established North-South cooperation.

In the case a hard boundary gets to be established, fences, checks, customs officials, border inspectors, and police or military personnel might be reintroduced²². This eventuality is largely unwished-for and it may lead people who regularly cross the border to protest, potentially, in a violent way. In turn, this may provoke the police presence on the border and the whole situation might recall the tumultuous years of the Troubles. During that time, Northern Ireland had a hard border in place and thousands of people died.

Chapter 1 extensively described the struggle that the island of Ireland experienced in the last 100 years. However, after the Good Friday Agreement, violence was reduced and the hard border was removed. Now the border is so soft that people do not notice any disparity except for road signals, which differ in terms of the unit of measurement (miles and kilometers).

After the UK voted for Brexit, Theresa May manifested that no single market or customs union would have been kept in place. This means that the border will become the crossing point for non-EU goods entering into the EU market. Therefore, the European Union wants to establish checks at least on products,

²¹ CARSWELL (2018).

²² *Ibidem*.

in order to evaluate if the conformity to EU standards is respected. Accordingly, the Union, the UK, and Ireland do not wish for a hard border, but they cannot reach a common solution on customs checks.

Several solutions have been proposed; particularly, one alleges for lorries to cross without any physical control at the border; in fact, checks would happen away from it²³. Actually, this already happens to cross-border goods such as fuel, alcohol, and tobacco.

The danger is that the deal cannot be worked out in time.

The EU proposed a backstop, a sort of backup plan, that would take place in case no deal happens. The ambiguity of this solution is that it would practically push the border between Northern Ireland and the Republic out of the island and this would cause a differential treatment for Northern Ireland from the rest of the UK. As a consequence, this represents a threat for unionists, and primarily for Theresa May, that belongs to the Conservative and Unionist party and relies on the DUP to give her majority in Parliament. It seems that the Prime Minister might need to come to a compromise on the status of the UK in the customs union and find a solution that Brussels, her unionist colleagues in Northern Ireland and the British citizens find reasonable. However, as these years of negotiations show, this will not be effortless.

2.2. EU negotiating stance

Soon after the referendum, the EU announced it would respect the UK's people decision and initiate negotiations. The possibility of an exit from the European Union is defined in article 50 TEU, which exemplifies the process to be followed.

At the start of the negotiations of the withdrawal agreement, the European Union fostered to reach three main aims: ensuring the rights of British citizens living in the EU and of EU citizens living in the UK, defining the financial obligations of the UK and providing that no hard border gets to be established between Northern Ireland and the Republic of Ireland²⁴. This has been considered fundamental to settle the divorce and pursue a closer integration. The priority has been to try to ensure an orderly withdrawal and reduce the possibility of a hard Brexit, that would disrupt the current equilibrium ensured by the existence of the Union.

The Withdrawal Agreement has been the first step of the negotiations that initially set the formal exit of the UK on 29 March 2019, then extended to 12 April 2019 in case of no-deal or 22 May in case the deal was approved, and ultimately extended to 31 October 2019²⁵.

²³ MCKINNEY (2017).

²⁴ SACERDOTI (2018: 687).

²⁵ FARNESINA (2019).

After the referendum of 23 June 2016, the European Union required an official notification by the UK in order to formalize the request and proceed by following article 50: “There will be no negotiations of any kind before the British notification about a possible exit reaches us. No negotiation without notification”²⁶.

On 29 April 2017, the European Council published a document containing the guidelines for Brexit negotiations and they clearly express the EU negotiating stance. In this document, “the European Council welcomes and shares the United Kingdom’s desire to establish a close partnership between the Union and the United Kingdom after its departure. While a relationship between the Union and a non Member State cannot offer the same benefits as Union membership, strong and constructive ties will remain in both sides’ interest and should encompass more than just trade”²⁷. In fact, on the other side “the British government has indicated that it will not seek to remain in the Single Market, but would like to pursue an ambitious free trade agreement with the European Union. Based on the Union’s interests, the European Council stands ready to initiate work towards an agreement on trade, to be finalised and concluded once the United Kingdom is no longer a Member State”²⁸. Moreover, “any agreement with the United Kingdom will have to be based on a balance of rights and obligations, and ensure a level playing field”²⁹.

However, one of the main points argued by the EU is that, since the UK will not be a member anymore, it could never enjoy equal or better treatment than the one granted upon the membership of the European Union: “A non-member of the Union, that does not live up to the same obligations as a member, cannot have the same rights and enjoy the same benefits as a member”³⁰.

Moreover, the EU27 ambassadors decided to act in conformity with the principle of transparency and publish all the negotiating documents. In the same year, the EU27 leaders agreed to trigger the necessary procedure to transfer the European Agencies with the headquarters in the UK. In particular, the European Medicines Agency will be moved to Amsterdam and the European Banking Authority will be moved to Paris.

The second phase of the negotiations opened at the beginning of 2018; on February 28th the first draft of the Withdrawal Agreement was published, and on March 19th an agreement was reached on the rights citizens, financial commitment and the transition period³¹. In the same year, the EU27 leaders acknowledged that not enough progress had been made to provide a solution to the Irish border question.

In the third phase of the negotiations, the “Art. 50” Special European Council meeting approved the Withdrawal Agreement and the Political Declaration on

²⁶ EUROPEAN COMMISSION (2016).

²⁷ EUROPEAN COUNCIL (2017).

²⁸ *Ibidem*.

²⁹ *Ibidem*.

³⁰ *Ibidem*.

³¹ FARNESINA (2019).

future UK-EU relations. The Agreement provides for a transition period until the end of 2020 during which the UK will maintain the current status, except for the fact that it will not be able to participate in the decision-making process of the Union anymore³².

Despite this step forward accomplished in November 2018, on 15 January 2019 the British Parliament struck down the Agreement and this happened a second time on 12 March 2019, although some changes were made about the Irish backstop.

Successively, on 20 March 2019, Theresa May asked with a letter for an extension of the deadline provided by article 50 to June 30 to the President of the European Council Donald Tusk³³.

The “Art. 50” Special European Council held a meeting on 21 March 2019 and it was decided that the extension to 22 May could be granted only if the Agreement was approved by the House of Commons within the following week. Otherwise, the Council agreed to grant an extension until 12 April, within which the UK should have indicated the arrangements agreed.

On 29 March 2019, the third “meaningful vote” verified in the British Parliament and, again, it was negative³⁴. As a consequence, President Donald Tusk announced a special meeting on 10 April 2019.

On 5 April 2019, Theresa May wrote a new letter to Donald Tusk asking for a further extension until 30 June 2019.

On 10 April 2019 EU leaders agreed to delay Brexit until 31 October 2019. Anyway, if the deal goes through the British Parliament before then the UK will be a third country starting from the first day of the following month.

However, the delay is subject to several conditions. First, in case the UK has still not ratified the Withdrawal Agreement it has to participate in the European Parliament elections taking place on 23-26 May; if this does not happen, the withdrawal will occur on 1 June 2019. Second, it will not be possible to reopen the negotiations on the Agreement previously agreed or on any measure pertaining to future relations. Third, the United Kingdom must respect the “sincere cooperation” principle. Lastly, the European Council will examine the progress during the next European Council meeting in June³⁵.

Even if the extension granted by the Union drastically reduces the possibility of a ‘no-deal’ Brexit, both the EU and its Member States are constantly working to elaborate the best contingency measures possible through a coordinated approach. The main areas addressed by the measures are police and judicial cooperation, citizens’ rights, sanitary and phytosanitary measures, social security systems, financial services, customs, intellectual property, data protection, geographic indications, industrial products, tariffs, tourism, and international agreements.

³² *Ibidem.*

³³ *Ibidem.*

³⁴ *Ibidem.*

³⁵ *Ibidem.*

2.3. Backstop clause

The United Kingdom and the European Union have tried to find a solution to the Irish border question since the beginning of the negotiations. More in detail, this has been done in the context of the agreement on the future relationship, which will be agreed after Brexit, starting from 1 November 2019 on the basis of the situation defined by the Political Declaration adopted by the European Council.

The backstop is a safeguarding measure contained in the Withdrawal Agreement meant to avoid a hard border between Northern Ireland and the Republic of Ireland.

The clause provided by the Protocol on Ireland and Northern Ireland would enter into force only in the case that on 31 December 2020 (at the end of the transitional period) no alternative solution has been found.

The idea of keeping an open border between the Republic and Northern Ireland has been agreed by the UK and the EU at the end of the first phase of the negotiations; it was meant to give certainty to citizens and companies of the total application of the peace agreements of 1998, shutting off the tensions between unionists and republicans.

The backstop is only valid for goods; in fact, people are protected by the agreements on the CTA, which will not be altered by Brexit since both the UK and the Republic of Ireland are out of the Schengen Area.

In the case the deal goes through the British Parliament, the United Kingdom will keep its status within the Union until 31 December 2020. Since both Brussels and London aim to avoid a hard border and, at the same time, the UK is unlikely to remain in the single market and customs union, the time to conclude a comprehensive free trade and customs agreement before the transitional period is too short.

Brexit could change the actual status on the island of Ireland: in fact, the countries would be in different regulatory systems, and this could involve checks at the border.

On the other hand, the backstop provides for the UK to remain in the customs union for a temporary period following the transition period.

Notwithstanding, the clause provoked anger from Brexiteers since it will obstacle the possibility of the UK to seal deals with other partners all over the world.

If on 1 January 2021 no alternative solution has been found, the backstop will enter into force and it can be concluded only by a joint committee; this means that the EU has veto power and that the backstop could be in place endlessly.

However, Prime Minister Theresa May tried to set a limit date on 31 December 2021 and successively asked to opt out of the clause, but the EU rejected both requests.

Also, it has been argued by the DUP that the backstop would impose checks on the trade between Northern Ireland and the rest of the UK by disrupting the integrity of the State.

The danger arises because, unless every part of the agreement is set, there can be no withdrawal from it and, accordingly, no transition deal or agreement on the future relationship.

2.3.1: Joint UK-EU Report (December 2017)

At the end of 2017, a series of discussions took place between the United Kingdom, the European Commission, and Ireland with the aim of charting the North-South cooperation. On 8 December 2017, a Joint UK-EU Report was disclosed and it covered what happened during the first phase of the negotiations. The largest and newest section was dedicated to Ireland and Northern Ireland, and it contained the will of both parties to uphold the Irish question as a priority and to protect the outcome of the 1998 Good Friday Agreement: “Both Parties recognise the need to respect the provisions of the 1998 Agreement regarding the constitutional status of Northern Ireland and the principle of consent”³⁶. In regard to this, it has been outlined the importance of not having frictions between Northern Ireland and the Republic of Ireland and of supporting North-South cooperation: “Cooperation between Ireland and Northern 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. In this regard, both Parties recall the roles, functions and safeguards of the Northern Ireland Executive, the Northern Ireland Assembly, and the North-South Ministerial Council (including its cross-community provisions) as set out in the 1998 Agreement. The two Parties have carried out a mapping exercise, which shows that North-South cooperation relies to a significant extent on a common European Union legal and policy framework. Therefore, the United Kingdom’s departure from the European Union gives rise to substantial challenges to the maintenance and development of North-South cooperation”³⁷. In other words, North-South cooperation heavily relies on the European legal framework.

In addition, both parties are committed to respect the right of identification of the people in Northern Ireland and to regard them as European citizens in case they classified themselves as such: “Both Parties acknowledge that the 1998 Agreement recognises the birth right of all the people of Northern Ireland to

³⁶ EUROPEAN COMMISSION (2017).

³⁷ *Ibidem*.

choose to be Irish or British or both and be accepted as such. The people of Northern Ireland who are Irish citizens will continue to enjoy rights as EU citizens, including where they reside in Northern Ireland. Both Parties therefore agree that the Withdrawal Agreement should respect and be without prejudice to the rights, opportunities and identity that come with European Union citizenship for such people and, in the next phase of negotiations, will examine arrangements required to give effect to the ongoing exercise of, and access to, their EU rights, opportunities and benefits³⁸.

Finally, “both Parties will honour their commitments to the PEACE and INTERREG funding programmes under the current multi-annual financial framework. Possibilities for future support will be examined favourably³⁹. Moreover, the Report highlights that the UK does not intend to remain in the EU single market or customs union and sets out three scenarios for after UK’s withdrawal from the EU. The first solution includes a trade deal, with the aim of avoiding customs controls down the Irish Sea or along the Irish border. However, this is going to be difficult because of the exit of the UK from the customs union and the single market.

The second solution claims that the UK will “propose specific solutions to address the unique circumstances of the island of Ireland⁴⁰”, implying that membership in the single market and customs union should be maintained.

The last solution is relevant in the case that no other alternative is found for Northern Ireland. In this specific case, “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 Agreement⁴¹. However, in order for this to happen, it is necessary that the EU assures that regulatory alignment exists in Northern Ireland and that it could be maintained.

In the case of a no deal, checks must be imposed on all kind of goods according to the rules of WTO and it seems that a hard border cannot be avoided. If the UK really exits from the customs union and the single market, it is inevitable for border controls to increase.

In addition, the Joint Report is not legally binding and, in fact, it has been incorporated in a section on Ireland/Northern Ireland within the Withdrawal Agreement.

Following the Joint Report, in March 2018, the EU proposed a backstop with the following features: a regulatory alignment of Northern Ireland with the EU in order to avoid controls on standards and a customs union between the two to avoid customs controls.

The EU solution has been rejected because, in the UK’s view, it could create a sea border between the United Kingdom and Northern Ireland. However, the

³⁸ *Ibidem*.

³⁹ *Ibidem*.

⁴⁰ *Ibidem*.

⁴¹ *Ibidem*.

EU demonstrated that the sea border would not exist (in fact, most of the goods between the island and the United Kingdom cut across Dublin), but the British government refused the EU proposal.

2.3.2: EU withdrawal agreement (February 2018)

The Withdrawal Agreement published in February 2018 includes the Protocol on Ireland and Northern Ireland, containing all the provisions regulating the backstop solution.

If the agreement does not enter into force before 31 December 2020, the backstop solution will apply until new agreements are found in relation to the border issue: “[T]he objective of the Withdrawal Agreement is not to establish a permanent relationship between the Union and the United Kingdom. The provisions of this Protocol are therefore intended to apply only temporarily, taking into account the commitments of the Parties set out in Article 2(1). The provisions of this Protocol shall apply unless and until they are superseded, in whole or in part, by a subsequent agreement”⁴². Alternatively, the UK may request an extension of the transition period by 1 July 2020 or ratify an agreement replacing the backstop by then.

The compromise solution agreed in November 2018 provides for an enlargement of the customs union to the whole territory of the United Kingdom with no tariffs, quotas, or checks on rules of origins: “Until the future relationship becomes applicable, a single customs territory between the Union and the United Kingdom shall be established (‘the single customs territory’). Accordingly, Northern Ireland is in the same customs territory as Great Britain”⁴³. Furthermore, “the UK will harmonise its commercial policy with the EU’s common commercial policy to the extent necessary for the functioning of the single customs territory. Under no circumstances can the UK apply a lower customs tariff to its customs territory than the EU Common Customs Tariff for any good imported from any third country or apply different rules of origin”⁴⁴. The belonging to the customs union impedes any further commercial agreement between the United Kingdom and third countries.

In a different manner, the regulatory alignment to the Union’s Customs Code (UCC) is only relative to Northern Ireland, together with strict measures protecting reciprocity in terms of State aid, competition, taxation, environment, labor and social protection (valid for the UK as a whole). The Protocol binds

⁴² *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 on 25 November 2018.*

⁴³ *Ibidem.*

⁴⁴ *Ibidem.*

the UK to apply EU State aid rules and to guarantee open and fair competition. In relation to State aid, “the Commission will continue to enforce State aid rules directly as part of the backstop solution”⁴⁵. Additionally, regarding competition “the EU and the UK commit to ensuring that their respective competition laws effectively enforce these agreed rules. More concretely, the UK commits to ensure that administrative and judicial proceedings are available in order to permit the effective and timely action against violations of competition rules, and provide for effective remedies. In case of disputes about whether the UK complies with these commitments, dispute settlement through arbitration is available”⁴⁶.

These non-regression provisions look forward to hindering any eventual restriction Northern Irish businesses could find when placing products on the EU’s Single Market. The rules relative to the Northern Ireland’s continuing membership in the EU Single Market would also include legislation on goods, sanitary rules, and Value Added Tax. Moreover, they must be respected by the UK as well since they are essential to avoid a hard border.

If one of the parties considers that backstop is not essential after the transition period, it must notify the other explaining the supporting reasons. The Joint Committee instituted by the Agreement will consider the request.

The United Kingdom has accepted this compromise solution believing that also the EU does not want to be blocked into the backstop and this is why it added a further incentive to find a solution to the Irish question in relation to the future relationship: “this Protocol shall be implemented and applied so as to maintain the necessary conditions for continued North-South cooperation, including in the areas of environment, health, agriculture, transport, education and tourism, as well as in the areas of energy, telecommunications, broadcasting, inland fisheries, justice and security, higher education and sport. In full respect of Union law, the United Kingdom and Ireland may continue to make new arrangements that build on the provisions of the 1998 Agreement in other areas of North-South cooperation on the island of Ireland”⁴⁷. Further news include the possibility to extend the transition period to one or two years.

In addition, the Protocol contains other provisions to ensure the rights of the citizens of the island; it reiterates the will to safeguard and carry forward the Good Friday Agreement and the Common Travel Area. It also preserves the necessary conditions for continued North-South cooperation and the Single Electricity Market.

Since a great number of people living in Northern Ireland identified themselves as Irish (and then European) at birth, the parties of the agreement are committed to respecting the free movement of the subjects and not to discrim-

⁴⁵ EUROPEAN COMMISSION (2018a).

⁴⁶ *Ibidem*.

⁴⁷ *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 on 25 November 2018.*

inate on the basis of nationality. Finally, The PEACE and INTERREG programmes will continue and the Commission announced the inauguration of a PEACE PLUS programme for after 2020.

2.3.3: UK proposal (July 2018)

In the wake of the EU draft proposal, Theresa May appeared to be contrary and to deem as unacceptable the request of the Union. Accordingly, the UK published a ‘temporary customs arrangement’ to be applied in case no other solution is found, and later put out the Chequers White Paper. The latter proposes ‘common rulebook’ on goods in order to avoid checks at the border. It was meant to adhere to the commitments of respect toward the EU and to avoid to harm the UK’s integrity. Its primary aim is to honor the result of the referendum.

It focuses on five main areas. The first is economy, in which it intends to develop “a broad and deep economic relationship with the EU that maximises future prosperity in line with the modern Industrial Strategy and minimizes disruption to trade between the UK and the EU, protecting jobs and livelihoods – at the same time making the most of trading opportunities around the world”⁴⁸. As for communities, the UK wants to establish a new immigration system and support farming and fisheries. The third and very important focus is the integrity of the union, and this is why it wishes to protect the peace process in Northern Ireland and to avoid a hard border. Moreover, it intends to protect the principle of democracy by ensuring that laws are made in the UK by the people chosen by the citizens and by fostering principles supportive of the UK’s place in the world.

The Chequers arrangement consists in the realization of a customs agreement to be realized through regulatory alignment to the EU standards in relation to goods of the agricultural and industrial sectors and through the application of a series of advanced telematic checks at the borders capable of defining if the goods are destined to the United Kingdom or to the territory of the European Union. In the latter case, the EU would be entitled to acquire the tariffs collected at the British customs to then transfer them to the European Union. In this view, this agreement could be beneficial for both parties⁴⁹.

In fact, it would allow for the possibility to proceed with the commercial exchanges between the two sides of the Channel without the need to refer to an implementation of a tariff system and, due to the digitalization of the customs process, it would be possible for transit goods not to incur in problems and delays because of the checking procedure⁵⁰.

At the same time, it would reach this result without involving the participation of the United Kingdom in the European Economic Area or within the Customs

⁴⁸ HM GOVERNMENT (2018).

⁴⁹ ECONOPOLY (2018).

⁵⁰ *Ibidem*.

Union and, therefore, allowing the British government to pursue an autonomous commercial policy and to freely subscribe commercial agreements with third countries. Furthermore, it would allow the European Union to be untangled from ties to the United Kingdom in the realization of further agreements with non-EU countries. Finally, and most importantly, it would definitely prevent the hypothesis of a hard border between Northern Ireland and the Republic of Ireland from happening⁵¹.

However, the proposal was made without verifying the possibility of digitalizing checks processes and, moreover, it lacks the exchange of services, in particular of the financial ones, that represent a crucial point for the future relationship⁵².

On the side of the European Union, both Michel Barnier and Donald Tusk confirmed the position of the Union, which considered the Paper as damaging the EU's single market. In fact, the proposal represents a sort of 'cherry picking' by the UK and it would breach the EU's negotiating red lines. Accordingly, it is risky for the Union's policies. The position has been confirmed on the occasion of the Salzburg summit by the Chief Negotiator Michel Barnier, according to whom the European Union cannot empower a non-member state to define and apply customs rules, VAT and duty collection. Therefore, Theresa May announced that an alternative solution would have been delivered.

2.3.4: "We have no desire to use the backstop" (January 2019)

In the last quarter of 2018, the European Council failed to deliver the Withdrawal Agreement. However, it was subsequently agreed by the Special Council. Nevertheless, it was hard for to proceed since the Government delayed the first meaningful vote.

Accordingly, Theresa May wrote a letter to Presidents Jean-Claude Juncker and Donald Tusk on 14 January 2019 outlining that the backstop represented a tricky point for the discussion in Parliament, that had as its primary aim the protection of UK's integrity. In fact, in May's words, "while both sides were clear that we must deliver on our shared commitment to avoid a hard border, my priority was also to protect the integrity of the United Kingdom, while the EU understandably needed to safeguard the integrity of its single market and Customs Union"⁵³. Diversely, the EU fears that the UK could use the threat of a hard border as a form of leverage in the negotiations.

⁵¹ *Ibidem*.

⁵² *Ibidem*.

⁵³ MAY (2019).

In the end, the PM proposes to start exploratory talks to confirm the legal connection between the Withdrawal Agreement and the Political Declaration. Moreover, she underlined that, in the case in which the backstop is likely to be applied, the UK will tend to apply the agreement (even if in course of finalization). This provides for a further guarantee in the direction of ‘no backstop’.

The letter has provoked a quick reply with a joint statement of Presidents Tusk and Juncker. They confirm that the backstop is a suboptimal arrangement for both parties and that its entry into force is not fostered by the European Union and that “the Commission can also confirm the European Union’s determination to replace the backstop solution on Northern Ireland by a subsequent agreement that would ensure the absence of a hard border on the island of Ireland on a permanent footing”⁵⁴. However, the EU also confirmed that the Withdrawal Agreement is the final deal and that no renegotiation is planned: “As you know, we are not in a position to agree to anything that changes or is inconsistent with the withdrawal agreement”⁵⁵.

A few days later, on 23 January 2019, the Chief Negotiator held a Speech at the European Economic and Social Committee, where he took the same line of Tusk and Juncker and explained the reasons that pushed to the adoption of the backstop clause. First, the specific request of the UK to leave the Union created a specific problem between the Republic of Ireland and Northern Ireland that requires a specific solution. Second, the backstop issue is not only related to goods, but it is essential to give certainty to people. Finally, the matter is a European issue because the Irish border is a European border and it tackles the European Single Market’s integrity. However, since it is an insurance policy, “we have no desire to use the backstop”⁵⁶, Barnier says.

2.3.5. May-Juncker understanding (11 March 2019)

Moving on, in January 2019, the British Parliament rejected the deal for the first time and approved the ‘Brady amendment’. The latter supports the idea of replacing the backstop with alternative arrangements. In February, further negotiations between Stephen Barclay, Secretary of State for Exiting the EU, Geoffrey Cox, Attorney General, and the EU were undertaken⁵⁷.

In March, Theresa May talked to Jean-Claude Juncker and secured some legally binding modifications to the Withdrawal Agreement. The understanding between the two leaders is mainly about the backstop and they presented three

⁵⁴ EUROPEAN COUNCIL (2019).

⁵⁵ *Ibidem*.

⁵⁶ EUROPEAN COMMISSION (2019a).

⁵⁷ INSTITUTE FOR GOVERNMENT (2019).

updates to try to unfreeze the Brexit negotiation and to convince the British Parliament to approve the deal. The understanding is mainly about technicalities and small changes to the documents that go with the Withdrawal Agreement. According to May and Juncker, these changes should provide clarifications and reassurances on how the backstop will be implemented and on the temporary nature of the clause.

The crucial point of the discussion was still about the backstop. May and Juncker, at the end of their meeting in Strasbourg, explained that the United Kingdom and the European Union agreed on a legally binding declaration that would allow both to leave the temporary union if one of the parties does not negotiate at its best for a final solution meant to replace the backstop⁵⁸. The document should prevent the United Kingdom and the European Union from being satisfied by the safeguarding clause and it should push both parts to negotiating a new agreement. If this does not happen, according to the document, the other party could ask to unilaterally abandon the union provided by the backstop through the use of arbitration, and its outcome would be legally binding. It was meant to convince the Tories in the British Parliament that the backstop will never be long-lasting. The document clarifies the violations of the obligations pursuant to art. 2(1) of the Protocol on Ireland and specifies that the indefinite application of the Protocol would be inconsistent with the requirements qualifying its temporary nature. Additionally, a High-Level Conference is provided every six months to evaluate the progress made and future developments.

Secondly, May and Juncker have said that negotiations on future relationship will be promptly launched. Furthermore, May has fixed a new deadline for the negotiations: by December 2020 the United Kingdom and the European Union should find an alternative solution to the backstop. Therefore, even if the deal is not approved before 2021, there will be other ways to handle the situation. In this circumstance too, these changes have been made to reassure the members of the Parliament that the United Kingdom will never be trapped into the backstop.

Finally, May has announced that the United Kingdom has put together its own unilateral interpretation on the Agreement, where it supports the right to abandon the backstop in any case. In fact, the impossibility to conclude alternative arrangements on the Irish border establishes a violation of the obligations defined in the Protocol and it would trigger a unilateral waiver of the Withdrawal Agreement and of the Protocol on Ireland in the parts relative to the backstop. This choice seems to be made in order to manifest the political will of the government, but without any concrete consequence. It is possible that Juncker agreed to insert this in the document just to ease the tensions.

However, this understanding does not change the essential nature of the Withdrawal Agreement. The allowances made to the Prime Minister are still far

⁵⁸ RAYNER (2019).

from those asked by the members in the British Parliament that rejected the deal for three times. Nevertheless, Brexiteers and the DUP turned down the deal because the backstop did not have a temporary limit and, basically, this condition has not been changed. The understanding reduces the risk that the United Kingdom will be indefinitely stuck within the backstop, but it does not eliminate it.

Also, the British Parliament asked May to substitute the backstop with alternative proposals such as the introduction of a telematic system for border checks. Nonetheless, in the understanding, it has only been agreed that the UK and the EU have to find an alternative solution by 2020 without specifying the details.

2.5. British and Irish political positions on the issue

As it has been mentioned before, the backstop is a controversial point of the Withdrawal Agreement and, in fact, it sparked tensions not only between the UK, the EU, and Ireland but also within and across British political parties⁵⁹. Brexiteers see the measure as a tie that keeps the country bound to the European Union for an indefinite amount of time, without having the possibility to unilaterally withdraw from the customs union unless a new agreement has been found. Moreover, this would undermine the possibility to trade deals with partners from all over the world and threatens the UK's credibility in the international arena. In fact, agreements with third countries would still be possible, but with much more difficulty⁶⁰.

Diversely, the Labour Party has a less clear position on the issue; in fact, its members opposed the Withdrawal Agreement, but not because of the backstop clause. However, Jeremy Corbyn has expressed dissatisfaction with the impossibility to unilaterally waive and he explicitly supports the idea of a UK-wide customs union with the EU. The positions expressed are highly controversial, given that Corbyn agitates for the lack of unilateral exit but he does not use this as a supporting reason to reject the deal. Additionally, it is in contrast with the Labour's policy, which claims for the backstop to be accepted by the communities in Northern Ireland⁶¹.

In Northern Ireland, the issue is much more difficult, because people feel it personally and in different ways. In particular, the measure has provoked opposing views by the unionist and nationalist parties.

The unionist parties hold several objections. First, they fear that the backstop will threaten the UK's constitutional integrity by imposing more checks between Northern Ireland and the rest of the country. In their opinion, this will

⁵⁹ MURPHY (2019).

⁶⁰ *Ibidem*.

⁶¹ *Ibidem*.

inevitably provoke a departure of Northern Ireland. Moreover, they see the backstop as a way of diminishing the autonomy of the Northern Ireland Assembly, that will be subject to EU rules.

In particular, the DUP fears that the EU's intransigence on the clause would generate instability across the region. With any probability, it would infringe the principle of consent outlined in the Good Friday Agreement, according to which changes in the constitutional position of the region must come from the people of Northern Ireland⁶².

The possibility of an open border has been showed to be the toughest point of Brexit negotiations; however, the opinions in Northern Ireland are divergent. In fact, four local parties support the backstop: the Social Democratic and Labour Party (SDLP), Sinn Féin, the Alliance Party of Northern Ireland and the Green Party, together with many civil and business organizations. In addition, for some, the backstop facilitates Northern Ireland in accessing the EU market⁶³.

On the side of the Republic of Ireland, obviously, the position is in line with the one of the European Union and the backstop represents a legal guarantee. The Taoiseach Leo Varadkar repeatedly supported the EU position and the need for a safeguard clause, arguing that the solution put forward by the Withdrawal Agreement is the best outcome possible.

Chapter 3

The Post-Brexit Common Travel Area

The Common Travel Area ("CTA") has been conceived to preserve the lack of border controls principally on the Irish border. It is a visa-free zone between Northern Ireland, Ireland, Great Britain, the Isle of Man and the Channel Islands. Also, the agreement involves reciprocal non-discrimination and equal rights (such as the right to vote, to employment, to social welfare, to health care, to education, etc.) for each other's citizens in both jurisdictions. In other words, Ireland is not treated as a foreign country and Irish citizens are not considered as foreigners; in fact, they are dispensed from applying for settled status or for any residence permit⁶⁴.

⁶² HENRY (2019).

⁶³ *Ibidem*.

⁶⁴ DEXEU (2018).

The CTA is not a formal bilateral treaty; in fact, it is fragmented and bits and pieces of it can be found in the domestic law of both countries⁶⁵. The CTA implicitly grants a number of rights, stemming from the status of Irish citizens in the UK and of UK citizens in Ireland, and therefore, they have never been the subject of specific legislation or international agreements. The CTA is recognized in EU law by Protocol No. 20 to the Treaty on European Union (“TEU”) and Treaty on the Functioning of the EU (“TFEU”). In order to fully understand its provisions, the CTA should be analyzed along with the Good Friday Agreement.

Of course, Brexit could mean that both immigration systems will be on a different level and that it would be extremely difficult to conduct ordinary duties, such as walking a dog across the border without a permit that allows for the export of an animal⁶⁶. However, a form of Common Travel Area may still be in place after Brexit, but it is unlikely for a completely open border to remain in force.

Both the UK and the EU have announced that ensuring the movement of people is a priority in the negotiations and, with any probability, it will still be possible to cross the border without strict border checks. Some groups will be expressly protected, such as ‘frontier workers’ and for those whose protection is not ensured, they must refer and rely on UK domestic law.

Following Brexit, a clear legal basis might need to be provided in order to incorporate the Common Travel Area in both the UK and Ireland’s legal systems through a bilateral agreement.

3.1: Origins of the Common Travel Area

Between 1801 and 1922 Ireland belonged to the United Kingdom. When the Irish Free State was established in 1922 and seceded from the rest of the UK, Irish citizens continued to be regarded as British. Accordingly, they enjoyed the same rights enforced in the former motherland and a peculiar status within the UK.

The Common Travel Area arrangements codified this status, but without any specific agreement or piece of legislation⁶⁷. The pact has been in place since 1922 and it involves the lack of controls on passports when traveling cross-border.

As Bernard Ryan, professor at the University of Leicester, explains: “[W]hen the Home Office was faced with the imminent establishment of the Free State,

⁶⁵ DE MARS, MURRAY, O’DONOGHUE, WARWICK (2018: 71).

⁶⁶ HOLDER (2017: 96).

⁶⁷ COUNCIL OF THE EUROPEAN UNION (2017a).

its view was that it ‘would not propose to require under the Aliens Order a passport system between this country and Ireland, and could not make any use of such a requirement if they were asked to impose it’. The status quo depended however upon Free State agreement to continue to participate in the British system of immigration control, [...]. The Irish officials appear to have accepted the proposal with enthusiasm [...]⁶⁸.

On the other hand, in 1922, Ireland did not regard Irish born citizens as British from a legal point of view. Thus, even if Ireland wanted to maintain the Common Travel Area in place, the treatment of Irish citizens in the UK was not reciprocal to the one enjoyed by British citizens in Ireland. Nevertheless, Irish citizens were not treated as aliens and they still enjoyed a special status. Only with the Irish Nationality and Citizenship Act in 1935 formal and substantial reciprocity was granted⁶⁹.

At the outbreak of the Second World War, controls were reintroduced. At its conclusion, in 1949, the Citizens of the United Kingdom and Colonies Order ruled that UK citizens in Ireland would enjoy equal rights with respect to Irish citizens in the UK⁷⁰.

This reciprocal relationship has been facilitated by the nature of the law systems of both countries; in fact, they are both rooted in the common law tradition. In other words, legislation in force in 1922 is still valid, unless it is repealed by another piece of law⁷¹.

After the passage from the Irish Free State to the Republic of Ireland in 1949 and the refusal of the British monarch, the UK formalized this agreement by recognizing that, although Ireland was not part of the United Kingdom or the Commonwealth, it was exempted from being treated as any other foreign country.

In 1949, the British Parliament enacted the Ireland Act, stating that: “[I]t is hereby declared that, notwithstanding that the Republic of Ireland is not part of His Majesty’s dominions, the Republic of Ireland is not a foreign country for the purposes of any law in force in any part of the United Kingdom”⁷².

In 1952, the agreement was furtherly formalized by recognizing that nationals of both jurisdictions should have been regarded in the same way. The right to vote, work, social welfare ,and health care represented just a section of the rights that British and Irish citizens could claim.

As for the right to vote, Irish citizens in the UK can vote in local, national and European elections and run for the UK Parliament, while non-Irish citizens

⁶⁸ RYAN (2003).

⁶⁹ COUNCIL OF THE EUROPEAN UNION (2017a).

⁷⁰ *Ibidem*.

⁷¹ *Ibidem*.

⁷² UK GOVERNMENT (1949).

cannot run for the Dáil (the principal chamber of the Irish legislature) or vote in constitutional referendums and presidential elections⁷³.

Irish nationals could preserve their peculiar status under the Immigration Act 1971 and the British Nationality Act 1981⁷⁴.

For Professor Ryan, the CTA revealed to be successful and supported by both states for three reasons: “The primary explanation for the durability of these arrangements has been the assumption of the UK authorities that it is impractical for the Irish border to be an immigration frontier. One result has been support by Northern Irish unionists for the common travel area, in order to avoid immigration control on journeys between Northern Ireland and Great Britain. The many social and economic connections between the Republic of Ireland and all parts of the UK are a second factor pointing towards relative freedom of movement between the two states. This aspect of the common travel area is generally favoured by the Irish Government. It also appeals to nationalist opinion in Northern Ireland, which supports any lessening of the de facto consequences of the partition of the island of Ireland. A third factor underlying common travel area arrangements is that these favour the free movement of labour. For most of the period since 1922, that meant movement of Irish workers to Great Britain. With greater economic development in the Republic of Ireland since the mid-1990s, the pattern has been more varied, with movement in both directions”⁷⁵.

Finally, this agreement has been in place for almost a century now and it was life-changing for people living close to the border. The rest of the chapter will analyze what the CTA protects and if and how this is going to be changed by Brexit in any way.

3.2. CTA arrangements

The core of the Common Travel Area is the establishment of a free movement area and in Ireland it allows Irish and British citizens to live and work in both jurisdictions without any permit. An Irish citizen in the UK is treated as one possessing permanent permission to reside in the UK, and the same happens for UK citizens in Ireland⁷⁶. As it was mentioned before, these liberties have always been in place since the creation of the Irish Free State in 1922, except for the period of the Second World War.⁷⁷

In other words, the Common Travel Area arrangements allow British and Irish citizens to move visa-free. Accordingly, the existing coordination between the

⁷³ DE MARS, MURRAY, O'DONOGHUE, WARWICK (2018: 16).

⁷⁴ COUNCIL OF THE EUROPEAN UNION (2017a).

⁷⁵ RYAN (2003).

⁷⁶ DEXEU (2019).

⁷⁷ COUNCIL OF THE EUROPEAN UNION (2017a).

⁷⁷ *Ibidem*.

two jurisdictions functions similarly to the Schengen Area. The above-mentioned cooperation includes sharing information on visa applicants, asylum seekers, citizenship applications, police watch lists, and the British Irish Visa scheme⁷⁸.

The rights ensured by the agreement are extensive; in fact, they include access to social security, health, education and reciprocal recognition of professional and academic qualifications.

In relation to education, British and Irish citizens have access in both jurisdictions to all levels of education, as if they were citizens of that state⁷⁹.

Equal treatment is the main principle governing the CTA and it applies, for example, to the bilateral arrangements related to access to social welfare benefits and health systems.

3.3: Post-Brexit: an analysis of the different areas

The equilibrium created by the Common Travel Area is definitely going to be challenged by Brexit and, in fact, in the aftermath of the referendum both Ireland and the UK were skeptical and uncertain on the future of the CTA. This opinion was expressed in the UK Government's March 2016 paper, which stated that it was not clear if the CTA "could continue to operate with the UK outside the EU, and Ireland inside, in the same way that it did before both countries joined the EU in 1973"⁸⁰.

As a matter of fact, after the withdrawal of the United Kingdom from the European Union, ordinary things may become a little impractical. For example, people owning a farm or land extending across the border will have to face unexpected complications.

However, on the basis of the promises made by the EU and the UK, free movement of British and Irish citizens across the border will still be facilitated after Brexit. Both negotiating parties have declared that the coordination of social security systems, access to health care, work and education will be ongoing and reciprocal.

In February 2019, UK and Ireland agreed on a Memorandum of Understanding ("MoU") enabling the access to social security and granting certainty in case of a no-deal scenario⁸¹. It provided the basis for shared rules, which ex-

⁷⁸ *Ibidem*.

⁷⁹ DEXEU (2019).

⁸⁰ HM GOVERNMENT (2016).

⁸¹ FRANKEL (2019).

clude the possibility of citizens claiming benefits in both countries and prevents them to be in the situation of not being recognized as residents by any of the two jurisdictions⁸².

On 8 May 2019, the UK and Irish authorities signed a non-binding deal granting additional rights; the MoU allows British and Irish citizens to freely move between the two jurisdictions across the Irish border and to access to education and healthcare in both States⁸³.

In order to see these rights concretely granted, it is necessary to establish a clear legal basis in the UK and Ireland's legal systems and to agree on an international agreement between the two countries underpinning the Common Travel Area⁸⁴.

Finally, the implications for the CTA may be huge, but both governments are committed to keeping the Common Travel Area in place and ensure that no hard border is established.

3.3.1: Free movement

With any probability, during the grace period, the UK will still be a member of the common market and the customs union; this means that the four fundamental freedoms of the common market will be preserved.

But what will happen when the UK is going to be an independent actor in the international scene? Are the four freedoms going to be kept in place? Will the withdrawal influence the free movement ensured by the Common Travel Area?

Apparently, if the United Kingdom is going to exit from the customs union as it was announced, it will be extremely difficult to maintain a soft border and grant free movement without any kind of border control.

As the Joint Report claims, the UK should decide between two options: or it remains aligned to the common market without any border control, or it respects the North-South cooperation outlined in the 1998 Agreement and fosters the protection of the economy of the island⁸⁵.

The free movement represents a crucial issue on the island of Ireland since a lot of people are transnational workers. This issue has also been raised with regard to Gibraltar, where 96% of the population voted to remain within the EU and now wants to avoid an eventual hard border. In that situation, two models have been taken into account as possible solutions: the 'reverse Greenland-model' and the Norwegian model.

⁸² *Ibidem*.

⁸³ IRISH EXAMINER (2019).

⁸⁴ FRANKEL (2019).

⁸⁵ EUROPEAN COMMISSION (2017).

The first refers to the situation in which a part of the territory of a Member State could leave the Union, while the main part of the territory stays represented in Brussels. Is the reverse way of this model also good for Northern Ireland?

First, Greenland enjoys a peculiar status; in fact, it is a self-governing territory for the majority of affairs and Danish responsibility is essentially limited to monetary policy, citizenship, defense, and foreign affairs⁸⁶. Contrarily, Northern Ireland has much less autonomy in almost every area and as a conclusion, the ‘reverse Greenland-model’ results politically unrealistic.

On the other hand, the Norwegian example shows that it is easier to agree on policies rather than on politics and institutions⁸⁷. Norway has never joined the European Communities until it became one of the three non-EU members to be included in the European Economic Area (“EEA”). Thus, if the UK sticks to the Norwegian model, the concerns in Northern Ireland about free movement would not have any reason to exist, since they would be safeguarded. Diversely, if the UK decides not to follow the Norwegian model, Northern Ireland does not have any possibility to join the EEA because it is not a sovereign State.

It must be said that free movement represented a crucial aspect in the Brexit referendum and polls showed it to be a determining reason for people voting to ‘Leave’. In fact, British people fear that immigration causes the decline in available jobs, downward pressure on wages and a greater overcharge on local services⁸⁸. However, for people benefitting from it, it is an opportunity to work and travel. In fact, in the past, it was conceived as a way of optimizing the resource of labor and it was extensively achieved with the Treaty of Maastricht.

Concretely, Irish citizens will be entitled to continue traveling visa-free between the UK and Ireland⁸⁹. Although the Common Travel Area does not require any passport control, some air and sea carriers will need some form of identification and some might regard the passport as the only valid one, as explained by the Irish Government: “[T]he Common Travel Area means that there are no passport controls in operation for Irish and UK citizens travelling between the 2 countries. You do not need to have a passport in order to enter the other country. However, all air and sea carriers require some form of identification and some regard a passport as the only valid identification. Immigration authorities may also require you to have valid official photo-identification which shows your nationality. As you are being asked to prove that you are an Irish or UK citizen who is entitled to avail of the Common Travel Area arrangements, it is advisable to travel with your passport”⁹⁰.

⁸⁶ MEINEN (2018: 407).

⁸⁷ *Ibidem*.

⁸⁸ BARNARD, BUTLIN (2018: 203).

⁸⁹ GOVERNMENT OF IRELAND.

⁹⁰ CITIZENSINFORMATION.IE (2016).

The Northern Ireland Affairs Committee considered three possible scenarios with regard to the free movement of EU nationals (and specifically Irish) in the UK⁹¹. The first solution entails the imposition of a hard border between the Republic of Ireland and Northern Ireland; of course, this would cause serious disease for people who have a cross-border life. The second solution aims for a border to be established in the Irish Sea, or better, outside the island of Ireland; however, this would cause disruption between Northern Ireland and the rest of the UK. The last option might be to consider a harmonized approach for immigration controls between the UK and Ireland, and this may be done on the basis of the existing cooperation. However, Ireland's EU membership might reduce the policy options available⁹².

3.3.2: Right to work

Free movement is extremely important for several reasons, but it should be considered that 30,000 people daily cross the border for purposes of work specifically⁹³.

The European idea of removing obstacles for granting the free movement of persons and the equal treatment of migrant workers was initially codified in the 1948 Paris Treaty⁹⁴. Article 8 established that the parties of the treaty should have done whatever was in their power to facilitate the movement of workers and to provide for satisfactory economic and social conditions⁹⁵.

This principle was later included in the Brussels Treaty, which recognized the principle of non-discrimination towards transnational workers on the basis of their nationality and the right for them to freely choose who to work for⁹⁶.

Of course, the Common Travel Area already protects this right and British and Irish citizens are enabled to work in both jurisdictions, including on a self-employed basis, without the need to ask for any permission from the government⁹⁷. However, since the continuation of the CTA regime is apparently compatible with the EU law, because it is a bilateral agreement, it will be straightforward to safeguard this right on the existing terms.

In accordance with the Common Travel Area, the UK authorities are committed to ensuring the right to work to Irish and British nationals in both countries on a continuous basis following the withdrawal from the EU. Also, the Irish

⁹¹ MCGUINNES, GOWER (2017).

⁹² *Ibidem*.

⁹³ DE MARS, MURRAY, O'DONOGHUE, WARWICK (2018: 11).

⁹⁴ BARNARD, BUTLIN (2018: 208 ss.).

⁹⁵ *Ibidem*.

⁹⁶ *Ibidem*.

⁹⁷ GOVERNMENT OF IRELAND.

authorities promised to make certain that provisions recognizing professional qualifications on a reciprocal basis are in place⁹⁸.

3.3.3: Access to education

In accordance with the Common Travel Area arrangements, British and Irish citizens have access to all level of educations in both States under the principle of non-discrimination. The Irish and British governments are committed to ensuring that the existing regime will be maintained after Brexit.

There will be no change in the rights covered; in fact, access to education will still be possible on a reciprocal basis⁹⁹.

Moreover, it is very common to witness situations in which parents are cross-border workers and take their children to school across the border. This situation is going to be unchanged and parents' will to access education on either side of the border will be respected¹⁰⁰.

However, in regard to further and higher education in the UK, Irish citizens will be subject to the fees reserved to EU nationals for the school year 2019/2020¹⁰¹. Nevertheless, both countries are committed to allow British and Irish citizens to access higher education on the same fee basis.

Irish citizens can still access SUSI (Student Universal Support Ireland) on the same basis. It is an awarding authority awarding grants for further and higher studies and the Irish Government is committed to amending the Student Support Act of 2011 to make this possible on a continuous basis.

On the other hand, nothing changes for British citizens willing to study in Ireland.

3.3.4: Other rights

As it was mentioned before, the Common Travel Area ensures a bundle of rights to Irish and British citizens, and they are all connected. In fact, in relation to the right to work, people are entitled to access the social welfare systems.

⁹⁸ DExEU (2019).

⁹⁹ GOVERNMENT OF IRELAND.

¹⁰⁰ *Ibidem*.

¹⁰¹ *Ibidem*.

The CTA allows citizens of both jurisdictions to claim access to social security benefits in both States, under the principle of non-discrimination. This includes the possibility to access to Child Benefit, Social Insurance, and Social Assistance schemes¹⁰². Concretely, in the CTA a citizen is subject to contribute to one social security scheme at a time and he/she can access to the same social security rights and benefits when in the other state.

Obviously, both governments are committed to allowing for this regime to continue on a reciprocal basis.

However, the Republic of Ireland and the United Kingdom have signed a Social Protection Agreement on 1 February 2019 formalizing the pre-existing arrangements covered by the Common Travel Area. The Agreement substantially confirms the rights granted by the CTA regarding the Social Insurance entitlements and ensures they are respected when the withdrawal happens. In other words, Irish citizens living in Ireland are able to claim social security benefits if they worked in the UK and they can access Social Insurance payments if they live in the UK and vice versa¹⁰³. In addition, EU nationals living in Ireland will be able to claim social security benefits if they worked in the UK.

In relation to healthcare, both governments have expressed their will to continue to apply the arrangements currently in place. Under the Common Travel Area, Irish and British citizens can access healthcare in both States. In addition, this status is also implemented by North-South cooperation.

Access to health systems depends on the residency, meaning that a UK citizen residing in Ireland and an Irish citizen living in the UK have equal access to public health services. These include both emergency and non-emergency cases, planned treatment and emergency transfers from one jurisdiction to the other¹⁰⁴.

The two countries are connected in several areas surrounding health; for example, medicines travel across the UK to arrive in Ireland¹⁰⁵. However, the withdrawal of the UK from the EU is unlikely to create immediate consequences in this area, since there are already additional stocks in the Irish medicine supply chain¹⁰⁶. Within the broader context of the Common Travel Area, there are other healthcare arrangements between Ireland and the UK, including the Treatment Abroad Scheme, the Cross Border Directive and the European Health Insurance Card¹⁰⁷. Authorities announced that they are fully committed to preserving them and they are confident that stocks are enough to manage any potential shortage in the first months¹⁰⁸.

¹⁰² *Ibidem*.

¹⁰² *Ibidem*.

¹⁰³ DEPARTMENT OF HEALTH, GOVERNMENT OF IRELAND (2019).

¹⁰⁴ *Ibidem*.

¹⁰⁵ *Ibidem*.

¹⁰⁶ *Ibidem*.

¹⁰⁷ *Ibidem*.

¹⁰⁸ *Ibidem*.

Moreover, access to health services will still be possible for Irish and British citizens if they live, work or visit the other state, regardless of the existence of a deal¹⁰⁹.

As long as it concerns professional qualifications, they are currently recognized on a reciprocal basis in both jurisdictions. People who already have their UK qualification recognized in Ireland, will not face any problem. However, in case of a ‘no deal’, people requesting for their UK qualifications to be recognized will have their applications processed on the same basis of non-EU applicants and this may result in the lengthening of the process¹¹⁰.

Of course, the Department of Health and the Health products Regulatory Authority (“HPRA”) are working to ensure that risks and issues are minimal¹¹¹, but the supply chain for medicines is complex, regardless of Brexit.

Social housing is one of the other rights recognized by the Common Travel Area; in fact, citizens can access to supported housing and homeless assistance as if they were nationals of the State they are living in¹¹².

In relation to access to social housing and voting rights within the Common Travel Area, both governments are committed to ensuring that existing arrangements will continue to be applied¹¹³.

Moreover, Irish citizens living in the UK do not need to apply to the EU Settlement Scheme or to do anything to safeguard their status within the country, before or after Brexit¹¹⁴. In fact, the Common Travel Area already provides for the necessary guarantees.

On the other hand, in order to allow for close family members to remain within the UK or join EU citizens living in the UK, it is necessary to rely on the Withdrawal Agreement, rather than on the Common Travel Area arrangements. In this case, non-Irish and non-British family members are required to apply for the EU Settlement Scheme and to prove the relationship with the Irish citizen, its identity and nationality and their continuous residence in the UK¹¹⁵.

3.4: What about the Schengen Area?

One of the reasons why the Irish border has always been problematic is because both the UK and Ireland are out of the Schengen Area.

¹⁰⁹ *Ibidem*.

¹¹⁰ *Ibidem*.

¹¹¹ *Ibidem*.

¹¹² DEXEU (2019).

¹¹³ *Ibidem*.

¹¹⁴ *Ibidem*.

¹¹⁵ *Ibidem*.

The Schengen Agreement allows citizens to freely move in the area without being subject to border checks¹¹⁶. It was signed in 1985 by five Member States of the European Economic Community and implemented in 1995; by 1997 all European Member States had signed the Agreement except for the United Kingdom and Ireland. Later, the Agreement was incorporated in the Amsterdam Treaty and transposed into EU law. However, it allowed for Ireland and the UK to opt-out and maintain controls at their borders.

The Republic of Ireland showed to be more favorable to the agreement, but, on the other hand, it wanted to keep open the border with Northern Ireland and maintain the CTA¹¹⁷. With any probability, after Brexit Ireland is still willing to stay out of the Schengen Area, in order to adhere to the Common Travel Area.

Chapter 4

The Post-Brexit Good Friday Agreement and the threat posed to the Peace Process

The 1998 Good Friday Agreement provided the framework to ensure peace, political stability, and reconciliation within the island of Ireland. The GFA was decided by the political parties in Northern Ireland the Governments of Ireland and the UK, and lodged with the UN. The Agreement provided for a decline in political violence and an increase in cooperation in several areas. Moreover, it has ensured human rights protection across the island through the principles of equivalence and non-diminution¹¹⁸.

Is Brexit a real threat for the terms of the GFA?

This Chapter will try to answer this question and it will analyze the importance of the Good Friday Agreement in the peace process and its importance for the people. In fact, the last two decades showed the success of the peace process in the region, especially after the violence of the Troubles. In addition, the role of the EU in this framework will be analyzed and the potential impacts of Brexit will be assessed.

Although legal advice suggests that the Brexit deal is not in contrast with the GFA, others say that the risk for the Irish peace is concrete. In fact, among the

¹¹⁶ EUROPEAN COMMISSION (2019b).

¹¹⁷ MAHER (2017).

¹¹⁸ Ivi, p. 84.

possible threats, it is distinguished the one posed to constitutional security with respect to the weakening of the peace process¹¹⁹.

4.1: The GFA as a successful peace symbol

The 1998 Good Friday Agreement (or Belfast Agreement) marked a special time in the UK-Ireland relationship. It is the core of the Peace Process and it was legitimated by referendum both in Northern Ireland and Ireland in 1998 with massive support (71% in Northern Ireland and 94% in the Irish Republic)¹²⁰. As it was mentioned in the previous chapters, Northern Ireland experienced decades of violence with thousands of victims from the 1960s to the 1990s. Twenty years later, the Belfast Agreement paved the way for reciprocal cooperation and integrity. Furthermore, its relevance is due to its mission of enduring peace between the two jurisdictions and granting a higher number of rights to citizens.

The Belfast Agreement includes a Declaration of Support, which shows the will to guarantee “partnership, equality and mutual respect”¹²¹ and to aim for reconciliation within the framework of democratic institutions¹²². In fact, the GFA acknowledges the “legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status”¹²³.

The Good Friday Agreement brought with it the creation of a power-sharing model between unionists and nationalists through devolved institutions and the enhancement of cooperation following the North-South and East-West dynamics¹²⁴. It was signed by both the Irish and the British Government and registered at the UN. Moreover, it involved the main political parties in Northern Ireland, namely Sinn Féin, the Ulster Unionist Party, the Social Democratic and Labour Party, and the Alliance Party¹²⁵. Diversely, the Democratic Unionist Party abstained¹²⁶. Furthermore, the Agreement provided for the possibility of Ireland to be united, in case the majority of the population voted and supported this idea. It set up “a power-sharing Executive and a legislative Assembly in Northern Ireland, the North/South Ministerial Council and six North/South Implementation Bodies with cross-border executive functions;

¹¹⁹ O’KEEFFE (2019).

¹²⁰ THE GUARDIAN (2018).

¹²¹ UNDPPA (1998).

¹²² COUNCIL OF THE EUROPEAN UNION (2017b).

¹²³ UNDPPA (1998).

¹²⁴ DE MARS, MURRAY, O’DONOGHUE, WARWICK (2018: 4).

¹²⁵ LANDOW, SERGIE (2019).

¹²⁶ *Ibidem*.

the British-Irish Council and the British-Irish Intergovernmental Conference¹²⁷. Moreover, it led the way for authorities and paramilitary groups to abandon the weapons and join the political process¹²⁸.

Aside from the value of the Agreement, suspicion and skepticism persisted through the years¹²⁹. The theme of devolution caused turmoil and obstructed the implementation of the Good Friday Agreement¹³⁰. Powers were devolved by London in late 1999, but, because of the tensions, the direct rule was reimposed in 2000 and 2002¹³¹. Subsequently, the St. Andrews Agreement definitively restored the devolved government in 2007¹³². Later in time, the Hillsborough Agreement set the terms agreed by the DUP and Sinn Féin for delegating functions relative to police and justice¹³³. Subsequent amendments expanded the achievements of the agreement itself, including the expansion of cross-border trade and cooperation on energy, tourism and other areas across the island¹³⁴.

In 2017 a scandal broke out in relation to the resignation of the Sinn Féin's deputy Martin McGuinness, and this caused the collapse of the executive and the call for elections for the assembly in March 2017¹³⁵. This provoked an unbalanced situation in the assembly in 2017 with a slight victory of the nationalist parties over the two largest unionist parties (thirty-nine seats versus thirty-eight seats) and an overall victory of Sinn Féin¹³⁶. Later in time, the UK's Prime Minister Theresa May sealed an alliance with the DUP in order to maintain power¹³⁷. However, Sinn Féin leaders criticized the pact and accused the British government of not honoring the Good Friday Agreement.

As a consequence, several issues reappeared at the center of the discussion, including language, culture, parades, marches, flags, and emblems¹³⁸.

Brexit is seen as a threat by the former Prime Minister Tony Blair, the Taoiseach Leo Varadkar and Sinn Féin leaders¹³⁹. Given that the areas of cooperation ensured by the Agreement are more than 140 in the various Strands, there is the suspect that any disruption in the existing framework may threaten the basis of the agreement and the peace process¹⁴⁰.

Given the difficulty of the establishment of the peace in the region, it is an ongoing challenge to maintain reconciliation in Northern Ireland after Brexit,

¹²⁷ COUNCIL OF THE EUROPEAN UNION (2017b).

¹²⁸ LANDOW, SERGIE (2019).

¹²⁹ *Ibidem*.

¹³⁰ *Ibidem*.

¹³¹ *Ibidem*.

¹³² *Ibidem*.

¹³³ *Ibidem*.

¹³⁴ DE MARS, MURRAY, O'DONOGHUE, WARWICK (2018: 4).

¹³⁵ LANDOW, SERGIE (2019).

¹³⁶ *Ibidem*.

¹³⁷ *Ibidem*.

¹³⁸ *Ibidem*.

¹³⁹ *Ibidem*.

¹⁴⁰ *Ibidem*.

which may irreversibly change the existing equilibrium. Finally, may this push people in Northern Ireland to leave the UK and join Ireland through a referendum, as provided by the Good Friday Agreement¹⁴¹?

4.2: The role of the EU

Notwithstanding that the peace process is ongoing, it needs to be facilitated by the two Governments involved and by the European Union. In fact, through the years, additional political and legal agreements were needed to boost the peace process and to address political crises in Northern Ireland. It is worth noting that the role played by the EU is extremely significant.

In fact, in the bigger picture, the EU helped to accomplish considerable milestones in the peace process, especially in two ways. First, the European Union provided for the political framework of Northern Ireland, the Republic of Ireland and the United Kingdom¹⁴². Second, the Union has been extremely sensitive to the Irish Question through time and, therefore, it supported the economic and social development in the region¹⁴³. Other significant gains include the regularization of the relationship between all the communities in the different parts of the island, the removal of violence from people's daily lives and the establishment of an extremely soft border on the island¹⁴⁴. Moreover, the common EU legal framework helped to pursue and realize all-island cooperation, economic advancement, and societal normalization¹⁴⁵.

In addition, the impact of the EU has also been indirect through the influence on structure, language, and context of conflict resolution in Northern Ireland¹⁴⁶. The adequacy of the European model is reflected by the multidimensionality of the conflict in Northern Ireland, which needed to be addressed at different levels¹⁴⁷.

The importance of the European dimension within the Good Friday Agreement was formally acknowledged by the 1985 Hillsborough Agreement and later by the 1993 Downing Street Declaration and the 1995 Framework Documents¹⁴⁸. In the same year, the Framework Documents outlined the importance of an all-island approach to common EU issues¹⁴⁹.

¹⁴¹ *Ibidem*.

¹⁴² EUROPEAN PARLIAMENT (2018).

¹⁴³ *Ibidem*.

¹⁴⁴ COUNCIL OF THE EUROPEAN UNION (2017b).

¹⁴⁵ *Ibidem*.

¹⁴⁶ EUROPEAN PARLIAMENT (2017: 19).

¹⁴⁷ *Ibidem*.

¹⁴⁸ *Ibidem*.

¹⁴⁹ *Ibidem*.

For sure, the fact that both states enjoyed EU membership simplified the process and smoothed the nationalist tensions within Northern Ireland. In fact, the EU definitively showed to be significant in this process and uprisings on the border were shut down with the establishment of the Single Market in 1993¹⁵⁰.

Nevertheless, the Agreement does not contain any explicit reference to the EU and it does not demand continuing membership to the Union¹⁵¹, but this expectation may be implicit and it should not be interpreted as a way to assign a marginal role to the EU¹⁵². It should be noted that the EU represented the framework surrounding the agreement and that the EU membership is a value-added for both states.

In fact, in the Preamble of the GFA, both governments promised to “develop still further the unique relationship between their peoples and the close cooperation between their countries as friendly neighbours and as partners in the European Union”¹⁵³. Additionally, the North/South Ministerial Council has the duty to “consider the European Union dimension of relevant matters”¹⁵⁴ and to respect and consider the Union’s views.

Ultimately, it must be said that the EU provides Northern Ireland with almost a billion euros a year for agriculture, employment and plans to secure the peace process¹⁵⁵ through the PEACE and INTERREG programmes. Moreover, the EU set three cross-border Cooperation Programmes in which both the UK and Ireland partake and they are worth 650 million euros for the period 2014-2020¹⁵⁶. In particular, these programmes are able to maintain peace in the region and to protect the Good Friday Agreement.

However, the dual risk posed by Brexit is that the efforts made by the EU are underestimated on one hand and taken for granted on the other hand¹⁵⁷.

¹⁵⁰ DE MARS, MURRAY, O’DONOGHUE, WARWICK (2018: 17).

¹⁵¹ *Ibidem*.

¹⁵² EUROPEAN PARLIAMENT (2017: 21).

¹⁵³ UNDPPA (1998).

¹⁵⁴ *Ibidem*.

¹⁵⁵ LANDOW, SERGIE (2019).

¹⁵⁶ COUNCIL OF THE EUROPEAN UNION (2017b).

¹⁵⁷ LANDOW, SERGIE (2019).

4.3: What is changing with Brexit?

4.3.1: North/South cooperation

As the Withdrawal Agreement recognizes, North/South cooperation is a crucial section of the Good Friday Agreement and it is – more or less – embedded in the European context. The North/South Ministerial Council (“NMSC”) is established by Strand Two of the GFA, and it has the purpose of ensuring cooperation on several matters on all-island and cross-border basis¹⁵⁸. The NMSC fully expresses the cooperation of the two administrations, namely the Irish Government and the Northern Ireland Executive¹⁵⁹. In fact, the GFA lays down that “the North/South Ministerial Council and Northern Ireland Assembly are mutually inter-dependent and that one cannot successfully function without the other”¹⁶⁰. The GFA identifies 12 areas for cooperation and, at present, six of them take place; education, agriculture, environment, health, transport, and tourism¹⁶¹. In addition, there are six Implementation Bodies operating on an all-island basis: Special EU Programmes Body, the Foyle Carlingford and Irish Lights Commission, Food Safety Promotion Board, Inter-TradeIreland, Waterways Ireland and the North/South Language Body¹⁶².

Unsurprisingly, Brexit represents a notable risk for this tight partnership, since EU law enables the functioning of this system. As a matter of fact, the EU serves as a relevant actor in decisional processes and with regard to policies and programmes to assist the region in the Peace Process.

The following examples will demonstrate the relevance of the role assumed by the European Union in this framework.

First, as long as it concerns health, the North/South Ministerial Council decides on common policies related to emergency planning, co-operation on high technology equipment, cancer research and health promotion¹⁶³. Health cooperation allows for access to health services on both sides of the border and one of its greatest successes is the new Radiotherapy Unit at Altnagelvin Area Hospital in Derry which covers the Northwest part of the island, preventing patients from traveling to Galway for their treatment¹⁶⁴. Of course, this is possible because it takes place within the European framework, which ensures

¹⁵⁸ COUNCIL OF THE EUROPEAN UNION (2017b).

¹⁵⁹ *Ibidem*.

¹⁶⁰ UNDPPA (1998).

¹⁶¹ COUNCIL OF THE EUROPEAN UNION (2017b).

¹⁶² *Ibidem*.

¹⁶³ *Ibidem*.

¹⁶⁴ *Ibidem*.

that both jurisdictions respect the same regulations and meet the same standards for medicines, organs for transplantation, blood products, and medical devices¹⁶⁵.

Second, the environment area also displays the importance of the role played by the EU. In fact, the EU INTERREG IIIA Programme for Ireland/Northern Ireland supports the oversight of the three International River Basin District (IRBDs) in the North Western, Neagh Bann and Shannon districts¹⁶⁶. Its aim was to implement the EU Water Framework Directive which is committed to protect and improve the quality of water and its sustainable use¹⁶⁷.

Third, justice and security cooperation provides a further area in which the two states collaborate under the European regime; for example, the latter includes the European Arrest Warrant system¹⁶⁸.

Last, cooperation on energy policies is condensed in the Single Electricity Market (SEM) and it is feasible on the basis of the EU internal energy market¹⁶⁹.

In the end, the areas can be divided in those falling completely under the EU legal framework, those partially falling under the EU legal framework and those not at all falling under the EU legal framework¹⁷⁰. There are also a number of cross-cutting fields that will definitively be impacted by Brexit, including information sharing, health, safety, access to EU funding and the Common Travel Area¹⁷¹.

4.3.3: Citizenship

One of the most relevant provisions contained in the GFA is relative to the possibility for people in Northern Ireland to identify as either British or Irish at birth. Basically, it confirms the principle of non-discrimination and it was seen as “a drive towards parity of esteem for personal identity choices”¹⁷². In fact, both governments “recognize the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as

¹⁶⁵ *Ibidem*.

¹⁶⁶ *Ibidem*.

¹⁶⁷ *Ibidem*.

¹⁶⁸ *Ibidem*.

¹⁶⁹ *Ibidem*.

¹⁷⁰ UK GOVERNMENT (2018).

¹⁷¹ *Ibidem*.

¹⁷² DE MARS, MURRAY, O'DONOGHUE, WARWICK (2018: 58 ss.).

they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland¹⁷³.

It needs to be said that this provision is particularly relevant in the light of the identity divisions that caused the Troubles and the subsequent tensions in the region.

However, after Brexit British citizens in Northern Ireland will enjoy different rights from their Irish counterparts; in fact, it will not be possible for them to exercise EU Treaty rights anymore and, accordingly, everything becomes more challenging¹⁷⁴.

The GFA provision applies to 1.8 million people born in NI and those who claimed or will claim Irish citizenship will be considered as EU citizens under the Agreement¹⁷⁵.

Of course, the withdrawal of the UK from the EU will alter the geographical scope within which EU Treaty rights can be exercised, but the concept of the provision itself is crucial to the idea at the core of the GFA¹⁷⁶.

Will most of the EU rights for Irish citizens in Northern Ireland fade away? Official Brexit documents claim that this will not be the case, but one of the consequences might be a differential treatment within the region of Northern Ireland¹⁷⁷. For example, British citizens in NI might be disadvantaged with regard to political rights; in fact, MEPs will only represent one part of the community¹⁷⁸.

As far as it concerns Irish citizens, they will maintain EU citizenship: “[...] The people of Northern Ireland who are Irish citizens will continue to enjoy rights as EU citizens, including where they reside in Northern Ireland. Both Parties therefore agree that the Withdrawal Agreement should respect and be without prejudice to the rights, opportunities and identity that come with European Union citizenship for such people [...]”¹⁷⁹. In addition, many EU rights will be ensured on this basis (live, visit, retire elsewhere, etc.), while gaining other benefits will be less immediate¹⁸⁰.

One of the options available for EU citizens living in the UK before Brexit was the application to the EU Settlement Scheme through the Home Office in order to obtain other EU Treaty rights¹⁸¹. This was confirmed by the pilot

¹⁷³ UNDPPA (1998).

¹⁷⁴ COMMITTEE ON THE ADMINISTRATION OF JUSTICE (2018).

¹⁷⁵ COUNCIL OF THE EUROPEAN UNION (2017b).

¹⁷⁶ *Ibidem*.

¹⁷⁷ COMMITTEE ON THE ADMINISTRATION OF JUSTICE (2018).

¹⁷⁸ *Ibidem*.

¹⁷⁹ UNDPPA (1998).

¹⁸⁰ HOLDER (2019).

¹⁸¹ *Ibidem*.

phase of the Settlement Scheme, which allowed Irish citizens born in Northern Ireland to apply¹⁸². However, on March 29th the Home Office changed the criteria and blocked the access to the application for NI-born Irish citizens¹⁸³. The Home Office justified this position with the claim that the category in question does not need EU rights under the Settlement Scheme since they are already granted by the CTA¹⁸⁴.

In case this approach is confirmed, NI-born Irish citizens are the only EU citizens who cannot apply for the Settlement Scheme in the UK¹⁸⁵.

4.3.2: Rights

As for the North/South cooperation, the GFA human rights and equality provisions are conceived in the general framework of EU law¹⁸⁶. In fact, multiple rights granted by the Belfast Agreement are preserved by EU regulations and directives and by the EU Charter of Fundamental Rights, as it happens for the area of employment law and non-discrimination¹⁸⁷. Given the background of the country, particular attention is given to equality law.

In this regard, the danger posed by Brexit is that eventual North/South divergencies may prevent equivalent standards for the protection of rights from being applied and respected across the island¹⁸⁸.

At present, in light of the December 2017 Phase 1 Agreement and the March 2018 Protocol to the Draft Agreement, it can be said that there is a commitment to keep on recognizing the rights of Irish citizens living in Northern Ireland and, in particular those related to residency in a EU Member State, such as voting rights and EU student fee rates¹⁸⁹: “[...]The people of Northern Ireland who are Irish citizens will continue to enjoy rights as EU citizens, including where they reside in Northern Ireland. Both Parties therefore agree that the Withdrawal Agreement should respect and be without prejudice to the rights, opportunities and identity that come with European Union citizenship for such people and, in the next phase of negotiations, will examine arrangements required to give effect to the ongoing exercise of, and access to, their EU rights, opportunities and benefits”¹⁹⁰. In relation to the other rights connected to EU residency, political rights assume a notable relevance. After Brexit, Irish citizens in Northern Ireland will not be able anymore to vote in

¹⁸² *Ibidem*.

¹⁸³ *Ibidem*.

¹⁸⁴ *Ibidem*.

¹⁸⁵ *Ibidem*.

¹⁸⁶ COUNCIL OF THE EUROPEAN UNION (2017b).

¹⁸⁷ *Ibidem*.

¹⁸⁸ *Ibidem*.

¹⁸⁹ HOLDER (2019).

¹⁹⁰ EUROPEAN COMMISSION (2017).

the region and be represented by MEPs because Northern Ireland will no longer be a Member State; and the right to vote is usually exercised in the Member State of residence¹⁹¹. Another right that may expire after Brexit is the access to health care in EEA states with the European Health Insurance Card (“EHIC”)¹⁹². Finally, it will not be possible anymore to study wherever in the EU and to pay EU fees; in fact, this requires residency in an EU Member State for three out of the five previous years¹⁹³.

Yet, Irish citizens in the UK will still be able to access to public services and benefits.

To be more precise, multiple rights are conceded to people in Northern Ireland directly under EU law. Typical examples are the four freedoms under the EU Single Market (free movement of goods, capital, services, and people), EU equality law and anti-discrimination law¹⁹⁴. Moreover, both Ireland and Northern Ireland are subject to the Court of Justice of the European Union (“CJEU”) in relation to fundamental rights and to EU law as long as it regards employment rights¹⁹⁵. Finally, numerous rights in Northern Ireland derive from the European Convention on Human Rights (“ECHR”) and the Human Rights Act 1998. Apparently, since Brexit is happening, many are asking for a possible UK Bill of Rights¹⁹⁶.

On its side, the EU is committed to engaging in the protection of rights in the EU-27’s paper on Guiding Principles for the dialogue on Ireland/Northern Ireland, since it is extremely important for the island¹⁹⁷.

On the other side, the UK adopted a much less clear approach to the issue.

4.3.4: Border

As it has been outlined multiple times in this study, avoiding a hard border on the island is a priority for the European Union, the Republic of Ireland, Northern Ireland (and a little less for the rest of the United Kingdom). Indeed, in light of the episodes of violence on the island, the soft border is the symbol of the peace process¹⁹⁸. Accordingly, any return to a hard border would remind

¹⁹¹ COMMITTEE ON THE ADMINISTRATION OF JUSTICE (2018).

¹⁹² *Ibidem*.

¹⁹³ *Ibidem*.

¹⁹⁴ *Ibidem*.

¹⁹⁵ MCCRUDDEN (2017).

¹⁹⁶ *Ibidem*.

¹⁹⁷ *Ibidem*.

¹⁹⁸ COUNCIL OF THE EUROPEAN UNION (2017b).

of the divisions and conflicts in the 1970s, which frequently targeted checkpoints¹⁹⁹. Furthermore, it would cause political, economic, psychological and social effects in the region²⁰⁰.

In this regard the Phase One Joint Report explains the commitments of the United Kingdom: “[t]he avoidance of a hard border, including any physical infrastructure or related checks and controls”²⁰¹ and, in “the absence of agreed solutions”, it would “maintain full alignment with 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”²⁰². However, “nothing is agreed until everything is agreed”²⁰³.

On the EU side, the 27 countries are committed to avoiding a hard border and this was expressed by Michel Barnier’s Speech on 9 February 2019: “On Ireland, we focused on solutions to avoid a hard border. Any solution must be precise, clear and unambiguous.

As you know, our Joint Report provides for three options:

First, solving the issues on the island of Ireland through the future relationship. This future relationship would need to avoid a hard border, and protect North-South cooperation and the Good Friday Agreement. Once again, ladies and gentlemen, it is important to tell the truth. A UK decision to leave the Single Market and the Customs Union would make border checks unavoidable.

Second, the UK has committed to proposing specific solutions to the unique circumstances on the island of Ireland. We are waiting for such solutions.

The third option is to maintain full regulatory alignment with those rules of the Single Market and the Customs Union – current or future – which support North-South cooperation, the all-island economy and the Good Friday Agreement.

Options 1 and 2 can only be made operational in the context of the future relationship.

In the meantime, it is our responsibility to include the third option in the text of the Withdrawal Agreement to guarantee that there will be no hard border whatever the circumstances.

This means that we must now start legally defining how this scenario would work in operational terms. There must be no ambiguity here.

Based on the discussions this week, the UK has accepted the necessity of discussing how to make this full alignment scenario operational, provided we discuss the other two options in parallel. This is what we will work on in the coming rounds”²⁰⁴.

¹⁹⁹ *Ibidem*.

²⁰⁰ *Ibidem*.

²⁰¹ EUROPEAN COMMISSION (2017).

²⁰² *Ibidem*.

²⁰³ *Ibidem*.

²⁰⁴ EUROPEAN COMMISSION (2018b).

Conclusion

One of the conclusions that can be drawn from this study is that the eventuality of having a hard border on the island of Ireland had not been estimated by the United Kingdom when opting for Brexit – at least not in relation to every possible consequence.

The border in Northern Ireland is the symbol of decades of violence and, concurrently, decades of peace, depending on whether we are talking about a ‘hard’ or a ‘soft’ border.

This study aimed at answering two major questions: whether the withdrawal of the UK from the EU could harm the peace process initiated by the Good Friday Agreement and the equilibrium created by the Common Travel Area.

History shows why it is so important to maintain a soft border in the region and why the Union is one of the main actors in the Peace Process.

Theresa May claimed on multiple occasions that no customs union or single market will be in place and, accordingly, it does not seem possible to avoid a hard border.

The only concrete solution, for now, resides in the backstop clause; it is a safeguarding measure contained in the Withdrawal Agreement and conceived to avoid a hard border between the Republic of Ireland and Northern Ireland.

Since the UK will be out of the customs union and the single market, the three most probable solutions are to conclude a trade deal which allows for a seamless border, for the UK to propose an ad-hoc solution for the region or for the UK to be fully aligned to the rules of the Internal Market and the Customs Union.

On its side, the UK proposed a ‘temporary customs’ arrangement’ requesting to be a part of the same customs’ territory as the EU or to create a new union including both the UK and the EU, to apply the EU common external tariff at the UK’s external border and to access the IT systems which enable information exchange.

Anyway, no party wants to use the backstop and there are a huge number of opinions and contrasting positions on the issue.

As far as it concerns the CTA, it has been envisioned to ensure free movement. In the context of Brexit, both the EU and UK authorities have announced that they will do their best to maintain the zone visa-free and checks-free. Even if the withdrawal is still a challenge, several documents published by the UK Government and Ireland enshrine the will to ensure the same rights granted by the CTA after Brexit (free movement, social security, education, healthcare, etc.). In fact, with any probability, there will not be any substantial change, except in the case of a ‘no deal’.

In relation to the Good Friday Agreement, it helped to achieve the peace endured today. The Agreement is embedded in the common EU legal framework, which played an important role in realizing all-island cooperation, economic advancement, and societal normalization. In this context, the withdrawal from the EU may cause several damages and foreshadow a possible return to the violence of the Troubles. In fact, Brexit may cease cooperation on the island and increase discrimination on the basis of identification at birth (either Irish or British) in Northern Ireland. Furthermore, it seems impossible for NI-born citizens to apply for the Settlement Scheme in the UK.

Will the Irish border be seamless? This cannot be said with certainty, but it is a sure thing that Brexit complicates things in a fragile region, where people witnessed violence. On a legal point of view, it is impossible for things to stay the same and it is important for Ireland, Northern Ireland, the rest of the UK and the EU to stay committed and ensure that turbulence does not escalate in the region.

Finally, the Common Travel Area and the Good Friday Agreement provide for a further guarantee on a substantial level against any kind of division within the island.

However, the dynamics of Brexit are new and time is needed to evaluate the outcome of the withdrawal.

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Yours faithfully,

Benedetta Torre

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Abstract

La Brexit sembra essere finalmente prossima ad una conclusione, dopo l'ulteriore proroga concessa dall'Unione Europea fissata al 31 ottobre 2019. In questo contesto, il dibattito sul confine irlandese ha assunto un ruolo cruciale anche per le autorità europee, le quali hanno concordato con il Regno Unito i tre obiettivi principali da raggiungere tramite i negoziati relativi all'accordo di recesso.

In primo luogo, si mira a garantire i diritti dei cittadini dell'Unione Europea che vivono nel Regno Unito e dei cittadini britannici che vivono nell'Unione.

In secondo luogo, è necessario definire gli obblighi finanziari del Regno Unito.

Infine, evitare che un eventuale confine rigido venga stabilito tra Irlanda del Nord e Repubblica d'Irlanda.

Tale eventualità rappresenterebbe una minaccia alla situazione attuale del confine; ma, a quanto pare, i controlli doganali sarebbero inevitabili a meno che non venga istituita un'unione doganale di fatto tra l'UE e il Regno Unito.

Nonostante vi sia un confine tra le due giurisdizioni sull'isola d'Irlanda, la relazione economica più significativa dell'Irlanda del Nord è con l'UE e con la Repubblica d'Irlanda.

Contrariamente al violento passato, ora non vi è alcuna barriera politica, giuridica o fisica. Grazie alla presenza della Common Travel Area ("CTA"), le persone possono liberamente spostarsi nel Regno Unito, in Irlanda, nell'Isola di Man e nelle Isole del Canale senza la necessità di mostrare il passaporto alle frontiere. Da un lato, ciò potrebbe aver favorito l'immigrazione clandestina attraverso l'Irlanda nel Regno Unito. D'altra parte, è stato ampiamente riconosciuto che questo accordo rappresenti un enorme vantaggio per i cittadini all'interno della CTA.

Al momento, qualsiasi previsione su un eventuale confine è inaffidabile.

Chiaramente, la Brexit rappresenta una seria minaccia per le attività transfrontaliere (piccole imprese, trasporti, ecc.) e per le minoranze presenti sull'isola.

Inoltre, il recesso del Regno Unito dall'Unione Europea potrebbe danneggiare il processo di pace innescato dall'Accordo del Venerdì Santo ("GFA") nel 1998. Quest'ultimo ha permesso una profonda integrazione dell'Irlanda del Nord con il Regno Unito ed ha concesso agli abitanti della regione di scegliere se identificarsi come irlandesi o britannici alla nascita. Oltre alla cooperazione Est-Ovest (tra Irlanda del Nord e Regno Unito), il GFA ha avviato la cooperazione Nord-Sud (tra Irlanda del Nord e Repubblica d'Irlanda) permettendo significativi passi in avanti: ad esempio, la cooperazione transfrontaliera sul turismo, l'assistenza sanitaria e l'energia in tutta l'isola.

Questo elaborato ha analizzato la rilevanza e la complessità del contesto storico, politico e sociale della questione irlandese (capitolo 1), e di come

quest'ultima sia stata tenuta in considerazione durante i negoziati sulla Brexit (capitolo 2). Inoltre, sono stati valutati gli eventuali cambiamenti che il recesso del Regno Unito dall'Unione Europea potrebbe apportare agli accordi in vigore, in particolare l'area di libera circolazione e l'Accordo del Venerdì Santo (capitoli 3 e 4).

Nonostante la cosiddetta “questione irlandese” al momento identifichi i temi afferenti al confine irlandese e alla Brexit, l'espressione risale al XIX secolo, quando veniva usata in relazione alle richieste per l'indipendenza. Il desiderio di autonomia nasce nel lontano 1536, anno in cui i britannici conquistarono l'isola di Irlanda, causando ostilità tra i cattolici, abitanti originari dell'isola, ed i protestanti, introdotti dal dominio britannico. Le tensioni interne causarono diverse carestie, milioni di morti ed un'emigrazione di massa verso l'America del Nord e la Gran Bretagna.

Più di un decennio dopo, Charles Stewart Parnell fondò il Partito Parlamentare Irlandese (che verrà denominato in seguito Sinn Féin, letteralmente “noi soli”) e gettò nuova luce sulla questione dell'indipendenza. A tal proposito, nel 1866 il primo Home Rule rappresentò il primo passo verso l'autonomia successivamente garantita alla regione, pari a quella esistente in Scozia e Galles.

In questo contesto, la prima guerra mondiale rappresentò una seria sfida per la Gran Bretagna e le sue colonie, le quali chiedevano insistentemente l'indipendenza dalla madrepatria. Agli inizi della guerra, il Parlamento britannico approvò un atto in favore dell'autonomia irlandese su questioni estere e costituzionali, ma nonostante ciò, fu sospeso durante il periodo bellico. Le conseguenze inevitabili furono l'opposizione degli unionisti e le imponenti rivolte verificatesi a Dublino guidate dal Sinn Féin (e poi represses dall'esercito britannico), che causarono centinaia di morti.

In sintesi, la guerra d'indipendenza irlandese si concluse con la creazione dello Stato Libero d'Irlanda e dell'Irlanda del Nord come due distinte giurisdizioni.

La partizione acquisì un duplice significato; infatti, è stata in grado di dividere e ristrutturare il Regno Unito simultaneamente. Ciò è riflesso nello stato peculiare dell'Irlanda del Nord, che è l'unica parte del Regno Unito dove i matrimoni gay e l'aborto sono illegali, l'economia è fortemente integrata con quella irlandese nel settore agroalimentare e, allo stesso tempo, riceve ingenti fondi dallo Stato britannico.

Anche l'adesione dell'Irlanda del Nord all'UE ha creato accesi dibattiti e dubbi riguardo all'effettivo potere del Regno Unito sulla regione. L'euroscetticismo è sempre stato una caratteristica della politica britannica e, di fatto, durante la fine degli anni settanta era estremamente diffuso; infatti, proprio nel 1975 fu indetto il primo referendum relativo all'uscita dalla Comunità europea. In quell'occasione, il 52% della popolazione dell'Irlanda del Nord si pronunciò a favore della permanenza nella Comunità, e ciò si è rivelato un vantaggio su numerosi fronti. Si può affermare che l'appartenenza dell'Irlanda del Nord all'UE sia stata fondamentale per esacerbare il divario tra na-

zionalisti e unionisti e, inoltre, l'UE ha reso possibili dei cambiamenti sostanziali nella vita quotidiana dei cittadini, dalla politica agricola comune al programma PEACE, ecc.

Nonostante inizialmente non avesse assunto la giusta importanza, la questione irlandese è diventata determinante nei negoziati, dove è stata riassunta nel cosiddetto 'backstop': una clausola di salvaguardia che mira ad evitare ogni tipo di confine fisico e a preservare le condizioni stabilite dall'Accordo del Venerdì Santo del 1998. Il backstop verrebbe applicato nell'eventualità di un 'no deal' ed è valido solo per le merci; infatti, per quanto riguarda le persone, ci sono gli accordi sulla CTA, che non saranno modificati dalla Brexit, poiché sia il Regno Unito che la Repubblica d'Irlanda sono fuori dallo Spazio Schengen. Inoltre, il backstop prevede che il Regno Unito rimanga nell'unione doganale per un periodo temporaneo successivo al periodo di transizione.

Se l'accordo non entrerà in vigore prima del 31 dicembre 2020, il backstop verrà applicato fino a quando non sarà trovata una soluzione definitiva per il confine.

In seguito all'emanazione dell'Accordo di Recesso da parte del Consiglio europeo, il Parlamento britannico ha bocciato per tre volte l'intesa promossa dalla May. La Premier britannica, proprio alla vigilia del primo 'meaningful vote', ha scritto una lettera ai presidenti Jean-Claude Juncker e Donald Tusk il 14 gennaio 2019 sottolineando come il backstop rappresentasse un punto delicato per la discussione dell'accordo in Parlamento. Infatti, quest'ultimo aveva come priorità la protezione dell'integrità del Regno Unito, contrariamente all'UE, comprensibilmente preoccupata per la salvaguardia dell'integrità del mercato unico e dell'unione doganale. La lettera è stata seguita da una dichiarazione congiunta dei Presidenti Tusk e Juncker, i quali hanno confermato la natura subottimale della clausola augurandosi che la stessa non entri in vigore. La medesima posizione è stata assunta pochi giorni dopo dal Capo Negoziatore Michel Barnier in occasione di un discorso al Comitato economico e sociale europeo.

Nonostante ciò, il Parlamento britannico ha approvato il 'Brady amendment' che mira a sostituire il backstop con disposizioni alternative, tra cui, ad esempio, l'introduzione di un sistema telematico per il controllo del traffico. Come è stato detto in precedenza, il backstop è un punto controverso dell'accordo di recesso e, di fatto, ha innescato tensioni non solo tra il Regno Unito, l'UE e l'Irlanda, ma anche tra i partiti politici britannici e all'interno degli stessi. In particolare, in Irlanda del Nord, la questione ha suscitato opinioni contrastanti da parte dei partiti unionisti e nazionalisti e dei cittadini stessi, i quali si sentono coinvolti in prima persona. Per quanto riguarda la Repubblica d'Irlanda, invece, la posizione è ovviamente in linea con quella dell'Unione europea e il backstop rappresenta una garanzia legale.

Un'ulteriore conseguenza della Brexit potrebbe coinvolgere l'esistenza di due diversi sistemi di immigrazione sull'isola d'Irlanda, il che renderebbe

difficoltoso concludere attività quotidiane, tra cui, banalmente, portare a spasso un cane oltre il confine senza un permesso che consenta l'esportazione dell'animale. Ciò rientrerebbe nella violazione della Common Travel Area, che permette di oltrepassare il confine irlandese senza alcun controllo. Tuttavia, sia il Regno Unito che l'UE hanno annunciato che garantire la libera circolazione delle persone è una priorità dei negoziati e, con ogni probabilità, sarà ancora possibile attraversare la frontiera senza rigorosi controlli alle frontiere dopo il recesso del Regno Unito anche se potrebbe essere necessario incorporare la Common Travel Area nei sistemi legali del Regno Unito e dell'Irlanda con un accordo bilaterale.

L'accordo è stato formalizzato nel 1952 e riconosce la possibilità per i cittadini di entrambe le giurisdizioni di non essere discriminati sulla base della nazionalità. Inoltre, tra i moltissimi diritti che la CTA riconosce, i cittadini britannici e irlandesi possono rivendicare il diritto di voto, al lavoro, all'assistenza sociale e all'assistenza sanitaria.

Per quanto riguarda il diritto di voto, i cittadini irlandesi nel Regno Unito possono votare alle elezioni locali, nazionali ed europee e candidarsi per il Parlamento del Regno Unito. D'altra parte, i cittadini non irlandesi non possono candidarsi per il Dàil (la camera principale della legislatura irlandese) o votare ai referendum costituzionali e alle elezioni presidenziali.

Per quanto riguarda la libera circolazione, con ogni probabilità, durante il periodo di transizione il Regno Unito sarà ancora membro del mercato unico e dell'unione doganale; ciò significa che saranno preservate le quattro libertà fondamentali proprie del mercato unico. Al termine del periodo di grazia, il Regno Unito dovrebbe decidere tra due opzioni: rimanere allineato al mercato unico senza alcun controllo alle frontiere, o rispettare la cooperazione Nord-Sud delineata nell'accordo del 1998. In ogni caso, i cittadini irlandesi avranno il diritto di continuare a viaggiare senza visto tra il Regno Unito e l'Irlanda.

Il tema della libera circolazione assume particolare importanza nell'isola d'Irlanda, poiché ogni giorno circa 30,000 persone attraversano il confine per motivi di lavoro. Il diritto al lavoro è protetto dalla Common Travel Area e i cittadini britannici e irlandesi sono abilitati a lavorare in entrambe le giurisdizioni, anche in qualità di lavoratori autonomi, senza la necessità di chiedere alcun permesso al governo. A tal proposito, le autorità britanniche ed irlandesi si sono impegnate a garantire tale diritto anche dopo la Brexit.

Inoltre, la CTA consente ai cittadini di entrambe le giurisdizioni di richiedere l'accesso alle prestazioni di sicurezza sociale in entrambi gli Stati, in base al principio di non discriminazione ed entrambi i governi coinvolti sono impegnati a garantire la continuazione di questo regime.

In relazione all'assistenza sanitaria, le autorità britanniche ed irlandesi hanno espresso la volontà di continuare ad applicare gli accordi attualmente in vigore, i quali permettono l'accesso all'assistenza sanitaria ai cittadini irlandesi e britannici in entrambi gli stati grazie alla cooperazione nord-sud.

Infine, sebbene la consulenza legale suggerisca che la Brexit non sia in contrasto con l'Accordo del Venerdì Santo, altri affermano che il recesso del

Regno Unito rappresenti una minaccia concreta per il GFA e per la pace irlandese. L'accordo ha fornito i termini necessari per garantire la pace, la stabilità politica e la riconciliazione sull'isola d'Irlanda ed ha segnato un momento speciale nel rapporto tra Regno Unito ed Irlanda. L'accordo del Venerdì Santo portò con sé la devoluzione delle istituzioni e il rafforzamento della cooperazione Nord-Sud (con la Repubblica d'Irlanda) ed Est-Ovest (con il Regno Unito).

In questo contesto, è stato fondamentale il ruolo assunto dall'Unione Europea, la quale ha contribuito a realizzare importanti traguardi nel processo di pace; infatti, l'UE è stata estremamente sensibile alla questione irlandese nel tempo e ha sostenuto lo sviluppo economico e sociale della regione. L'importanza della dimensione europea nell'accordo del Venerdì Santo è stata formalmente riconosciuta dall'Accordo di Hillsborough del 1985 e successivamente dalla Dichiarazione di Downing Street del 1993 e dai documenti quadro del 1995.

In proposito, l'appartenenza di entrambi gli Stati all'UE ha semplificato il processo e attenuato le tensioni nazionaliste all'interno dell'Irlanda del Nord. Ciononostante, l'accordo non contiene alcun riferimento esplicito all'UE e non richiede un'adesione continua all'Unione, ma ciò non dovrebbe essere interpretato come un modo per relegare l'Unione Europea ad un ruolo marginale. Infatti, va detto che l'UE fornisce all'Irlanda del Nord quasi un miliardo di euro l'anno per l'agricoltura, l'occupazione e i piani per assicurare il processo di pace attraverso i programmi PEACE e INTERREG. Tuttavia, il doppio rischio posto dalla Brexit è che gli sforzi compiuti dall'Unione europea siano sottovalutati da una parte e dati per scontati dall'altra.

Come riconosce l'accordo di recesso, la cooperazione nord-sud è una parte cruciale dell'Accordo del Venerdì Santo ed è - più o meno - inserita nel contesto europeo, il quale permette il funzionamento di questo sistema. La Brexit rappresenta un notevole rischio per questa collaborazione che avviene in diversi campi, tra cui salute, ambiente, sicurezza e cooperazione in materia di giustizia e politiche energetiche.

Una delle disposizioni decisive contenute nel GFA è relativa alla possibilità per le persone nell'Irlanda del Nord di identificarsi come britannici o irlandesi alla nascita e, in seguito, di esercitare tutti i diritti connessi alla cittadinanza acquisita. Tuttavia, dopo la Brexit, vi potrebbe essere una disparità di trattamento nell'Irlanda del Nord tra cittadini britannici e irlandesi; infatti, non sarà più possibile esercitare i diritti UE per i cittadini britannici residenti in Irlanda del Nord. Infine, i cittadini nati in Irlanda del Nord che sceglieranno di identificarsi come irlandesi alla nascita sono gli unici cittadini UE che non potranno registrarsi all'EU Settlement Scheme nel Regno Unito.

Tra le possibili conclusioni di questo studio, è necessario osservare che la possibilità di avere un confine rigido non era stata stimata dal Regno Unito ponderatamente quando optò per la Brexit. Il confine nell'Irlanda del Nord è il simbolo di decenni di violenza e, parallelamente, di decenni di pace.

Gli eventi storici mostrano l'importanza di mantenere un confine 'morbido' nella regione e la rilevanza dell'Unione nel processo di pace.

L'unica soluzione concreta per ora risiede nella clausola 'backstop': una misura di salvaguardia contenuta nell'accordo di recesso e concepita per evitare un duro confine tra la Repubblica d'Irlanda e l'Irlanda del Nord.

Inoltre, questo studio mirava a chiarire gli effetti del ritiro del Regno Unito dall'UE sul processo di pace avviato dall'Accordo del Venerdì Santo e sull'equilibrio creato dalla Common Travel Area.

Per quanto riguarda la CTA, le autorità UE e quelle britanniche hanno annunciato che faranno del loro meglio per mantenere la zona senza visti e senza controlli.

In relazione all'accordo del Venerdì Santo, invece, la Brexit potrebbe cessare la cooperazione sull'isola e aumentare la discriminazione sulla base dell'identificazione alla nascita (irlandese o britannica) nell'Irlanda del Nord.

Infine, sarà possibile avere una frontiera irlandese 'trasparente'? Non si può dire con certezza, ma è certo che la Brexit andrà a complicare il contesto politico, economico e sociale di una regione fragile, dove la gente ha avuto modo di vivere decenni di violenza e auspica che ciò non si verifichi nuovamente.