



A&L Goodbody

BREXIT: BREAKING THE EU, THE UK, THE BRITISH ISLES... AND THE LAW?

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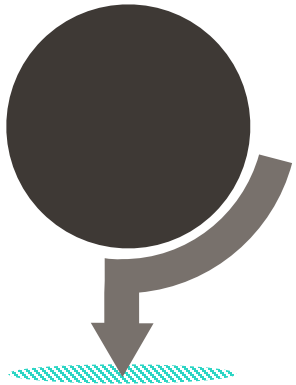
Introduction

- We live in an era of “disruption”
- But is it more than that?

Introduction

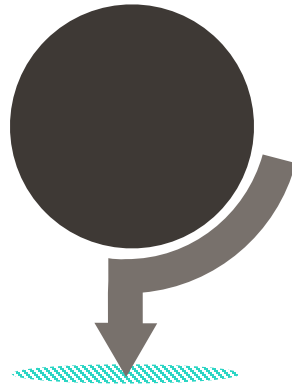
- Is it also an era of “destruction”?
- Is it an era when some people want to break-up established structures, norms and rules?
- To what extent does Brexit involve destruction?

Is Brexit Breaking?



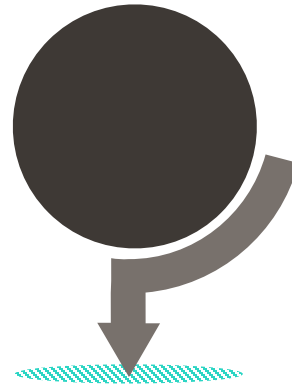
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The EU itself?



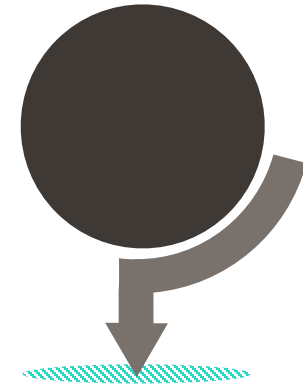
02

The British Isles?



03

The UK?



04

The Law?

Is Brexit Breaking the EU?



Breaking the EU?

- There are some ardent Brexiteers who believe not only in breaking the link between the UK and the EU but are also keen to see the destruction of the EU
- For example, Nigel Farage said:
 - > “The euro Titanic has now hit the iceberg - and there simply aren't enough lifeboats to go round.” (2012)
 - > “I want the EU to end but I want it to end democratically. If it doesn't end democratically I'm afraid it will end very unpleasantly” (2014)

Breaking the EU?

- While the Brexit result in June 2016 gave some stimulus to Eurosceptics and Europhobes in the immediate aftermath, the position since is that the EU has not so much been broken by Brexit but strengthened by it



Breaking the EU?

- Dividing and Ruling?
- Direct negotiation with the EU capitals?

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- Direct negotiation with the EU capitals?



The EU thwarted those plans and very shrewdly appointed a Point-Person (M. Barnier) to keep the 27 and the EU institutions in check

Breaking the EU?

- There was an initial “misstep” by the Founding Six Member States when their foreign ministers met in Berlin on the day after the result was announced in the UK
- This was a misstep because one needed the *whole* of the remaining family to be united and strong in the context of Brexit



Breaking the EU?

- There are some ardent Brexiteers who believe not only in breaking the link between the UK and the EU but are also keen to see the destruction of the EU – this is the EU's bulwark – the New 27 meeting informally in Bratislava in the aftermath of the vote



Breaking the EU?



The Sound of Somber Music in Salzburg at the
EU Council Summit

Breaking the EU?



Breaking the EU?



Breaking the EU?

- Would the EU cave in to the UK and do a deal?

Breaking the EU?

- Boris Johnson: "There is no plan for no deal because we are going to get a great deal"
- Liam Fox: "The free trade agreement that we will have to do with the European Union should be one of the easiest in human history"
- Gerard Batten (former UKIP leader): "A trade deal with the EU could be sorted out in an afternoon over a cup of coffee"
- Douglas Carswell (former UKIP MP): "I think free trade would be relatively straightforward between the UK and America"
- Dominic Raab: "I hadn't quite understood the full extent of this but... we are particularly reliant on the Dover-Calais crossing"

Breaking the EU?

- EU Economy – GDP of \$18.8 trillion
- UK Economy – GDP of \$2.8 trillion

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The proportions are the same as a basketball's diameter to the diameter of a table tennis ball....



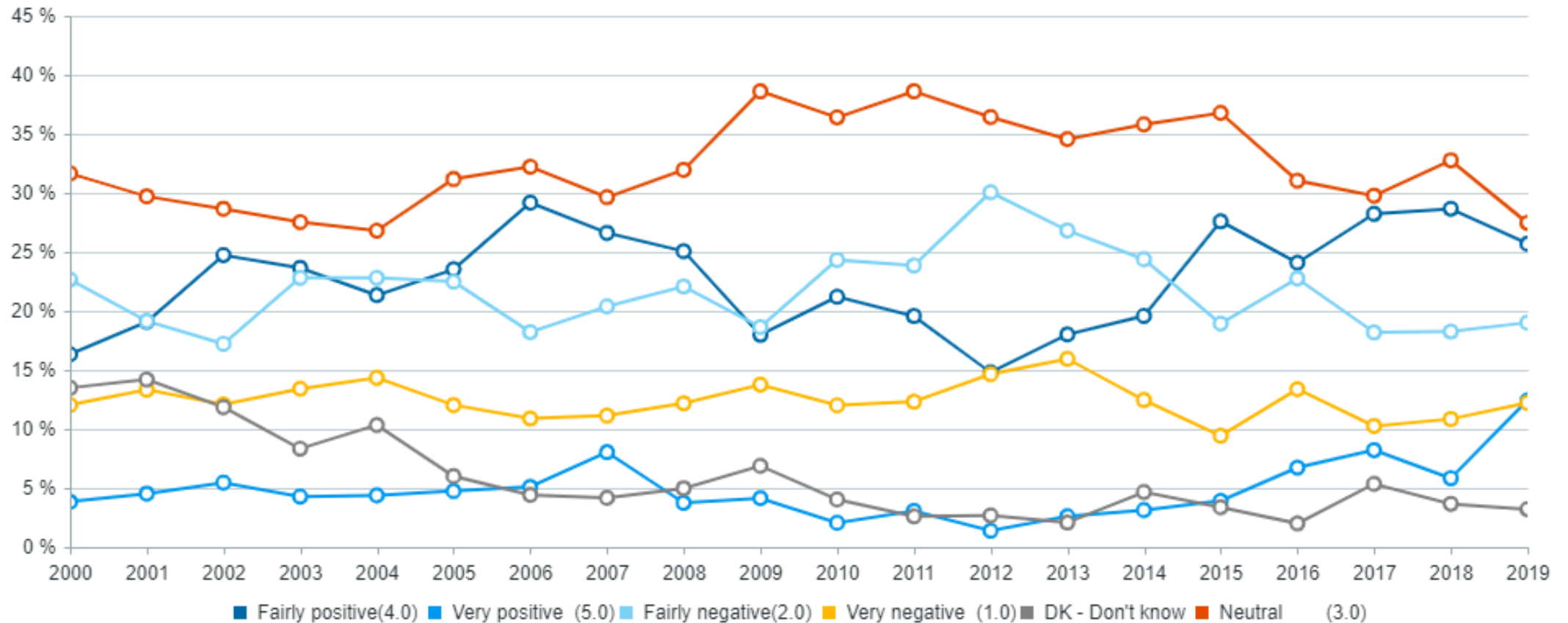
Breaking the EU?

- The lowest GDP per capita of any EU Member State is that of Bulgaria which in 2019 was US \$24,577
- The highest was Luxembourg with US\$112,622
- The UK was at US\$47,042
- There were 10 EU Member States ahead of the UK in that league table
- China went above US\$10,000 for the first time in 2019 (US\$10,276) – remember it was below US\$1,000 in 2000

Attitudes in the UK towards the EU (2000-2019)

In general, does the European Union conjure up for you a very positive, fairly positive, neutral, fairly negative or very negative image?

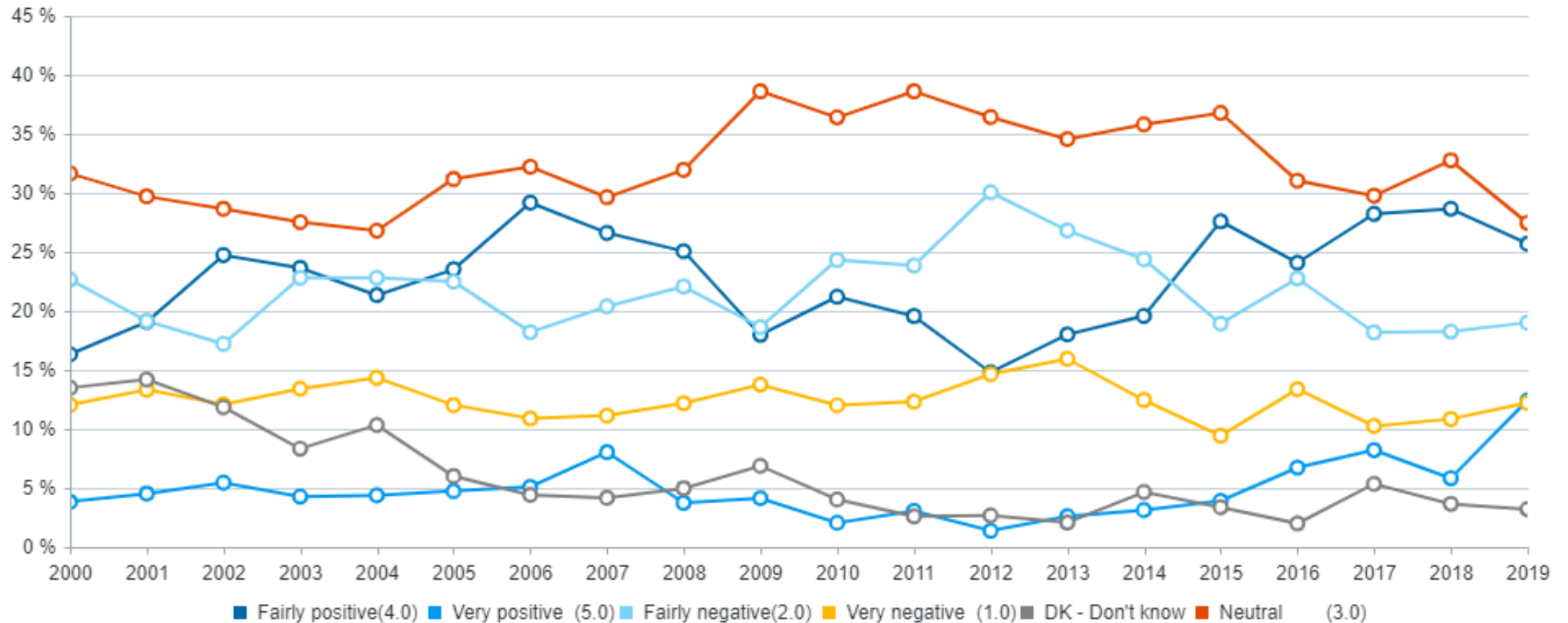
United Kingdom (from 04/2000 to 11/2019)



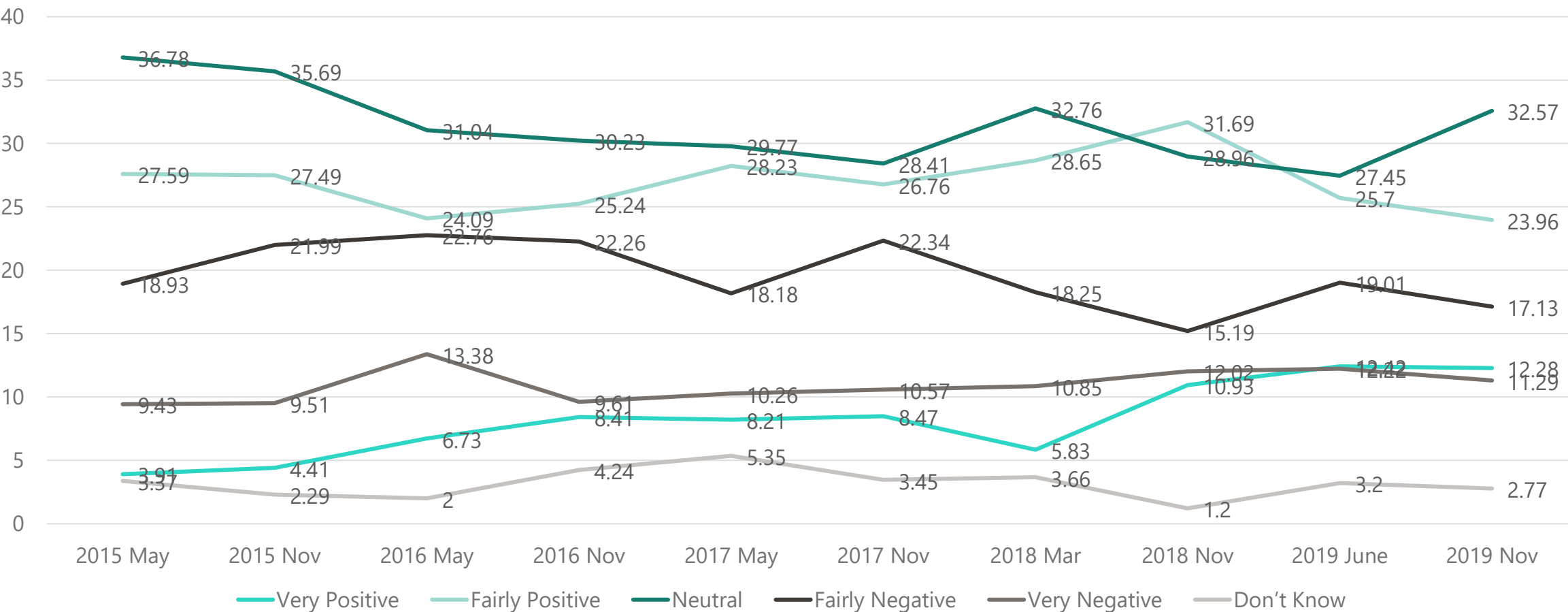
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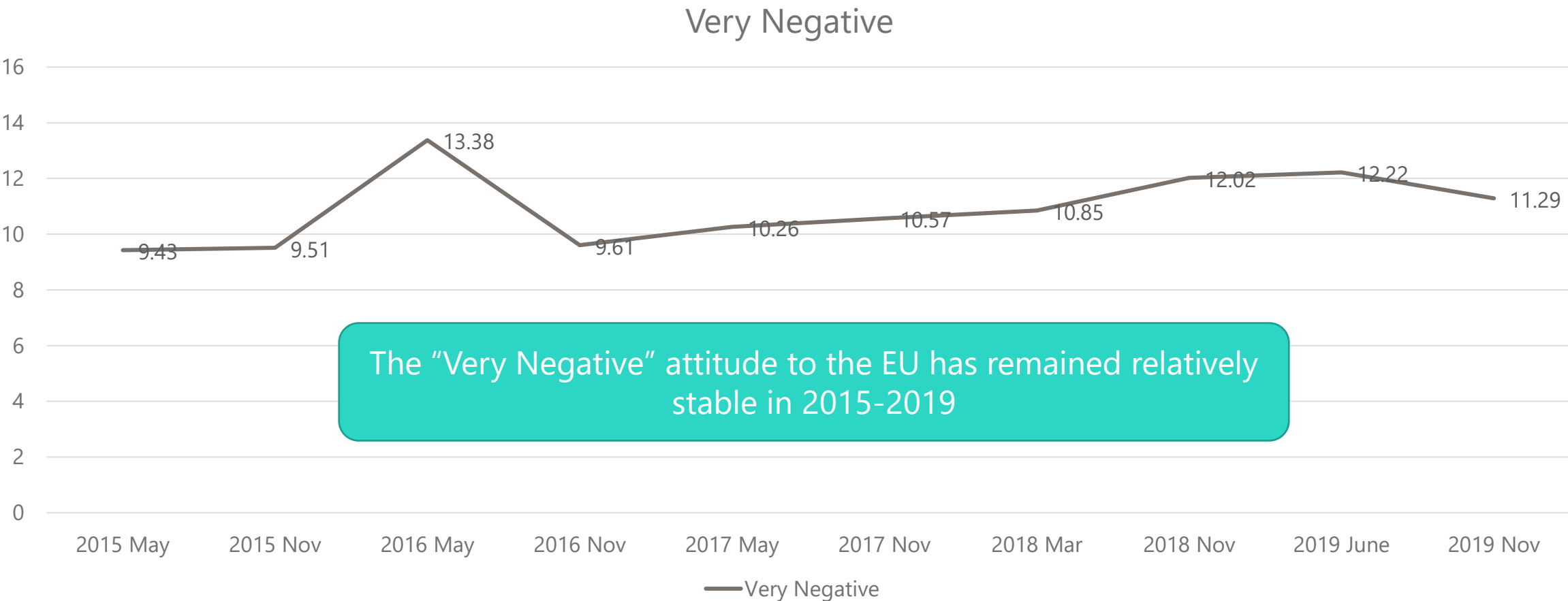
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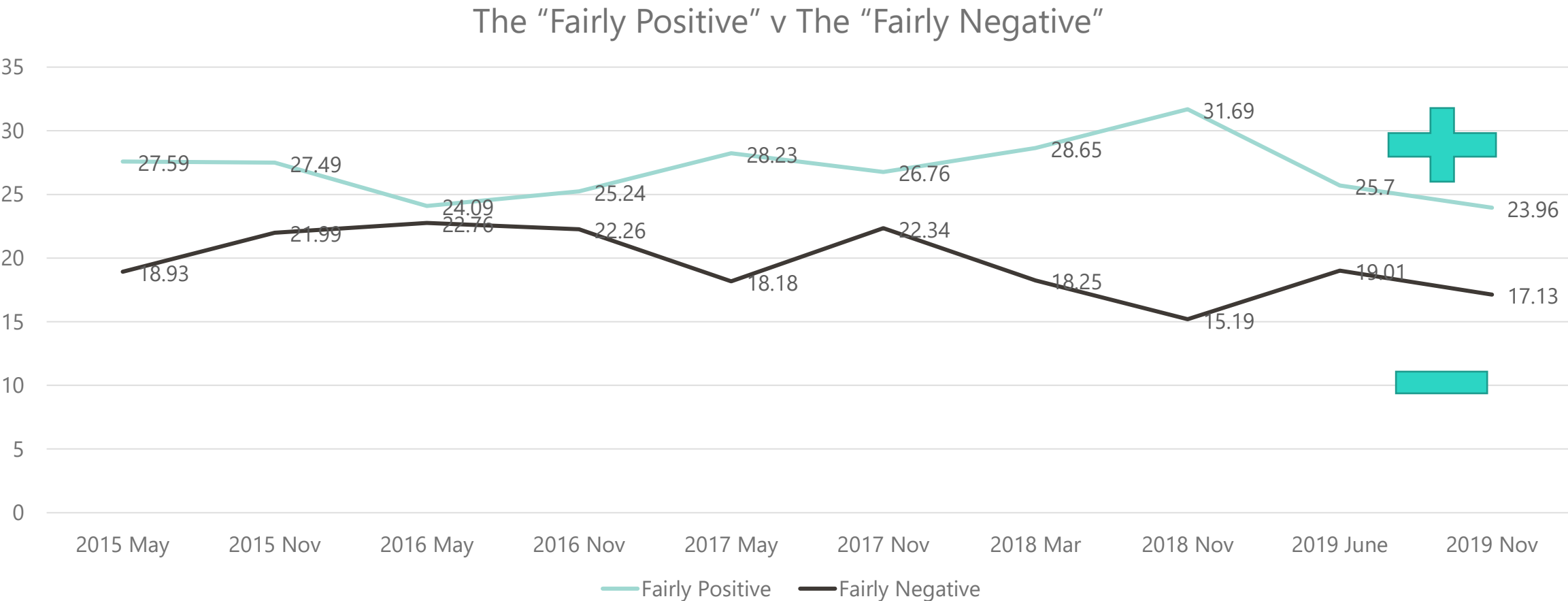
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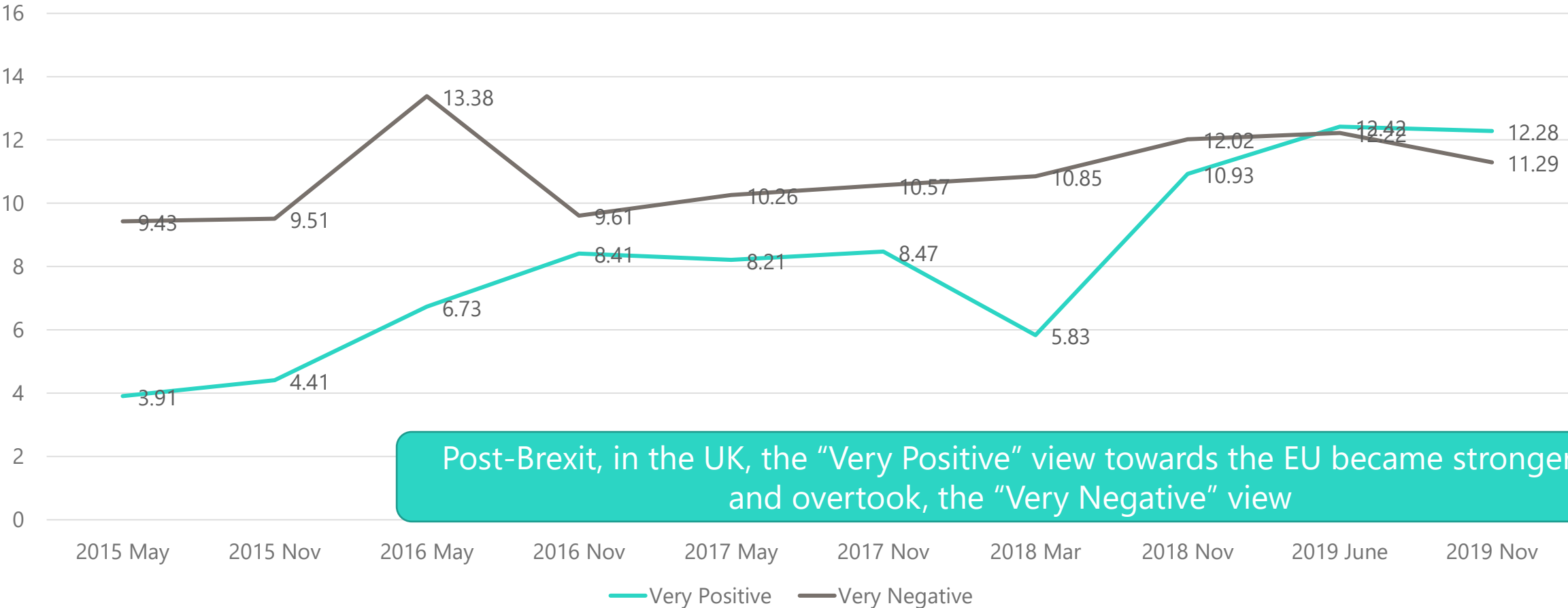
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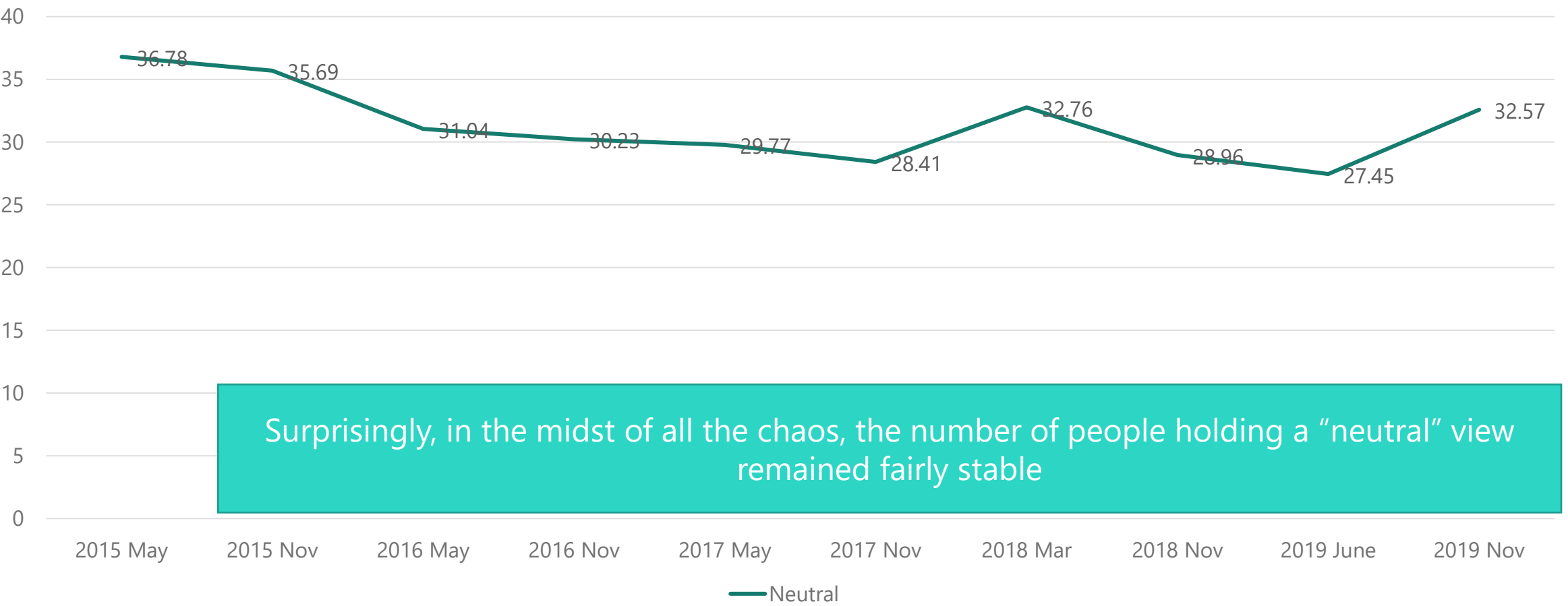
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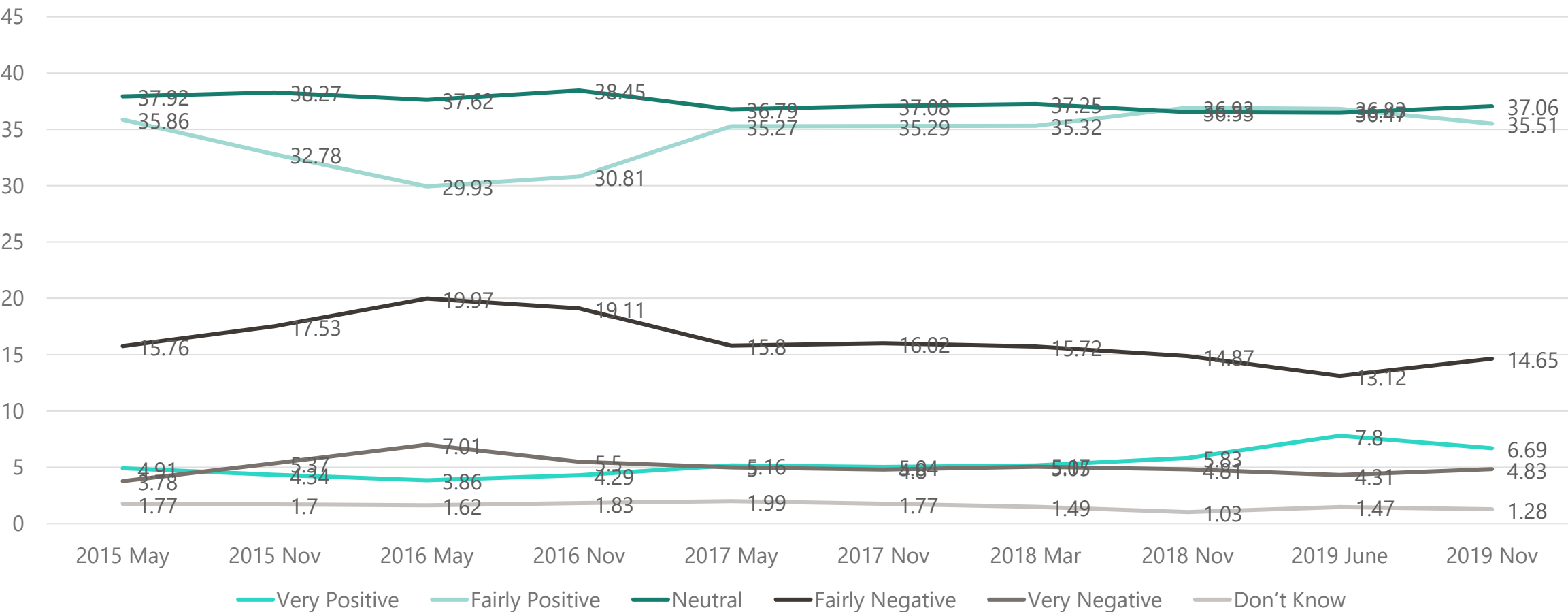
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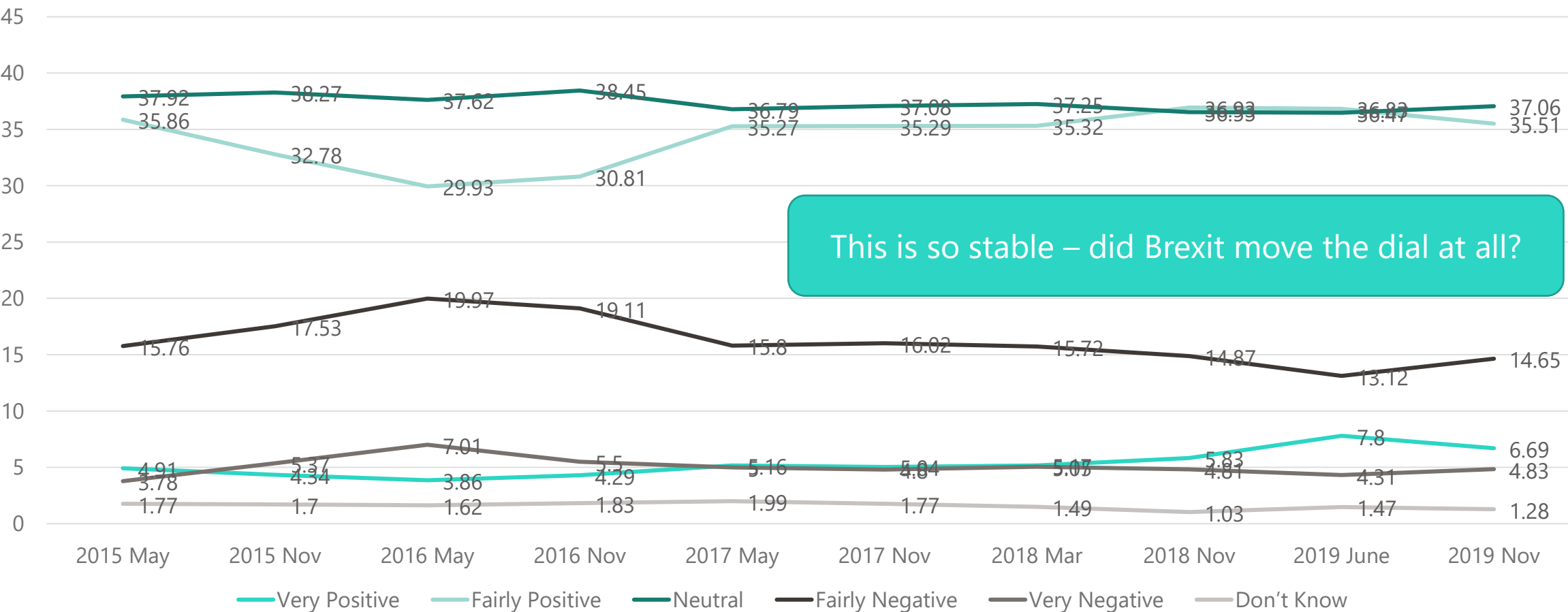
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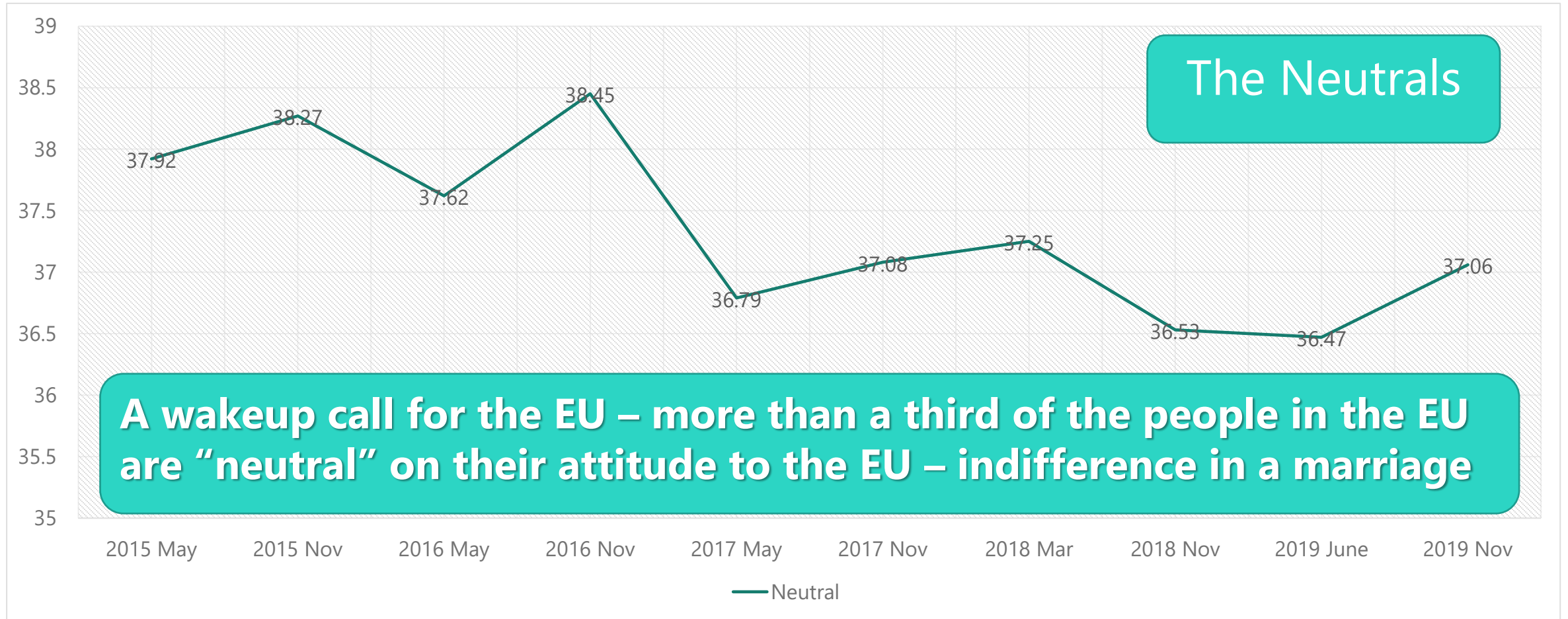
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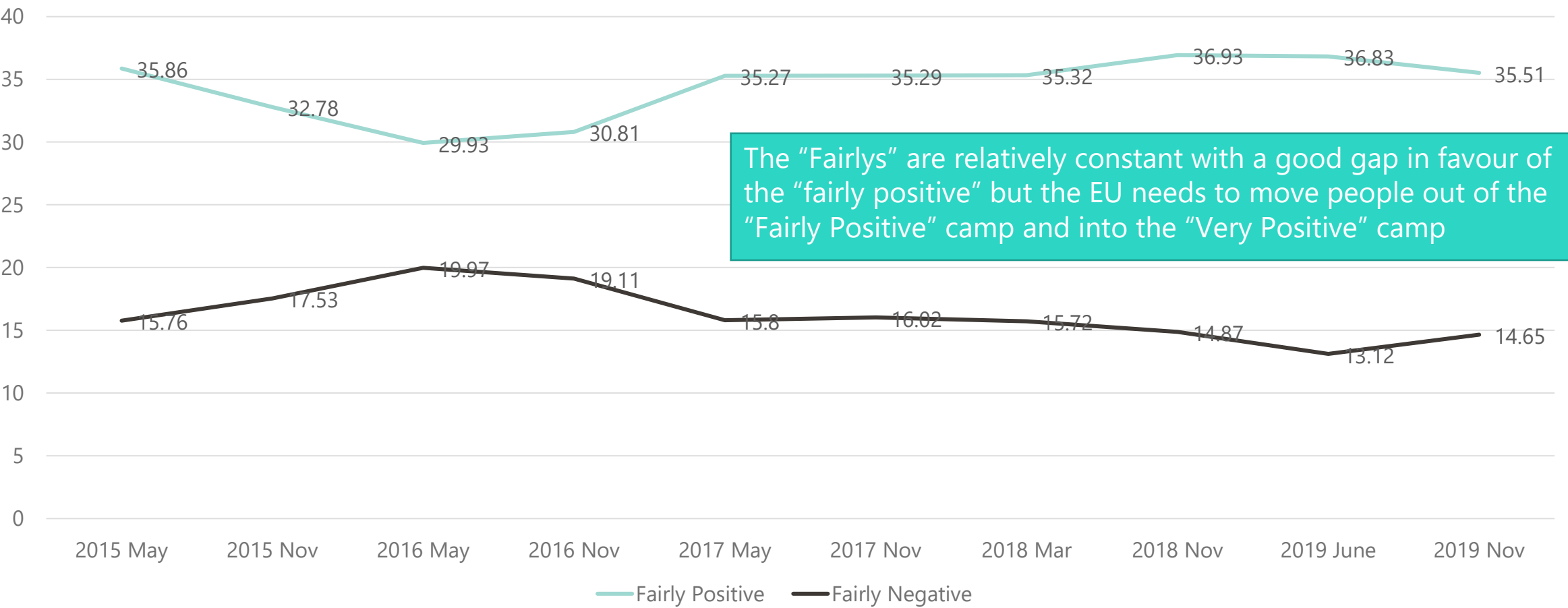
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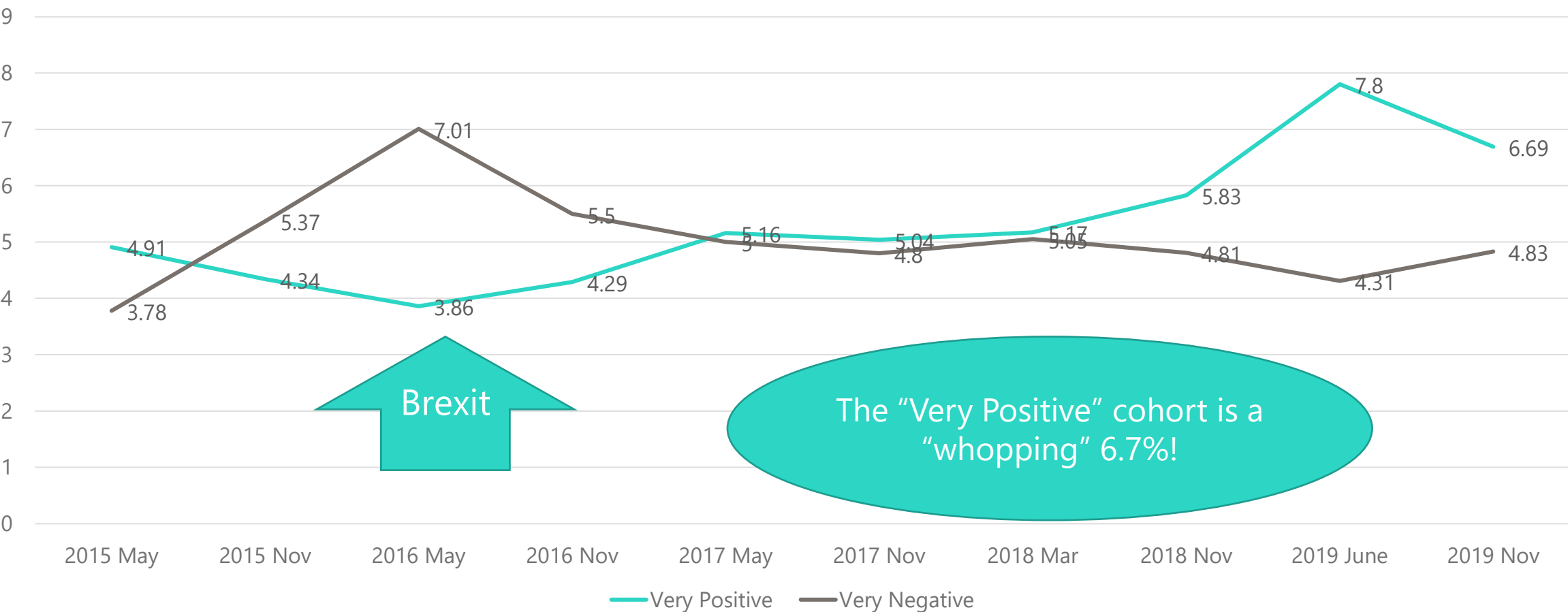
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Is Brexit Breaking the British Isles?



Breaking the British Isles?

- The links between island of Ireland and Britain are long, historical and strong
- While there were political, legal and other links for almost 800 years until 1922, those links were broken to *some* extent in 1922 when Ireland became independent
- Ironically, in 1973, those links grew stronger again when both countries acceded to the then European Communities (now, the EU)
- Ireland and the UK often operated in tandem

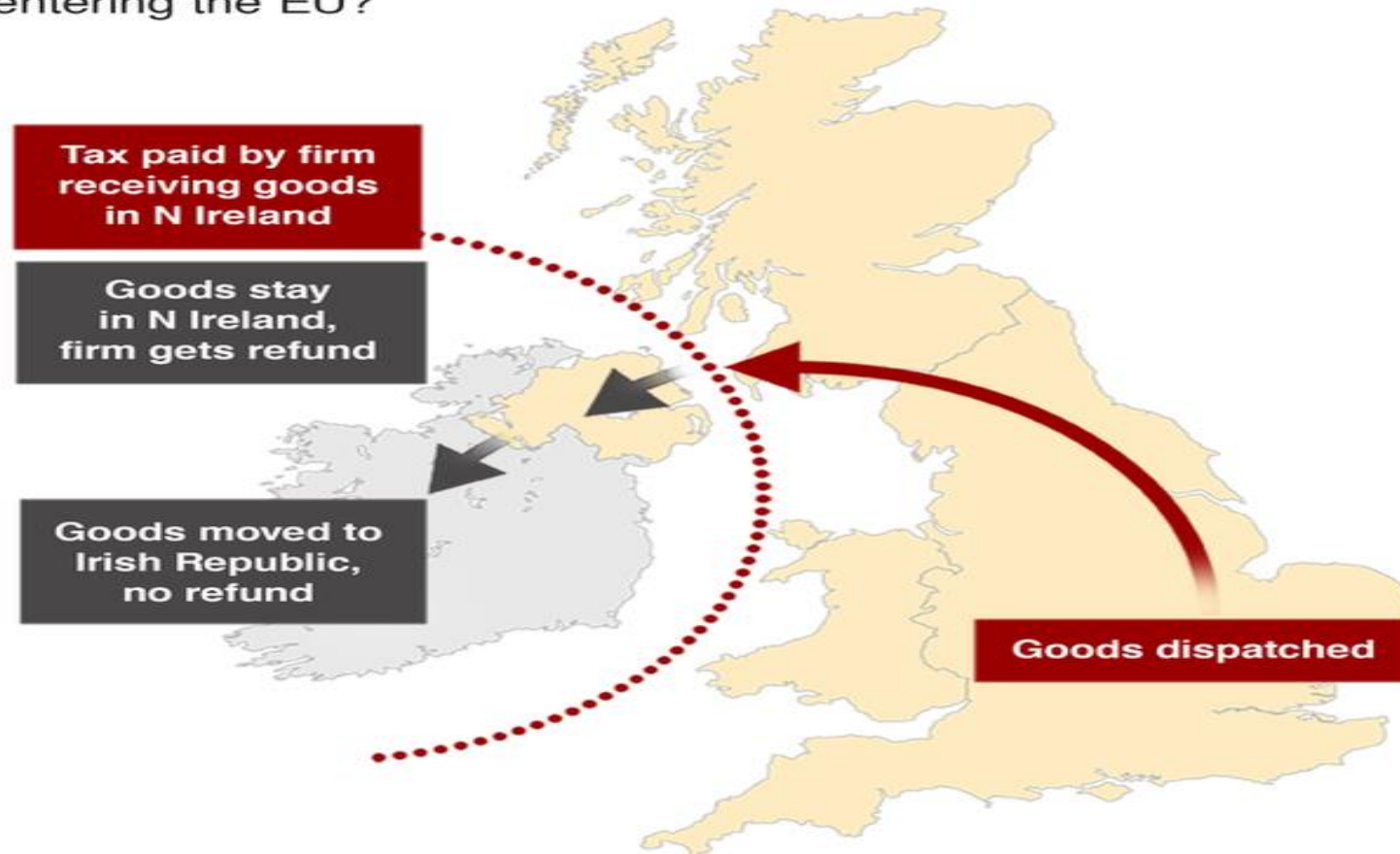
Breaking the British Isles?

- For Ireland, joining the EU was a step up
- For the UK, joining the EU was perhaps a step down
 - > Permanent Security Council member at the UN with a veto
 - > Now equivalent to Luxembourg and Ireland in terms of Unanimity votes
 - > Always the “gooseberry” in the Franco-German alliance
- Brexit has seen the two islands diverge again
- This divergence is typified by the INI Protocol but it will be a reality because of the divergence in rules between Ireland and the UK post-Full Brexit

Breaking the British Isles?

How customs might work

What might happen when a firm in Northern Ireland orders goods from the rest of the UK deemed “at risk” of then entering the EU?



Is Brexit Breaking the United Kingdom?



Breaking the United Kingdom?

- There are some ardent Brexiteers who believe not only in breaking the link between the UK and the EU but are also keen to see the destruction of the EU
- But many of the strongest Brexiteers are ardent “unionists” and believe strongly in the great value and history of the United Kingdom
- Northern Ireland v Great Britain
- Scotland v England
- Scottish Independence back on the table?

Breaking the United Kingdom?

- Ironical outcome
- Economic Impact
- Legal Impact
- Too early to tell but destabilization occurring

Is the United Kingdom planning to Break the Law because of Brexit?



United Kingdom Internal Market Bill

- 1 February 2020: Withdrawal Agreement between the EU and the UK enters into force
- The Withdrawal Agreement has the Ireland/Northern Ireland Protocol with its special rules on trade between Britain and Ireland
- 9 September 2020: UK publishes a Bill
- Bill would, in part, override the Withdrawal Agreement

Withdrawal Agreement

- Under the Withdrawal Agreement, Northern Ireland is to remain part of the UK's customs union but many EU custom rules would still apply to certain goods entering into Ireland, so that they can still move freely in Ireland and in the EU
- Goods moving from Britain to Northern Ireland would only be subject to tariffs when they are “at risk” of moving into the EU.
- This means that certain checks and processes would be required on goods moving between Britain and Northern Ireland
- The purpose of this is to prevent a hard border on the island of Ireland
- It protects the integrity of the EU's single market
- Ireland does not become a ‘back door’ for goods coming into the EU

United Kingdom Internal Market Bill

- 9 September Bill includes provisions which the UK government state will maintain that trade between Britain and Northern Ireland will remain barrier-free even after the transition period ends
- “Part 5 of the Bill empowers Ministers to prevent the application of, and unilaterally re-interpret and disapply parts of the Protocol, as well as ignore their legal obligations under both domestic and international law to enact the Protocol.” – House of Commons Library

United Kingdom Internal Market Bill

Clause	House of Commons Library Commentary
41	"Restricting UK authorities from using their powers after the transition period in a way that might result in the introduction of checks, controls or administrative processes for goods moving from Northern Ireland to Great Britain"
42	"Giving a power to Ministers to make regulations to change how exit procedures for goods operate when moving from Northern Ireland to Great Britain"
43	"Giving the Secretary of State an enabling power to make regulations that can interpret Article 10 of the Protocol, and further disapply and modify its effects, including disapplying it entirely. Article 10 applies EU state aid rules to 'measures which affect that trade between Northern Ireland and the EU' (so not just subsidies given in NI)."
44	"Stating that only the Secretary of State may notify the European Commission of state aid or proposed state aid, and give information about it, if this is required by Article 10 of the Protocol"
45	"States that the powers given to Ministers under Clauses 42 and 43, as well as Clause 45 itself will be regarded as legally effective notwithstanding any incompatibility or inconsistency with "any relevant international or domestic law."

United Kingdom Internal Market Bill

Clause	House of Commons Library Commentary
45	<p data-bbox="318 389 2474 554">"Clause 45 deals with the incompatibility with domestic law and international law that might arise from the inclusion and exercise of powers under clauses 42 and 43. It does this through a series of extraordinary measures that build upon one another. The Clause:</p> <ul data-bbox="318 618 2474 1346" style="list-style-type: none"><li data-bbox="318 618 2474 782">• States that the powers given to Ministers under Clauses 42 and 43, as well as Clause 45 itself will be regarded as legally effective notwithstanding any incompatibility or inconsistency with "any relevant international or domestic law".<li data-bbox="318 846 2474 953">• Picks apart the foundations of how the Withdrawal Agreement is given supremacy and direct effect in domestic legislation through the EU (Withdrawal) Act 2018.<li data-bbox="318 1018 2474 1182">• Ensures domestic courts would still have to give full force and effect to these regulations made even if those regulations were in conflict with all relevant domestic and international laws, and international law as a whole.<li data-bbox="318 1246 2474 1346">• Restricts and potentially precludes entirely domestic judicial review of section 42 or 43, a so called "ouster clause".

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- **Hansard: Northern Ireland Protocol: UK Legal Obligations, 8 September 2020, Volume 679**
 - Question:
 - Sir Robert Neill (Bromley and Chislehurst) (Con)
 - The Secretary of State has said that he and the Government are committed to the rule of law. Does he recognise that adherence to the rule of law is not negotiable? Against that background, will he assure us that nothing that is proposed in this legislation does, or potentially might, breach international legal obligations or international legal arrangements that we have entered into? Will he specifically answer the other point: was any ministerial direction given?

■

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- Hansard: Northern Ireland Protocol: UK Legal Obligations, 8 September 2020, Volume 679
 - Answer
 - Brandon Lewis [Secretary of State for Northern Ireland]
 - I would say to my hon. Friend that yes, this does break international law in a very specific and limited way. We are taking the power to disapply the EU law concept of direct effect, required by article 4, in certain very tightly defined circumstances. There are clear precedents of this for the UK and, indeed, other countries needing to consider their international obligations as circumstances change. I say to hon. Members here, many of whom would have been in this House when we passed the Finance Act 2013, that that Act contains an example of treaty override. It contains provisions that expressly disapply international tax treaties to the extent that these conflict with the general anti-abuse rule. I say to my hon. Friend that we are determined to ensure that we are delivering on the agreement that we have in the protocol, and our leading priority is to do that through the negotiations and through the Joint Committee work. The clauses that will be in the Bill tomorrow are specifically there should that fail, ensuring that we can deliver on our commitment to the people of Northern Ireland.

United Kingdom Internal Market Bill

- 9 September Bill includes provisions which the UK government state will maintain that trade between Britain and Northern Ireland will remain barrier-free even after the transition period ends
- 14 September 2020: Conservative Government gets Bill through House of Commons with a majority of 77 but 2 Conservatives voted against it and 30 abstained

Breaking the Law

- But breaking the law may not be anything new...
- One need only recall the unanimous and emphatic judgment of the UK Supreme Court on proroguing the UK Parliament
- On 24 September 2019, the Supreme Court ruled unanimously that the prorogation was both justiciable and unlawful, and therefore null and of no effect
- [2019] UKSC 41 – a 25-page judgment embodying clarity and precision - <https://www.supremecourt.uk/cases/docs/uksc-2019-0192-judgment.pdf>















Is the United Kingdom planning to Break its Anti-State Aid Philosophy because of Brexit?



UK attitude to State Aid

- While Labour Governments have been, on occasion, keen to provide State aid
- One associates Conservative/Tory Governments with strong opposition to State aid
- Margaret Thatcher was opposed to State aid
- Curiously, State aid has become a battle ground between the EU and the UK?
- Breaking principles?
- Or will this logjam break too and normality be restored?

Breaking-up is Hard to Do!



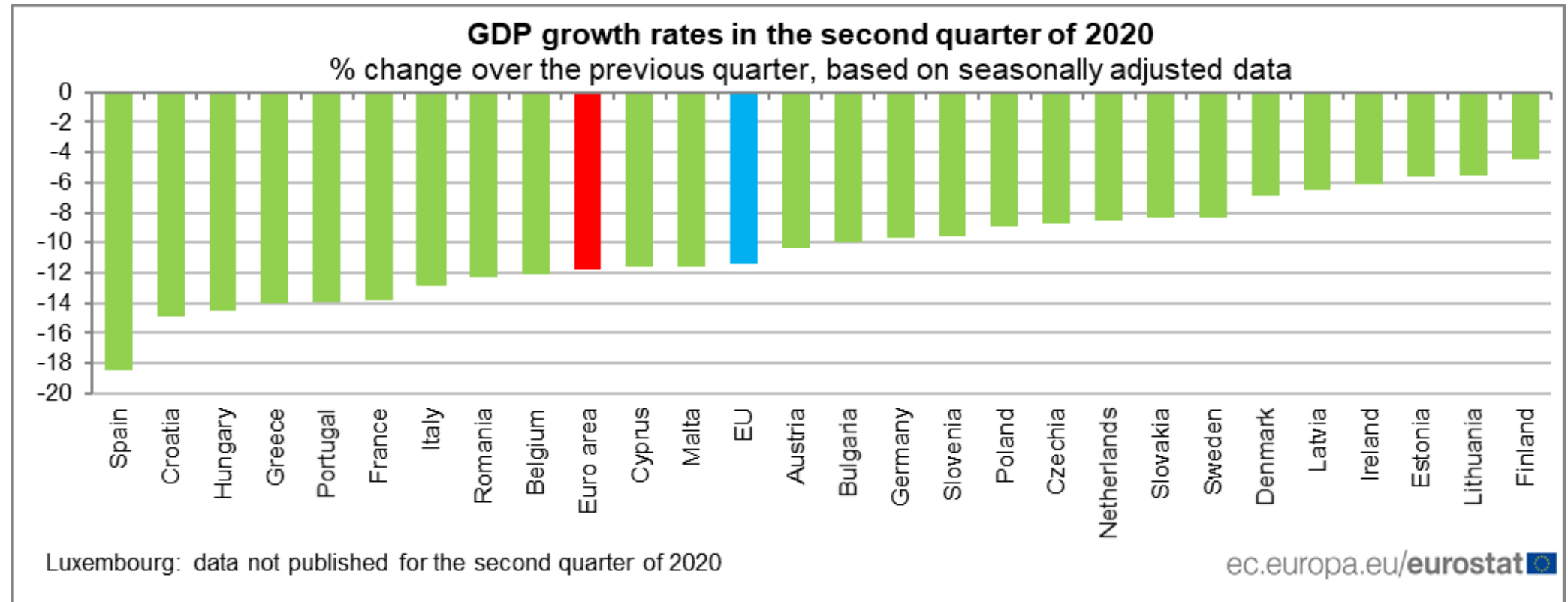
Transition to Transition?

- The Transition Period is scheduled to end on 31 December 2020
- Boris Johnson has said that the UK will not prolong the Transition Period
- His statement does not rule out a U-Turn on the issue
- It is possible that both sides could agree that there a prolongation of the Transition Period would help
- If there is no deal and the Transition Period is not extended then the full consequences of Brexit become clearer but not clear

Can you see if the UK Economy was broken by Brexit?

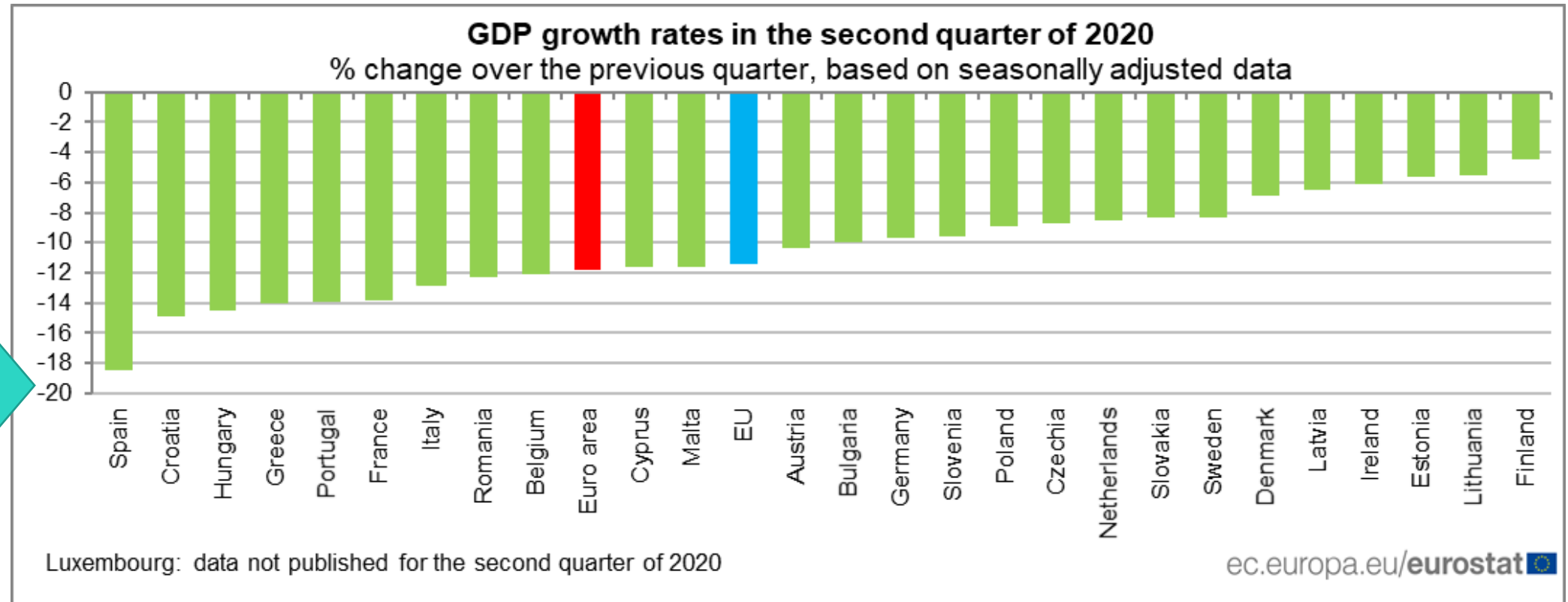
- It is very difficult to see the full consequences of Brexit because of the complications of COVID-19 – for example, a downturn in the economy could be blamed on the latter even if it were caused by the former
- What was caused by COVID-19 and what was caused by Brexit will be difficult to discern

GDP Q2-2020



EU Data: Eurostat (8 September 2020)

GDP Q2-2020



UK: 19.8%

UK Data: UK Office of National Statistics (30 September 2020)

Conclusions

- The EU has not been broken by Brexit and it is very unlikely that it will be

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- The EU has not been broken by Brexit and it is very unlikely that it will be
- The Integrity of the British Isles within the EU has been broken by the INI Protocol but to save the Integrity of the EU and peace on the island of Ireland
- **The Integrity of the UK has been broken by the INI Protocol**

Conclusions

- The EU has not been broken by Brexit and it is very unlikely that it will be
- The Integrity of the British Isles within the EU has been broken by the INI Protocol but to save the Integrity of the EU and peace on the island of Ireland
- The Integrity of the UK has been broken by the INI Protocol
- **The Integrity of the UK could be further challenged by internal tensions**

Conclusions

- The EU has not been broken by Brexit and it is very unlikely that it will be
- The Integrity of the British Isles within the EU has been broken by the INI Protocol but to save the Integrity of the EU and the island of Ireland
- The Integrity of the UK has been broken by the INI Protocol
- The Integrity of the UK could be further challenged by internal tensions
- **The Unexpected and the Unwanted have been visited upon Brexiteers because of the Unforeseen and Unintended consequences of the Brexit Vote**



Thank you



Questions?
