Brexit and the UK-Ireland Border

A new Briefing Paper series

Briefing Paper 1: A Roadmap

November 2017
The Centre for Cross Border Studies (CCBS) begins a new Briefing Paper Series on ‘Brexit and UK-Ireland border’. The series consists of five papers and develops an overview of the likely effects of Brexit on the future of the UK-Ireland land border. This first paper in the series is prepared by Dr. Milena Komarova, CCBS Research Officer. It discusses what contemporary state borders are and how they work. The paper further outlines the remaining four briefing papers.
Executive Summary

- This Briefing Paper argues that in order to understand how the UK-Ireland border can remain as ‘frictionless’ and as ‘invisible and open’ as possible, despite the UK leaving the European Union’s single market and customs union, we must properly acknowledge what borders are and how they operate. It therefore discusses the following four propositions about state borders:
  - State borders are not only lines at the edges of states. They exist in multiple sites within and between states, in every instance when different legislation, policies and their associated practices (e.g. with respect to citizens’ rights, immigration, or trade) are applied;
  - Borders regulate not just the flows (of people or of goods and services) that cross them but every aspect of social and commercial life associated with them by means of border regimes, i.e. systems of legal and policy rules, and their associated practices;
  - The openness of borders is a relative term because the rules of border-crossing vary for different groups of people, countries and goods, and their effects depend on implementation practices. Changes in the rules/practices for one type of movement (e.g. of people) will also affect a border’s openness to other types of movement (e.g. of goods);
  - There is a complex relationship between the visibility and openness of borders. Each affects the other in ways that vary for different groups of people, and depend on practices of border enforcement. No visible physical infrastructure at the post-Brexit border would not in itself mean it retains its previous degree of openness.

- The UK-Ireland border is historically constituted through the crisscrossing of at least four different border regimes: the Common Travel Area (CTA), EU membership, the Belfast/Good Friday Agreement, and UK devolution arrangements.

- Each of the remaining four briefing papers will focus on the changing aspects of these border regimes in the near future:
  - ‘Briefing Paper 2: Citizens’ rights’ focuses on the role of rights for the future of the border, including provisions for continued reciprocity of UK, Irish and EU citizens’ rights.
  - ‘Briefing Paper 3: Changing trade relations and regulations’ addresses the effects on trade of the UK’s withdrawal from the EU’s single market and customs union. The withdrawal challenges the stated desire to ‘avoid any
physical border infrastructure in either the United Kingdom or Ireland.‘¹ We query the proposals to address this challenge and investigate the potential spillover effects of changing trade regulations on the movement of people.

- ‘Briefing Paper 4: The Belfast/Good Friday Agreement and the entirety of relationships within and between these islands’ develops a fuller understanding of: the effects of Brexit on the continued viability of the Belfast/Good Friday Agreement; the centrality of the Agreement to developing workable solutions for the future of the UK-Ireland land border; and the steps necessary to guarantee the protection of the Agreement in all of its parts.

- ‘Briefing Paper 5: Devolution’ addresses the scope that may arise from new post-Brexit legislation, for accommodating flexibility within Northern Ireland’s devolved arrangement vis-à-vis key questions, including replacement of EU funds, future trade relations, and continued market integration on the island of Ireland.

¹ UK Government (2017) Position Paper on Northern Ireland and Ireland, p. 15
1. Introduction
In the run-up to and in the aftermath of the UK’s June 2016 referendum on leaving the European Union the Centre for Cross Border Studies (CCBS) followed intently the political, academic and public debates on Brexit, within and beyond the UK. As a contribution to those debates CCBS has published Briefing Papers, reports and consultation responses on many aspects of the UK’s departure from the EU. We feel however, that as debates have progressed, diversified, and enriched in detail, the level of expertise and time-investment required to understand and follow them often make it difficult to appreciate the relationship between key aspects of the Brexit negotiations and the future of the UK-Ireland border. We believe there may sometimes be a degree of confusion regarding this relationship, as well as with respect to the nature and role of the border itself. We are keen to address this confusion and will do so through a series of ‘Brexit and the border’ Briefing Papers to be published in the following months.

The present publication serves the purpose of outlining a roadmap to the rest in the series. It develops an understanding of the core features of the UK-Ireland border linked to its present-day functions and degrees of openness.

In doing so, it provides the basis to appreciating how the particular potential forms of Brexit emerging from the principle positions of the UK Government and the EU could affect the border’s transformation in the immediate future. The paper also elucidates the role of the border not simply as a geographical line of separation between the UK and the Republic of Ireland but as bearing upon the entire gamut of relationships and forms of co-operation within and between these islands.

2. A new border lexicon?
Over the course of the past year and a half, visions for the future of the UK-Irish land border have been articulated through phrases such as ‘no return to the [hard] borders of the past’, ‘frictionless’, ‘seamless’ and ‘invisible and open’. At the same time the United Kingdom has pursued a ‘hard Brexit’ through leaving both the European single market and the customs union. While these terms and phrases may have served a purpose in the immediate aftermath of the 2016 Referendum, at this stage of the UK-EU negotiations they can misrepresent what the border is and how it works. Border discourses like these tend to overwhelmingly focus on the geographical and physical crossing points for movement (particularly of people and goods). As such, we believe, they can distract from the diverse and far-reaching processes reshaping the border. Borders, as we stress below, are located and projected both at and away from the edges of state territories, and are not always visible in geographic space.

While it is imperative to discuss what kind of a border we will see post-Brexit, what it will look like, and what degree of friction will be associated with any new visible physical infrastructure, it is equally important to have a serious debate about how the border is made in invisible ways.
3. What state borders are and what they are not

a. State borders are not only lines at the edges of states. Contrary to the popular imaginary of borders as lines of separation delimiting the state, borders exist at multiple sites within and between states\(^2\). Their power can be best seen in the enforcement of differential treatment within the jurisdiction of the state, and in every instance when and where different legislation, policies and their associated practices (e.g. with respect to citizens' rights, immigration, or trade) are applied.

This also means that borders are not made by states alone but by a variety of political and social institutions above and below the level of the state. For instance, by setting the rules of trade between nations the World Trade Organization regulates the openness of state borders to different types of goods. On the other end of the spectrum, local authorities may manage or maintain roads that cross national state borders. An example of how the state regulates and controls borders throughout its territory is provided by the UK Government in its *Northern Ireland and Ireland Position Paper*:

> [I]mmigration controls are not, and never have been, solely about the ability to prevent and control entry at the UK’s physical border. Along with many other Member States, controlling access to the labour market and social security have long formed an integral part of the UK’s immigration system [emphasis ours].\(^3\)

b. Borders are regulated through regimes of legal, political and social rules and practices. The above quote simply reminds us that the mere physical entry into either the UK or Ireland is only the beginning of what can be an arduous journey towards establishing and enacting the conditions under which a person is able to remain. Basic aspects of everyday life - such as being able to register at an address or with a GP, opening a bank account, finding employment, enrolling your children in school and so on - all depend on the existence and enactment of rights which vary according to a person’s citizenship, and are linked to reciprocal agreements between states.

‘The border’ comes into existence when a decision is taken by the relevant authorities at each of these points regarding whether or not a right exists that can be enacted. If no right exists then the person is not granted access to a network of resources, services and entitlements.

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Borders, therefore, regulate not just simple physical movement but every aspect of social (and commercial) life associated with it, through a series of discreet decisions taken at various points in time and space (within and beyond the territory of a state, at and beyond geographical borderlines). Such decisions are based on entire systems of legal and policy rules, and their associated practices. These systems of rules and practices are border regimes.

They define what the border is, how it functions, and how open (permeable) it is to different types of goods and service and different groups of people.

c. The ‘openness’ of borders is a relative term. Borders often need to respond to contradictory requirements. For instance - to facilitate the movement of some goods and groups of people, while restricting that of others. The vocabulary of ‘hard’, ‘soft’, ‘frictionless’ or ‘seamless’ often describes precisely the rigidity of such regulatory regimes, or the openness of borders i.e. - the conditions under which access to resources or markets can be granted. However, there exist enormously complicated hierarchies in the regulation of different forms of movement.

In addition, because borders are not simply the results of disembodied rules of law but also depend on the means by, and places at which, these rules are enacted and enforced, border openness is not easy to operationalize, as the rules and ease of border-crossing typically vary across different categories of people, countries and goods. Different bordering and de-bordering practices exist simultaneously and create complex patterns. Openness, thus, is a relative term made meaningful by comparisons of implementation practices over time and across specific border contexts.4

When assessing claims that the UK-Ireland land border can retain its present degree of openness post-Brexit, or proposed solutions to this effect, it is critical to be mindful of the complexity and relativity of border ‘openness’ itself.

d. There is a complex relationship between the visibility and openness of borders. The perceived openness of a border is also affected by how visible its infrastructure or any practices of border control (e.g. checks) are. The actual or even imagined visibility of a border can invite or deter an attempt to cross it, dramatically change the experience of crossing it, and shape its meaning and symbolism in one’s mind.

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This is why in/visibility is often used as a tool of border-making. In recent decades, for instance, the UK and other European governments have invested in less visible forms of bordering, such as e-borders, offshore borders, and juxtaposed borders. Academics have pointed out that these are means of border control designed to ensure the different treatment of different flows. While making for a ‘formidable barrier’ to those beyond UK/EU borders, they do not necessarily register ‘in the consciousness of’, or impact upon, ‘those living on the inside’.

The in/visibility of borders, therefore, can have selective effects on different groups of people. Think, for instance, of the most recent announcement regarding new measures introduced by the UK Government requiring banks and building societies to carry out checks on current account holders, establishing if they are in the UK illegally. Note that the execution of such checks is by definition invisible to the public eye, yet in substance, this is clearly a form of border control.

We need to be careful then, if we expect that the lack of visible physical infrastructure at the geographical UK-Ireland land border by itself suggests openness. While the invisibility of border controls and infrastructure at this border has undoubtedly had enormously positive practical and symbolic effects, particularly in Northern Ireland, there is a complicated relationship between the visibility and openness of borders. Each can affect the other but, again, in ways that vary across different groups of people, and depend on the spatial, material, and practical aspects of border enforcement.

4. Border Regimes that affect the UK–Ireland border
We can better understand the challenges and opportunities for the UK–Ireland border post-Brexit if we acknowledge the complex and diffuse character of borders outlined above, i.e. as systems of rules and practices (regimes) that enforce differential treatment within the jurisdiction of a state.

The UK-Ireland border is historically constituted through the crisscrossing of different border regimes, including the Common Travel Area, EU membership, the Belfast/Good Friday Agreement, and UK devolution arrangements. These regulate how, who and what is deemed to fall on one side or other of the

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5 This means that immigration checks on certain routes into the country take place before crossing the actual geographical borderline and while into the territory of the country of entry, rather than upon arrival. For details on the UK juxtaposed controls in France and Belgium, for instance, see the following Home Office website: https://homeofficemedia.blog.gov.uk/2017/07/11/fact-sheet-the-uks-juxtaposed-border-controls/


7 Ibid.

The first, and perhaps most obvious, border regime is that of the Common Travel Area (CTA). It is primarily a legal regime, originally created in 1923 in response to the potential disruption to the movement of people within and between these islands, resulting from the drawing of the border around Northern Ireland. The CTA entails hierarchical treatment of British and Irish citizens above all others, and dictates that they are free to ‘move between the two jurisdictions, and thereby reside and work in either …, without the need for special permission’.9

The CTA has introduced a significant layer of openness to the border prior to EU membership as it has meant no passport checks for British and Irish citizens, though checks on other citizens have variously continued, until much more recently. As the Irish government have pointed out, the CTA has ‘been essential in enabling people of Irish identity not to have to assert British citizenship rights in Northern Ireland in order, for instance, to establish the right to permanent residency in the place they were born or, following Brexit, the right to live and work there at all’.10

This is important both in terms of conflict management on the island of Ireland and because it demonstrates how by defining and regulating the application of citizens’ rights within a jurisdiction a border regime affects important aspects of one’s life and work, including relationship to place.

We stress, therefore, that the question of citizens’ rights is integral to defining the functions and degrees of openness of the border.

We return to this question below as a live issue of interest concerning both the future of the CTA and the overall transformation of the functions and openness of the UK–Ireland land border.

- The UK and Ireland have also been part of the common legal, political, economic and social EU border regime since 1993.11 This has included a shared subscription to the acquis communautaire with its four freedoms of movement (goods, services, capital and people). The resulting removal of customs checks at the border in the early nineties has been one of the cornerstones of market integration throughout the territory of the island. Other, far reaching consequences of EU membership have included equal rights of each country’s citizens as EU citizens, forms of supranational governance, and the introduction of a number

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11 Replacing the EEC of which the two countries were members since 1973.
of EU funding programmes addressing the particular social and economic deficits of the Ireland-Northern Ireland border region. Politically, participation in this common EU border regime has facilitated the functioning of the 1998 Belfast/Good Friday Agreement, and has shaped the peace process on the island in legal, practical and symbolic terms.

The UK's exit from the European Union's single market and customs union will present a particular challenge to the movement of goods across the border and as such – to the border's ability to enable and support economic integration on the island. More problematically, however, and because of the interrelated nature of the different types of movement (goods, services, capital and people) that the border regulates, it is likely that restrictions, or even new tiers of border control, on one type of movement will also create a greater degree of friction for others.

- **The 1998 Belfast/Good Friday Agreement** has worked as an all-island border regime by institutionalizing an equivalence of rights as EU citizens for both British and Irish nationals, formalizing north/south institutional governance, and enabling all-island cooperation in specific sectors (e.g. waterways, food safety).

When, after the signing of the Agreement, security checks at the border also ceased, the Irish land border all but disappeared from view – a fact of weighty symbolic importance, particularly cherished by Irish nationalists and one which has meant that the legacy of fear, suspicion and restricted mobility in and around the border region, resulting largely from ‘the troubles,’ has been given the chance of transformation. The GFA has thus cemented the openness of the border not only symbolically and politically but also - socially.

One of the most fundamental achievements of the GFA is defining citizenship and rights in a way that disentangles ‘national identity from its expression by residence in a nation state.' The Agreement’s ability to do so hinges upon the guarantee of equal rights for Irish and British citizens, while the content of this equivalence is provided by virtue of their common EU citizenship. There are, for example, a range of significant rights and equality protections in the areas of employment law and non-discrimination, enshrined in EU law, and which presently apply both north and south of the border.

This equivalence of rights has been critical to both improving north–south relationships, and to the ability of divided communities in Northern Ireland to accept the legitimacy of the Agreement itself. Furthermore, the operation of Strand II of the Agreement (North-South co-operation), particularly the current

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functioning of cross-border bodies, will be most directly affected by regulatory divergence north and south of the border post-Brexit.

- Finally, **devolution** is a border regime effecting differential governance arrangements (with different regional competencies on different devolved matters) and policy experience within the United Kingdom itself.

**Different legal, policy and governance environments between Northern Ireland and the other regions in the UK have significant implications for a post-Brexit scenario.** One question of importance here concerns whether policy areas currently governed at EU level (e.g. agriculture, environment, trade) may, in future, fall under the devolved administrations. At the present juncture this is a question that could be addressed through the content of the EU Withdrawal Bill, currently making its way through Parliament.

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**5. The ‘Brexit and the border’ paper series**

It is essential to emphasise that the present-day functions, governance and degree of openness of the UK – Irish land border is a result of the historical over-layering of the above different border regimes, operating at sub-, national, and supra-national levels. Thus, changes in one of these will have complex knock-on effects on others.

While for Leave supporters Brexit may have been envisioned as an exercise in the separation and selective treatment of the different types of movement that the UK borders regulate, the interconnected and relational nature of borders, and the regimes that regulate them, make this task extraordinarily complex. With this in mind, while each of the following papers in this series will focus on a particular theme, it will also address the connections between themes, and their relationship to different positions and dis/agreements resulting from the Brexit negotiations.

**Briefing Paper 2: Citizens’ rights**

As the preceding discussion suggested, the definition, interpretation, enactment, and mechanisms for the protection of citizens’ rights, are fundamental to the working and degree of openness of any border. Specifically, the cumulative effect of the interpenetrating border regimes affecting the UK–Ireland border is the establishment of a gamut of rules and practices (such as equality protections) for different groups of people, regulating behaviour both at the actual borderline and within the UK and Ireland respectively. Many such rights, for instance in the area of employment law and non-discrimination protections, have been
established through EU regulations and directives, and are enshrined in the EU Charter of Fundamental Rights.\(^{13}\)

**Therefore, divesting the UK-Irish border of the EU border regime has raised concerns regarding a possible divergence of rights north and south. Such a divergence, creating a differential of rights for UK, Irish, EU and other citizens respectively, will effectively change the degree of openness of the border, and would be politically sensitive. Several tiers of this issue exist and the aim of this paper will be to follow and outline aspects of UK – EU negotiations, as well as legislation and policies within the UK, that will affect the following: the legality of the CTA provisions for continued reciprocity of UK – Irish citizens’ rights;\(^{14}\) provisions for protection of the reciprocal citizenship rights of UK and Irish citizens; and future provisions for reciprocal EU – UK citizens’ rights.**

We note that while it is entirely feasible, for instance, that no passport checks will need to be (re)introduced at the land border crossing points, this should not be taken to indicate the continuation of the same degree of openness of the border for either group of citizens concerned. Different degrees of openness may still *de facto* exist for EU and non-EU citizens through diverging regulation of the labour market, social security, health or education rights.

**Briefing Paper 3: Changing trade relations and regulations**

This paper will address the challenges and opportunities for the land border created by the UK’s withdrawal from the European Union’s single market and customs union. It is clear at this stage, that whatever the future agreement between the EU and the UK, goods imported into, or exported from the UK from/to either the EU or from/to anywhere else will be subject to tariffs, and to import/export duties, that will need controlled through customs posts at the border.

Whether these checks are performed at the geographical borderline with Ireland or elsewhere, while not insignificant, is only partially the question raised. The legal and policy regulations that enable the functioning of customs controls and the infrastructure to perform customs checks will need to exist. Their mere existence represents the border and, however in/visible and

\(^{13}\) As discussed in CAJ (2017) ‘Brexit and Northern Ireland: A briefing on Threats to the Peace Agreement’.


wherever placed, will create friction to a greater extent than currently experienced.

Such friction can look like any one of a series of things – from time delays along the supply chain, to the cost of servicing the process on both the public purse and on private businesses, and the effects experienced by each and anyone of us in terms of where, when, how, and at what cost we will be able to consume a product brought across the border.

Furthermore, a future Free Trade Agreement with the EU, and with any other UK trade partner, may involve the elimination of tariffs and other restrictive regulations of commerce on most but not all products that originate from within the respective Free Trade Area only. This means that duties as well as rules of origin checks and regulations will still apply, at the very least against third countries.

Border controls, therefore, will still be needed at any new FTA’s internal borders in order to differentiate between originating products (entitled to duty-free access) and non-originating products (on which duty is payable).\textsuperscript{15} Commentators have pointed out in this respect that ‘[a]s long as the North is outside the EU and its customs union, and the Republic is inside, there will have to be border controls between North and South to rule out trade diversion’ [emphasis ours].\textsuperscript{16} As such this particular aspect of Brexit enormously complicates the otherwise stated desire to ‘avoid any physical border infrastructure in either the United Kingdom or Ireland, for any purpose (including customs or agri-food checks)’\textsuperscript{17}

Again, the infrastructure for completing such checks will need to exist, even if not necessarily placed at the physical borderline.

This paper, therefore, will develop an overview of, and query, the proposals that have been put forward to address this challenge – both as a part of EU – UK negotiations (by either of the negotiating parties) and by academics, policy and other experts and analysts. It will also investigate the potential spillover effects of changing trade regulations on regulating the movement of people.

\textit{Briefing Paper 4: The Belfast/Good Friday Agreement and the entirety of relationships within and between these islands}

This paper will develop a fuller understanding of: the effects of Brexit on the continued viability of the Belfast/Good Friday Agreement; the centrality of the Agreement to


\textsuperscript{16} K. O’Rourke, \url{http://www.irisheconomy.ie/index.php/2017/02/16/brexit-customs-unions-and-borders/}

\textsuperscript{17} UK Government (2017) \textit{Position Paper on Northern Ireland and Ireland}, p. 15
developing workable solutions for the future of the UK – Irish land border; and the steps necessary to guarantee (in law and in political practice) the protection of the Agreement in all of its parts. For instance, there is a question regarding how the equivalence of rights guaranteed by the Agreement will be assured when EU law no longer applies.

While the UK government may have recognized that ‘[a]s long as Ireland remains a member of the EU, Irish citizenship also confers EU citizenship’,\(^6\) it has indicated no provision for the rights of Northern Ireland citizens who choose not to exercise their right to an Irish passport.\(^7\) How this question is settled is essential to the future social and political legitimacy of the Agreement. In practical terms, it is also vital for the de facto openness of the UK–Ireland border to these citizens post-Brexit.

Another live area of interest the paper will address, is how any divergence in market/trade, business, public sector or rights regulations on each side of the border will affect the de facto operation of any of the implementation bodies set up by the Agreement, the wide variety of cross-border partnerships, and the associated effects on the concept and practice of cross-border co-operation.

**Briefing Paper 5: Devolution**

The already existing diversity in devolution arrangements and the associated public policy environments throughout the UK, means that the political impact of Brexit in different devolved regions will vary.

Such variation will be associated with the repatriation of EU powers, and future financial arrangements for the replacement of EU funds.\(^8\) The resolution of the already existing political tensions in this context (both within devolved regions and between devolved regions and central government) may depend on the extent to which post-Brexit devolved administrations will have the flexibility of devising their own policies in matters of strategic interest. In the case of Northern Ireland, for instance, such interests include the ability to preserve the highest possible degree of openness of the land border with Ireland. Other issues include guarantees for the full replacement from HM Treasury of funds currently received from the EU, beyond the year 2020. This paper will therefore address the scope, arising from new post-Brexit legislation, for accommodating flexibility within Northern Ireland’s devolved arrangement vis-à-vis these questions, particularly concerning future trade relations and continued market integration on the island of Ireland.

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\(^6\) Ibid, p. 5.

\(^7\) As pointed out by CCBS in their response to the Position Paper. See [http://crossborder.ie/?s=northern+ireland+and+ireland+position+paper](http://crossborder.ie/?s=northern+ireland+and+ireland+position+paper)

\(^8\) See ‘Brexit: The impacts of and implications for devolution in the UK’, [https://www.britac.ac.uk/blog/brexit-impacts-and-implications-devolution-uk](https://www.britac.ac.uk/blog/brexit-impacts-and-implications-devolution-uk)
6. Conclusions

- Our forthcoming paper series on ‘Brexit and the border’ aims to develop an overview of the effects of key aspects of Brexit on the future of the UK–Ireland land border. A central idea in political discourse so far has been that the border must remain as ‘frictionless’ and as ‘invisible and open’ as possible. To understand what this means, however, and the conditions under which it is achievable, despite the UK leaving the European Union’s single market and customs union, we need to properly acknowledge what borders are and how they operate.

- We have suggested in this respect that the power of borders can be best seen not so much in the control of movement at geographical borderlines, as in the enforcement of differential treatment within the jurisdiction of the state. As such borders can be found in every instance when, and where, different legislation, policies and their associated practices (e.g. with respect to citizens’ rights, immigration, or trade) are applied.

- Their openness is complex and relative to different categories of movement, rules, practices and spaces.

- Furthermore, since there is an equally complex relationship between the visibility and openness of borders, we need to be careful in judging any lack of visible physical infrastructure, or the absence of border checks, at the geographical UK–Ireland border in the future as suggestive of preserving the border’s present degree of openness. Instead, we need to consider the multiple invisible layers of border regimes that constitute the border. These include the Common Travel Area, EU membership, the Good Friday Agreement, and devolution arrangements.

- From this perspective, we can see that one of the biggest challenges to the task of preserving the present-day invisibility and openness of the UK–Ireland border is precisely the intersecting nature of the border regimes that constitute it. It is likely, for instance, that by restricting, or even introducing border controls on the mobility of people (and remember, these do not have to take place at the geographical borderline in order to be effective), the border will also create friction for trade. Conversely, it is necessary to be mindful of how any new trade regulations and the associated divergence of standards may de facto affect the enactment of citizens’ rights and the work of a wide variety of cross-border bodies.
• As a contribution to discussions of how to address both the challenges and opportunities arising from Brexit, our ‘Brexit and the border’ Briefing Paper series will focus on key changes in these border regimes post-Brexit that will affect the UK–Ireland border.