



The Centre for
Cross Border Studies

Brexit and the UK-Ireland Border

Briefing Paper Series

Briefing Paper 5: The Impact of Brexit on Devolution in Northern Ireland

Executive Summary

- Devolution in the UK has developed asymmetrically since 1998 as different and increasing powers have been conferred upon the devolved administrations of Scotland, Wales and Northern Ireland.
- Devolution arrangements have been loosely structured in an informal system of inter-governmental relations, creating over time tension between the principles and exercise of Parliamentary sovereignty, on the one hand, and the ‘permissive autonomy’¹ of regional governance, on another. Such tension has been heightened by Brexit.
- Controversy has developed over the extent to which, after Brexit, devolved administrations will have the flexibility of devising their own policies in matters of strategic interest.²
- The EU Withdrawal Act 2018 effectively decrees the initial repatriation of devolved powers, presently framed by EU law, to the UK central level³. This potentially restricts the devolved administrations’ scope for governing and could elevate further political tensions.
- Of the 153 areas of EU law which overlap with devolved competencies, 151 are applicable to Northern Ireland (including agriculture and fisheries, the environment, and policing and criminal justice) while only 107 and 63 areas are applicable to Scotland and Wales respectively.⁴ This gives just a partial indication of the asymmetry of devolution within the UK and the scale of the impact Brexit may have upon governance in Northern Ireland.
- The precise effects of Brexit on the exercise of devolved powers in the different UK regions are difficult to know as yet. However, it is clear that these will depend on: the circumstances under which ‘repatriated’ competencies will be ‘released’ by central government to the devolved administrations; the eventual EU Withdrawal Agreement (or lack thereof); the nature of the UK’s future relationship with the EU; and, more broadly, on the type of international trade regime that the UK will operate under after Brexit.

¹ Stanford, M. and Gormley-Heenan, C. (2018) ‘Taking Back Control’, the UK’s Constitutional Narrative and Schrodinger’s Devolution’, in *Parliamentary Affairs* 0, pp. 1 – 19, doi: doi:10.1093/pa/gsy039

² See Austin, L. (2017) [‘Brexit: The impacts of and implications for devolution in the UK’](#)

³ i.e. Westminster and Whitehall.

⁴ Institute for Government (20 March 2018) [‘EU Withdrawal Bill Clause 11 and the devolution deadlock’](#)

- Northern Ireland is in the unique position within the UK of having a land border with the EU. Moreover, Northern Ireland's experience with and form of devolution, is historically distinctive and is strongly shaped by the 1998 Belfast/Good Friday Agreement with its in-built principle of cross-border cooperation (Strands II and III). Together with the UK's and Ireland's common membership of the EU, the Agreement has cemented the openness of the UK-Ireland border.
- Given this distinctiveness, the way Brexit will affect the capacity of the regional administration to preserve and maintain the openness of the UK-Ireland border is a question of enormous and direct practical, political and social significance.
- Of concern is the devolved administration's ability to protect cross-border cooperation, in all of its guises, after Brexit. The UK Government has maintained that after Brexit 'arrangements for North-South cooperation remain a matter for the Northern Ireland Executive and the Government of Ireland' and that 'Cooperation will remain a matter for two sovereign jurisdictions on the island of Ireland to decide in accordance with their respective legal regimes.'¹⁵ However, it is worth remembering the Northern Ireland Assembly and Executive *do not* constitute a sovereign government and as such *do not* have control over the legal regime on the island of Ireland on which such cooperation will continue to rely.
- Particularly concerning is the potentially reduced capacity of the devolved administration to legislate for integrated all-island supply chains which are essential to the agriculture and fisheries sectors in the region.
- Similarly, the extensive cooperation that has developed between the two jurisdictions on the island on environmental issues and policy will, as a result of Brexit, be subject to pressures for divergence, making cross-border cooperation more difficult.
- There is also a concern that removing access to EU agencies and alignment with EU law will diminish the structured framework for effective North-South cooperation in criminal justice matters and result, in practice, in a heightened security risk at the land border.

⁵ Department for Exiting the European Union, UK Government (7 December 2018) '[Technical Explanatory Note: North-South Cooperation Mapping Exercise](#)', p. 2.

- EU withdrawal requires renewed attention to developing new collaborative approaches to cross-border policy-making and effective cooperation in an environment where the legal frameworks across the UK-Ireland border will increasingly differ.

1. Introduction

This is the fifth and final paper from our Briefing Paper Series on *Brexit and the UK-Ireland Border*.⁶ It considers the questions that the United Kingdom's exit from the European Union raises for devolution in Northern Ireland. Such questions are fundamental for the future of regional and UK governance as a whole. Moreover, devolution in Northern Ireland (in its relationship with the Belfast/Good Friday Agreement⁷) also structures relations across the UK-Ireland border and between the islands of Ireland and Great Britain. It is in this sense that CCBS addresses devolution as one of a number of 'border regimes' on the island of Ireland.⁸

Debates over the UK's devolution arrangements are long-standing but there is no doubt that Brexit has injected a particular salience into these. Brexit will require reform of various levels of government and will fundamentally affect policy-making and content. As such, the aim of this paper is to chart the main aspects of how these changes may affect Northern Ireland's particular experience with devolution and the consequences for governance and policy-making in the region.

In what follows we first outline how devolution has worked in the United Kingdom and then discuss the challenges that Brexit poses to it. We move on to describe the specificity of Northern Ireland's devolution arrangements, including in devolved matters such as agriculture and fisheries, the environment, and policing and criminal justice. We discuss how these are likely to be affected by Brexit, the unique role of the 1998 Belfast/Good Friday Agreement in regional governance, and the challenges that Brexit poses to cross-border cooperation.

2. UK devolution: Regional variation and differentiation

- Devolution is a process of decentralisation that aims to put power closer to the citizen so that local factors are better recognised in decision-making.⁹ Following three 1998 Devolution Acts, devolved legislatures were established in Scotland and Wales, and re-established in Northern Ireland.

⁶ The paper is authored by Dr Milena Komarova, CCBS Research Officer, Ms Hollie Akehurst, CCBS intern, and Mr Mark McClatchey, CCBS Administrative and Research Assistant.

⁷ CCBS (2018) ['Briefing Paper 4: The Belfast/Good Friday Agreement and the negotiations on the UK's withdrawal from the EU'](#), Brexit and the Border Series.

⁸ In ['Briefing Paper 1: A Roadmap'](#) of the Brexit and the UK-Ireland Border Series (CCBS, 2017), we defined 'border regimes' as 'entire systems of legal and policy rules, and their associated practices'. Devolution is one such system; an aspect of regional governance that also shapes the openness of the border to different kinds of movement – be it of people, goods, capital, or information.

⁹ UK Government (18 February 2013) ['Guidance. Devolution of powers to Scotland, Wales and Northern Ireland'](#)

- While still part of the United Kingdom, with the UK Parliament in Westminster as sovereign, devolved legislatures have powers previously held in Westminster to legislate on some matters, known as ‘devolved’ matters; issues that remain the responsibility of the UK Parliament alone are referred to as ‘reserved’ matters. There are also ‘shared powers,’ meaning that while Westminster reserves the power to set the law in some areas, such as taxation rates, devolved governments still have powers to set specific ‘devolved taxes.’ Crucially, the UK Parliament retains the power to amend or even repeal the devolution acts or to legislate on devolved matters.¹⁰
 - Since 1998 the devolution settlements affecting Northern Ireland, Wales and Scotland have evolved incrementally and asymmetrically, as different and increasing powers have been conferred upon the devolved institutions.¹¹ These changes have been set out in a series of Acts of Parliament, each amending its predecessors, leading to an increasing complexity of ‘overlapping and shared competencies’.¹² Each devolved administration has different levels of control over different policy areas.
 - Within the system of devolution, the relations between devolved administrations (i.e. inter-governmental relations) have remained informally structured, underpinned by Memoranda of Understanding and bilateral concordats between the UK and each devolved government. A Joint Ministerial Committee between regional Executives is convened on an *ad hoc* basis and has been much criticised for its long periods of inactivity and domination by the UK government.¹³
 - Legislative relations are regulated by the ‘Sewel convention’, according to which the UK Parliament would not normally legislate on devolved matters without the consent of the devolved legislatures.
 - Analysts recognise¹⁴ that, over time, the system of governance described above has led to tensions between the principles and exercise of Parliamentary sovereignty on the one hand and regional devolution, on the other.
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3. Brexit and the challenges to UK devolution

- Devolution in the UK has been characterised by ‘[e]xtensive devolved self-rule in practice (permissive autonomy)’¹⁵ where devolved governments have developed diverging interpretations of the operating principles of devolution, and of the extent and reach of their devolved competences. As such devolution is judged ‘vulnerable to external shocks’, with ‘the strong potential to lead to ongoing political instability’.¹⁶

¹⁰ Supplementary to the devolution agreements are Notices of Devolution, which seek to outline comprehensively how devolved settlements will work, and when parliamentary consent is required from devolved legislatures and/or Westminster.

¹¹ House of Lords, European Union Committee (2018) [‘Brexit: Devolution’](#), 4th Report of Session 2017–19.

¹² House of Lords, European Union Committee (2018) [‘Brexit: Devolution’](#), 4th Report of Session 2017–19, p12.

¹³ McEwen, N., Petersohn, B. and Brown Swan, C. (2015). [‘Intergovernmental Relations and Parliamentary Scrutiny: A Comparative Overview’](#), Centre on Constitutional Change. Report prepared for the Devolution (Further Powers) Committee.

¹⁴ Jack, M. T., Owen, J., Paun, A., and Kellam, J. (2018) [‘Devolution after Brexit Managing the environment, agriculture and fisheries’](#), Institute for Government.

¹⁵ Standford, M. and Gormley-Heenan, C. (2018) ‘Taking Back Control’, the UK’s Constitutional Narrative and Schrodinger’s Devolution’, in *Parliamentary Affairs* 0, pp. 1 – 19, doi: doi:10.1093/pa/gsy039, p. 3.

¹⁶ *Ibid*, p. 9.

- Brexit has represented such a ‘shock’. This is because as a member of the EU, the UK’s devolution settlements reflect the supremacy of EU law and Brexit now requires emancipation from EU law. This is a difficult task, particularly where ‘complex overlapping’¹⁷ central, devolved and shared competencies are concerned.

• Tensions, therefore, have surfaced in discussions of the EU Withdrawal Act which determines where within the UK the estimated 153 legislative powers, in areas of devolved competency in Northern Ireland, Scotland and Wales – currently held at EU level – will initially return. While the devolved administrations want the direct ‘repatriation’ of these powers to their respective regions, the UK Government wants them returned to London, pending further decisions. Devolved governments see this as a ‘power grab’. The UK Government sees it as ensuring continuity and certainty.¹⁸

- Clause 11 of the EU Withdrawal Act 2018 initially proposed that all returning powers are retained at UK central level, enabling the UK Parliament to create new UK-wide legal frameworks to replace EU legislation. After a series of Parliamentary debates, Clause 11 was amended so that control over areas where EU and devolved law overlap would be passed to the devolved institutions. However, UK ministers can make regulations that ‘freeze’ the devolved governments’ ability to change the law in some areas. In such cases Westminster would retain control pending agreement on what will replace EU law.¹⁹
- The UK Government has published a list of 153 areas where EU and devolved law currently intersect, and where new UK-wide frameworks might be required after Brexit. Of this list, 63 apply to Wales, 107 to Scotland, and 151 to Northern Ireland.
- This list is telling of the variation between the three devolution settlements and is further divided into several sub-groups:
 - 1) 49 areas, comprising aspects of transport,²⁰ environmental and energy policy that can be immediately devolved to all three nations;
 - 2) Another 82 areas where the UK government believes ‘non-legislative common frameworks’ are required, i.e. voluntary arrangement between central and devolved governments to cooperate in these areas which will not be enforced in law. Of these areas, 42 relate to justice and policing²¹;
 - 3) A further 24 areas for which binding ‘legislative common frameworks’ may be needed in order ‘to preserve the functioning of the UK internal market or to ensure the Government can implement trade and other international agreements’.²² These include policy areas such

¹⁷ House of Lords, European Union Committee (2018) [‘Brexit: Devolution’](#), 4th Report of Session 2017–19, p. 12.

¹⁸ Jack, M. T., Owen, J., Paun, A., and Kellam, J. (2018) [‘Devolution after Brexit Managing the environment, agriculture and fisheries’](#), Institute for Government, p. 3.

¹⁹ Institute for Government (20 March 2018) [‘EU Withdrawal Bill Clause 11 and the devolution deadlock’](#).

²⁰ Only 17 of these are devolved to Northern Ireland.

²¹ Including cross-border judicial cooperation, police data sharing arrangements, and minimum-standards legislation in areas such as cybercrime and human trafficking.

²² Institute for Government (20 March 2018) [‘EU Withdrawal Bill Clause 11 and the devolution deadlock’](#), p. 2.

as agricultural support, animal welfare and fisheries management and support, within the responsibility of the Department for the Environment, Food and Rural Affairs (Defra);

- 4) Discussions are ongoing in 12 additional policy areas which, the UK Government argues, are already reserved to Westminster. These include state aid, food geographical indications, and access to benefits for migrants.²³
 - There is tension between the centralised approach of the UK government reflected in Clause 11 (which aims to secure the necessary degree of internal harmonisation) and the devolved governments' emphasis on policy divergence (to reflect local conditions and preferences). Furthermore, analysts have criticised Clause 11 for defining 'retained EU law' based on 'whatever the EU has legislated in the past', rather than on 'a coherent vision of the appropriate division of competencies'. This, it is suggested 'may be too extensive in some respects and too limited in others'.²⁴
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4. Specificity of Northern Ireland's devolution arrangements

- Present-day devolved arrangements in Northern Ireland are rooted in a long history of both devolved and direct rule, intertwined with long-standing political and inter-communal conflict, and with the governance arrangements put in place through the 1998 Belfast/Good Friday Agreement.
- Uniquely, the Northern Ireland devolution settlement defines three categories of legislative powers: reserved, excepted and transferred. The Northern Ireland Assembly can make primary and secondary²⁵ legislation on 'transferred' matters. These include: health and social services; education, employment and skills; agriculture; social security, pensions and child support; housing; economic development; local government; environmental issues, including planning; transport; culture and sport; the Northern Ireland Civil Service; equal opportunities; and justice, prisons and policing.²⁶
- The Northern Ireland Assembly can also legislate on 'reserved' matters but with the consent of the Secretary of State for Northern Ireland.
- Excepted matters are subjects reserved to Westminster and can only be transferred under primary legislation.²⁷
- The 1998 Belfast/Good Friday Agreement (B/GFA) which 'set out to create the political and social conditions that were stable, practical and 'exclusively democratic and peaceful'',²⁸ also shapes how devolution in Northern Ireland operates.

²³ Institute for Government (20 March 2018) ['EU Withdrawal Bill Clause 11 and the devolution deadlock'](#).

²⁴ Keating, M. (2018) ['The Repatriation of Competences in Agriculture after Brexit'](#), Centre for Constitutional Change. Research Briefing, p. 16.

²⁵ Primary legislation is the term describing the main laws passed by the legislative bodies of the UK. For instance, Acts of the UK Parliament and of the regional Assemblies are primary legislation. Secondary legislation provides a much greater level of legislative detail to what Acts tend to include and can be used to amend, update or enforce existing primary legislation (Source: <http://www.niassembly.gov.uk/utility/faqs/primary-and-secondary-legislation/>).

²⁶ Torrance, D. (2018) ['Devolution in NI, 1998 – 2018'](#). House of Commons Library, Briefing Paper.

²⁷ Torrance, D. (2018) ['Devolution in NI, 1998 – 2018'](#). House of Commons Library, Briefing Paper, p. 9.

²⁸ Phinnemore, D., Hayward, K. (2017) ['UK Withdrawal \('Brexit'\) and the Good Friday Agreement'](#), European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs. Study for the AFCO Committee.

- The Agreement establishes three strands of institutional governance which formalise first, power-sharing arrangements between unionists and nationalists in Northern Ireland (through the Northern Ireland Assembly and Executive); second, extensive North-South cooperation on the island of Ireland (including the North South Ministerial Council (NSMC) that oversees the implementation of a number of cooperation areas); and third, increased East-West cooperation between governments (including the British-Irish Intergovernmental Conference and the British–Irish Council).

The 1998 Belfast/Good Friday Agreement (and the 1998 Northern Ireland Act) also ensures the constitutional position of Northern Ireland within the United Kingdom by declaring that it ‘shall not cease to be so’ without the consent of a majority of its people and those in the Republic of Ireland, expressed in simultaneous referenda on Irish unification on both sides of the border.

‘The Belfast/Good Friday Agreement established a delicate [governance] equilibrium, encapsulated in the power-sharing institutions, and the mechanisms for enhanced North-South and East-West cooperation’.²⁹ These institutions form part of a multi-level governance system that, by definition and in practice, straddles both the internal to the United Kingdom constituent regions and its sovereign borders with the Republic of Ireland. In this way, Northern Ireland remains closely linked to both Britain and the Republic of Ireland – an arrangement that conditions, practically and symbolically the very possibility of peace in the region. A central expression and manifestation of this multi-level governance ‘balancing act’ is cross-border cooperation within and between these islands.

- The devolution of various competencies (particularly in agriculture) was crucial in giving Northern Ireland a level of autonomy which created the legislative space for cross-border arrangements, without threatening the integrity of the Union. Much of this integration has been realised through Strand Two of the B/GFA, with the North-South Ministerial Council (NSMC) overseeing the cross-border implementation of EU devolved competencies.
- NSMC is further charged with the cross border implementation of policies which help ensure integrated cross border networks in areas such as food safety, trade and business development, EU programmes and tourism promotion. However, it has been unable to meet since the suspension of the Northern Ireland Assembly in January 2017.

Crucially, through the United Kingdom’s and the Republic of Ireland’s EU membership, the European Union’s legal regime has profoundly shaped the practical possibility for cross-border cooperation. As such, cross-border cooperation is neither simply a specific feature of Northern Ireland’s peace

²⁹ House of Lords, European Union Committee (2018) [‘Brexit: Devolution’](#), 4th Report of Session 2017–19, p. 25

agreement, nor is it one of regional devolution. Instead, it is a phenomenon of multi-level governance, equally embedded in the UK's internal constitutional arrangements, in the arrangements made by the 1998 international Belfast/Good Friday Agreement, and in wider EU law. By de-coupling Northern Ireland from EU legislation and policy (while these continue to apply to the Republic of Ireland), Brexit creates a major challenge to the conditions for, and the practice of, cross-border cooperation.

4.1. Brexit and Devolved Competencies in Northern Ireland

i. Agriculture and Fisheries

- Agriculture is among the key competencies currently devolved within the United Kingdom but subject to EU law. The devolution statutes for Scotland, Wales and Northern Ireland devolve large parts of the competencies in agricultural support (farmer payments) and regulation (e.g. sanitary, phytosanitary and food standards), while agricultural trade is a reserved matter. Divergence in implementing EU directives with respect to the two devolved agricultural competencies (e.g. support and regulation) is already the norm among the different regions of the UK.

For instance, different regions receive different shares of CAP funding. It is estimated that between 50 and 60 per cent of farm income in the UK as a whole comes from CAP payments. In Northern Ireland, Wales and Scotland it is 87, 80 and 75 per cent respectively (Greer, 2017).³⁰

- Under Clause 11 of the EU Withdrawal Act (2018) agriculture competencies are due for 'repatriation' to Westminster as part of 'retained EU law' and could later be released to the devolved regions pending the agreement of 'legislative common frameworks'.³¹ Two main factors will bear on the *de facto* freedom that devolved regions will have to develop and implement their own agricultural policy after Brexit: the precise way in which post-Brexit legislation will shape devolved powers and the associated policies and capacities; and the type of future international trade regime the UK will enter into.
- Analysts suggest that to avoid disruption in agricultural trade within the UK and across the international border on the island of Ireland after Brexit, further divergence in agricultural support and regulation (beyond the already existing divergence within the UK) should be avoided, and that some degree of continued internal and external regulatory harmonisation will be needed.³²

³⁰ Keating, M. (2018) ['The Repatriation of Competences in Agriculture after Brexit'](#), Centre for Constitutional Change. Research Briefing, p. 8

³¹ Institute for Government (20 March 2018) ['EU Withdrawal Bill Clause 11 and the devolution deadlock'](#).

³² Keating, M. (2018) ['The Repatriation of Competences in Agriculture after Brexit'](#), Centre for Constitutional Change. Research Briefing.

- In Northern Ireland, agriculture is more significant than in other parts of the UK in terms of the high degree of employment it creates and its substantial overall economic contribution.³³ Moreover, agri-food business in particular ‘operate[s] on an all-island basis, with produce frequently crossing the border to be processed, packaged or sold’.³⁴ This means Northern Ireland farm businesses are reliant on the continued easy movement of goods and people across borders to an extent that those in other parts of the UK are not. Absence of cross-border regulatory harmonisation could, therefore, result in costly disruption to supply chains.
- Unsurprisingly, public opinion research in Northern Ireland shows that the most popular level of decision-making for ‘agriculture and fisheries’ is the devolved level. This is in contrast to the rest of the UK where the most popular decision-making level across all policy areas is the national.³⁵ Additionally, research shows that farming unions in Scotland, Wales and Northern Ireland ‘want powers over support and rural policy to come back to the devolved level where more coherent policies, linked to supply chains and the rural environment, can be forged’ and are ‘strongly in favour of common standards and regulatory frameworks in order to retain access across the UK and avoid duplication’.³⁶
- Different scenarios then exist for the future of the UK’s international trade agreements and these may affect the devolution of agriculture in a regionally differentiated manner. In the case of trade under a WTO regime, new rules for permissible state subsidies for agriculture and on standards will need to be taken into account, with variable effects across regions. Furthermore, some suggest such a scenario is likely to ‘take more agricultural powers and authority away’ from the devolved regions, ‘not least because the World Trade Organisation will negotiate only with the UK government as the relevant negotiating authority’.³⁷
- A free trade agreement with the EU on the other hand, would probably require a degree of harmonisation of agricultural support (even if the UK does not simply mirror CAP rules on permissible subsidies as this would prevent it from developing its own agricultural policy). The UK would also have to meet EU standards in production, environment and sanitary and phytosanitary standards which would apply across the country. Moreover, bilateral FTAs with other countries may exercise ‘downward pressure’ on standards, thus risking ‘the exclusion of British products from European markets and prevent[ing] the devolved territories from adopting the EU standards themselves in order to gain access to European markets’.³⁸
- The draft Withdrawal Agreement (WA) of 14 November 2018 makes stipulations regarding state aid in Annexes 4 (of the general Agreement) and 9 (of the Protocol on Ireland/Northern Ireland) which suggest that until the end of the transition period (December 2020) the levels of

³³ Allen, M. (2016) [‘Northern Ireland’s agri-food sector – background and possible ‘Brexit’ considerations’](#), Northern Ireland Assembly Research and Information Service Briefing Paper.

³⁴House of Commons, Northern Ireland Affairs Committee (2018) [‘Brexit and Agriculture in Northern Ireland’](#), 5th report of Session 2017-19, p. 4.

³⁵ Menon, A. (ed.) (2018) [‘Brexit: Local and Devolved Government’](#), The UK in a Changing Europe, Research Paper, p. 26

³⁶ Keating, M. (2018) [‘The Repatriation of Competences in Agriculture after Brexit’](#), Centre for Constitutional Change. Research Briefing, p. 14.

³⁷ Stanford, M. and Gormley-Heenan, C. (2018) ‘Taking Back Control’, the UK’s Constitutional Narrative and Schrodinger’s Devolution’, in *Parliamentary Affairs* 0, pp. 1 – 19, doi: doi:10.1093/pa/gsy039, p. 12.

³⁸ Keating, M. (2018) [‘The Repatriation of Competences in Agriculture after Brexit’](#), Centre for Constitutional Change. Research Briefing, p. 12

agricultural subsidies will be agreed by the Joint Committee (the Agreement's proposed governing body) and will be informed by the design of the United Kingdom's future agricultural support scheme and by the average annual total expenditure incurred in the UK under the current CAP financing round.

- A withdrawal from the EU with an Agreement of the type proposed on 14 November 2018, including a 'backstop' for avoiding a hard border on the island of Ireland would, in addition to alignment with a limited number of EU single market rules and regulations, also require the region to meet EU standards in production, environment and sanitary and phytosanitary standards. Annex 5 of the Protocol on Ireland/Northern Ireland contains regulations for the production and placement of agricultural goods and foods with respect to Northern Ireland, including required compliance with European standards on pesticides and biocides; with European food law principles, the European Food Safety Authority, European standards on food hygiene, food marketing standards, and standards on additives, traces, and GMOs, among others.

In any scenario for the future of the UK's international trade relations, the imperative of preserving the present openness of the land border to the movement of agricultural goods remains, if harm to agri-business is to be avoided. Avoiding a 'hard' border, however, by means other than a 'backstop'³⁹ would in effect require a more extensive devolution of agricultural powers (among others) in Northern Ireland than is presently the case. Otherwise, devolved government will be left with no control over the legal regime which frames its ability to trade with agri-products across the border, and which can secure the supply chains vital to such trade.

- There is also the question of the future of agricultural support (or funding) for farmers. It is yet unclear what approach the UK government will take in this respect. It has already stated its commitment to providing the same cash funds for agricultural support for the remainder of this Parliament. However, government's intention for the future is to move away from direct support to a system of 'public money for public goods',⁴⁰ originally envisioned for England.
- Concerns have been expressed of the suitability of a 'public money for public goods' funding system for Northern Ireland. The Northern Ireland Affairs Committee has stated that such proposals 'would not be appropriate' for the region, and that 'maintaining farm income must remain an objective of the province's agricultural policy ... to help sustain businesses for which direct payments are of existential importance'.⁴¹ Similarly, environmentalists have stressed the need 'to ensure that farmers receive a fair price for the private goods they produce', pointing out

³⁹ E.g. as proposed in the draft WA of November 14th 2018, with Northern Ireland in the same customs area as the Republic of Ireland and with a degree of EU single market regulatory alignment.

⁴⁰ i.e. paying farmers for goods not delivered by the market, particularly to do with environmental enhancement (including clean air and water, beautiful scenery and protection of rare species).

⁴¹ House of Commons, Northern Ireland Affairs Committee (2018) '[Brexit and Agriculture in Northern Ireland](#)', 5th report of Session 2017-19, p. 3

that the 'new system should not be used as a cover for taking money away from farming and land management here'.⁴²

ii. Fisheries

- Under the current devolved powers Northern Ireland has control over its own commercial fishing fleets⁴³ within a UK wide system. The EU has repeatedly stated that it will only allow UK seafood exporters' tariff and quota-free access to EU markets in exchange for a reciprocal agreement that EU fishing fleets can continue to operate in UK waters. The political statement on the draft Withdrawal Agreement of 14 November 2018 states that the UK and EU will agree a new fisheries agreement before the end of the transition period but has not ruled out that this agreement will include granting rights for EU member states to fish in UK waters.
- Within the Northern Ireland Protocol contained in the draft EU Withdrawal Agreement, fisheries have been excluded from the single customs territory as EU member states are reluctant to give up their access to Northern Ireland waters; this could be a difficult issue to negotiate in any future agreement between the UK and EU. According to the Northern Ireland Affairs Committee report⁴⁴ it is vital for Northern Ireland fishing industry to continue to have access to EU markets for its products and it is possible that the trade-off for this in the future negotiations may be EU States continued access to fish in Northern Ireland waters.

iii. Environment

- Environmental policy across the UK has been strongly shaped by EU membership, with EU minimum standards for environmental protection applying to all of the UK's constituent regions. However, as a devolved matter environmental policy has evolved differently in the constituent regions and has been uniquely shaped in Northern Ireland.⁴⁵ The Scottish and Welsh governments have sought to create environmental policies that go beyond the EU's minimum requirements. By contrast, Northern Ireland is said to have 'a poor history of environmental governance, which is illustrated by the frequency of environmental' and cross-border waste-dumping crimes.⁴⁶ The regional Department for Agriculture, Environment and Rural Affairs (DAERA) and the Northern Ireland Environment Agency (within the Department) lack the legislative and enforcement capabilities of their English, Welsh and Scottish counterparts.⁴⁷
- Brexit has brought into sharp relief the challenges for the coordination of environmental governance and policies within the UK, as well as those specific to the future of environmental protection and governance in Northern Ireland. On the one hand, policy analysts⁴⁸ have

⁴² Martin, J. (2018) '[Public Goods can help keep farmers farming](#)'.

⁴³ According to the House of Commons, Exiting the EU Committee [Sectoral Report - Fisheries](#) (2018), these employ 800 out of the 12000 fishermen in the UK (with a further 600 jobs in Fish Processing).

⁴⁴ House of Commons, Northern Ireland Affairs Committee (2018) '[Brexit and Northern Ireland: fisheries](#)', Fourth Report of Session 2017–19.

⁴⁵ Gravey, V., Burns, C., Carter, N., Cowell, R., Eckersley, P., Farstad, F., Jordan, A., Moore, B. and Reid, C. (2018) '[Northern Ireland: Challenges and opportunities for post-Brexit environmental governance](#)' Research Brief.

⁴⁶ Ibid, p. 10

⁴⁷ Burns, C., Carter, N., Cowell, R., Eckersley, P., Farstad, F., Gravey, V., Jordan, A, Moore, B. and Reid, C. (2018) '[Environmental policy in a devolved United Kingdom. Challenges and opportunities after Brexit](#)', p. 4.

⁴⁸ Burns, C., Carter, N., Cowell, R., Eckersley, P., Farstad, F., Gravey, V., Jordan, A, Moore, B. and Reid, C. (2018) '[Environmental policy in a devolved United Kingdom. Challenges and opportunities after Brexit](#)'

recommended that any new environmental governance structures are better coordinated across the UK's constituent regions; are transparent and accountable; and that environmental policy be properly resourced to improve implementation and enforcement. However, the extent to which such recommendations are implementable, given the 'limited trust'⁴⁹ between devolved and the central UK government, is questionable, and this raises the risks both to the future of UK-wide environmental protection, and to the suitability of such policies to the Northern Ireland context.

- The UK government has adopted a 25 Year Environment Plan (25 YEP) and, following a consultation on environmental principles and governance, is expected to bring forward a new environmental bill. This will be limited to England, though it is expected that co-designed environmental policies in the other constituent regions of the UK may be developed. It is not clear how such co-design will work in practice.
- **Geographical circumstance means that Northern Ireland shares with the Republic of Ireland some distinct environmental challenges, such as pollution and invasive species. The two jurisdictions on the island have consequently developed extensive cooperation on environmental issues, and environmental policy is a focus of the NSMC. It is concerning, therefore, that deregulatory pressures in Northern Ireland resulting from Brexit may lead to divergence in environmental policy and standards on the two sides of the border, making such cross-border cooperation more difficult.**⁵⁰
- Again, the regime under which the UK will trade with the rest of the world will shape the contours of environmental policy to a great extent. Should the UK remain in the EU after another referendum (a pathway made possible by recent political developments) then there will be only limited implications for the country's environmental policy. More major implications can be expected under other scenarios.
 - The Withdrawal Agreement of 14 November 2018 proposes to preserve the environmental policy *status quo* in the UK until the end of the transition period (December 2020 or, at the latest, December 2022). Annex 4, Part Two, Articles 2 and 3 of the draft Withdrawal Agreement not only commit the UK to non-regression in the level of environmental protection ('as a way of ensuring the proper functioning of the [UK-wide] single customs territory') but spell out elements of the governance of environmental protection (through 'an independent and adequately resourced body or bodies'). It remains to be seen if the anticipated new UK environmental bill (as referred to above) will reflect this commitment through the establishment of one UK-wide or four different environmental watchdogs. Any more detailed policy commitments, beyond the end of the transition period, are as yet unclear and will largely depend on the nature of the negotiated future relationship.
 - Should, after the end of the transition period, the UK and the EU fail to agree on their future relationship, the Irish backstop will come into effect. In this respect, Annex 5 of the Northern

⁴⁹ Ibid, p. 4.

⁵⁰ Burns, C., Carter, N., Cowell, R., Eckersley, P., Farstad, F., Gravey, V., Jordan, A, Moore, B. and Reid, C. (2018) ['Environmental policy in a devolved United Kingdom. Challenges and opportunities after Brexit'](#)

Ireland-specific 'backstop' (draft Withdrawal Agreement) contains a list of different pieces of EU environmental legislation that Northern Ireland will be required to observe in order to ensure the proper functioning of the backstop (i.e. avoidance of a hard border for goods, continuing cross-border cooperation and protection in full of the Belfast/Good Friday Agreement).

- No deal: It has been suggested that 'Under a scenario where no-deal leads to an economic shock, ... the environment will be downgraded on the policy agenda, with a squeeze on public spending... Under this scenario there will be no requirement upon the UK government to align with EU standards and, given the preferences of some Conservative MPs, there may be demands to get rid of 'green tape'.⁵¹ Such a scenario would affect 'Northern Irish energy supplies' and how Irish hazardous waste (typically exported to the UK for treatment) is treated. Moreover, applicable to all UK borders would be the prospect of queues which 'also raises the risk of poor air quality from standing traffic in those areas'.⁵²
- An agreement to the effect of the UK joining the European Economic Area (the so called 'Norway option') would mean the UK remaining broadly tied to EU environmental policies, while being free to develop new agricultural and fisheries policies which would leave more scope for 'policies tailored to national circumstances in these fields (subject to external constraints)'.⁵³ Even if such an Agreement is not achieved, it is likely that in negotiating the future relationship with the UK, the EU will still insist on maintaining some minimal equivalence on environmental standards. At the same time, negotiating free trade deals with countries with lower than the EU standards of environmental regulation may result in Westminster putting deregulatory pressures on the devolved governments.⁵⁴

iv. Policing and criminal justice

- As with the previously discussed devolved policy areas, there has been increasing divergence in the way policing is exercised in England, Wales, Scotland and Northern Ireland. This is primarily a result of devolution itself, rather than the process of applying EU laws.⁵⁵
- Policing and criminal justice have been devolved matters in Northern Ireland since 2010 – as negotiated for through the St. Andrew's Agreement of 2006. It has to be said in this respect that Northern Ireland has distinctive legal traditions, and its own specific concerns in relation to policing; the contentious history of which has been just as closely intertwined with conflict as its reform – a condition for post-conflict political agreement.
- For historical reasons and because of Northern Ireland's shared border with the Republic of Ireland, and the free movement of individuals stemming from the Common Travel Area, access to EU agencies and alignment with EU law have been particularly important for the exercise of policing and criminal justice powers in the region. Additionally, North-South Intergovernmental Agreements on Co-operation on Criminal Justice Matters (July 2005 and April 2010) have provided a structured framework to enhance and develop more effective all-island co-operation,

⁵¹ Burns, C. (2018) ['May survives confidence vote: Where now for the environment?'](#)

⁵² Ibid.

⁵³ Burns, C. (2018) ['May survives confidence vote: Where now for the environment?'](#)

⁵⁴ Burns, C., Carter, N., Cowell, R., Eckersley, P., Farstad, F., Gravey, V., Jordan, A, Moore, B. and Reid, C. (2018) ['Environmental policy in a devolved United Kingdom. Challenges and opportunities after Brexit'](#)

⁵⁵ Tierney, S. and Remond, A. (2018) ['The Repatriation of Competencies After Brexit: Justice and Home Affairs'](#)

information sharing and co-ordination on criminal justice matters.⁵⁶ In light of the history of conflict on the island, such cooperation has had both political and operational significance.

- Though being devolved competencies, the exercise of policing and criminal justice powers in the UK devolved regions is closely linked to the Justice and Home Affairs (JHA) pillar of the EU treaty architecture, with its two dimensions – civil justice, and police and criminal justice (the latter now including border controls, immigration and asylum). As such policing and civil and criminal justice affairs constitute the framework for a deep cooperation across the EU, albeit individual countries having the choice to opt in or out of various frameworks.
- The UK's participation in the field of police cooperation and judicial cooperation in criminal matters, for instance, covers cooperation between member state authorities, information and data exchange, European agencies/bodies membership, and procedural harmonisation over specific criminal offences.⁵⁷ In 2014 the UK opted into 35 EU police and criminal justice measures. It participates in: the EUROPOL⁵⁸ (and is said to use it more than any other member state) and the EUROJUST⁵⁹ systems (which utilises common translation and legal advice as well as joint investigation teams) as well as in the Schengen Information System,⁶⁰ the European Arrest Warrant (EAW) system⁶¹ and the European Criminal Records System (ECRIS).^{62, 63}
- Given the above level of involvement in EU-wide policing and civil and criminal justice frameworks and the associated bodies, the impact of Brexit on the exercise of policing and criminal and civil justice powers in the UK as a whole, and Northern Ireland in particular, will be significantly shaped by the specific negotiated conditions of UK withdrawal (or the lack of agreement on these, i.e. 'no deal') and by the nature of the future UK-EU relationship.
- Different possibilities exist in this regard: arrangements in the Justice and Home Affairs field can in principle be preserved as they stand. However, bar a scenario of the UK remaining in the EU after a possible second referendum, this seems unlikely. A more selective agreement could preserve only some areas of cooperation, while a more radical form of withdrawal (without an exit deal) could see the loss of cooperation across a range of areas.
- The draft WA of 14 November 2018 covers only separation issues, including the winding down of current arrangements with respect to ongoing police and judicial cooperation in criminal matters, other administrative and judicial procedures and the use of data and information exchanged before the end of the transition period. It stipulates that any procedures in these areas, begun before the end of the transition period, should still be completed according to existing EU rules.

⁵⁶ Tierney, S. and Remond, A. (2018) [‘The Repatriation of Competencies After Brexit: Justice and Home Affairs’](#) Centre for Constitutional Change. Research Briefing.

⁵⁷ Tierney, S. and Remond, A. (2018) [‘The Repatriation of Competencies After Brexit: Justice and Home Affairs’](#)

⁵⁸ The system gathers, analyses and shares information used for operational coordination.

⁵⁹ Which coordinates national investigating and prosecuting in relation to serious crime across EU member states.

⁶⁰ A pan-European database communicating real-time information between participating countries including the UK for law enforcement elements. SISII data is available in the UK to all police officers, police staff and law enforcement agents.

⁶¹ The UK joined the EAW system in 2015. The system provides a mechanism by which individuals wanted in relation to significant crimes are extradited between EU member states to face prosecution, or to serve a prison sentence for an existing conviction. The system is directly accessible by police officers on the street.

⁶² Which records convictions in member states and, through electronic interconnections, ensures that information from criminal records can be exchanged in standardised formats to meet short legal deadlines.

⁶³ Marnoch, G. (2018) [‘Brexit and public services in Northern Ireland’](#). University of Glasgow Brexit Briefings.

The Agreement however, does not extend to specifying the nature of future cooperation on policing and justice matters.

- Neither does the draft Political Declaration Setting out the Framework on the Future Relationship between the EU and the UK⁶⁴ contain sufficient detail to allow for judging the exact nature of future cooperation on policing and civil and criminal justice matters. The document does outline, however, a shared view of the importance of establishing ‘a broad, comprehensive and balanced security partnership’ to comprise ‘law enforcement and judicial cooperation in criminal matters, foreign policy, security and defence, as well as thematic cooperation in areas of common interest’.⁶⁵ The future relationship with respect to law enforcement and judicial cooperation in criminal matters is also said to ‘cover arrangements across three areas of cooperation: data exchange; operational coordination between law enforcement authorities and judicial cooperation in criminal matters; and anti-money laundering and counter terrorism financing’.⁶⁶
- **The most potentially problematic Brexit scenario for policing in the UK is the ‘no deal’ scenario, since it could mean protracted and painstaking future negotiations to replacing police cooperation instruments based on intergovernmental agreements negotiated bilaterally with individual EU member states. With respect to Northern Ireland, such a scenario is associated with a much heightened security risk and would require a much higher degree of policing the UK-Ireland land border.**
- The PSNI would be required to provide significant additional support to UK Government agencies, such as Border Force, UK Visas and Immigration, Immigration Enforcement and UK Revenue and Customs. This would necessitate additional funding, staffing and training at a significant cost.⁶⁷ Indeed, it was announced in December 2018⁶⁸ that, after receiving £16.5m funding from the Treasury to address potential challenges to border policing after Brexit, the PSNI will recruit an extra 308 officers and staff by April 2020.
- Politically speaking, Brexit threatens to overturn a long– and essential to peace in Northern Ireland – process of border de-securitisation. The Counter Terrorism and Border Security Bill 2018, currently making its way through Parliament, gives further grounds for concern in this respect as it introduces anti-terror checks ‘within one mile of the Northern Ireland land border,’ including at train stations connecting the north and south. Analysts express concern with the proposed extensive border control checks running in direct conflict with the UK’s legal commitment to avoid a hard border, and criticise the Bill for introducing powers that can be used after Brexit for *de facto* passport control on the land border, increasing the risk of racial

⁶⁴ UK Government, Department for Exiting the European Union (2018) [‘Draft Political Declaration setting out the framework for the future relationship between the United Kingdom and the European Union’](#). Policy Paper agreed at negotiators’ level and agreed in principle at political level, subject to endorsement by Leaders.

⁶⁵ *Ibid*, p. 15.

⁶⁶ UK Government, Department for Exiting the European Union (2018) [‘Draft Political Declaration setting out the framework for the future relationship between the United Kingdom and the European Union’](#). Policy Paper agreed at negotiators’ level and agreed in principle at political level, subject to endorsement by Leaders, pp 15 – 16.

⁶⁷ Marnoch, G. (2018) [‘Brexit and public services in Northern Ireland’](#). University of Glasgow Brexit Briefings, p. 4.

⁶⁸ BBC News (19 December 2018) [‘Brexit: PSNI to recruit an extra 308 officers after funding boost’](#)

profiling.⁶⁹ The Bill is further deemed to be in conflict with the Good Friday Agreement and to contradict the government's previous assurances of no passport control on the land border.⁷⁰

5. Brexit and policy-making in Northern Ireland: Between local and central government

- Brexit has not only had 'a fundamental impact on the political landscape' but has spurred calls for a more dramatic rescaling of governance arrangements across the UK, including for greater devolution to cities and regions. This is hardly surprising given the extent to which the country's Brexit vote was led by smaller cities and towns in coastal and rural areas, and in post-industrial hinterlands, often dubbed the UK's 'left behind' regions – areas which have actively lost out of globalisation, whilst seeing the least benefits of EU membership.⁷¹
- As such, Brexit poses significant questions for the future powers and capacity of local authorities across the UK to take strategic decisions, influence decision-making at central level and implement locally responsive strategic policies. Given the lack of functioning regional government and Assembly since January 2017, such challenges are particularly acute for Northern Ireland.
- As a way to address the ensuing gridlock of regional governance and in the face of apparent inability to re-establish devolved government, whilst lacking desire to commit to Direct Rule, the government introduced in Westminster the Northern Ireland (Executive Formation and Exercise of Functions) Act which received royal assent and came into force on 1 November 2018. The Act is significant for allowing the Secretary of State for Northern Ireland to legislate on matters which would normally be under the remit of the Northern Ireland Executive.⁷² It further allows senior civil servants to make decisions in the absence of their departmental minister. Arguably, whilst, in the absence of functioning devolved government, the Northern Ireland Act 2018 allows for some operational freedom for administrative decision-making in regional governance, it does not resolve the democratic deficit which the region is experiencing; neither does it offer a better representation of regional interests in the Brexit negotiations.
- **Particularly acute are the challenges that Brexit and the democratic deficit in Northern Ireland together pose to governance and policy-making with respect to the UK-Ireland border region. Due to its history and peripherality, the region has already suffered from 'elevated levels of unemployment, overcrowding, financial dependency and over-representation of declining and low-value added industries'.⁷³ The EU has played a fundamental role in targeted efforts to overcome**

⁶⁹ Committee for the Administration of Justice (21 October 2018) '[Groups urge House of Lords to rethink Counter-Terrorism and Border Security Bill](#)'. Press Release.

⁷⁰ Committee for the Administration of Justice (2018) '[Counter-Terrorism and Border Security Bill - Paragraph 2, Schedule 3, Border Security Powers: A CAJ Briefing Note](#)'

⁷¹ Menon, A. (ed.) (2018) '[Brexit: Local and Devolved Government](#)', The UK in a Changing Europe, Research Paper, p. 4

⁷² Indeed, Mrs Bradley has recently used these powers to appoint members to the Northern Ireland Policing Board in the absence of Northern Ireland Ministers.

⁷³ House of Lords, European Union Committee (2018) '[Brexit: Devolution](#)', 4th Report of Session 2017–19, p. 18.

the economic, social and political asymmetries of the border region. EU withdrawal, therefore, requires renewed attention to developing new collaborative approaches to cross-border policy making. There is a particular need to understand and boost the capacity of organisations (both local government and third sector) to work effectively in cross-border environments with regulatory frameworks that will increasingly differ.

- Furthermore, the withdrawal of EU regional funding after Brexit threatens the return of ‘back-to-back’ development in the border region, while it remains to be seen to what extent replacement funding, such as the UK government’s proposed Shared Prosperity Fund and the future Peace Plus Programme will aim, or have the capacity, to ensure and achieve a cross-border reach.
- We stress in this respect that Northern Ireland is in a unique situation because of the need to consider policy coordination on the island of Ireland as well as with Great Britain. There is a need to maintain an all-island perspective for economic integration, cooperation and integration of public services for which ‘maintaining a pocket of EU law compliance... would be advantageous as it would contribute to minimising regulatory discord between Ireland and Northern Ireland’.⁷⁴

6. Conclusions

- Devolution in the UK has been an asymmetrical process⁷⁵ which has given rise to differing expectations among the devolved administrations with respect to their powers in regional governance.⁷⁶
- Brexit brings new challenges to bear on the complications of this existing system of devolution. This is because, as some have argued, the devolution settlements have reflected ‘a three-sided relationship, in which many key powers are exercised neither in Westminster, nor in Edinburgh, Cardiff and Belfast, but in Brussels. Thus the EU has, in effect, been the glue holding together the United Kingdom’s single market’.⁷⁷
- Serious internal political tensions have, therefore, arisen from the attempt to divorce UK from EU law, posing the question of how regional governance will be exercised in the future.
- This question has a specific resonance for devolution in Northern Ireland, given its unique context. Integral to the 1998 Belfast/Good Friday Agreement, are both North-South (Strand II) and East-West (Strand III) cooperation. With its aim of

⁷⁴ Ibid, pp. 20 – 21.

⁷⁵ Harvey, C. (2017) [‘No, the Northern Ireland Brexit solution was not going to break up the United Kingdom’](#)

⁷⁶ Standford, M. and Gormley-Heenan, C. (2018) ‘Taking Back Control’, the UK’s Constitutional Narrative and Schrodinger’s Devolution’, in *Parliamentary Affairs* 0, pp. 1 – 19, doi: doi:10.1093/pa/gsy039

⁷⁷ House of Lords, European Union Committee (2018) [‘Brexit: Devolution’](#), 4th Report of Session 2017–19, p. 10.

disentangling the UK from EU law, Brexit represents a political and practical threat to both strands of cooperation. Politically, because it exposes the diverging interpretations of asymmetrical devolved arrangements; practically, because it removes the common regulatory basis upon which cross-border trade and governance are built.

- Of concern in this respect is the potentially diminished capacity for the devolved government in Northern Ireland to legislate in the future in policy areas covering integrated cross-border supply chains, and cross-border cooperation on issues such as the environment, policing and criminal justice, among others.
- Significant questions remain about the future of devolution and of governance, more generally, in the UK. These include where the boundaries between reserved and devolved powers will lie, how the devolved institutions will use their powers under the Withdrawal Act, and how the devolved governments will negotiate common policies and frameworks.⁷⁸
- More broadly speaking, a bigger question of sovereignty overshadows the Brexit debate. This question, however, is not as simple as whether decisions should be taken at the EU, UK-central or even regional-devolved levels. As an EU member the UK and its constituent regions have long been part of a multi-level governance system made possible by common EU laws. Divergence from these, while ensuring continued growth, will necessarily require a broader reform of governance. It is already the case that failure to ensure equal growth across the UK has spurred calls for the empowerment of lower level regional and urban local authorities.
- In the UK-Ireland border region such debates will now need to take into account the necessity to ensure continued cross-border cooperation in an environment of increasing regulatory divergence.

⁷⁸ Standford, M. and Gormley-Heenan, C. (2018) [‘Taking Back Control and Schrodinger’s Devolution’](#)