



# The Irish border after Brexit

Tim Durrant, Alex Stojanovic

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*This Insight paper considers how the Government can ensure that the question of the Irish border does not hold up progress at the June European Council.*

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## The UK's exit from the EU means the land border in Ireland becomes part of the EU's external frontier

The border between Northern Ireland and the Republic of Ireland is open, with no controls on goods or people crossing from one jurisdiction to the other. It is often remarked that the only way a traveller can tell that she has crossed the border is because the speed limit signs change from miles per hour to kilometres per hour.

While the border is open, there are legal and economic differences between the two jurisdictions, including separate currencies and tax regimes. These differences lead to legitimate cross-border shopping, not least on fuel where there are petrol stations located along both sides of the border, allowing consumers to shop in the cheaper jurisdiction according to exchange rates and duty rates. They also provide an incentive for cross-border smuggling of excised goods, described as a 'national sport along the border region'.<sup>1</sup>

But none of those differences require any physical checks at the border. Since the formal end of the Troubles, with the Good Friday Agreement of 1998, the border region has seen a dramatic change. Where previously British soldiers manned security checkpoints, and the majority of border crossings were closed, there are now over 200 open border crossings that allow the free flow of goods and at least 23,000 people in both directions every day.<sup>2</sup>

Numerous businesses, particularly agricultural firms, operate across the borders, with suppliers on one side, and processing facilities and customers on the other.

### With no special arrangement, a hard border will be needed when the UK becomes a third country

Brexit will dramatically change that relationship. The UK's decision to leave the Single Market and Customs Union means that it will become a 'third country' to the European Union (EU). If no special arrangements are found for the Irish border, the EU will impose the standard checks they have at their border with any third country. The UK may decide not to impose checks on its side of the border – but risks being challenged in the World Trade Organization (WTO) by other countries who think this is providing more favourable treatment to goods crossing the Northern Irish land border compared to those entering via other ports.

The European Commission has published more detailed information on what a third country border looks like in its series of notes on 'Brexit preparedness'.<sup>3</sup> This would first and foremost mean a new requirement to submit customs declarations to EU authorities documenting what the product is and providing proof of where the good originates.\*

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\* To be specific, it would mean an entry summary declaration, and non-preferential rules of origin

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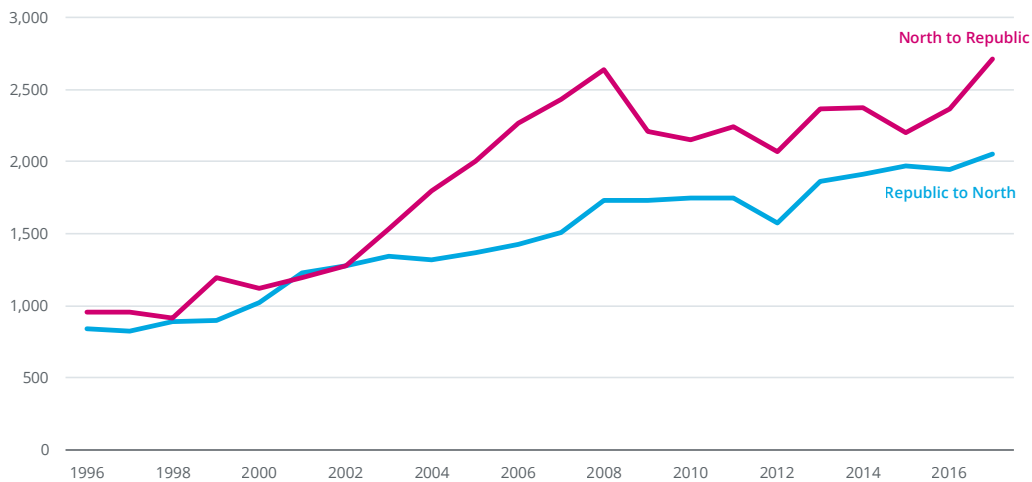
Customs checks account for less than half of the border formalities, however. More onerous are regulatory checks. For these, the rules are very different depending on the product and the risk it poses to consumers or the environment. There would be a range of new requirements to verify that goods comply with the standards and regulations of the importing country,<sup>4</sup> the most damaging of which for Irish trade would be the rules for animal products and plant products. Under EU law these products must go through specialised border posts when they enter a member state.<sup>5</sup> Agri-food accounts for close to 40% of Northern Irish exports to the Republic,<sup>6</sup> and supply chains across the border are highly integrated, with live animals travelling for slaughter in each direction, so it is imperative to find a way to remove the need for these checks.

Other regulatory requirements would impose behind-the-border compliance costs, falling particularly on heavily regulated products – such as chemicals, which accounted for 8% of goods crossing from the North to the Republic in 2017, or road vehicles, which represented around 6.5%.<sup>7</sup> Such costs include re-registering with EU agencies, and getting independent verification of compliance with EU regulations – known as conformity assessment – prior to export. Compliance with these regulatory checks is normally enforced at the border. From the EU's point of view, therefore, an open border would risk opening up a regulatory gap in the Single Market border.

### **Introducing border checks will hamper cross-border trade and risks provoking community tensions**

Goods trade across the border between Northern Ireland and the Republic has grown steadily in the last two decades, as the graph below shows – and any additional costs will disrupt current trade and reduce growth in the future. Analysis by InterTrade Ireland, a cross-border organisation supported by the Irish Government and the Northern Irish Executive, found that if the UK becomes a third country reliant on WTO rules, with the requisite checks at the border, cross-border trade could fall by between 9 and 17%.<sup>8</sup> The report also found that there are 'disproportionate effects on the food-related sectors',<sup>9</sup> which, as noted, make up a significant proportion of cross-border trade.

**Figure 1: Cross-border goods trade between Northern Ireland and the Republic of Ireland, £ million**



Source: Institute for Government analysis of HMRC Regional Trade Statistics.

But the economic impact of Brexit for the two parts of the island is not confined to cross-border trade. An assessment for the Irish Government in 2016 foresaw Irish gross domestic product (GDP) being 2.8% lower by 2030 if the UK joined the European Economic Area (EEA), through to 7% lower if the UK traded with the EU on WTO terms alone, with a 4.3% reduction in its 'customs union scenario' (this does not distinguish North-South from East-West trade and assumes no policy change in response)<sup>10</sup>. The UK Government's own analysis<sup>11</sup> showed Northern Ireland to be one of the three most impacted regions, with GDP 2.5% lower in an EEA scenario, but 12% lower if trade with the EU was on WTO terms, and 8% lower with a free trade agreement.

Even so, facilitating trade is not the most important reason for avoiding a hard border. The open border is a potent symbol of the success of the peace process in Northern Ireland, which was formalised in the Good Friday/Belfast Agreement of 1998.<sup>12</sup> The Agreement established formal and informal mechanisms for cross-community co-operation on a whole host of issues, which has also supported the ongoing 'normalisation' of relations between Protestant and Catholic communities within Northern Ireland and across the border.

These links could be threatened by any change to the arrangements at the border. After the 2016 EU referendum, then First Minister and Deputy First Minister, Arlene Foster and Martin McGuinness, wrote to the UK Prime Minister arguing that 'it is equally important that the border does not create an incentive for those who would wish to undermine the peace process and/or the political settlement.'<sup>13</sup>

A recent study from Queen's University Belfast found that 'there is substantial and intense opposition to possible North-South border checks [of the kind that would be required if the UK were to become a third country with no special arrangements] between Northern Ireland and the Republic of Ireland and to East-West border checks between Northern Ireland and Great Britain.'

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The report found that around 60% of people surveyed would support peaceful protests against checks on the border. It also noted that there is little support for violence against border infrastructure, with 'only 5% of the population as a whole... fairly or very supportive of vandalising border technology'. But the authors found that in focus group discussions, 'there are strong expectations that protests against either North-South or East-West border checks would quickly deteriorate into violence.'<sup>14</sup>

Maintaining the peace process, and the strengthening of cross-border and inter-community links that support it, is, in many ways, a more important driver of agreement than facilitating trade across the border – but the two go hand in hand. The historic legacy of the island of Ireland is why solving the Irish border requires more than simply transposing the arrangements between Norway and Sweden, France and Switzerland, or even the US and Canada.

## **Both the UK and EU have committed to avoiding a hard border but have not agreed how**

### **Both sides agree on the need to avoid a 'hard border' – but they do not agree on what that means**

The 27 member states of the EU (EU27) insisted that future arrangements on the island of Ireland had to be dealt with in the first phase of the negotiations. The UK argued that this was a subject to be resolved in the second phase on the long-term relationship – but lost that argument last summer. The border between Northern Ireland and Ireland currently poses the biggest risk to the timely conclusion of the Withdrawal Agreement between the UK and the EU – the deal that marks the end of the first phase of the negotiations and opens the way to agreeing the future relationship.

Last December the UK was obliged to sign up to a formula on Ireland in order for the European Council to judge that there had been 'sufficient progress' on withdrawal to move negotiations forward.

That formula was set out in the December 2017 'Joint Report'<sup>15</sup> on the key withdrawal issues. This set out a three-stage approach to avoiding a hard border in Ireland, which agreed that it would be resolved:

- 'through the overall EU-UK relationship'; or, failing that
- via 'specific solutions to address the unique circumstances of the island of Ireland' or, if that does not work
- through 'full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 [Good Friday] Agreement'.

This third option has become known as the 'backstop' or 'insurance policy' – it will only be used if neither of the others work. At the last minute, the UK also insisted on

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additional language being inserted, to ensure that any option did not put a border down the Irish Sea. This was a condition of the Democratic Unionist Party (DUP), upon whom the Prime Minister relies for her Parliamentary majority; they do not want any new barriers on trade between Northern Ireland and the rest of the UK (which is much greater than trade with the Republic).

So, the two sides are clear that they want to avoid a hard border. However, they differ on what avoiding a hard border means in practice. The UK Government speaks of avoiding any physical infrastructure at the border, including cameras that can read vehicle number plates, but seems prepared to contemplate new processes and checks that take place away from the border.<sup>16</sup> The Irish Government has a stronger interpretation of the December report, setting out that it wants a 'fully seamless border with no physical infrastructure or related checks and controls',<sup>17</sup> rejecting anything that imposes extra costs on business in the island of Ireland.

### **The UK's proposals on the future relationship are still too vague to resolve the border question**

The UK has suggested that it wants to solve the border question through the future economic relationship it agrees with the EU. The key issues for the border are customs arrangements and regulatory checks.

Even if the future trade agreement secures tariff-free trade, as both sides have said they want, **customs processes** will still be needed to check 'origin' (i.e. that goods qualify for tariff-free access); to check for contraband; to enforce the requirements by the World Customs Organisation (WCO) and WTO that goods be declared when crossing a border<sup>18</sup>; and to collect VAT that becomes due when goods cross the border. Back in August 2017, the UK proposed two ways<sup>19</sup> to deal with the customs declaration and rules of origin issues: the customs partnership and the maximum facilitation options. They have failed to publish any further details since.

Both options face a number of technical and political challenges. Maximum facilitation depends on new systems being in place to allow advance notification, and streamlines customs processing – but does not avoid them – so there would be checks, just not at the border. But most advance notification systems depend on some sort of physical infrastructure to confirm goods are moving as notified. The Northern Irish Affairs select committee took evidence from Dr Christian Bock, Director General of the Swiss Federal Customs Administration, who suggested it would be possible to design a customs system 'without visible checkpoints'<sup>20</sup>, a position since supported by Jon Thompson, Permanent Secretary of HM Revenue and Customs (HMRC).<sup>21</sup> However, the UK has yet to give any more detail on how this would work. The current proposal would impose administrative costs – estimated at £ 32.50 per declaration by the HMRC.<sup>22</sup> To avoid this, the Government envisages exempting small traders, accounting for 80% of cross-border trade, from customs processes, but this would potentially open up a big hole in the EU border.<sup>23</sup>

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The customs partnership is a bigger political challenge: while it would avoid a border in Ireland, it would do so by having the UK operate the EU's border for it – without any of the oversight and enforcement mechanisms currently in place. There is no precedent for such an arrangement – and trade experts at the UK Trade Policy Observatory have called it 'problematic in several regards' and 'extraordinarily complicated'<sup>24</sup> because of the difficulty of tracking goods used as inputs to UK manufacturing products, and the way it would limit the UK's ability to impose higher tariffs than the EU, for example in trade defence. Moreover, the more administratively burdensome it is for a business to claim a rebate, the less valuable a UK tariff reduction would be in bilateral trade negotiations with other countries.

What is clear is that with no more details provided on either proposal since last August, and irrespective of whether either of these prove the basis for a long-term agreement, there is zero prospect of the UK and EU reaching agreement on either of them ahead of the Withdrawal Agreement needing ratification.

Similarly, the UK's options for the future **regulatory** relationship remain vague and untested. In her Mansion House speech in March 2018,<sup>25</sup> the Prime Minister offered binding commitments to observe EU state aid and competition policy, proposed a system based on "substantial alignment" on product standards which would allow "mutual recognition", and said that the UK would seek to stay under the jurisdiction of some of the most important EU regulators. In effect, the UK is asking the EU to accept that the UK after Brexit is likely to stay close enough to EU rules to be allowed access on the same terms as member states to the Single Market, but without being subject to the EU's harmonised rules, nor its supervision and enforcement mechanisms.

This is unlikely to be acceptable to the EU: as former UK Permanent Representative Sir Ivan Rogers recently put it: "Why, again, should members... allow a non-member greater latitude than they have themselves to achieve so-called comparable regulatory outcomes...? This is not going to happen in a month of Sundays."<sup>26</sup> That view was shared in a recent report by the House of Commons EU Scrutiny Committee, chaired by well-known Eurosceptic Sir Bill Cash. It concluded that 'the UK and the EU's visions of the level of mutual recognition that is possible within the future economic partnership diverge so considerably that it may not be possible for the negotiators to find a middle ground'.<sup>27</sup>

So, while the UK has begun to propose future arrangements that could help avoid a hard Irish border, these are far from being agreed by the EU. That means the immediate focus must be on agreeing an acceptable backstop.

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## The priority now has to be to agree a backstop

### Despite its importance, there has been little progress made on agreeing the backstop since December

Ireland and the European Commission are clear that they need a workable 'backstop' as part of the UK's Withdrawal Agreement to ensure that there is no risk of a hard border in the future. The Commission originally published a draft Withdrawal Agreement<sup>28</sup> in February 2018 which, to deliver the backstop, proposed keeping Northern Ireland within the EU customs territory and 'common regulatory area' covering goods and sanitary and phytosanitary regulations. Northern Ireland would also stay within the Single Market regime for state aid and would remain subject to EU institutions such as the Commission and the European Court of Justice (ECJ).

The proposal would mean that checks would be moved from the land border to the Irish Sea – where the EU argues they would be relatively easily added to existing animal health checks (for biosecurity reasons) and port formalities. The EU regards this as a special dispensation, showing flexibility to meet the unique circumstances of Northern Ireland.

The UK Government has rejected this option, with Theresa May saying "the draft legal text that the Commission has published would, if implemented, undermine the UK common market and threaten the constitutional integrity of the UK by creating a customs and regulatory border down the Irish Sea, and no UK Prime Minister could ever agree to it."<sup>29</sup> This position is supported by other UK political parties, particularly the DUP, who point to the commitment in the Joint Report that the UK will ensure 'that no new regulatory barriers develop between Northern Ireland and the rest of the United Kingdom' unless agreed by the (currently non-functioning) Executive.

But having rejected the EU's proposal, the UK has yet to propose an alternative – in public at least. As a result, there has been little progress on this issue since the December Joint Report. To break the impasse, and ensure that the Withdrawal Agreement is concluded by October 2018, in time for ratification by the UK and European Parliaments, the UK needs to propose its own backstop.

### The UK needs to propose its own backstop

The UK has made it clear that the EU version of the backstop is unacceptable. But the Government has not, so far, put forward draft language of its own. It needs to – and it needs to make clear that it is not trying to shirk the commitments it entered into in December. With no other workable proposition yet identified, let alone agreed, it needs to table something that could work, meets those commitments, and is politically acceptable.

The Cabinet is reported to be contemplating proposing that the whole of the UK stays in a customs union with the EU for an extended period. If agreed, that would remove



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tariff and rules of origin issues. It leaves the issue of regulatory convergence which the EU regards as critical to maintaining the integrity of the Single Market. As noted, any solution for the Irish border will have to include arrangements on regulations for goods; avoiding customs procedures is not sufficient to maintain an open border.

### **A UK-wide backstop would better meet the Joint Report commitment than one for Northern Ireland alone**

One option would be for the UK to offer a variant of the EU protocol, but applying to the whole UK. The UK could propose that it would stay aligned to EU rules for goods, as well as continuing in a customs union. That would almost inevitably mean that the ECJ would continue to have an effect in the UK, due to its role in interpreting EU law, even if the agreement itself were overseen by an alternative dispute resolution mechanism.

This would be the least disruptive to the economy on both sides of the border – and much, much less disruptive than no deal. It would avoid introducing any new barrier to East-West trade – which is significantly more important for both Northern Ireland and the Republic than North-South trade. It would also, once agreed, allow civil servants working on border issues, the biggest implementation challenge, to stop planning for a 'no-deal' outcome in both March 2019 and January 2021. By coming as close as possible to preserving the status quo for the movement of goods, it would meet the important political test, which the current EU proposal does not, of not being seen to favour the nationalist or unionist communities in Northern Ireland – neither 'more Ireland' nor 'more UK'. In this way the UK could show that it continues to stand by the commitments it made in the Joint Report.

### **If a UK-wide backstop proves un-negotiable, the parties should consider adapting the Northern Ireland-only backstop**

But the EU has indicated that while it is prepared to make an exception for Northern Ireland, in response to its special circumstances, it is not prepared to offer the same deal for the UK.

If it sticks to that line, the UK and the EU will need to explore the promised 'innovative solutions' either for the North – or the whole island of Ireland – that are both compatible with the Joint Report and do not upset the delicate unionist-nationalist balance of the Good Friday/Belfast Agreement. The UK could, for example, try reducing coverage to key sectors for cross-border trade and try negotiating equivalence in specific areas – whereby the EU would accept that the UK was meeting the same outcomes but by different means. It could also propose that the backstop was overseen by whatever governance process is agreed for the Withdrawal Agreement rather than the EU institutions as now. The aim would be to remove the implication that Northern Ireland was separated from the rest of the UK and had become part of the EU's customs territory and regulatory jurisdiction.

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## **Both sides have strong incentives to avoid no deal – and need to show flexibility to reach agreement**

The incentive to reach an agreement is high – a ‘no deal’ Brexit would be highly damaging not just for the peace process, but also for the all-island economy. Both sides may have to accept that that means a compromise neither likes. Attention should then turn to how to avoid that backstop being needed.

## **Any backstop potentially pre-empts the future relationship**

### **Once in place the backstop could become a full stop**

The UK always argued that the Irish border issue could not be settled separately from the long-term future relationship. One of the risks of the EU’s preferred sequencing was that the Irish border settlement would pre-empt the wider negotiations. The EU sought to avoid that by including a commitment in the Joint Report that the conclusions on Ireland would not ‘pre-determine the outcome of wider discussions on the future relationship between the European Union and the United Kingdom and are, as necessary, specific to the unique circumstances on the island of Ireland.’<sup>30</sup> But the truth is that whatever is agreed will condition the negotiations.

The EU is worried that the UK will use the Irish border to leverage a favourable relationship with the Single Market – access without commensurate obligations – and would see a UK-wide backstop as setting a precedent for that. But the Northern Ireland-only backstop envisaged by the EU is not neutral either: the UK would in effect have to decide whether the future relationship on customs, regulation and VAT it negotiates with the EU would leave the backstop, and hence barriers to East-West trade, in place. In this scenario, the UK faces a choice between no deal and an internal border; a choice which the EU is refusing to countenance. Both sides have an incentive to make sure the backstop does not become permanent.

### **The UK needs to ensure it does not give away future relationship leverage in proposing a backstop**

The UK should be wary of proposing a backstop that could become a sustainable permanent solution. An agreement too close to the so-called Jersey model,<sup>31</sup> where the UK stayed in a customs union and the Single Market for goods, would, in principle, suit the EU’s economic interests by giving their exporters unencumbered access on goods where they have a big surplus, while leaving services, where the UK has a surplus, outside. Of course, it would mean the EU accepting the divisibility of the Single Market and its four freedoms\* if the UK was not obliged to continue with free movement of labour.

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\* The four freedoms of the Single Market are free movement of goods, services, capital and people.

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The UK needs to ensure that the backstop both meets the commitments of the Joint Report and is sufficiently unappealing to both sides so both have an incentive to conclude a final agreement. Two factors that the UK needs to consider are any so-called level playing field commitments<sup>32</sup> (cross-cutting policies where the EU is concerned the UK may seek to gain a competitive advantage by deviating from EU rules), and whether the backstop is time-limited.

The EU's worry about the risk of the UK deciding to tilt the playing field is one of the UK's stronger negotiating cards on the future relationship: a potential point of leverage to get a better deal than the Canadian free trade agreement, in particular on services. It is important therefore not to concede it through a backstop agreement. The EU's Northern Ireland-only draft only mentions commitments deemed important to protect North-South co-operation. The UK needs to hold out against giving away more in a backstop, particularly a permanent rather than a temporary one.

Another consideration for the UK Government is whether to propose a UK-wide backstop as a permanent or a temporary solution. The EU clearly envisages the backstop as a permanent fall-back. The UK should propose a time-limited UK-wide backstop, not dissimilar from the 'customs and regulatory alignment implementation period' that the Prime Minister is reportedly considering for after the end of the formal transition period.<sup>33</sup> Unless the UK decided it wanted to tie itself into regulatory alignment indefinitely, it should propose a time-limited solution (though one which goes beyond the transition in the Withdrawal Agreement). This would also ensure that both sides have incentives to continue negotiating a more mutually acceptable future relationship, as a temporary backstop would simply postpone, not remove, the need for a border in Ireland.

## **The future relationship negotiations will not be able to avoid the Irish dimension**

If the UK is serious about settling the Irish border issue through its long-term economic partnership with the EU, there first needs to be agreement on what the 'hard border' is that both sides are trying to avoid. The UK then needs to make concrete proposals for customs. If no checks at all are acceptable, the only options are a customs partnership or a new customs union: if streamlined checks are possible, a version of 'maximum facilitation' may come back into play.

No customs option can deliver an invisible border without solving the regulatory issues. The UK will need to articulate what guarantees come with its offer of 'substantial alignment', and how it would make this work to avoid the need for regulatory checks. The UK is unlikely to make much headway with its proposal for a general scheme of mutual recognition. It could try to negotiate equivalence in some sectors while aligning in others. But if the EU does not budge, the Government may ultimately be forced to choose between continued UK-wide alignment on goods regulation – or a Northern Ireland-specific solution.

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The UK also needs to consider what the scope is for 'specific Irish solutions', for example on agri-food, where the economy is already highly integrated and Ireland already operates as a single unit for animal health issues, with attendant checks. Agriculture is already a devolved area and a future Northern Irish Executive may prefer to stay aligned with the Republic – its farm payment scheme is already closer to the Republic's than England's.<sup>34</sup> There might even be scope to explore options that recognise the unique geographical position of the island of Ireland and the likely continuing importance of the UK economy to the Republic.

The Irish border issue is preoccupying minds now as it is the biggest roadblock on the way to a Withdrawal Agreement. But negotiators on both sides will not be able to regard the issue as solved by whatever compromise emerges in the autumn: both will need to take full account of the Irish dimension as they negotiate a sustainable long-term relationship between the UK and the EU.

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**Institute for Government, 2 Carlton Gardens  
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