

No Deal Brexit and the Union

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About this report

This report considers the potential implications for devolution and the Union of leaving the EU without a deal. It looks at how the UK government and devolved administrations have prepared for a no deal Brexit, what issues they will need to manage in the aftermath, and how long-term risks to the Union can be mitigated.

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Summary

Brexit has put a strain on relations between the nations of the UK. A no deal departure from the EU could take it to breaking point. The Scottish and Welsh governments have felt increasingly side-lined since 2016 and, aside from the DUP, voices from Northern Ireland have been unrepresented in the Brexit process.

While the devolved administrations have been vocal in their opposition to leaving the EU without a deal, the UK government has committed to leaving the EU on the 31 October “come what may”. This runs counter to the prime minister’s commitment to strengthen the Union

Preparing for no deal

- The UK government and the devolved administrations have undertaken substantial work to prepare for no deal and mitigate any negative effects. In the lead up to the original March deadline the four governments worked well together.
- Since Boris Johnson became Prime Minister and formed a new government in July 2019, there has been a decline in engagement with the devolved governments.
- No deal will cause significant disruption throughout the UK. Some consequences, including for the agriculture and fisheries sectors, will be felt acutely in Scotland and Wales. But the consequences will be most severe in Northern Ireland, where the border with the Republic of Ireland would harden overnight.

Managing the aftermath of no deal

- The current situation in Northern Ireland – where departmental functions are exercised by civil servants without ministerial direction – will be unsustainable in the event of no deal. The UK government will need to impose direct rule in Northern Ireland. At the same time it will need to work with Dublin to mitigate a likely backlash.
- Short term no deal planning has diverted attention away from longer-term questions about the relationship between Westminster and the devolved governments, including how to replace EU law with new UK-wide common frameworks and how to replace EU funding.
- Meaningful and systematic engagement between the UK and devolved governments will be necessary for negotiations on future international agreements, including the UK-EU relationship and other trade deals.
- No deal will mean no transition period, so these unresolved issues will need to be addressed urgently, in what will be an even more charged political atmosphere.

Mitigating the risks to the Union

- A no-deal Brexit will increase the risks faced by the Union itself. In Northern Ireland, no deal and direct rule would make a swift return to power sharing unlikely. Pressure for a border poll on the island of Ireland is likely to increase. More thinking about what a united Ireland would look like needs to be done before this happens.
- The Scottish government intends to hold a second independence referendum. This will need the agreement of Westminster. However, if there is a clear majority in Scotland for a second vote on independence, it would be unsustainable and counterproductive for the UK government to block it indefinitely.
- A modest independence movement has developed in Wales, although a majority of voters remain in favour of the Union. Nonetheless, Brexit has illustrated that Welsh devolution is vulnerable to decisions taken at Westminster over which it has no control. If the UK government does not take steps to improve its relationship with Cardiff, Welsh discontent may continue to grow.
- If the Union is to survive and prosper, people in all parts of the country need to be persuaded of the value of remaining within the UK. The UK government needs a new strategy to make the positive case for the Union, and to work better with the devolved governments.

1. Introduction

This report considers the implications of a no-deal Brexit for devolution and the Union. It is the product of a short research project involving interviews with politicians and civil servants in the four UK nations, many of whom wish to remain anonymous. We also draw upon the evidence on Brexit and devolution gathered by the Institute over the past three years.

We found that, after a difficult start, relationships between the UK and devolved governments improved in the latter period of the Theresa May government. Civil servants across the country have worked hard to prepare for the consequences of Brexit, including a possible no-deal exit. The different administrations have collaborated well, for instance to ensure that retained EU law will function effectively across the UK in the immediate aftermath of no deal.

But trust has declined in recent months – at least at the political level. Difficult political relationships have hampered information sharing. This increases the risk that contingency planning for no deal does not reflect the particular challenges that may be faced at the devolved level.

Many questions about how the four governments will work together after Brexit remain unresolved. A no-deal departure would create an even more politically charged atmosphere, which would be unlikely to help UK-devolved relations.

If the UK leaves the EU without a deal the Union itself is likely to come under sustained pressure in all corners of the UK.

2. The political context

“If we choose to leave without a deal on 29 March, this country will face economic, political and constitutional challenges.” – Michael Gove, then-Secretary of State for the Environment, Food and Rural Affairs, 13 March 2019.¹

Brexit is placing a major strain on the relationships between the nations of the UK

Relations between the nations – and the governments – of the UK have been strained ever since the EU referendum. A no-deal Brexit would pose additional problems.

In June 2016, 62% of Scottish voters voted in favour of Remain, and there were majorities in every Scottish voting area. The Scottish government says there is no mandate to take Scotland out of the EU against its wishes, or at least not on terms that have not been approved by the Scottish Parliament or people.

There was also a pro-Remain majority in Northern Ireland, which mapped onto the sectarian divide: nationalist voters and parties were heavily in favour of staying in the EU, while unionist voters (more narrowly) favoured Brexit, as did the largest unionist party, the DUP.²

Voters in Wales opted to leave the EU by a small margin, but the Welsh government opposes Brexit, particularly in its harder forms. There is also evidence that Welsh-born and Welsh-speaking voters were predominantly anti-Brexit in 2016, and that it was English-born residents that tipped the balance in favour of leaving.³

Overall, the Leave campaign was victorious due to a pro-Brexit majority of 55% in the eight English regions outside London (although many cities and towns within those regions voted to Remain).⁴

After replacing David Cameron as Prime Minister in July 2016, Theresa May appeared to recognise the importance of working in partnership with the devolved governments on Brexit when she promised to develop a shared “UK approach and objectives for negotiations”.⁵ But this rhetoric has not been matched by action. All major decisions on the Brexit strategy have been taken – more or less unilaterally – by UK ministers, with limited consultation with their devolved counterparts.

There has been no devolved government in Belfast since early 2017. This has left Northern Ireland – and the nationalist community in particular – with no clear voice in the negotiations, even though Brexit is set to have a bigger impact on Northern Ireland than any other part of the country.* These effects would be especially acute in a no deal scenario that restricted economic activity across the Irish border. Only the DUP have had a formal route to influence Brexit, through their seats in the Westminster

* In the absence of a sitting Assembly in Northern Ireland, the only political representation is at Westminster. At the 2017 election Sinn Féin were the only nationalist party elected to the UK Parliament, but their abstentionist policy means that there are no sitting Northern Ireland nationalist MPs

Parliament and their confidence and supply arrangement with the Conservative party. But the DUP does not represent all of Northern Ireland's people. That has enabled Leo Varadkar, the Irish Taoiseach, to claim that it was for his government to protect the interests of "the nationalist people in Northern Ireland".⁶

The other devolved nations have found their ability to influence the Brexit process to be limited. In the months following the referendum both the Scottish and Welsh governments advocated for a softer form of Brexit in which the UK would remain in the customs union and single market.⁷ With these options long ruled out by UK ministers, the devolved administrations now favour a second referendum.

No deal would be highly controversial in all three devolved nations

The Scottish and Welsh administrations oppose leaving the EU without a deal. In a joint letter to the prime minister in July, the Scottish and Welsh first ministers argued that "It would be unconscionable for a UK government to contemplate a chaotic no deal exit and we urge you to reject this possibility clearly and unambiguously as soon as possible."⁸ A recent report by the Bennett Institute and Centre on Constitutional Change found that "the overwhelming majority of elected politicians outside England are strongly opposed to the prospect of leaving the EU without a deal". Both the Scottish Parliament and Welsh Assembly have explicitly voted against no deal, and polling data in Scotland and Northern Ireland suggests that it has little public support.⁹

The Scottish and Welsh governments have said that a no-deal Brexit would make a breakup of the Union more likely. The Scottish Government intends to seek Westminster authorisation for a second independence referendum in any case, but this plan may be accelerated if the UK leaves the EU with no deal. The Welsh Labour government is committed to the Union, but faces a growing challenge from the pro-independence Plaid Cymru. In this context, First Minister Mark Drakeford has expressed his "dismay... at the carelessness with which the new UK government has treated the future integrity of the Union."¹⁰

In Northern Ireland, meanwhile, a no-deal Brexit could make it even more difficult for power sharing between unionists and nationalists to be restored. The two main parties remain diametrically opposed on Brexit, and no deal will only drive them further apart. Even when it was functioning, the executive struggled to make quick decisions and "it is not clear how well a new executive could cope being pitched into crisis management".¹¹ It could also bolster the case for a referendum on Irish reunification.

A no-deal Brexit would be a high-stakes gamble with the future of the Union.

Theresa May's former Chief of Staff, Gavin Barwell, has said it was the future of the Union that persuaded the former Prime Minister that no deal was not a viable route forward for the UK.¹² A number of her most senior ministers re-iterated these concerns, with Sir David Lidington warning of the 'real risk' to the Union posed by no deal.¹³ But Theresa May left Downing Street on 24 July 2019, and her successor does not seem to share these concerns to the same extent.

Leaving the EU without a deal would run counter to the prime minister's commitment to strengthen the Union

When he took office, Boris Johnson made two constitutional commitments that stand in direct tension with one another. In his first public statement as prime minister, he promised to strengthen the UK, which he described as "the awesome foursome that are incarnated in that red, white and blue flag, who together are so much more than the sum of their parts."¹⁴ He toured the capitals of the UK, met political leaders in Scotland, Wales and Northern Ireland, and designated himself minister for the Union.¹⁵

But in the same speech, the prime minister underlined his determination to take the UK out of the EU by 31 October "no ifs, no buts" and, if necessary, no deal. In addition to the many practical and economic challenges that a no deal exit would present, this scenario would further test the strained relationship between the UK and devolved governments. It would almost certainly undermine the prime minister's ambitions to strengthen the Union.

Despite opposition from Cardiff and Edinburgh, the UK government has continued to make clear that it is prepared to leave the EU without a deal if negotiations fail, and Whitehall has accelerated its no-deal preparations accordingly. Boris Johnson's key demand has been that the EU agrees to revise the Irish backstop in the Withdrawal Agreement. The backstop, negotiated between the Theresa May administration and the European Commission, was designed to guarantee that Brexit does not create a hard economic border on the island of Ireland.

On 2 October the government published proposals for an alternative to the backstop. The initial response from Dublin and other EU capitals was not encouraging. Simon Coveney, the Irish foreign minister, said: "If that is the final proposal, there will be no deal."¹⁶ However, following talks with the prime minister, Irish Taoiseach, Leo Varadkar, said that a deal was "possible" by the end of October.¹⁷ Negotiations are ongoing, but it is uncertain whether this or any Brexit deal could get through the current House of Commons, even if the UK and EU negotiating teams make a breakthrough.

If a deal is not agreed, MPs have taken action to prevent the UK leaving on 31 October. In September, Parliament passed the so-called "Benn Act", which requires the prime minister to seek a further three-month extension to the Brexit process if a withdrawal agreement has not been ratified. Despite this, the prime minister told the Conservative party conference in early October that he was still committed to leaving the EU at the end of the month, "come what may".¹⁸

The UK government is reportedly exploring ways around the Benn Act, but most legal experts believe that the Act is watertight. Without a vote in Parliament under the terms of the Act, there has been no lawful route identified that would allow the Prime Minister to avoid asking for an extension.¹⁹ Consequently, the only credible path to a Halloween no-deal departure is if the EU refuses to grant an extension. This is also improbable as European leaders do not want to be blamed for a disorderly Brexit.²⁰ But even if a third Brexit extension is secured, a no-deal Brexit remains the legal default if the clock runs out again – unless Parliament commits to another course of action.

3. The potential consequences of no deal

“No deal would have a profound and long-lasting negative impact on Northern Ireland’s economy and society.” – David Sterling, Head of the Northern Ireland Civil Service, 10 July 2019.²¹

There is a risk that no deal will cause significant disruption throughout the UK

It is impossible to say exactly what will happen in the event a no-deal Brexit. It will depend on the readiness and reactions of the UK government, the devolved administrations, businesses, citizens and EU member states.

Given this level of uncertainty, the UK government has produced planning assumptions and a “reasonable worst-case” scenario to inform preparations as part of Operation Yellowhammer. It makes clear that the effects of no deal would be felt right across the UK.²² The UK Government is planning for a dramatic reduction in trade flows – with 40–60% fewer lorries passing through the UK’s key trade artery with the EU (Dover-Calais) on day one, improving to 30–50% within 3 months. If problems at these ports lead to a reduction in trade with the EU, the reduced flow of goods and medicines could be felt most acutely in remote parts of the UK, including northern Scotland, Northern Ireland and rural parts of Wales, which are at the end of distribution chains.

The economic impact of no deal will not be spread evenly across the country. For example, agriculture is disproportionately important to the economies of Wales, Scotland and Northern Ireland, accounting for 0.8%, 0.9% and 1.6% of the three devolved nations’ economic output (in terms of Gross Value Added) in 2017 respectively. In England, the number is 0.5%.²³ With a significant dependence on trade with the EU, the imposition of the EU’s tariffs for trade with third countries, which are particularly high for agricultural products (around 40% for sheep), could have a dramatic impact on the competitiveness of UK agriculture.

Similarly, Scottish fisheries rely on exports to the EU. In 2017, Scottish vessels accounted for almost 60% of the UK’s fishing catch by value, and 71% of UK fish exports are sent to the EU.²⁴ These would be affected by high tariffs and significant additional paperwork and bureaucracy at the border – making the prospect of business with the continent unviable for some vessels, for a period at least.²⁵

If no-deal disruption hits manufacturing exports, this will be felt most keenly in Wales and Northern Ireland, from which 61% of exports are sold within the EU, compared with a UK average of 50%.²⁶ Disruption to the financial services industry would have a greater impact on Scotland than the other devolved nations and most parts of England, with the major exception of London. The sector represents 7% of economic output and 6% of jobs in Scotland.²⁷

No deal will have particularly severe consequences for Northern Ireland

In March 2019, David Sterling, the Head of the Northern Ireland Civil Service, warned that “the cumulative impact and disruption from a ‘no deal’ scenario will be longer and much more severe in Northern Ireland than in GB”.²⁸ Northern Ireland shares the UK’s only land border with the EU, which poses practical difficulties for cross-border supply chains and for individuals and communities living near the border. Its economy relies heavily on trade with the Republic of Ireland and on the agri-food sector. In 2017, Ireland was the destination for 39% of Northern Ireland’s exports, of which a third were ‘food and live animals’ worth £1bn.²⁹

Additional challenges are posed by the political situation in Northern Ireland. Only twenty years have passed since the Good Friday Agreement was negotiated between unionists, who want Northern Ireland to remain part of the UK, and nationalists, whose aim is Irish reunification.³⁰ Central to the peace settlement was the elimination of a visible security border on the island of Ireland, which was seen as essential to allow both identities to coexist. There was no need for trade barriers since both countries were EU members. Avoiding the re-emergence of a hard border was a key aim of the withdrawal agreement negotiations, but in the absence of such an agreement, serious difficulties are likely to arise.

In the event of no deal, the UK government’s stated strategy for managing the Irish border in the short term is – with some limited exceptions – to have no checks, no controls on goods and no tariffs.³¹ However, the viability of this strategy is undermined by the government’s own Operation Yellowhammer document which notes that this model “is likely to prove unsustainable due to significant economic, legal and biosecurity risks and no effective unilateral mitigations to address this will be available”.³²

Further, the document warns that on exit day the UK will become a third country and immediately be subject to EU tariffs and regulatory requirements. This will put a significant strain on businesses in Northern Ireland, a high proportion of which are small and medium-sized. These companies will find it particularly difficult to absorb the costs of additional administrative requirements.³³ The UK government’s own analysis predicts that many businesses will be unable to comply with these new requirements and will either cease trading or pass the increased costs on to consumers. Northern Ireland’s Department of Economy estimates that at least 40,000 jobs are at risk in this scenario.³⁴

The reality is that, regardless of what happens with infrastructure, the border on the island of Ireland will harden overnight after a no-deal Brexit. Businesses in the Republic of Ireland, particularly those that then sell on into the rest of the EU, will be wary of buying products from Northern Ireland given the potential for enforcement proceedings. Northern Ireland and the UK will be outside of the EU single market. This means that, unless goods have the correct paperwork, labelling and comply with customs rules, they won’t be legally tradeable.

The agri-food sector will be particularly hard hit. There have been warnings of 'milk lakes' and 'cattle culls' if dairy farmers are no longer able to sell their product in Ireland.³⁵ Although these more colourful claims have been dismissed by the Ulster Farmers' Union (UFU),³⁶ the UFU has nonetheless been strongly opposed to both no deal and the UK government's zero tariff policy.³⁷ We heard concerns in Northern Ireland that, if products can move freely from south to north, but not north to south, this could spark civil unrest from those whose livelihoods are affected.

Yellowhammer also warns that "price and other differentials are likely to lead to the growth of the illegitimate economy". The chief constable of the Police Service of Northern Ireland (PSNI), warned that this could potentially lead to the revival of paramilitary groups, who may seek to exploit new criminal opportunities in border areas where they already operate.³⁸ The PSNI has also raised concerns that border infrastructure may become a target for violent attacks.³⁹

A no-deal Brexit would bring about an immediate end to important law enforcement co-operation between the UK and the EU, such as the European Arrest Warrant system and data exchange facilitated by agencies such as Europol.⁴⁰ This has caused particular concern in Northern Ireland, due to the high degree of cross-border justice co-operation between the PSNI and Irish police.⁴¹

4. Preparing for no deal

“The biggest determining factor affecting our ability to prepare effectively is the UK Government itself, and its willingness to provide additional funding, share information and meaningfully work with us. Unfortunately, under the new UK Government, engagement and information flow has significantly reduced.”

– Welsh Government no-deal Brexit action plan, 16 September 2019.⁴²

Significant work has been undertaken by the governments of the UK to prepare for a no-deal Brexit

The UK and devolved governments have made preparations to mitigate the risks set out in the previous section. DExEU identified 310 projects being run by departments in preparation for Brexit.⁴³ Some of that work relates to any form of Brexit, such as creating and implementing new regulatory structures in areas that were previously subject to EU oversight. In the event of no deal, and without a transition period, these structures will need to be in place more urgently.

Other elements of the work by the four governments relates specifically to contingency planning for a no-deal Brexit. In practice, no deal is a massive organisational challenge that requires co-ordination between the UK government, the Scottish and Welsh governments and the Northern Ireland Civil Service. Much of the groundwork has already been laid but joint working remains essential and the Scottish and Welsh governments are pushing for closer collaboration.

Preparation for no deal has four aspects:

- **UK-wide preparedness** – work that is led by UK government departments on projects extending across the UK with input from the devolved administrations, for example the work of the Border Delivery Group to prepare the border in Holyhead.
- **Preparedness at a devolved level** – action taken by the devolved administrations to prepare for no deal in devolved areas. For example, working with major supermarkets on stockpiling, and supporting social care providers.
- **Legislation** – preparing the statute books of the UK and devolved administrations for exit day to ensure they continue to function once the UK is no longer subject to EU law. For example, by passing statutory instruments to correct ‘retained EU law’ in the UK Parliament and devolved legislatures.
- **Civil contingencies preparation** – action co-ordinated by the Civil Contingencies Secretariat to respond to crises that may arise in the event of no deal. For example, the work of local resilience forums.

Devolved input into UK-wide preparedness is essential for effective planning

The UK government has led preparedness work in areas that require UK-wide working. In some cases, this is because these areas fall within the exclusive competence of the UK government, for example in customs, immigration and security co-operation. In other cases, devolved areas may be affected, but UK-wide co-ordination is needed. Health policy, for example, is a devolved matter, but the UK government is responsible for ensuring medicine supply across the UK. The UK government is also responsible for other aspects of preparedness such as ensuring adequate food supply, energy supply and animal health.⁴⁴

Although this work is led from Whitehall, input from the devolved administrations is necessary to prepare effectively. The devolved administrations have information about specific issues that will affect their businesses, communities and citizens, and how this should inform and feed into the planning process. The devolved administrations are also likely to have a strong interest in many reserved areas. For instance, the significance of Scotland's financial services industry means that the Scottish government will want to participate in the no-deal plans for that industry. The UK and devolved governments will also have to work together on implementation of plans. For example, food supply is co-ordinated at a UK-level, but the devolved administrations will be responsible for distribution.

The devolved governments have had some ability to provide input on Brexit through formal intergovernmental channels such as the Joint Ministerial Committee, both in plenary form (JMC(P)), which is attended by the prime minister and first ministers, and the JMC European Negotiations (JMC(EN)). In 2019 a separate Ministerial Forum (European Negotiations) was also established, with a focus on questions relating to the future UK-EU relationship.⁴⁵

Northern Ireland officials have attended in lieu of ministers, as there has been no functioning executive since 2017, but their role has been restricted to providing factual information only. In any case, meetings of these bodies have been held sporadically, often to the frustration of the devolved governments.

After the failure to pass a deal in early 2019 and with no deal an increasingly likely outcome, the UK government established specific structures to co-ordinate preparations. UK-wide preparedness work is now led at ministerial level by the EU Exit Operations (XO) Cabinet Committee. Its terms of reference are to "to consider matters relating to the effective delivery of plans for an orderly exit from the EU".⁴⁶ Unusually for a UK cabinet committee, ministers from the devolved administrations are invited to attend, but only "as the agenda demands".⁴⁷ Northern Ireland officials also attend.

Additionally, the devolved administrations have contributed to UK-wide preparations at a departmental level, with UK officials working directly with their counterparts in the other administrations, and ministers maintaining bilateral relations in particularly important areas. Departments have developed their own systems for devolved engagement, the scale of which depends on the scale of the no-deal challenge faced

by the department and the extent to which there is an overlap between EU matters and devolved powers.

The department at the frontline of the Brexit/devolution interface is the Department for the Environment, Food and Rural Affairs (Defra). Defra has established its own intergovernmental machinery, including an Inter-Ministerial Group for Environment, Food, and Rural Affairs (IMG EFRA), and various civil service working groups, which have sought to ensure that all parts of the UK are prepared for disruption in areas such as food supply and animal exports.

When he was secretary of state for Defra, Michael Gove spoke of his good relations with Scottish ministers and devolved officials.⁴⁸ This was echoed by officials we spoke to in the devolved administrations, who recognised that Defra took devolution issues seriously. However, they reported greater frustration in their interaction with other parts of Whitehall.

The effectiveness of preparations by devolved administrations depends on good co-ordination with Whitehall

The devolved administrations have been making their own no-deal preparations. The Scottish government has established a Ministerial Group on EU Exit Readiness “to oversee the cross-Government programme of mitigation work to prepare and improve readiness for EU Exit”.⁴⁹ Welsh government preparations have been co-ordinated by “weekly Cabinet discussions supported by weekly meetings of the Cabinet sub-committee on European transition”.⁵⁰

In the absence of ministers, the Northern Ireland Civil Service (NICS) has been responsible for co-ordinating no deal planning in Northern Ireland. It has worked closely with Whitehall. Officials told us that the absence of ministers had, in some ways, made planning easier: Whitehall has sometimes appeared more willing to share information with NICS than with their Scottish and Welsh counterparts, as there were no concerns that it could be used for political purposes. However, although NICS officials have been increasingly vocal in highlighting the impact of no deal on Northern Ireland,⁵¹ without ministers there has been no one to raise concerns at a political level.

Planning by the devolved administrations has focused on devolved policy areas, such as agriculture and fisheries, providing advice and information to businesses, communities and citizens and mitigating the knock-on impacts on public services. Even where competence is devolved, collaboration and information-sharing with Whitehall has been imperative. In some cases, no-deal planning has involved areas where the division between UK and devolved competence is unclear or there is significant overlap. For example, the Welsh government has developed traffic overflow plans for ports including Holyhead, while the UK government has taken responsibility for border management preparations.⁵²

In other areas, information sharing has been required to ensure consistency. For instance, the devolved administrations and the UK government have run communication campaigns to support businesses and citizens in their Brexit

preparations, and these have required co-operation. Devolved officials emphasised to us that their information needed to match that shared by the UK government.

There are also questions of capacity. The devolved administrations are significantly smaller than Whitehall and have access to fewer specialist skills and civil servants. Whitehall officials told us that often the devolved administrations would “piggyback” on their schemes when both governments had the same objectives and the issues were highly technical areas such as chemicals regulation.

The governments have worked together effectively to fix the statute book for a no-deal Brexit

The UK and devolved governments have worked together to correct EU law that has been copied into UK law by the European Union Withdrawal Act 2018 (EUWA). The Act gave devolved ministers the power to correct retained EU law in areas of devolved competence using statutory instruments (SIs). It also gave UK ministers the power to make SIs in these areas, acting jointly with devolved ministers.

This process has worked well. In the case of both Scotland and Wales, the majority of EUWA SIs have been passed at Westminster with devolved agreement, with a smaller number being dealt with at the devolved level. Welsh ministers brought SIs before the Welsh Assembly where a policy change was necessary, for example over Structural Funds, but otherwise deferred to Westminster.⁵³ Welsh Brexit Minister Jeremy Miles told us that the SI process required “unprecedented levels of work at both ends of the M4”, but also that it was effective and well-constructed in the context of wider uncertainty about intergovernmental relations.⁵⁴ This perspective is shared by officials across the governments.

SIs have now been used to fix UK law in most critical areas ahead of 31 October. The UK government has “worked closely with the Scottish and Welsh Governments to ensure that over 200 Statutory Instruments legislating in a devolved area and required for 31 October have been laid before Parliament”.⁵⁵ Around 51 SIs have been put in place in Westminster specifically for Northern Ireland.⁵⁶ Welsh ministers have laid 43 SIs before the Welsh Assembly and given consent to 147 SIs taken through Westminster.⁵⁷ The Scottish government expects nearly 50 Scottish SIs to have passed through the Scottish Parliament by 31 October.⁵⁸

We were told of occasional disagreements over what issues were and were not devolved, for instance over state aid and geographical indications on foods. On such issues, UK and devolved ministers agreed to disagree, and focused on passing the necessary SIs to fix the law before exit day while reserving long-term judgements on whether the matter was devolved or not. Such disagreements will need to be resolved after exit day as soon as any part of the UK wishes to diverge from the inherited (and corrected) EU legal framework. But the process has ensured that there should be legal certainty in the immediate aftermath of a no-deal exit.

Structures are in place to manage crises, but they will rely on good working relationships

Since June 2018, the Civil Contingencies Secretariat (CCS) has been working on the government's contingency preparations, codenamed Operation Yellowhammer. It focuses on "mitigating short-term, severe, disruptive impacts where planned mitigations are not delivered in time or are not sufficient."⁵⁹ This work involves understanding major risks and agreeing common planning assumptions (as recently published by the UK government) to ensure that departments have contingency plans in place. It also establishes a Command, Control and Co-ordination structure (C3).

In the event of no deal, the C3 structures will become operational. The CCS will be responsible for co-ordinating all the bodies, including 42 local resilience forums in England and Wales, equivalent bodies in Scotland and Northern Ireland, the Scottish and Welsh governments and the Northern Ireland Civil Service. The devolved administrations will be responsible for taking actions where necessary, directing operations and collating information from local resilience forums, sectors and industries. They will also implement decisions made by emergency response committees and escalate issues where necessary.⁶⁰ Devolved administrations have their own structures to facilitate this, such as the Scottish Government Resilience Room (SGoRR),⁶¹ the Wales Resilience Forum,⁶² and the Civil Contingencies Policy Branch (CCPB) in Northern Ireland.⁶³

These structures, although comprehensive, are largely untested. In practice, the ability to respond to crises will depend on efficient information sharing and management. A failure to share well could cause serious problems and, in the most severe circumstances, potentially cost lives.

Engagement between the UK government and devolved administrations has deteriorated in recent months

In the final months of Theresa May's premiership the UK government put more effort into joint working, after criticism of how it had engaged with devolved counterparts in the early phase of Brexit. Sir David Lidington, Minister for the Cabinet Office at the time, and Cabinet Secretary Sir Mark Sedwill made a push to share more information with the devolved governments when no-deal preparation first ramped up in December 2018. They ensured that, starting in February 2019, devolved representatives were invited to the EXTP cabinet committee, the predecessor to the XO committee, which had responsibility for EU exit operations in the latter part of the Theresa May administration.⁶⁴

These developments were generally well received in the devolved nations. According to Jeremy Miles, engagement between the governments was "in a much better place by the end of Theresa May's time" as prime minister.⁶⁵ Scottish cabinet minister Michael Russell agreed that "in the run-up to 29 March, there was considerable co-operation and consultation between our Governments", based on the fact that "both sides knew that we needed to work together".⁶⁶

However, UK-devolved relations have worsened under the Johnson government. Jeremy Miles reported that they had “dropped off drastically”, at the same time as the overall pace of no-deal preparations escalated.⁶⁷ Following a reorganisation of the cabinet committee structure in July 2019, responsibility for no-deal preparedness shifted to the new XO committee. But despite a continued commitment to involve devolved representatives, there has been a marked change in practice. As of 8 October, Scottish ministers had been invited to just 8 out of over 50 meetings of the XO committee.⁶⁸ Jeremy Miles said: “the default position [under the previous administration] was that we went [to the relevant cabinet committee] unless there was a reason why not. I think we now see the mirror image of that”.⁶⁹

Civil servants in all administrations emphasised their ability to work together even when ministerial relationships were poor. But the two levels of interaction are not totally unrelated. Some devolved officials reported a recent decline in willingness to share information and to consult on important decisions. The Home Office in particular was regarded as poor at sharing information, although this was in part due to the sensitivity of the data that it holds.

Several explanations were given for the change in relationship between governments; some suggested that with new ministers in place, many Whitehall officials were awaiting direction before sharing information. Others suggested that the change to daily Cabinet committee meetings meant that UK civil servants had to spend most of their time briefing ministers, distracting them from other work. Whether intentional or not, these barriers to information sharing and collaboration have had consequences.

Jeremy Miles told us that the recent decline in engagement had led to a “lack of visibility” that was hampering Welsh government no-deal work, particularly in areas such as traffic management and maritime enforcement.⁷⁰ Scottish police chief Will Kerr publicly claimed that the UK government was failing to provide Police Scotland with access to sensitive plans to handle civil disruption after Brexit.⁷¹ The Scottish government also recently called upon the UK government to “share data on the continuity of supply of medical supplies and radioisotopes and make sure that regulatory frameworks are in place for their continued supply”.⁷² The Welsh government has pressed Whitehall to share information on the impact of no deal on the welfare system, so that it can deploy funding to people in financial difficulty.⁷³

Barriers to engagement between the UK government and the devolved administrations are a serious concern. If the UK leaves the EU without a deal the four governments will need to work together more extensively than ever before. And in areas where communication and co-operation between governments have become less common prior to Brexit, it will be harder to step up joint working after exit day, should unexpected problems arise.

Despite efforts at mitigation, there is a still risk of negative consequences from a no deal, including food shortages, business failures, job losses, consumer price increases and economic damage. Given how strongly no deal has been opposed by the Scottish and Welsh governments, it is likely that tolerance for such consequences will be lower

in Scotland and Wales. Any negative consequences are likely to attract significant attention, including from the Scottish government, which may use evidence of post-Brexit disruption to bolster its case for independence.

As a result, the UK government may dismiss criticism of no-deal consequences as politically motivated even if it is well-founded. Alternatively, it may attribute problems to the Scottish Government's own no-deal planning. Michael Gove has already criticised the Scottish Government for the distribution of its no-deal funding. In October he said that he was "deeply worried" that Scottish Ministers were "not passing on the money that we are giving to them for Scotland's citizens".⁷⁴ This illustrates the risk that post-Brexit relations could descend into a blame game – in place of constructive cooperation to solve problems arising from no deal.

5. Managing the aftermath of no deal

“In any next phase of the EU Exit process, the meaningful involvement of all the United Kingdom’s governments in the decisions that affect them is crucial. This will require a significant shift in the culture and approach to intergovernmental relations we have experienced over the past three years” – Joint letter from the first ministers of Scotland and Wales to the prime minister, 25 July 2019.⁷⁵

To cope with the fall-out from no deal, the UK government will need to impose direct rule in Northern Ireland

Since the collapse of the Northern Ireland executive in 2017, the Northern Ireland Civil Service has been responsible for running the administration. Following a judicial challenge, the ability of officials to exercise departmental functions was clarified by the Northern Ireland (Executive Formation and Exercise of Functions Act) 2018, and the secretary of state set a public interest test for decision making.⁷⁶ Throughout this period, civil servants have continued to make decisions within the constraints of the policy direction set by the executive before its collapse, without new ministerial direction.

In the event of no deal, this situation will not be sustainable. Difficult political decisions about whether to offer financial support to businesses in Northern Ireland – in which sectors, how much, and for how long – will need to be made. With civil unrest a possibility, the PSNI, although operationally independent, will need political cover and support. Government will need to be able to respond quickly to unforeseen events and potential crises using all the tools available. But under the current arrangements, the apparatus of the state is severely constrained by the absence of ministers. If the power-sharing executive is not restored before no deal takes place, it is likely that direct rule will need to be imposed.

The need to equip the secretary of state for Northern Ireland with additional powers in the event of no deal has been acknowledged by the UK government. Giving evidence to the House of Commons Committee on Exiting the European Union in September 2019, the minister responsible for no-deal preparation, Michael Gove, said that direct rule was a possibility: “it is the case that the Northern Ireland civil service and others would want to have ministerial direction in certain circumstances”.⁷⁷

The imposition of direct rule would require primary legislation. To ensure that ministers have the necessary powers immediately on exit, the government should get this legislation in place before exit day. Ministers may be reluctant to introduce a bill in case it is used by their opponents as a vehicle for unwelcome amendments, including provisions aimed at preventing no deal. But a failure to do so could create further uncertainty and hamper the ability of the administration to manage potential no-deal disruption.

It is not clear whether legislating for additional powers would necessitate a complete suspension of devolution, as has been the case when direct rule has been imposed previously. It might be that arrangements could be made to give the secretary of state powers in some devolved areas, to manage the fallout from no deal, but not other policy areas. However, it would be difficult to predict exactly what powers might be necessary so this would risk leaving gaps and creating confused accountability arrangements, especially for public spending in Northern Ireland.

In either case, giving direct powers to the UK government to operate in devolved areas would provoke strong criticism from nationalists in Northern Ireland, the Irish Government, and the UK's international partners, particularly the US. All are likely to regard this as a breach of the Belfast/Good Friday Agreement.⁷⁸ And all are likely to want a strong role for the Irish government.

The nationalist parties – Sinn Féin and the Social Democratic Labour Party – have both called for joint authority, where Northern Ireland would be co-governed by London and Dublin. But this proposal has previously been rejected by the UK government.⁷⁹ In September, the Irish Taoiseach, Leo Varadkar said that, if direct rule is imposed, the Irish government would seek a “consultative role” through the British-Irish Intergovernmental Conference (BIIC), the bilateral British-Irish body established by the Belfast/Good Friday Agreement.⁸⁰

Michael Gove has said that, if the Northern Ireland executive is not restored before a no-deal Brexit, the UK government will begin discussions with the Republic of Ireland on what steps might be necessary to support the Northern Ireland Civil Service.⁸¹ However, we have heard from UK officials that the current UK government has been reluctant to embrace the Irish government's interpretation of its role as a co-guarantor of the Good Friday Agreement.

British-Irish relations have been largely neglected over the last decade – the BIIC did not meet at all between 2008 and 2018 and has only met three times since the collapse of the power-sharing institutions.⁸² Although any signs of a greater role for the Irish government in the north are likely to draw criticism from unionists, Westminster must seek opportunities to work with Dublin to minimise the political consequences of imposing direct rule in Northern Ireland.

The devolved governments will look to Westminster for additional funding to mitigate the effects of no deal

The UK government has provided the devolved administrations with significant funding for no-deal preparations. According to the UK Government's latest no-deal readiness report, “this includes £138.4 million [m] for the Scottish Government, £80.3m for the Welsh Government, and £51.4m for the Northern Ireland Civil Service. In addition, the Northern Ireland Civil Service has been provided with a further £34.5m... [to be divided between] policing (£16.5m) and other pressures not faced in other parts of the UK (£18m).”⁸³

Much of the funding given to the devolved administrations has been a result of the Barnett Formula – giving them a set percentage of the cash given to Whitehall departments for devolved matters, reflecting population size. But while this kind of approach may be suitable for the adjustment in scale of services, where major new systems or processes are required it does not necessarily cover the full upfront costs of design and implementation. The Scottish government has already argued that the funding provided has been insufficient, and stated that: “As leaving the EU was not Scotland’s choice, these costs must be met in full by the UK government.”⁸⁴

If no deal has significant negative economic consequences, the question of funding – for instance for schemes to compensate farmers and businesses – will likely be a flashpoint for intergovernmental relations.

The devolved governments, in collaboration with Defra, have developed contingency plans to support their agriculture and fisheries sectors in the event of no deal. However, the devolved administrations will rely on UK government funding to meet the costs of such schemes. In evidence to the House of Lords EU Committee, Michael Gove said that support would be available to farmers across the UK if a no-deal Brexit had a negative impact on their income.⁸⁵ The UK government has confirmed that it will meet costs for sheep farmers. The devolved governments are pushing for funding for similar schemes for cattle and seafood.⁸⁶ The Welsh government’s no-deal planning document says it “is pressing the UK government to make funding available to support farmers and meet the cost of this scheme in the event of significant market impacts.”⁸⁷

The devolved governments have also committed to providing grants to businesses in distress, in particular small and medium enterprises (SMEs), which are more vulnerable to disruption.⁸⁸ But here too devolved governments are concerned that Whitehall has not committed enough funding.⁸⁹ The Scottish government has called on the UK government to set out what it will do to support businesses in the event of no deal. Finance Secretary, Derek Mackay said, “if the UK government is determined to take us out of the EU and cause this economic harm, then it must set out what it will do to mediate [sic] these impacts”.⁹⁰

There is an impasse between Westminster and Edinburgh on the passage of further Brexit legislation

In July 2018, the EU Withdrawal Act (EUWA) was passed at Westminster without the consent of the Scottish Parliament. Scottish ministers have since refused to give consent to other Brexit bills (making one exception for the Reciprocal Healthcare Bill) that affect devolved powers, and for which consent would normally have been sought under the Sewel Convention.

The Scottish government argues that the Sewel Convention “is there to prevent Westminster from legislating without our consent in areas that are within our competence, or from changing our powers”.⁹¹ However, during the passage of the EUWA in 2018, the UK government argued that the usual operation of the Sewel Convention, based on the idea that Westminster does “not normally” intervene in areas of devolved competence, did not apply, because leaving the EU was “a quite

exceptional circumstance”.⁹² The then-Secretary of State for Scotland David Mundell argued that the UK government had shown a “commitment to the Sewel Convention... at every stage” of the legislative process.⁹³ The UK government has also rebuffed attempts to reform the Sewel Convention, ignoring the Scottish government’s proposals in September 2018 to give it a stronger statutory underpinning.⁹⁴

Scottish ministers’ refusal to consider granting consent under the Sewel Convention could be problematic. There are critical pieces of Brexit legislation which may need to be reintroduced to Parliament, including on agriculture, trade, fisheries, and immigration, which will affect devolved competencies. While the UK government could push through the legislation, this would make intergovernmental relations even more fractious and make it more difficult still for the governments to work together.

This legislation will be needed to introduce new legal powers following a no-deal Brexit. While the UK government does not necessarily need these powers immediately or can rely on short-term workarounds to circumvent the stalled Brexit bills, this approach will not be sustainable in the long-term. For instance, it has claimed that it will use the royal prerogative to set quotas for UK fisheries, but this will not provide the range of legal powers needed to manage those fisheries after Brexit. Sir Mark Sedwill, Cabinet Secretary and Head of the Civil Service, has said that if Brexit legislation is not in place, there will be legislative gaps of “varying seriousness in different areas”.⁹⁵ This makes it all the more urgent that the impasse over the Sewel Convention is ended.

No deal will mean no transition period – unresolved issues around Brexit will become urgent

Theresa May’s withdrawal agreement contained provision for an implementation period until 31 December 2020, with the possibility of an extension. During that time, EU law would continue to apply to the UK. In the event of no deal, EU law will cease to apply immediately.

Common frameworks

The UK and devolved governments have been working together to develop new common frameworks that will replace EU law in some devolved areas. These frameworks are regarded as necessary to fill the gap left by EU law, which has acted as a limit on the scale of divergence between the four nations in devolved areas – protecting the UK’s own ‘internal market’ and preventing barriers to trade and unfair competition within the UK.

Officials told us that there has been progress at the official level, but no final frameworks have yet been agreed. If the UK left the EU with a deal, the UK government and the devolved administrations would continue to be bound by EU law until the end of the transition period. This would give the governments another year – or possibly longer – to agree and implement frameworks before EU law ceases to apply.

If the UK leaves with no deal, there will be no EU law to prevent divergence between regulation in England, Scotland, Wales and Northern Ireland, and no legislative

frameworks to replace this constraint. This could create circumstances in which the UK government decides to use the power to make “freezing regulations” under section 12 of the European Union Withdrawal Act, which are designed to prevent the devolved nations from adopting different policies in areas such as agriculture, food standards and animal welfare.

Officials from the Scottish, Welsh and UK governments believe it is unlikely that such powers will need to be used; but should intergovernmental co-operation worsen after exit day, UK ministers may deem it necessary to do so to protect the UK internal market. Such an action would likely be characterised as a power-grab by the devolved administrations, and would make it even harder to achieve progress on common frameworks. Michael Russell, Cabinet Secretary for the Constitution, has said that the Scottish government would “not discuss a framework if a restriction is imposed on devolved powers”.⁹⁶ While this scenario looks improbable at the moment, no deal increases its likelihood.

Replacing EU funding

Under Theresa May’s Withdrawal Agreement, the UK would continue to participate in EU programmes financed under the current budget until the end of 2020. This means the devolved nations would continue to receive funding directly from the EU.

The two key areas of EU funding of interest to the devolved administrations are: the Common Agricultural Policy, which subsidises farmers and environmental protection; and Structural Funds, which support economic development in poorer areas. The devolved nations all receive more funding per person from both these EU funding streams than England. Wales is a particularly disproportionate beneficiary of structural funds, while both Scotland and Northern Ireland benefit greatly from agriculture spending.⁹⁷ If the UK leaves with no deal, EU funding will cease immediately.

In 2018, the UK government committed to providing “the same cash total in funds for farm support until the end of this parliament” (which was then expected in 2022), in the event of no deal.⁹⁸ It also agreed to “underwrite the UK’s allocation for structural and investment fund projects under this EU Budget period to 2020”⁹⁹ and has announced a UK Shared Prosperity Fund to replace structural funds at the end of the budget period.¹⁰⁰ But so far, little detail has been provided on how the Fund will work in practice. The same rules and processes for agricultural support will also continue until the UK Parliament and the devolved legislatures pass legislation.

There is concern amongst the devolved administrations that the funding promised by the UK government will not be exactly equivalent. The Welsh government’s no-deal planning urged the UK government “to clarify its position on future funding arrangements to ensure Wales does not get a penny less”.¹⁰¹ The Scottish government has said it was seeking a cast-iron guarantee “that all EU funding lost to Scotland will be replaced in full by the UK government”.¹⁰² Although the UK government has committed to respect the devolution settlements,¹⁰³ officials in the devolved administrations are also suspicious that the UK Shared Prosperity Fund might be used to allow the UK government to spend money directly in devolved areas, bypassing the

devolved governments. In a no-deal scenario, the devolved administrations will be relying on the UK government to distribute EU funding immediately and similar concerns are likely to arise.

Negotiations with the European Union

While there is still a possibility of ratifying a withdrawal agreement, the EU has refused to engage in any discussion of “mini deals”¹⁰⁴ that would likely be necessary in a no-deal scenario. Instead, the EU has put in place a number of unilateral measures on financial services, road and rail connectivity, the Erasmus+ programme, social security entitlements and visa reciprocity.¹⁰⁵ However, these measures are temporary, one-sided and will need to be superseded by long-term agreements.

Theresa May’s Withdrawal Agreement also contained arrangements for fisheries, ensuring that the UK’s fishing opportunities would not be reduced in the first year of the implementation period, while the UK negotiated a new agreement. However, in the event of no deal, negotiations on access for UK fishermen to EU waters, and vice versa, will need to begin immediately.

The devolved administrations will have an interest in all of these areas, and possible negotiations, as many have implications for devolved policy areas. For example, Scotland will have a strong interest in future fisheries policy. Meaningful and systematic engagement between the UK and devolved governments will be necessary.

However, the devolved administrations have been critical of the UK government’s engagement with them on previous EU negotiations. For instance, Jeremy Miles said that the Joint Ministerial Committee for European Negotiations was more of a mechanism for conveying information rather than a means to solicit the views of the devolved administrations. The tight timescale on which new agreements would need to be negotiated in the event of no deal would only increase the risk that the Scottish and Welsh governments are not adequately involved in these negotiations. This would be problematic because the devolved governments have the right to be involved in decisions that have an impact upon devolved matters. Moreover, implementation of any new arrangements agreed with the EU will rely on effective inter-governmental co-operation and information sharing.

Planning for no deal has diverted attention from longer-term questions about intergovernmental relationships

A focus on preparing for no deal has meant that effort and energy have been diverted from longer-term work, such as the development of common frameworks, engagement over the UK internal market, and reviewing the mechanisms used to manage intergovernmental relations.

We were told that the development of frameworks had been deprioritised in early 2019, when resources shifted to no deal preparation.¹⁰⁶ While the Scottish government has continued to engage with Whitehall on frameworks, we were told that officials have had little capacity to work on this due to the time taken up by no deal preparation. Jeremy Miles told us that working on frameworks had been slower “than

any of us had hoped” because Welsh government resources had been diverted to no-deal planning.¹⁰⁷

There has also been a breakdown in engagement over what is needed to protect the UK internal market. Having previously agreed that common frameworks should be created where necessary to prevent disruption to economic activity between the different parts of the UK, the Scottish government subsequently rejected the very concept of a UK internal market, apparently fearing that this idea was being used by UK ministers as a Trojan Horse to undermine devolution.¹⁰⁸

Other questions about the future of devolution also remain unresolved. A UK-wide review into intergovernmental relations was commissioned by then Prime Minister Theresa May and devolved leaders in March 2018.¹⁰⁹ To date, this review has made little visible progress, having so far only agreed a set of workstreams and published a set of principles.

These issues will need to be resolved after Brexit, in what might well be an even more challenging political context.

6. Mitigating the risks to the Union

“The principle is clear – the Union can and will only prosper if it enjoys the support of its people... Leaving without a deal... would have undoubted consequences for our economy and for the Union.” – Theresa May, former Prime Minister, 4 July 2019.¹¹⁰

No deal and direct rule will make a return to power-sharing in Northern Ireland less likely

In the event of a no-deal Brexit, direct rule will need to be imposed in Northern Ireland. Northern Ireland’s history shows that, once devolution is suspended, it is often a long time until it is restored. The conditions created by a no-deal Brexit – with potential economic crises and civil unrest – will provide little incentive for the main parties in Northern Ireland to return to government, since they would then be responsible for dealing with the fallout, including on sensitive issues relating to community relations. In that context, the parties may struggle to reach agreement and prefer instead to pass the buck to Westminster. This scenario would be unlikely to improve the already strained relationships between the political parties.

Despite being opposed to Brexit, nationalist and non-aligned parties representing a majority of members of the last Northern Ireland Assembly were in favour of the version of the backstop set out in Theresa May’s deal. Sinn Féin, the SDLP, the Alliance Party and the Green Party welcomed it as a means of avoiding a hard border. Over half of all members of Northern Ireland’s Legislative Assembly signed a letter to the president of the European Council expressing their support.¹¹¹

However, the DUP opposed Theresa May’s deal, voting against it at Westminster. If a failure by the UK and EU to agree an alternative to the backstop results in the UK leaving without a deal, it is likely that the other parties in Northern Ireland will blame the DUP for that outcome. Brexit has polarised the political parties, making restoring sustainable government increasingly unlikely. A no-deal exit could kill all hope entirely.

Power sharing was designed to foster peace between the communities. Yet as we identified in a recent report, *Governing without Ministers*, a key consequence of Northern Ireland’s two and half years without a functioning government has been the deterioration of community relations. No deal will also bring issues of identity to the fore. The absence of any physical or legal border between Northern Ireland and the Republic allowed moderate nationalists to live in the UK and still maintain their Irish identity. The return of a border could threaten this.

Pressure for a border poll on Irish unification is likely to increase

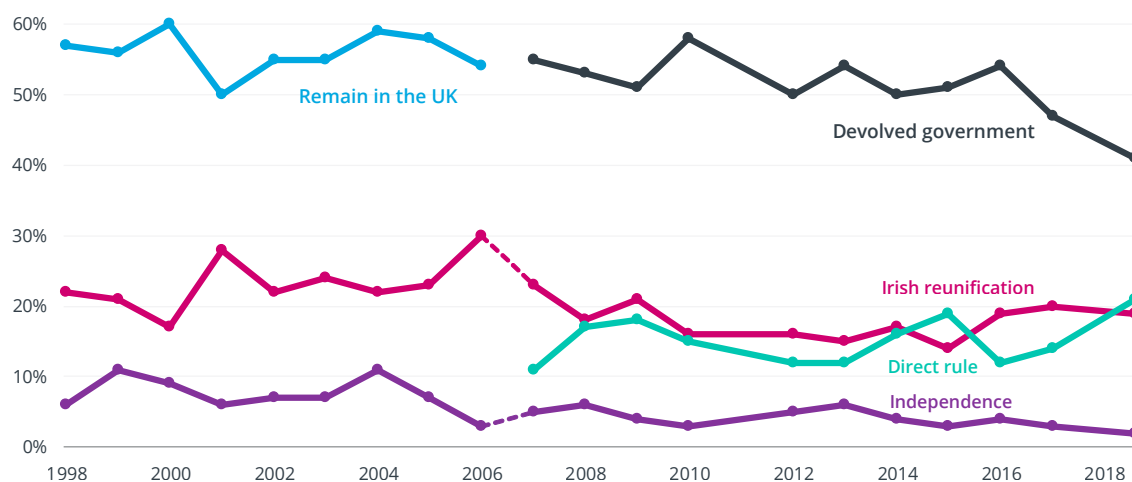
The Belfast/Good Friday Agreement recognises the right of “the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given”.¹¹² This is widely interpreted to mean that for reunification to take place separate referendums – commonly known as a border poll – would have to be held in Northern Ireland and the Republic of Ireland at the same time.

The Northern Ireland Act 1998 states that “if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland”, the secretary of state shall make an Order in Council enabling a border poll.¹¹³ The draft order must then be approved by both Houses of Parliament.¹¹⁴ The Act affords the secretary of state significant discretion in deciding whether a poll should take place. It is not clear what would count as a sufficient expression of support for a united Ireland to oblige the secretary of state to hold one – possibilities include a consistent majority in opinion polls, a nationalist majority in the Assembly, or a vote in the Assembly.^{115,*}

Calls for a border poll are not new – they were heard immediately after the 2016 EU referendum.¹¹⁶ But in the event of no deal, they are likely to be renewed and strengthened. The key difference will be the new context in which they are made.

Earlier in this report, we outlined the severe and long-lasting impact no deal is likely to have on Northern Ireland. A hard border will have serious political, economic and security implications. An alternative route to keeping the border fully open – ensuring no border infrastructure and allowing unfettered access to EU markets – would be for Northern Ireland to unite with Ireland. In these circumstances, reunification would become more attractive, not just to ardent nationalists, but to moderate nationalists and those without a strong community affiliation.

Figure 1: Changing attitudes in Northern Ireland



Source, Institute for Government analysis of the Northern Ireland Life and Times survey, 1998 to 2019. “Other” and “Don’t know” responses not shown

* The Constitution Unit, UCL, has established a Working Group to consider these issues; Constitution Unit, *Major new project on Irish unification referendums*, 6 September 2019, retrieved 30 September 2019, www.ucl.ac.uk/constitution-unit/news/2019/sep/major-new-project-irish-unification-referendums

Since 1998, the annual Northern Ireland Life and Times Survey has shown a clear constitutional preference for devolved government amongst the Northern Ireland public, with support for reunification low, at under 20% for most of the past decade (see figure 1 above.). However, support for power sharing has declined by 13 percentage points between 2016 and 2018 following the collapse of the institutions in 2017.¹¹⁷ In the event of no deal, with the restoration of devolution looking increasingly unlikely and the imposition of direct rule from the UK unacceptable to many nationalists, it is reasonable to expect that support for a border poll and reunification would increase.

There are some signs that public opinion has already changed during the course of the Brexit process, although methodological differences between pollsters make interpreting the data tricky. Analysis of opinion polls conducted since the 2016 referendum found that the first four had an average of 28% in favour of Irish unity and 57% opposed, compared to the most recent four in which the average was 44% in favour and 45% opposed.¹¹⁸

However, the most recent poll, in September 2019, found a narrow majority in favour of a united Ireland, with 51% in support, compared to 49% opposed (excluding don't knows).¹¹⁹ Predictably, views split along community lines: 98% of nationalists would back a united Ireland whilst 95% of unionists would stay in the UK, but the increasing number of voters who identify as neither nationalist nor unionist (half of the Northern Ireland population now falls into this category according to a 2018 survey) are likely to be decisive in any future vote.*

Sinn Féin leader Mary Lou McDonald has said that in the event of a no deal Brexit, "there will be an absolute imperative, a democratic imperative, to put the issue of Irish unity to the people by way of referendum".¹²⁰ However, this enthusiasm for a border poll in the immediate aftermath of no deal is not shared by any other major political party on the island of Ireland.

Unsurprisingly, unionist parties – the DUP and the UUP – are strongly opposed. The other main nationalist party, the SDLP, supports a poll at some stage but its leader Colum Eastwood has warned against holding a vote before plans on how a united Ireland would work are in place.¹²¹ Naomi Long, leader of the cross-community Alliance Party, has said that although the likelihood of a border poll would increase in the event of no deal, she would not support one in those circumstances.¹²²

Crucially, at present, an early referendum on reunification has little support from the Irish government. The Irish Taoiseach, Leo Varadkar, said a vote in such chaotic times, could be "divisive", alienating unionists and creating partition in reverse.¹²³ In order for reunification to happen, the decision to do so will also need to be approved in a referendum in the Republic of Ireland. There are questions as to how such a referendum would take place in practice, and whether two referendums – one on the

* The 2018 Northern Ireland Life and Times Survey found that 50% of people identify as neither unionist nor nationalist, an increase of 17% since 1998; Northern Ireland Life and Times Survey, Identity 1998 and 2019, retrieved 2 October 2019, www.ark.ac.uk/nilt/results/polatt.html#identity

principle of reunification and another on the constitutional amendment to implement it – might be needed.¹²⁴ There are also questions as to whether there is sufficient appetite in the Republic for a referendum on reunification at present.

Little thinking has been done about what a united Ireland might actually look like

If both Northern Ireland and the Republic of Ireland voted in favour of reunification, the Good Friday Agreement states that it “will be a binding obligation on both [the UK and Irish] governments to introduce and support in their respective parliaments legislation to give effect to that wish”. But there has been little thinking done so far as to how reunification would work in practice.

Caution about reunification south of the border reflects the economic and political complications that reunification would bring. There is a significant economic disparity between Northern Ireland and the Republic: economic output per capita was estimated in 2018 to be 45% higher in the Republic than in Northern Ireland.¹²⁵ As a result of its weak economic performance, Northern Ireland is disproportionately dependent on public spending, which is supported by a large fiscal transfer from the rest of the UK.

Northern Ireland has an estimated fiscal deficit of approximately £9 billion a year, which is the largest per capita deficit of any of the 12 standard UK regions).¹²⁶ If Northern Ireland were to reunite with Ireland, then this hole would need to be filled by the Irish Government via increased taxes or borrowing, or else there would need to be substantial public spending cuts in Northern Ireland.

There are also numerous unresolved questions about the exact terms of reunification including, crucially, whether the devolved Northern Ireland institutions would be retained, or whether the six counties of Northern Ireland would be fully integrated into the unitary Irish state.

In August 2017, a joint committee of the Irish Parliament explored a number of proposals for Northern Ireland’s constitutional future including a unitary state, a federal state, and a joint (UK-Irish) authority over the north. It suggested that the Northern Ireland Assembly could continue as a devolved regional parliament within a reunited Ireland, and that the East-West institutions could continue, allowing for a continuing British role in the affairs of Northern Ireland. These proposals were designed to give reassurance to the unionist community in the north that their interests, and its British identity, would be protected in a united Ireland.¹²⁷

Indeed, Irish High Court Justice Richard Humphreys, on whose work the report draws heavily, noted that, “in the absence of any amending agreement, it would therefore be a legal obligation on Ireland to continue to give effect to the [Good Friday] agreement after Irish Unity.”¹²⁸ Ultimately, the committee recommended that a new forum, with representatives from across the island of Ireland,¹²⁹ should be established to consider

the options.* The report represents the most detailed official assessment of the issues that would arise in the event of unification, but a great deal more thinking would need to be done should this become a serious possibility.

It would be irresponsible to hold a referendum on a major constitutional change without a clear plan for what precisely would happen in the event of a vote in favour. Accordingly, the onus is on those in favour of a united Ireland to develop detailed proposals for how the unification process would work and the status of Northern Ireland in a united Ireland, so that if a referendum happens, voters will have a clear proposition on which to base their decision. This process will take some time. In the short term, reunification seems unlikely, but no deal will raise the political temperature and may make this a more serious proposition. The UK government should not be complacent.

A no deal Brexit would also increase pressure for a second Scottish independence referendum

The Scottish government began calls for a second independence referendum shortly after the Brexit vote. The 2016 SNP manifesto stated that the Scottish Parliament should have the right to decide whether to hold another vote “if there is a significant and material change... such as Scotland being taken out of the EU against [its] will”.¹³⁰ In March 2017, the day before Article 50 was triggered, First Minister Nicola Sturgeon formally requested the consent of Westminster to hold another referendum. But Theresa May declined, arguing that “now is not the time”.¹³¹

In April 2019, Nicola Sturgeon renewed calls for a second independence referendum before the end of the Scottish Parliament’s term in 2021. She argued that a “choice between Brexit and a future for Scotland as an independent European nation should be offered.”¹³² This argument has been dismissed by unionist parties who argue that there is little demand among the Scottish public for another referendum, particularly in the context of the political upheaval created by Brexit.**

Opinion polling evidence on support for a further referendum is mixed. When asked in August 2019 whether there should be a referendum in the next two years, a narrow majority (51%) was in favour (excluding don’t knows).¹³³ Another poll, in September 2019 offered respondents a range of timeframes for when a second independence referendum could be held. This found that a clear majority (62%) think there should be a second independence referendum at some point, but only 27% thought this should

* It was suggested that this might take a similar form to the New Ireland Forum, which “elected nationalist representatives from North and South to deliberate on the shape of a new Ireland.”

** Responding to Sturgeon’s Statement, a Conservative spokesperson said “the last decade of constitutional politics and division has been more than enough”, Labour leader, Richard Leonard said, “there is no evidence whatsoever that the people of Scotland want another independence referendum” and Liberal Democrat Leader, Willie Rennie said “the last thing that this country needs is more division and chaos”. Scottish Parliament Official Report, *Brexit and Scotland’s Future*, 24 April 2019, retrieved 30 September 2019, www.parliament.scot/parliamentarybusiness/report.aspx?r=12053&i=109040

be on the Scottish government's preferred timeframe, which is for a vote by May 2021. Nonetheless, this figure has risen by 6 percentage points since April.¹³⁴

As discussed earlier in this report, if no deal is perceived to have had negative consequences for Scotland – such as job losses, food or medicine shortages – the Scottish government and other political parties are likely to blame the UK government. This could play into nationalist narratives and drive support for another referendum. The Scottish government clearly believes that a no-deal Brexit would strengthen their case for another vote. Cabinet Secretary, Michael Russell said in May that, if the prime minister pursues no deal, this “will be yet further proof that the conditions set out in our manifesto in April 2016 have been met in full and there will be an even greater urgency to give Scotland the choice of a different future.”¹³⁵ However, the Scottish Conservative MP John Lamont suggested to us that the Scottish government's strong warnings about the chaos that no deal would bring could end up weakening its case if such effects don't materialise. “When the heavens don't fall in people will say it was better than expected and the economy will be better than expected”.¹³⁶

There is an argument that the case for Scottish independence might in fact become harder for nationalists to make after a hard Brexit. The reason is that if the UK leaves the EU single market and customs union, and Scotland leaves the UK in order to re-join the EU, then this could lead to new barriers to trade and other economic activity between Scotland and England.

Patrick Harvie, co-leader of the pro-independence Scottish Green Party, said that “in 2014 there were those who tried to make a bogeyman of the border and they didn't really get anywhere with it because everybody could see that it was nonsense.” But in a future independence referendum, he suggested, this argument would need a response and more work needs to be done on the issue by those in favour of independence.¹³⁷ Many of the questions that have proved so tricky to resolve in Brexit – the nature of customs and regulatory arrangements as just two examples – would undoubtedly need answering in an independence campaign.

As it stands, however, support for independence does appear to have risen in recent months as the spectre of no deal Brexit has loomed. In 2018, support for Scottish independence was on average 9% behind support for Scotland remaining in the Union. In six polls conducted in 2019, that gap has narrowed to under 2%, with Yes ahead in one poll in August.¹³⁸ Reviewing the evidence in September 2019, Professor John Curtice concluded that “it is difficult to avoid the conclusion that some voters who wish to stay in the EU have changed their minds about the merits of independence”.¹³⁹ Unionist politicians have also expressed concerns about the effect of a post-no deal vote on attitudes towards independence. Willie Rennie, leader of the Scottish Liberal Democrats, told us that those who voted Remain “are looking for the most credible escape chute from Brexit”.

The UK government's tactic of blocking another vote may prove unsustainable and even counterproductive

Alongside calls for a further vote on independence, the Scottish government has taken practical steps designed to make it easier to hold a second independence referendum. In May, it introduced the Referendums (Scotland) Bill, which would give Scottish ministers the power to hold a referendum by regulation on any matter which falls within the remit of the Scottish Parliament.

However, "the Union of the Kingdoms of Scotland and England" is a reserved matter under the devolution legislation, meaning that the Scottish Parliament does not have the competence to legislate in this area. This is widely interpreted to mean that in order to hold a referendum on independence, a transfer of powers from Westminster to the Scottish Parliament would be required.

The first minister has herself acknowledged that in order "to put beyond doubt or challenge our ability to apply the bill to an independence referendum",¹⁴⁰ additional powers would need to be granted by Westminster. This would most likely be in the form of a section 30 order, a device used to amend the competence of the Scottish Parliament either permanently or temporarily, as was the case prior to the 2014 referendum.

Any attempt to proceed with a second referendum without Westminster explicitly devolving the power to do so would almost certainly be subject to legal challenge and probably a boycott from unionist parties and the UK government. A referendum held in this manner would be unlikely to command widespread legitimacy. It is clear that the Scottish government, and other prominent supporters of independence, do not want to go down the path of an unauthorised referendum. Scottish Green Party Leader, Patrick Harvie, warned that this approach would create "a much more fraught and polarised and unsuccessful context in which to have that discussion".¹⁴¹

A request for the power to hold "indyref2" appears to be imminent. Nicola Sturgeon has said a formal request for a section 30 order would be made during the referendum bill's passage.¹⁴² The current UK government is likely to refuse such a request. In September, Boris Johnson said that the 2014 referendum was a "once-in-a-generation opportunity".¹⁴³ However, it is not clear how long this position can be sustained, particularly if support for independence increases in the event of no deal.

There is evidence to suggest that even some of those opposed to a second independence vote think it should be for the Scottish Parliament to decide whether to hold one. One poll of Scots found 58% thought the Scottish Parliament should have the "final say" on the matter.¹⁴⁴ Repeated refusals to grant a section 30 order could be perceived as the UK government obstructing the Scottish Parliament and denying the Scottish people the right to determine their own future. In its 2019–20 Programme for Government, the Scottish government made this case, arguing that any attempt to block a referendum would be "contrary to basic democratic principles".¹⁴⁵

A continued refusal by the UK government to devolve the power to hold an independence referendum would become harder to justify if nationalist parties

perform well at the next UK general and Scottish parliamentary elections. A second independence referendum is likely to be a central part of both campaigns, but the Holyrood election of 2021 may prove the decisive moment. If this election returns a nationalist majority, elected on a clear manifesto commitment to hold another referendum, then the case for holding one would be greatly strengthened. There appears to be some acknowledgement of this within the Scottish Conservatives. In June Ruth Davidson, leader at the time, said the SNP would have a mandate for another vote if they won an outright majority.¹⁴⁶ But if the UK government continues to deny a vote in all circumstances, this could further undermine the legitimacy of the union and make for ever-more dysfunctional intergovernmental relations.

For both practical and principled reasons, the UK government should ultimately accept that Scotland has the right to secede from the union should a majority of its citizens so desire, as it appeared to recognise in 2014. Devolution in 1999 was founded on the principle that it is “the sovereign right of the Scottish people to determine the form of government best suited to their needs”.¹⁴⁷ In 1997 and again in 2014 the Scottish people decided that devolution is the form of government that best suited their needs. Should they decide at some future date that independence is now the answer, then that should ultimately be respected.

That does not mean that Westminster must pass a section 30 order to facilitate another referendum in all circumstances, nor that it should not attach conditions, for example that a referendum is held according to a certain process or timescale. But eventually, if the Scottish people choose to vote for political parties that favour a referendum, then a blanket refusal will not be sustainable. If the Union is to survive, it must be because a majority of people in all four parts of the UK are persuaded that its survival is for the best, not because Westminster wields the power of parliamentary sovereignty to hold the nations of the UK together against their will.

Even if the power to hold a referendum is devolved, the Scottish Parliament should not rush the process

No deal is likely to increase support for a second independence referendum, and the terms of the Referendums (Scotland) Bill mean that if and when the power to hold one is devolved, the Scottish Government would be able to do so held on an expedited timetable. The Bill, as introduced, allows ministers to provide for a referendum by regulation, removing the need for primary legislation as is required for the UK parliament to hold referendums. The Bill also provides an exemption from Electoral Commission question testing—which usually takes 12 weeks—for referendum questions that have been tested before. Therefore, if the 2014 referendum question were used again, the legal basis for the vote could be approved within just 8 weeks.

The bill also allows Scottish ministers to specify the length of the referendum period during which the campaign rules apply. There is no minimum specified in the bill so it could be as short as one week. Before this campaign period starts there must be a six-week period during which lead campaigners for each outcome are designated, but the time between approval of the legislation and polling day could be as little as seven

weeks. This means that in total, a minimum timetable for the whole referendum process is 15 weeks (around three and half months), as opposed to the estimated minimum of 22 weeks (five months) needed for UK referendums.¹⁴⁸

Important constitutional decisions must not be rushed. To ensure that the referendum result commands widespread legitimacy there must be full scrutiny of the basis for the referendum and time for citizens to deliberate on the issues during the campaign. The Institute for Government has previously recommended changes to the proposed referendums bill, including a requirement for the question to be specified in primary not secondary legislation, removing the question testing exemption, and including a minimum campaign period of 10 weeks. The Scottish Parliament should consider these amendments, but even if they are not made, in the event that a referendum is held every effort should be made to ensure that it is held according to best democratic practice.¹⁴⁹

The Welsh question will rise in prominence

In Wales, there are signs of a growing independence movement, albeit from a far lower base than in Scotland. Pro-independence marches and rallies have taken place across Wales, with up to 10,000 attending in Caernarfon, according to organisers.¹⁵⁰

Nationalist party Plaid Cymru has risen in the polls* since adopting a more explicitly pro-independence stance under its new leader Adam Price.¹⁵¹ In the 2019 European Parliament elections, Plaid beat Labour and the Conservatives to obtain the second-largest vote share after the Brexit Party.¹⁵² The party has also led in some recent voting intention polls for Welsh Assembly elections.¹⁵³

Polling has also suggested growing support for independence itself. When asked, should Wales be an independent country 24% said Yes. This rose to 33% in a scenario where an independent Wales remains a member of the European Union.¹⁵⁴

Nonetheless, the short-term threat of Wales breaking away from the rest of the UK is much less than in Scotland or Northern Ireland. Wales is dependent on large fiscal transfers from the rest of the country, and its economy is highly integrated into England. An independent Wales would therefore face some difficult economic and fiscal decisions, not least if it wished to re-join the EU single market and customs union while England remained outside.

For now, opinion in Wales remains in favour of the UK Union. Indeed, the Welsh government identifies “endangering the future of the union” as one of the key strategic risks of a no deal Brexit and includes “making the case for the union of the UK” as a key mitigating action.¹⁵⁵ But the Welsh government has been critical of the UK government’s approach to devolution. Welsh Brexit Minister, Jeremy Miles, said that it “seems still to have a profound ambivalence about devolution”.¹⁵⁶ The Brexit process has damaged UK-Welsh relations. Any negative consequences resulting from no deal are likely to add further fuel to the fire. Rhetoric has changed in recent times. In

* A July 2019 YouGov poll found Plaid with the highest vote share at 24% for Welsh Assembly elections, but the party ranked fourth for Westminster voting intention, on 15%. YouGov polling for Welsh Political Barometer, 26 July 2019, retrieved 1 October 2019, <http://blogs.cardiff.ac.uk/electionsinwales/wp-content/uploads/sites/100/2019/08/July-2019.pdf>

evidence to the Welsh Assembly External Affairs Committee, First Minister, Mark Drakeford said that support for the union was not “unconditional” and if parts of the UK were to secede, Wales would have to reassess its position.¹⁵⁷

The Welsh government has put forward proposals for a new approach to devolution and intergovernmental relations, “based on mutual respect, parity of esteem and participation between the various governments”.¹⁵⁸ However, the UK government has not engaged seriously with these proposals. If the UK government fails to address the growing discontent with UK-Welsh relations, in the long term, this could be destabilising.

The UK government will need a new strategy if it wishes to strengthen and preserve the Union

If the UK departs the EU with no deal, it is almost inevitable that this will further destabilise the UK’s territorial constitution. But that is not to say that there is nothing that can be done to mitigate the risks. The UK government is committed to strengthening the Union and, if it wishes to succeed in this objective, there are steps that it could take. Below we suggest some areas where improvement should be sought.

If the Union is to work in the long run, it will be on the basis that it is a voluntary partnership between the four parts of the UK, each of which has the right to self-determination. If a consistent and clear majority emerges in any of the three devolved nations (or, indeed, England) in favour of secession from the UK, then it would be unsustainable and counterproductive for the UK government to refuse to countenance the change. But we are not yet at that point, so the task for the UK government is to make the positive case for the Union. There should be a change of approach to intergovernmental relations, too, with devolved counterparts treated as partners rather than stakeholders to be consulted, especially when legislation is being developed and international negotiations are taking place that affect devolved competences.

To make this change a reality, the UK government should step up its investment in Whitehall’s devolution capability so that devolved views and interests are taken into account more systematically when policy and legislation are developed. This has long been acknowledged as a necessary task but, while some useful steps have been taken, there is clearly more work to be done, as was recognised by those we consulted.

Brexit will expand the range of issues where UK and devolved governments must work together. It will also raise the stakes if Whitehall gets things wrong, for instance when announcing new policy or engaging in international negotiations that impinge upon devolved responsibilities. Lord Dunlop, the former Scotland Office minister, is leading a review of how the UK government could improve its approach to the Union and is likely to make recommendations in this domain.¹⁵⁹ There is scope for schemes created after the Scottish independence referendum of 2014, such as the Devolution and You civil service-learning campaign and the One Civil Service scheme to facilitate short-term interchange placements between the different administrations, to be expanded and enhanced.¹⁶⁰

Departments should also be held accountable for how they engage with devolved counterparts. Another post-2014 innovation was that departments were asked to develop “devolution capability plans” that set out their approach to devolution and the systems that they were developing to improve relations with the devolved bodies.¹⁶¹ It is not known whether these plans still exist. In any case, it is difficult to assess their impact because none were published. But the principle underlying them was a good one. Each department should be expected to set out its approach to devolution, ideally in a public document. There should be accountability for delivery of these plans, with scrutiny by parliamentary committees and assessment by the UK Governance Group in the Cabinet Office, drawing on feedback from devolved counterparts and other interested parties.

In addition to these capability issues, the UK government should accelerate work on the review of intergovernmental relations in partnership with the devolved administrations. This review was announced in 2018, but it has made little visible progress so far, aside from the publication of a set of aspirational principles. It is clear, however, that resetting intergovernmental relations for the post-Brexit Union is a pressing task, especially in a no-deal context where decisions involving different governments will need to be taken with urgency. In particular, new systems for joint decision-making and dispute resolution will be required for common frameworks in areas currently governed by EU law.

A no-deal Brexit remains just one of a number of scenarios for how the long and winding Brexit process might come to a conclusion. Many of the points we make above about how to strengthen the Union will apply no matter what kind of Brexit occurs, or indeed if the UK remains in the EU after all. But, for the reasons we have set out in this report, a no-deal Brexit will make this all the more urgent.

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