



DEBATE PACK

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Implications for Scotland of leaving the EU

By Graeme Cowie

Summary

Patricia Gibson has secured a Westminster Hall debate on the implications for Scotland of leaving the European Union. This debate will take place at 09:30 on Tuesday 3 July 2018. This debate pack provides an overview of the key issues at stake relating to EU withdrawal, and in particular those having a direct bearing on Scotland's devolution settlement. This includes the UK's future relationship with the EU but also the *European Union (Withdrawal) Act 2018*, *Trade Bill* and other Brexit legislation. It also includes the future constitutional relationship between the UK and Scotland.

The House of Commons Library prepares a briefing in hard copy and/or online for most non-legislative debates in the Chamber and Westminster Hall other than half-hour debates. Debate Packs are produced quickly after the announcement of parliamentary business. They are intended to provide a summary or overview of the issue being debated and identify relevant briefings and useful documents, including press and parliamentary material. More detailed briefing can be prepared for Members on request to the Library.

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1. Background

Summary

The EU referendum on 23 June 2016 across the UK (52% Leave; 48% Remain) produced a very different result from that of voters in Scotland (62% Remain; 38% Leave). Scotland's role in the decision to leave the EU has been the subject of considerable scrutiny in that context. The UK Government's position consistently has been that a decision was taken by the UK as a whole, international relations is a reserved matter, and Scotland must leave the EU, its single market and its customs union on the same terms as the rest of the UK.

Beyond renewed calls from the Scottish Government for a second independence referendum, which the UK Government has rejected, there are many as of yet unanswered questions as to the implications of "Brexit" for Scotland and its devolution settlement. This debate pack provides an overview of the key issues at stake, which include:

- what the UK/Scotland's future relationship should be with the EU and its institutions;
- what role the devolved institutions should play in the process of leaving the EU;
- what should happen to the powers currently exercised by the EU that intersect with devolved policy areas; and
- what changes, if any, should be made to Scotland's devolution settlement as a consequence of leaving the EU and its institutions.

1.1 EU referendum result

Parliament legislated, through the *European Union (Referendum) Act 2015* to hold a referendum on the UK's continued membership of the European Union. The referendum was held on 23 June 2016 and the UK-wide result was 51.89% in favour of Leave to 48.11% in favour of Remain on a 72.21% turnout.

However, in Scotland, 62.00% of voters supported Remain and 38.00% supported Leave on a 67.25% turnout. Every local authority area in Scotland returned a majority of votes for the UK to remain in the European Union.

This discrepancy between the UK-wide and the Scottish-specific results has prompted disagreement as to both whether and how the UK should leave the European Union and its key institutions and whether (and if so what) special arrangements should be made for Scotland.

1.2 Deciding to leave the EU

The Scottish Government argued, before the EU referendum, that the UK should only leave the European Union if a majority voted in favour of doing so in each of the four nations of the United Kingdom.¹ This position, however, was rejected by the UK Government and no special provision was made in the *European Union (Referendum) Act 2015* by the UK Parliament in relation to the devolved nations. David Lidington MP, then Minister for Europe, said at the time:

The Government take the view that, in respect of EU membership, we are one United Kingdom. The referendum will be on the subject

¹ BBC News, [SNP bid for 'quadruple lock' on EU referendum vote rejected](#), 16 June 2015

of the United Kingdom's membership of the [EU] and it is therefore right that there should be one referendum and one result.²

The Scottish Government intervened in the [R \(Miller\) v Secretary of State for the European Union](#) case before the Supreme Court. It sought (unsuccessfully) to argue that the Sewel convention would necessarily be engaged by any primary legislation the UK Parliament would have to pass in order to commence the [Article 50 process](#) for leaving the European Union. The Supreme Court declined to say whether legislation of that nature would engage the convention, saying that the scope and enforcement of constitutional conventions (even those recognised in statute) are a matter for political, rather than judicial, actors.³

1.3 Revisiting independence?

On 24 June 2016, First Minister for Scotland Nicola Sturgeon indicated that the Scottish Government would revisit the question of an independence referendum given the Scottish National Party's manifesto pledge at the 2016 Holyrood elections.⁴ It had previously indicated that Scotland being "taken out of" the EU "against [its] will" would represent a "material change in circumstances" justifying another independence referendum. Nicola Sturgeon said:

It is ... a statement of the obvious that the option of a second referendum must be on the table. And it is on the table. Clearly, though, there are a lot of discussions to be had before final decisions are taken.

It would not be right to rush to judgment ahead of discussions on how Scotland's result will be responded to by the EU. However, when the Article 50 process is triggered in three months' time, the UK will be on a two year path to the EU exit door. If Parliament judges that a second referendum is the best or only way to protect our place in Europe, it must have the option to hold one within that timescale.

That means we must act now to protect that position. I can therefore confirm today that in order to protect that position we will begin to prepare the legislation that would be required to enable a new independence referendum to take place if and when Parliament so decides.⁵

A majority of members in the Scottish Parliament agreed to a motion requesting that the UK Government should grant a "section 30 Order" to allow Holyrood to legislate for another independence referendum.⁶ This request was refused by the UK Government.⁷

² HC Deb 16 June 2015 Vol 597 cc231

³ [R \(Miller\) v Secretary of State for Exiting the European Union](#) [2017] UKSC 5, para 151; see also Commons Library Briefing Paper, [Brexit: Devolution and legislative consent](#), 18/8274, 29 March 2018, pp. 26-27

⁴ Scottish Government, [First Minister – EU referendum result](#), 24 June 2016; Scottish National Party, [Holyrood Elections 2016 Manifesto](#), 2016, p. 24

⁵ Ibid.

⁶ BBC News, [Scottish Parliament backs referendum call](#), 28 March 2017

⁷ BBC News, [Scottish independence: Referendum demand 'will be rejected'](#), 16 March 2017

1.4 Key devolved Brexit concerns

Beyond underlying disagreement about whether the UK should leave the EU circumstances, and whether Scotland should remain within the United Kingdom, there are broadly four areas of political disagreement where the Scottish “territorial dimension” is particularly relevant.

The future relationship with the EU’s institutions

The first of these concerns the future relationship that the UK will have with the EU after it has left and any transition period has expired. This relationship will cover a range of issues, but will be especially relevant to the trading and customs arrangements between the two entities. The Scottish Government argues that the UK (or failing that, Scotland) should remain within the institutions of the EU’s single market and customs union, whereas the UK Government argues that continued participation from within those structures is incompatible with giving effect to the referendum result.

Process of leaving the EU

The second of these issues is ultimately one of process. There is disagreement about what role the Scottish Government and Parliament should play in preparing the UK for exit day and (where relevant) transition. This is what the disputes between the UK and Scottish Governments have been about in relation to the recently passed *European Union (Withdrawal) Act 2018*. The Scottish Government maintains that this legislation will diminish, both constitutionally and politically, the role of devolved institutions in making key decisions about and scrutinising Brexit.

Returning powers from the EU

The third issue relates to what should be done with powers currently exercised by the EU insofar as they intersect with devolved policy areas. The UK Government wants to make UK-wide arrangements, called “common frameworks” to govern how (at least) 24 of these repatriated powers should be used.

We do not yet know what these frameworks will look like in substance, although they are expected to be brought about by primary legislation engaging the Sewel convention. We also do not know what decision-making structure the UK Government intends that these frameworks will adopt, and therefore what influence devolved administrations will have on them.

Future of the devolution settlement

The fourth issue concerns the role of devolved authorities and legislatures in areas that are currently reserved matters under the *Scotland Act 1998* and the devolution statutes of the other devolved nations. Both the Scottish and Welsh Governments especially have called for clear guarantees as to their ability to influence the UK’s negotiating priorities with respect to future trade agreements with third countries.

The Scottish Government has also called for further devolution of aspects of (e.g.) immigration policy. It wishes to bring about special arrangements in this area for Scotland in light of the UK Government’s preference for leaving

the single market as a means to end the obligation of Free Movement of People under the EU Treaties.

Both the Scottish Government and the Welsh Government have also called for reform of the UK's intergovernmental machinery, including the Joint Ministerial Committee system. They have concerns, exacerbated by the challenges presented by the Brexit process, that devolved influence in these informal structures does not adequately protect devolved interests where there are intergovernmental disputes.

2. Future relationship with EU

Summary

The Scottish Government argues that the UK should remain within the EU's single market and customs union as it leaves the EU. It says this can be achieved by joining the European Economic Area (EEA) and the Customs Union. This position, they say, is consistent with giving effect to the referendum result, while mitigating against economic risk factors posed by alternative arrangements.

The UK Government maintains that continued membership of the single market and customs union is incompatible with the decision to leave the EU, since the "four freedoms" (including Freedom of Movement) applies to members of the EEA and enforcing the Common External Tariff would prevent the UK from negotiating its own "comprehensive trade deals" with third countries (i.e. those outside of the EU).

There have been a range of economic forecasts that have attempted to quantify the likely impact of different future economic relationships between the UK and the EU.

- The [UK Government's internal economic analysis](#), made available to MPs in February 2018 but not put fully into the public domain, suggested that Scotland's economy would be most negatively impacted by a scenario in which the UK left without any deal with the EU whatsoever.
 - It also indicated that Scotland would be less negatively impacted by the UK's continued membership of the single market than it would if a limited free trade deal was negotiated.
 - Under all three scenarios, economic growth in Scotland on a 15-year basis was expected to be slightly more negatively impacted than the UK as a whole.
- The [Scottish Government published a paper](#) in January 2018 indicating that Scotland's GDP could be negatively impacted by up to 8.5% by 2030 in the event that the UK leaves the single market.

Scottish Government's position

The Scottish Government published Scotland's Place In Europe in December 2016. It set out its policy position for what it believed the UK's future relationship with the European Union should be. It argued that the whole of the UK should remain within the European Union's single market and its customs union:

The Scottish Government believes that the UK's continued membership of the European Single Market – through the EEA Agreement – and the EU Customs Union is both feasible and desirable. There is no basis whatsoever for the assumption that all of those who voted to leave the EU also wanted to exit the European Single Market. Indeed, it is arguable that quite the opposite was the case – that there is simply no majority support for taking the UK out of the European Single Market or EU Customs Union. Membership of the EU and the European Single Market are, after all, quite distinct propositions.⁸

The Scottish Government advocated an alternative arrangement should the UK Government insist that a deal with the EU involved leaving the single market and customs union:

In the event that the UK Government does not pursue the option of retaining membership of the EEA, the Scottish Government is committed to exploring with the UK Government, in the first instance, the mechanisms whereby Scotland can remain within the EEA and the European Single Market even if the rest of the UK chooses to leave. This is essential if we are to ensure Scotland can

⁸ Scottish Government, [Scotland's Place in Europe](#), December 2016, para 97

continue to realise the substantial economic and social benefits from membership of the European Single Market and the “four freedoms” that lie at its core. However, as we set out later, we also consider that the proposal we put forward in this chapter could have benefits, not just for Scotland, but for the UK as a whole and for our European partners.⁹

UK Government’s response

Both of the Scottish Government’s proposals have been rejected by the UK Government. It has insisted that the UK will leave both the European single market and the customs union at the end of a transition period stipulated in any withdrawal agreement, failing which it would leave both on exit day.

In the Prime Minister’s [Lancaster House speech](#) on 17 January 2017, she indicated membership of the single market was not compatible with the government’s position on ending Free Movement of People. She also indicated that, since full membership of the customs union would entail agreeing to enforce the Common External Tariff, this was also unacceptable. This would mean that the UK would not be able to “negotiate [its] own comprehensive trade deals” with third countries.

The *Trade Bill* and *Taxation (Cross-Border Trade) Bill* currently being considered by Parliament provide the underpinnings for legislative framework for a set of future relations outside of the single market and customs union.¹⁰

Governments’ Economic Analysis and Forecasts

Both the Scottish Government and the UK Government have prepared analysis to assess the impact of leaving the EU (and the single market and customs union). The Scottish Government published its analysis in a paper in February 2018: [Scotland’s Place in Europe: People, Jobs and Investment](#). Its key findings related to the projected impact of leaving the EU on Scotland’s GDP:

Should the UK pursue a WTO-style relationship, Scotland’s GDP would be around 8.5%, or £12.7 billion (in 2016 cash terms), lower by 2030, compared to continued full EU membership. This is equivalent to a loss of around £2,300 per year for each person in Scotland. A Free Trade Agreement relationship would mean Scotland’s GDP would be 6.1% (£9bn in 2016 cash terms) lower by 2030. Should the UK remain in the Single Market by participating in the EEA this impact could be significantly mitigated, with Scottish GDP estimated to be around 2.7% (or £4 billion in 2016 cash terms) lower.¹¹

The UK Government has not published its analysis, but it was made available to MPs after parts of it became known by the media. The BBC reported the following:

Following a leak of some of the information to BuzzFeed last week, and political pressure to release it, ministers agreed to allow MPs to

⁹ Ibid. para 107

¹⁰ Commons Library Research Papers, [The Trade Bill](#), 18/8073, 7 March 2018 and [Taxation \(Cross-Border Trade\) Bill](#), 18/8126, 11 May 2018

¹¹ Scottish Government, [Scotland’s Place in Europe: People, Jobs and Investment](#), para 57

see the reports on a confidential basis in the House of Commons library.

In each scenario in the forecasts, growth would be lower, by 2%, 5% and 8% respectively, than currently forecast over a 15-year period.

In north-east England growth would be 3% lower if the UK stayed in the single market, 11% under a trade deal and 16% with no trade deal compared with staying in the EU, the forecast says.

The research suggests London - which backed Remain - would fare the best, with reductions of 1%, 2% and 2.5% in each of the three scenarios.

Scotland's estimated hit would be 2.5%, 6% and 9%. Wales would see reductions of 1.5%, 5.5% and 9.5%.¹²

The Commons Library [produced a debate pack](#) for the Westminster Hall debate on the Future of the Scottish Economy that took place on Tuesday 26 June 2018.

¹² BBC News, [Brexit: Official forecasts suggest economies throughout UK will be hit](#), 8 February 2018

3. Process of leaving the European Union

Summary

The key legislation expected to provide “contingency” following exit day (leaving aside any transitional arrangement that may be part of a withdrawal agreement) are the *European Union (Withdrawal) Act 2018 (EUW Act)*, the *Trade Bill* and the *Taxation (Cross-border Trade) Bill*, alongside sector and issue specific primary legislation.

European Union (Withdrawal) Act

The *EUW Act* provides the underlying framework for repatriating EU law and “converting” or “transposing” it into a freestanding and coherent body of domestically enforceable law. This has a potentially very significant impact on the areas where EU law intersects with areas of devolved competence. The Sewel or legislative consent convention applied to several provisions of that Bill, creating a presumptive constitutional expectation that the UK Parliament would secure the devolved legislatures’ agreement before approving it for Royal Assent.

Although the UK Government made changes to that Bill (and a number of political commitments) that persuaded the National Assembly for Wales to give consent for the Bill, the Scottish Parliament withheld legislative consent on 15 May 2018. The UK Parliament proceeded to approve the Bill without further amendment to the objected-to provisions. It received Royal Assent on 26 June 2018. This was the first time in the history of all three devolution settlements where the UK Government has pursued Royal Assent for provisions:

- a) in respect of which it acknowledged the Sewel convention applied; but
- b) where consent had been deliberately withheld.

The UK Government argue this is not a breach of the Sewel convention. It points out that the convention only stipulates Parliament “will not normally” legislate without consent. It maintains it is constitutionally defensible to do so in circumstances which are “not normal” and that this applies to the present circumstances.

Trade Bill

The *Trade Bill* also engages the legislative consent convention. It is a Bill to provide contingency for trade and procurement arrangements with countries in respect of which the EU has existing agreements. The implementation of trade agreements affects devolved functions, and the devolved authorities in both Scotland and Wales have expressed concerns about the approach taken by this Bill to the devolution settlements. That Bill will in any case have to be amended (likely at Commons Report stage) to reflect changes made to the *EUW Bill* in the Lords in May 2018.

Commons Library Briefing Papers:

[Brexit: Devolution and Legislative Consent](#), 18/8274, 29 March 2018

[Legislative consent and the European Union \(Withdrawal\) Bill](#), 18/8275, 23 May 2018

[Trade Bill](#), 18/8073, 11 May 2018

3.1 Overview

Independently of the negotiations between the UK Government and the European Union, contingency arrangements are necessary to prepare the UK for leaving the EU. What role the devolved authorities should have in

shaping those contingency arrangements, and in particular the legislation prepared to give effect to EU exit in a way that guarantees legal and economic certainty, is therefore very important.

3.2 *EUW Bill* and legal continuity

The current scheme for giving effect to EU law in the UK's constitutional order is the *European Communities Act 1972 (ECA)*. This Act confers broad powers on both UK and devolved ministers to take steps to implement EU law in their respective areas of responsibility and provides the domestic legal underpinning for the operation of the EU Treaties with respect to the UK.

The UK Government's starting point for leaving the EU has been to seek to repeal the *ECA*. However, it wishes to "convert" or "transpose" most of EU law, as it is on exit day, into a freestanding, coherent and domestically enforceable body of law. Broadly speaking, this is what the *European Union (Withdrawal) Act 2018* seeks to achieve by creating "retained EU law".

3.3 Changes to competence of the Scottish Parliament

Inevitably, such a process involves making significant changes that affect a broad range of policy areas where the EU makes laws. The devolution settlements are shaped by EU law in two important ways:

- no devolved legislation can be incompatible with EU law; and
- devolved administrations are responsible for *implementing* EU law in areas of devolved competence.

The *EUW Bill's clause 11* as introduced, would have made two key changes to devolved competence. Firstly, it would have removed the requirement to legislate compatibly with EU law. To maintain such a provision in s29(2)(d) of the *Scotland Act 1998* would have been an anachronism, since the UK's obligations to give effect to EU law under the EU Treaties (as a Member state) would no longer apply.

However, the UK Government also introduced provisions which would prevent the Scottish Parliament from modifying retained EU law in devolved policy areas. This was originally subject to only two exceptions:

- if the legal instrument was of a kind they could modify before exit day (i.e. domestic implementing legislation); or
- if the UK Government were to "release" elements of retained EU law from the protections by Order in Council at an undefined later date.

The final *EUW Act* took a different approach, the Bill having been amended to reflect objections raised by the Scottish and Welsh Governments. Instead of protecting from modification all retained EU law by default, **section 12** requires UK ministers to specify in affirmative regulations the areas they wish to protect.¹³ Those regulations would also be time limited: they could

¹³ Regulations made by the affirmative procedure require approval from both the Houses of Commons and Lords. Unlike what the Scotland Act calls a "Type A procedure" Order in Council, they do not need the consent of the Scottish Parliament.

not be made more than 2 years after exit day and could only have effect for up to 5 years. After that, any former EU powers would be released from protection and the devolved institutions could modify them as they see fit.

The UK Government has argued that this “freezing” of EU powers is necessary to prevent regulatory divergence in areas of common strategic interest throughout the UK. It intends to recreate through “common frameworks” some of the harmonised standards and approaches that currently apply throughout the EU, but on a UK-wide basis.

The Scottish Parliament and Government have continued to object to this approach. They agree that common frameworks are needed and that, in some cases, regulatory alignment within the UK will be desirable. However, they maintain that restrictions on the Parliament’s competence should only come with explicit devolved consent and on a case-by-case basis, rather than by secondary legislation.

The UK Government has committed in its Intergovernmental Agreement with the Welsh Government that it will not “normally” make section 12 regulations without devolved consent, provided that consent is not unreasonably withheld.¹⁴ The *EUW Act* allows a protected period of 40 days in which Holyrood can make a “consent decision” about a set of regulations, and a Minister wishing to make regulations without consent must justify to Parliament why she or he is doing so.¹⁵ Nevertheless Holyrood cannot, under the *EUW Act*, “veto” temporary changes to its competence made in this way; the commitment not to proceed without consent is a political, not a legal one, and is in any case qualified on the same terms as the Sewel convention with the word “normally”.

3.4 Legislative consent convention

The Sewel convention is a self-denying ordinance of the UK Parliament that it “will not normally” legislate “with regard to devolved matters” without the consent of the Scottish Parliament. It is recognised in statute (via [s.2 Scotland Act 2016](#)) but it is not judicially enforced as it is a convention rather than a law.¹⁶

The UK Government accepted that the *EUW Bill* engaged the Sewel convention for two reasons:

- it sought to change the law in relation to devolved matters in ways that could have been within the competence of the Scottish Parliament; and
- it sought to change the competence of the Scottish Parliament and the functions of the Scottish Government.

However, there was a discrepancy as to the extent to which the Bill engaged the convention. The Scottish and Welsh Governments, in their respective legislative consent memorandums, took the view that a broader

¹⁴ [Intergovernmental Agreement on the European Union \(Withdrawal\) Bill and the Establishment of Common Frameworks](#), 24 May 2018, para 6

¹⁵ She or he must also make available any statement as to why consent has not been given issued by the Scottish Government.

¹⁶ [R \(Miller\) v Secretary of State for Exiting the European Union](#) [2017] UKSC 5, para 151

range of provisions engaged the convention than was implied by the UK Government's Explanatory Notes to the Bill.

Before the *EUW Bill*, the Scottish Parliament had only once, on a motion, refused to grant consent to part of a UK Parliamentary Bill (the *Welfare Reform Act 2012*). On that instance the relevant provisions were removed from the Bill and Holyrood then legislated to fill the gap.¹⁷

3.5 Consent withheld

The Scottish Parliament's Finance and Constitution Committee considered the provisions of the original Bill and the Bill as amended on Lords Report.¹⁸ On both occasions it published reports recommending that consent should not be given for the Bill, and in particular not for what became section 12 and Schedule 2 of the Act.¹⁹ This assessment was in agreement with the position outlined by the Scottish Government in its [initial](#) and [supplementary](#) legislative consent memorandums.²⁰

The Scottish Parliament voted by 93 votes to 30 on 15 May 2018 to withhold legislative consent for the Bill.²¹ This position departed from that of the National Assembly for Wales, which voted by 46 votes to 9 to consent to the Bill on the recommendation of the Welsh Government.²²

3.6 Royal Assent without consent

Despite consent being withheld by the Scottish Parliament, the UK Parliament presented the *European Union (Withdrawal) Bill* for Royal Assent without further changes having been made to the elements of the Bill engaging the Sewel convention. This is the first time the UK Government has:

- accepted the Sewel convention applies to a Bill;
- had consent actively refused by a devolved authority; and
- sought Royal assent with the relevant provisions included regardless.

There are other instances where the UK Government has legislated without consent, but they have always been in cases where one of the following has applied:

- it disputed whether the Sewel convention was engaged by the provisions of a Bill;
- legislation has inadvertently affected devolved matters and neither UK nor devolved institutions have noticed at the time that the convention was engaged by the relevant provisions; or

¹⁷ [Brexit: Devolution and legislative consent, 18/8274, 29 March 2018](#), p. 45

¹⁸ Finance and Constitution Committee, [European Union \(Withdrawal\) Bill – Interim Report](#), SP Paper 255, 9 January 2018 and [Report on European Union \(Withdrawal\) Bill Supplementary LCM](#), SP Paper 316, 10 May 2018

¹⁹ Scottish Conservative members of the Finance and Constitution Committee dissented on the recommendation in their second report.

²⁰ [Legislative Consent Memorandum – European Union \(Withdrawal\) Bill](#), 12 September 2017; [Supplementary Legislative Consent Memorandum – European Union \(Withdrawal\) Bill](#), 26 April 2018

²¹ SP OR 15 May 2018, Motion S5M12223 (as amended)

²² Motion NDM6722, approved 15 May 2018

- the devolved legislature has not been in a position to grant or withhold consent.²³

3.7 Continuity Bills

Both the Scottish and Welsh Governments introduced and fast-tracked legislation in February-March 2018 before their respective legislatures.²⁴ They did so in anticipation of consent being withheld for the *EUW Bill*. The “Continuity Bills” were intended to make arrangements in devolved areas for the legal continuity of EU law. Their working assumption had been that the *EUW Bill* would, if consent was withheld, be amended to remove provisions not consented to.²⁵ These Bills had several notable differences compared to what became the *EUW Act*. These are outlined section 5 of Commons Library briefing paper: [Legislative consent and the European Union \(Withdrawal\) Bill](#).

The UK Government referred both Continuity Bills to the UK Supreme Court before they could get Royal Assent. It argues that there are doubts as to whether these Bills would be within the legislative competence of the devolved legislatures. If the Supreme Court were to agree with this assessment, it could strike down that legislation.

The Welsh Government has agreed to repeal its Continuity Bill (using regulations in it) as part of its bilateral agreement with the UK Government on the *EUW Bill*. To enable them to do so, the Supreme Court reference on that Bill has been withdrawn. In the absence of agreement, however, the Scottish Government has not agreed to repeal its Bill. The UK Supreme Court is expected to hear argument on the competence of the Scottish Continuity Bill on 25-26 July 2018.

If found to be *within* competence, or capable of being remedied so as to be within competence, the Scottish Continuity Bill would provide a parallel system of continuity arrangements to that in the *EUW Act*. It was also drafted to shadow a Bill that, in its final form, has changed considerably. It is not yet clear how those systems would operate alongside each other in practice or indeed whether one impliedly repeals the other to the extent that their provisions are mutually exclusive.

3.8 Trade Bill

Another Bill that engages the Sewel convention is the *Trade Bill*. It makes arrangements for the continuity of procurement and trade agreements entered into by the EU on the UK’s behalf before exit day. Although international relations and trade are reserved matters, the implementation of trade agreements is a devolved responsibility in devolved areas. Trade agreements typically cover as core areas policy matters that are devolved, like agriculture, fisheries and the environment.

²³ For a detailed account of all the instances in which consent has been withheld, see the Annex of [Brexit: Devolution and legislative consent, 18/8274, 29 March 2018](#)

²⁴ *Law Derived from the European Union (Wales) Bill* and *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill*

²⁵ The *EUW Act* was not in fact amended to remove those provisions despite the Scottish Parliament subsequently withholding consent for it.

The Scottish and Welsh Governments expressed concerns in their legislative consent memorandums in relation to that Bill of a similar nature to those they raised about the *EUW Bill*.²⁶ They were concerned especially that powers conferred on UK ministers could be used in ways that would change the devolution settlement or which could restrict devolved freedom to implement international obligations in the manner of their choosing. These concerns feed into their broader concerns about future trade agreements, which may come with conditions that place greater restrictions on devolved policy choices than are presently imposed by EU trade agreements.²⁷

3.9 Further legislation

The Government intends to bring forward a *Withdrawal Agreement and Implementation Bill (WAIB)* in the event that Parliament approves a withdrawal agreement reached between the UK Government and the EU. This legislation will have to address what the devolved relationship with EU law will be during any transition period, and will likely impact responsibilities of the devolved administrations and legislatures in other ways. Until that legislation is made available for scrutiny, however, it is not possible to say exactly what effect this will have on Scotland and its devolution settlement.

Unlike the *EUW Bill*, the *WAIB* will have a very short period of time in which to be scrutinised by the UK and devolved legislatures. Whereas the *EUW Bill* had almost a full year in which to be scrutinised from introduction to Royal Assent, the *WAIB* will need to be legislated for in (at most) five months. This will significantly constrain what the devolved legislatures' Committees can do to scrutinise this complex piece of constitutional legislation and any consent process will have to be undertaken far more quickly than for what is now the *EUW Act*.

²⁶ Scottish Government, [Legislative Consent Memorandum – Trade Bill](#), 20 December 2017; Welsh Government, [Legislative Consent Memorandum – Trade Bill](#), 7 December 2017

²⁷ On which, generally, see Commons Library Research Papers, [The Trade Bill](#), 18/8073, 7 March 2018, pp. 55-70

4. Returning EU powers

Summary

The UK Government has identified 107 areas where powers currently exercised by the EU's institutions interact with policy areas falling within the Scottish Parliament's devolved competence. Its "[Frameworks Analysis](#)" paper, published in March 2018, indicated that it expected 24 of these areas to be covered by "legislative common frameworks" after Brexit. These frameworks would be UK-wide replacements for EU schemes, predominantly in areas like agriculture, fisheries and the environment.

It is not clear what the UK Government intends these frameworks to look like, either in terms of their substance or how decisions are expected to be made under them. Although the UK Government has committed that it "will not normally" impose these new schemes without devolved legislative consent, it has not given any legal guarantee against the imposition of permanent arrangements with respect to these devolved policy areas.

There are an additional 12 areas in which there is some dispute between the Governments about whether and to what extent EU competencies fall within devolved decision-making at the moment. The most notable of these concern provision in relation to state aid rules and migrant access to (devolved) benefits.

4.1 UK Common Frameworks

The underlying reason why the UK Government sought to "freeze" the exercise of repatriated EU powers by devolved authorities, in the years immediately following exit day, is because it believes there are UK-wide interests that would be compromised by internal regulatory divergence. Although these matters relate to devolved policy areas, these policy areas were kept uniform to the extent that EU law imposed common standards or approaches. The logic follows that, just because matters were devolved under a settlement created while the UK was a long-standing member of the EU, does not mean that devolved authorities should be free to diverge completely to the extent that EU law no longer applies in the future.

The UK Government wishes to protect what it describes as the UK's "internal market" and certain other "common" interests in relation to resources and security. A more uniform regulatory environment in areas where the UK is likely to seek trade deals with third countries would also make it easier to agree more comprehensive agreements.

October 2017 – Agreement on principles

In its October meeting, the Joint Ministerial Committee on European Negotiations (JMC (EN)) published a Communiqué. It outlined an "in principle" agreement between the UK, Scottish and Welsh Governments as to the basis on which UK-wide common frameworks would be created. It first set out the reasons for which a common framework might be created, namely "where they are necessary" to:

- enable the functioning of the UK internal market, while acknowledging policy divergence;
- ensure compliance with international obligations;

- ensure the UK can negotiate, enter into and implement new trade agreements and international treaties;
- enable the management of common resources;
- administer and provide access to justice in cases with a cross-border element; [and]
- safeguard the security of the UK.²⁸

It then set out the agreed constraints on forming the frameworks, which were to:

- be based on established conventions and practices, including that the competence of the devolved institutions will not normally be adjusted without their consent;
- maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules;
- lead to a significant increase in decision-making powers for the devolved administrations.²⁹

However, this agreement neither settled the areas in which frameworks were in fact “necessary”, nor did it settle what they should look like or how decisions should be taken under them. Moreover, there was not, at that stage a definitive account of how many relevant powers in devolved areas were in fact being repatriated from the EU.

Frameworks Analysis

To this end, the UK Government published a “[Frameworks Analysis](#)” on 9 March 2018.³⁰ This document identifies 153 policy areas where there is an intersect between devolved competencies and powers currently exercised by the EU. Of those, 107 are relevant to the Scottish devolution settlement. It then subdivided these powers into three categories:

- those that do not require common frameworks;
- those that it believes may require non-legislative common frameworks; and
- those that it believes may require legislative common frameworks.

The distinction between “legislative” and “non-legislative” frameworks is likely to be a question of whether primary legislation will underpin a framework, imposing legally enforceable constraints on devolved competence, or whether intergovernmental agreements on an operational and non-statutory basis will contain the risk of divergence.

Legislative common frameworks

The UK Government identified 24 areas where it considered “legislative common frameworks” were necessary. For most of these areas, the relevant UK Government department or agency is the **Department for the Environment, Food and Rural Affairs** and/or the **Food Standards Agency** or **Health and Safety Executive**, and relate to agriculture, animal welfare,

²⁸ [Joint Ministerial Committee \(EU Negotiations\) Communiqué](#), 16 October 2017, p. 2

²⁹ Ibid.

³⁰ [Frameworks Analysis: Breakdown of Areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland](#), 9 March 2018

fisheries, the environment, chemicals and pesticides, and food (including food labelling).

There are also policy areas falling within the responsibility of the:

- **Department for Business, Energy and Industrial Strategy** (in relation to emissions trading schemes and mutual recognition of professional qualifications)³¹
- **Cabinet Office** (on public sector procurement); and
- **Ministry of Housing, Communities and Local Government** (on land use and hazardous substances).

The Government intends to bring forward primary legislation in these areas in the years immediately following Brexit. It is therefore likely that any common frameworks in these areas will form part of the Agriculture, Fisheries, Animal Welfare (Sentencing and Recognition of Sentience), and Environmental Principles and Governance Bills.

Non-legislative common frameworks

There is a much larger number of EU powers which the Government has indicated will not require legislative constraints, even if common frameworks are to be put in place at an operational level. There are 59 such areas outlined in the Frameworks Analysis that are relevant to the Scottish devolution settlement, in addition to 24 areas where the UK Government does not believe any kind of framework is needed at all.

Although the UK Government has indicated, politically, that these areas will not be the subject of legislative constraints, there is nothing in the *EUW Act* to prevent them from being included in the initial “freezing” regulations under **section 12**.

Contested areas of competence

In addition to the 143 areas of devolved interest the UK Government identified, there are 12 policy areas where it is contested or otherwise unclear whether the subject matters are devolved (and would need a framework) or are reserved (therefore do not need legislative intergovernmental arrangements anyway). The most notable of these unclear or contested areas concerns who gets to set state aid rules in relation to devolved competencies and functions in the absence of the existing EU-wide framework.

4.2 Intergovernmental Agreement

The UK and Welsh Governments’ bilateral agreement (reached in April 2018) helped to provide some greater clarity as to the UK Government’s intentions in relation to the creation of common frameworks after section 12 regulations expire. This confirmed the UK Government’s intention (politically) to constrain its section 12 regulations to the identified 24 areas and potentially to some of the 12 unclear or contentious areas as to what is and is not devolved at the moment.³¹

The Intergovernmental Agreement also committed those two governments to a further “deep dive” to be overseen by the Joint Ministerial Committee

³¹ [Intergovernmental Agreement](#), Memorandum para 3

on European Negotiations throughout May and June of 2018. The purpose of this was to:

refine policy thinking on legislative frameworks and cross-cutting issues in conjunction with a broader review of intergovernmental relations.³²

³² Ibid. para 5

5. Future of the devolution settlement

There are several broader respects in which the devolution settlement could be affected by Brexit. These range from the impact it has already had on intergovernmental and interparliamentary relations to how the devolution settlement in Scotland might change, indirectly, in response to the challenges presented by the UK's departure from the European Union.

5.1 Implications of Brexit for the Sewel convention

Of particularly recent note are the consequences of the *EUW Act* having been passed without the consent of the Scottish Parliament. This is the first time that the scope and extent of what the convention requires, and who can enforce it, has been tested "practically" since the creation of Scottish devolution. Although there have been more frequently contentious instances in Wales since 1999 on this issue, this situation is still unprecedented insofar as the UK Government has accepted that the Bill engaged the convention, but legislated without consent anyway.

Of more pressing importance is to what extent this instance sets a precedent as to the scope and enforceability of the convention. There is already at least one Bill currently going through Parliament which engages the convention (the *Trade Bill*), the *WAIB* will highly likely engage the convention, and several common framework Bills are anticipated further down the line, which will almost certainly engage the convention.

It is not yet clear whether the failure to reach agreement on the *EUW Act* will have knock-on implications for the ability of the UK Government to proceed by intergovernmental agreement for those subsequent pieces of legislation. If agreement had been reached on a settlement to the *EUW Act*, subsequent intergovernmental discussions may have been more likely to focus on the substance of those future Bills, rather than the process giving rise to them.

5.2 Influence in shaping reserved trade policy

The devolved authorities in both Scotland and Wales have been keen to assert a role in influencing future UK trade priorities, even though the power to make trade agreements is itself reserved to Westminster.

An Institute for Government report [Taking back control of trade policy](#) (published in May 2017) argues that a "working arrangement" with the devolved administrations will be needed for future trade discussions:

... there is a clear need for the UK to create a model for engaging the devolved administrations in trade discussions. This should be part of the 'common framework' with the devolved administrations, which the Government, in its Great Repeal Bill white paper, said it needed to develop to coordinate policy after Brexit. This could include establishing a Joint Ministerial Committee on International Trade (there is already a Joint Ministerial Committee on EU Negotiations), but also will require official-level forums for discussion of more detailed policy issues. This would build on the existing methods of cooperation that are used when the UK lobbies Brussels on EU regulations and directives related to devolved areas.

If a working arrangement is not found, the Westminster Government will find itself either in a 'political hell' of making trade policy without reference to the devolved administrations, or negotiating deals that are limited in their scope.³³

The approach taken to "working arrangements" can vary significantly depending upon a country's broader constitutional settlement. Most notably, there are EU Member States with federal constitutions that proactively involve sub-State bodies in the ratification process of "mixed agreements". This is not an approach the UK has adopted to date.

For further information on the challenges and issues underpinning the role of devolved institutions in influencing or setting trade policy, see the Library paper on [The Trade Bill](#).³⁴

5.3 Calls for further devolution of powers

The Scottish Government has also called for powers that are currently reserved to be devolved in light of Brexit. The most notable of these has been a call for aspects of immigration to be devolved, to allow Scotland to diverge from the rest of the UK in relation to immigration policy. The UK Government opposes the Scottish Government's preference for the UK to join the European Economic Area because it would involve accepting the EU's "four freedoms" including the Free Movement of People.

In February 2018, the Scottish Government published [Scotland's population needs and migration policy: Discussion paper on evidence, policy and powers for the Scottish Parliament](#). It said:

If the UK Government, in leaving the EU, takes Scotland out of the European Single Market and Customs Union, the Scottish Government will want to maintain as many of the benefits of free movement of people as possible. The UK Government has already recognized it would not be appropriate for future migration from the EU to be subject to the current UK immigration rules. It is expected to publish an Immigration White Paper setting out proposals for the transition period after the UK leaves the EU, and possibly further information on plans for EU migration after 2021. The future migration regime for EU citizens should replicate as far as possible the current system of free movement. Sector-specific schemes and caps would also be an inappropriate solution to what is a whole-workforce, whole-economy issue: such a policy solution would not be sufficiently responsive to future needs and emerging sectors.

If the future EU migration scheme for the whole of the UK does not replicate the benefits of free movement of people, the Scottish Government would seek to have new powers on migration devolved to the Scottish Parliament to ensure that, for future EU citizens coming to Scotland, their experience is the same as free movement within Europe and they are able to continue to live and work in Scotland as they do currently.³⁵

³³ Institute for Government, [Taking back control of trade policy](#), May 2017, p. 20

³⁴ The Trade Bill, 18/8073, 7 March 2018, pp. 55-66

³⁵ Scottish Government, [Scotland's population needs and migration policy: Discussion paper on evidence, policy and powers for the Scottish Parliament](#), February 2018, paras 83-84

The UK Government's position is against the devolution of immigration powers. The Minister for Immigration, Caroline Nokes, directly addressed this issue in oral evidence to the Scottish Affairs Committee in March 2018 in an exchange with the Committee Chair Pete Wishart. The exchange related to whether the Home Office was considering special arrangements for seasonal workers, either on a UK-wide or a regional basis:

Chair: Would you have any interest at all in the idea that, if, for whatever reason, you did not feel that you could proceed with such a scheme, the Scottish Government might be able to have the responsibility, so at least Perthshire farmers could be saved?

Caroline Nokes: Immigration is a reserved matter.

Chair: That is it?

Caroline Nokes: Yes.

Chair: We are up against this all the time when it comes to us trying to help and assist our sectors, "Immigration is reserved. Nothing can be done and we will leave it alone".

Caroline Nokes: When you look at the list under the old SAWS scheme of those parts of the country that brought in the most workers, I think Perth and Kinross was about fifth on the list behind Hereford and Lincolnshire.

Chair: Probably, yes.

Caroline Nokes: Immigration is a reserved matter and we are not going to grant an ability to the Scottish Government that I might not also be granting to Lincolnshire County Council.³⁶

5.4 Reform of intergovernmental machinery

There have been calls to reform the UK's intergovernmental machinery even before Brexit. The Joint Ministerial Committee, which is a non-statutory body and depends on a Memorandum of Understanding between the UK and devolved governments, has been criticised. Both UK and devolved Parliamentary Committees have called for reform of the institutional arrangements to make sure that it meets frequently, can more meaningfully resolve disputes through formal mechanisms, and allows devolved authorities greater opportunity to influence its agenda.

With the expected creation of UK-wide "legislative common frameworks" post Brexit, there is an urgency to clarify both the relationship between governments and role of devolved institutions in the space where EU powers currently operate. The devolved institutions have been particularly keen to see reform of intergovernmental machinery to strengthen their opportunities to influence UK priorities in future trade agreements. Consideration will also need to be given to the role of all four of the UK's legislatures in scrutinising decision-making by common framework bodies.

The Library's [debate pack](#) for a Westminster Hall debate on the future of the UK's intergovernmental machinery (Wednesday 20 June 2018) covers these issues in greater detail.

³⁶ [Oral evidence](#), Scottish Affairs Committee Inquiry: Immigration and Scotland, 28 March 2018, Q655-657

6. Further resources

Library Briefing Papers and debate packs

[Brexit: Devolution and legislative consent](#), 18/7274, 29 March 2018

[Legislative consent and the European Union \(Withdrawal\) Bill](#), 18/8275, 23 May 2018

[The Trade Bill](#), 18/8073, 7 March 2018 UK constitutional machinery and the frameworks for intergovernmental cooperation

[Taxation \(Cross-Border Trade\) Bill](#), 18/8126, 11 May 2018

UK Parliamentary materials

Public Administration and Constitutional Affairs Committee, [The Future of the Union, part two: Inter-institutional relations in the UK](#), Session 2016–17, HC 839, 29 November 2016

Lords Constitution Committee, [Inter-governmental relations in the United Kingdom](#), Session 2014–15, HL Paper 146, 27 March 2015

Lords Constitution Committee, [The Union and devolution](#), Session 2015–16, HL Paper 149, 25 May 2016

Intergovernmental materials

[Joint Ministerial Committee \(EU Negotiations\) Communiqué](#), 16 October 2017

[Intergovernmental Agreement on the European Union \(Withdrawal\) Bill and the Establishment of Common Frameworks](#), 24 May 2018

Scottish Government materials

Scottish Government, [Scotland's Place in Europe](#), December 2016

Scottish Government, [Scotland's Place in Europe: People, Jobs and Investment](#), February 2018

Scottish Government, [Scotland's population needs and migration policy: Discussion paper on evidence, policy and powers for the Scottish Parliament](#), February 2018

Scottish Parliamentary materials

Scottish Parliament Devolution (Further Powers) Committee, [Changing Relationships: Parliamentary Scrutiny of Intergovernmental Relations](#), SP Paper 809, 8th Report, 6 October 2015

Finance and Constitution Committee, [European Union \(Withdrawal\) Bill – Interim Report](#), SP Paper 255, 9 January 2018

Finance and Constitution Committee, [Report on European Union \(Withdrawal\) Bill Supplementary LCM](#), SP Paper 316, 10 May 2018

Other Parliamentary/Governmental materials

National Assembly for Wales Constitution and Legislative Affairs Committee, [UK governance post-Brexit](#), February 2018

Welsh Government, [Brexit and Devolution: Securing Wales' Future](#), June 2017

Independent materials

Institute for Government, [Devolution and the Joint Ministerial Committee](#), 23 February 2018

Institute for Government, [Devolution after Brexit](#), April 2018

Institute for Government, [Taking back control of Trade Policy](#), May 2017

Reform Scotland, [Shared Rule: What Scotland needs to learn from federalism](#), April 2016

Centre on Constitutional Change, [Brexit, EU Area-based Policies, and the Devolved Governments](#), February 2017

Alan Trench, [Intergovernmental Relations and Better Devolution](#), December 2014

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