



HOUSE OF LORDS

European Union Committee

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4th Report of Session 2017–19

# Brexit: devolution

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Ordered to be printed 11 July 2017 and published 19 July 2017

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Published by the Authority of the House of Lords

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The current staff of the Committee are Christopher Johnson (Principal Clerk), Stuart Stoner (Clerk) and Alice Delaney (Committee Assistant).

### *Contact details*

Contact details for individual Sub-Committees are given on the website. General correspondence should be addressed to the Clerk of the European Union Committee, Committee Office, House of Lords, London, SW1A 0PW. Telephone 020 7219 5791. Email [euclords@parliament.uk](mailto:euclords@parliament.uk).

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Evidence is published online at <http://www.parliament.uk/brexit-devolution-lords-inquiry> and available for inspection at the Parliamentary Archives (020 7219 3074).

Q in footnotes refers to a question in oral evidence.

## SUMMARY

The impact of UK withdrawal from the EU on the UK's devolution settlements is one of the most technically complex and politically contentious elements of the Brexit debate. The devolution settlements have developed incrementally and asymmetrically since 1997, as more overlapping and shared competences have been introduced. Moreover, EU law is interwoven with the devolution settlements, and throughout this period, the supremacy of that EU law, and its interpretation by the Court of Justice of the EU, have helped to hold the UK together and maintain the integrity of its internal market.

Brexit thus presents fundamental constitutional challenges to the United Kingdom as a whole. In the absence of changes to the devolution settlements, responsibility for policy areas that are already devolved, but are in practice exercised largely at EU level, notably agriculture, fisheries and the environment, will fall automatically to the devolved jurisdictions at the moment of Brexit. This will lead to an increased risk of clashes between the devolved administrations and the UK Government (which will remain responsible for negotiating international agreements, which may overlap with devolved competences). There will also be the potential for regulatory divergence, for instance in environmental standards, creating intra-UK barriers to trade.

These challenges are compounded by the current political climate. In Northern Ireland, the failure to form a power-sharing Executive, the fact that no nationalist MPs have taken up their seats in the new Parliament at Westminster, and the Conservative Party/Democratic Unionist Party agreement, could lead to increased instability and the erosion of cross-community support. As for Scotland, although the immediate prospect of another independence referendum has receded, relations between the Scottish and UK Governments are highly strained. Against this backdrop, the Welsh Government, which is seeking recognition of Wales' particular needs within a whole-UK Brexit deal, fears its interests will be overlooked.

Brexit is not just about competences—it is also about the economy, and about money. The devolved jurisdictions are major recipients of EU funding, including funding from the Common Agricultural Policy, on which hill farmers in particular rely, and structural funds, which support economically deprived areas.

Such reliance is not unique to the devolved jurisdictions—many regions of England face similar challenges. But, notwithstanding the Chancellor's commitment to match agreed EU funding until at least 2020, we heard compelling evidence that the existing population-based method of allocating funding to the devolved jurisdictions will not adequately recompense them in the long term for the loss of EU funding. Brexit means that it is now time finally to bite the bullet and replace the Barnett Formula with a needs-based funding arrangement.

Our inquiry has also underlined the significant reliance of the devolved jurisdictions upon EU migration, to meet labour market needs and demographic challenges. We call on the UK Government, in its forthcoming Immigration Bill, to look for opportunities to enhance the role of the devolved institutions in managing EU migration in ways that meet their specific needs.

The over-riding conclusion we draw from this inquiry is that the UK, Scottish and Welsh Governments, and, if it is formed, all parts of the Northern Ireland Executive, need to set aside their differences and work constructively together to achieve an outcome that protects the interests of all parts of the UK. No durable solution will be possible without the consent of all the nations of the UK.

Common standards will be needed to maintain the integrity of the UK single market, but these cannot be imposed top-down by the UK Government. They must be developed in partnership with the devolved Governments, respecting national, regional and local diversity. The belated acceptance by the UK Government that it will seek the legislative consent of the devolved legislatures to the Repeal Bill is a step in this direction, but more is needed.

In particular, we urge the Government to raise its game in making the Joint Ministerial Committee (European Negotiations) more effective. It needs to have more regular meetings and a structured work programme; it should be authorised to agree common positions on matters affecting devolved competences; and its meetings should be synchronised with the cycle of negotiations in Brussels, allowing the devolved governments to influence negotiations, and the UK Government to report back regularly on progress. This in turn needs to be complemented by enhanced interparliamentary liaison between Westminster and the devolved legislatures.

Brexit will be a major constitutional change for the United Kingdom, and thus potentially a source of instability. Any attempt to use Brexit to make a power-grab, either to 're-reserve' powers previously devolved, or to claim more devolved powers, could compound such instability: this is not the time to embark on controversial amendments to the devolution settlements. We therefore believe that the existing statutory balance of competences between the UK Parliament and the devolved legislatures should as far as possible be unchanged.

The House of Lords Constitution Committee has concluded that hitherto "there has been no guiding strategy or framework of principles to ensure that devolution develops in a coherent or consistent manner". We agree. Brexit makes it more important than ever that a clear and agreed framework of principles should underpin any future reform of the devolution settlements.

# Brexit: devolution

## CHAPTER 1: INTRODUCTION

### Background

1. The impact of UK withdrawal from the EU on the UK's devolution settlements is one of the most technically complex and politically contentious elements of the Brexit debate. The establishment in 1998–99 of the devolved institutions in Scotland, Wales and Northern Ireland transformed the UK's political and constitutional landscape, with the result that the UK has changed beyond recognition since it joined the European Economic Community in 1973.
2. Furthermore, the devolution settlements are built upon UK membership of the EU. Brexit will remove one of the foundations of the devolution settlements, with potentially destabilising consequences. These are compounded by the contemporary political currents of support for the Union of the United Kingdom or for independence (or in the case of Northern Ireland, for a united Ireland) that continue to swirl, in different ways and to varying degrees, in each of the devolved jurisdictions.
3. Indeed, the different perceptions of nationhood in Scotland, Wales and Northern Ireland are a key reason why the devolution settlements are based on so-called 'asymmetric devolution'—that is, devolution is designed differently in each of the devolved jurisdictions. Moreover, the devolution settlements have evolved rather than remaining static—the powers and institutional arrangements in Scotland, Wales and Northern Ireland have been repeatedly altered, leading to further asymmetry.
4. Added to this political complexity is the divisive nature of the Brexit referendum itself. As Table 1 sets out, the constituent parts of the UK voted differently—England and Wales voted to leave the EU, Scotland and Northern Ireland voted to remain.

**Table 1: Breakdown of referendum result by constituent parts of the UK**

	<b>Electorate</b>	<b>Voter turnout %</b>	<b>Votes for remain</b>	<b>Votes for leave</b>	<b>Vote % for remain</b>	<b>Vote % for leave</b>
England (including Gibraltar)	38,981,662	73.0	13,266,996	15,188,406	46.7	53.3
Scotland	3,987,112	67.2	1,661,191	1,018,322	62.0	38.0
Wales	2,270,272	71.7	772,347	854,572	47.5	52.5
Northern Ireland	1,260,955	62.7	440,707	349,442	55.8	44.2
UK	46,500,001	72.2	16,141,241	17,410,742	48.1	51.9

Source: The Electoral Commission, *EU referendum results (2017)*: <https://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information> [accessed 5 July 2017]

5. The result was determined by a simple majority across the UK as a whole. Therefore the vote to leave the EU will take effect across all parts of the UK, notwithstanding the different results in Scotland and Northern Ireland.
6. This in turn has fed into the febrile political context surrounding the future of the UK. In March 2017 the Scottish Government, supported by the Scottish Parliament, announced its intention to seek to hold a second independence referendum, following on from that held in 2014, either in late 2018 or 2019—after the terms of the UK's exit from the EU become clear, but before Brexit takes effect. This call was rebuffed by the UK Government on the grounds that, in the midst of the Brexit negotiations, “now is not the time” for a second referendum.<sup>1</sup> In June, following the general election, the First Minister of Scotland, Rt Hon Nicola Sturgeon MSP, announced that the Scottish Government would not after all seek to introduce the legislation for an independence referendum immediately, but would rather return to the issue at the end of the negotiations.<sup>2</sup>
7. In Northern Ireland, the Brexit referendum exacerbated the divisions between the unionist and nationalist components of the Northern Ireland Executive. The Democratic Unionist Party campaigned to leave the EU, while Sinn Féin campaigned to remain. These divisions became more significant following the referendum result, as Sinn Féin called for a border poll on a united Ireland and the designation of ‘special status’ for Northern Ireland within the EU, while the DUP stressed that Northern Ireland must leave the EU along with the rest of the UK, and that anything else would undermine the Union. These tensions may have contributed to the breakdown of relations that led to the collapse of the Northern Ireland Executive in January 2017. Again, the result of the 2017 general election, and the subsequent agreement between the Conservative Party and the DUP, will have a significant impact.
8. Political leaders in Wales have expressed concern that, given that a majority of voters in Wales supported ‘leave’, and given that Wales does not present such immediate constitutional and political dilemmas for the UK Government as do Scotland and Northern Ireland, it may be overlooked in the Brexit negotiations.
9. Both the Scottish and Welsh Governments (the latter in conjunction with Plaid Cymru) have produced papers on Brexit and the respective implications for Scotland and Wales. Because of the political circumstances there, no such paper has been produced by the Northern Ireland Executive, beyond the letter written by the then First and deputy First Ministers shortly after the referendum.
10. Upon her appointment as Prime Minister in July 2016, Rt Hon Theresa May MP set out “the Government’s commitment to fully engaging with the [devolved governments] in the forthcoming negotiations about the UK’s exit from the European Union”.<sup>3</sup> This commitment was restated in the Prime Minister’s January 2017 Lancaster House speech, when she committed to

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1 ITV, “Now is not the time’: May rules out Sturgeon’s call for IndyRef2’ (16 March 2017): <http://www.itv.com/news/2017-03-16/may-rules-out-sturgeons-call-for-second-scottish-referendum-saying-now-is-not-the-time/> [accessed 20 June 2017]

2 Scottish Parliament Official Report, 27 June 2017: <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11035> [accessed 10 July 2017]

3 Government press release, *Prime Minister to visit Scotland and underline commitment to “preserving this special union”*, 15 July 2016: <https://www.gov.uk/government/news/prime-minister-to-visit-scotland-and-underline-commitment-to-preserving-this-special-union> [accessed 20 June 2017]



“working with the administrations in Scotland, Wales and Northern Ireland to deliver a Brexit that works for the whole of the United Kingdom”. With this in mind, the Government has set up a Joint Ministerial Committee on EU Negotiations, “so ministers from each of the UK’s devolved administrations can contribute to the process of planning for our departure from the European Union”.<sup>4</sup> Yet opinions on whether the UK Government has done enough to take into account the views and concerns of the devolved administrations are divided.

### This report

11. The focus of this inquiry has been, from the outset, on the devolved territories, and on how their interests and concerns can be taken into account in the Brexit process. This emphasis highlights the anomalous constitutional position of England. Despite (or perhaps because of) the fact that England comprises 84% of the population of the UK,<sup>5</sup> there is no devolution settlement in England. England remains governed by the UK Government, and is represented in the UK Parliament. It follows that, notwithstanding the limited reform of House of Commons procedures that gave effect to ‘English Votes for English Laws’, there is no single institution that can represent or speak for England.
12. Nor is England itself homogeneous. London has a distinctive identity and a strong interest in Brexit, and the Mayor of London and the London Assembly exercise powers that may be termed quasi-devolved—but London cannot be equated in status with the nations of the UK. Beyond London, we also acknowledge the distinct (and sometimes contrasting) interests and concerns of the regions of England, from rural Cornwall to the industrial North East. In some cases the priorities of these regions overlap with those of the devolved nations, and in others they differ. But these voices have not been heard in this inquiry.
13. Instead, our intention in this report is to draw the attention of audiences throughout the UK and in the EU to the implications of Brexit for the devolution settlements. Although we have not set out to propose modifications to the devolution settlements, we have commented on the political and constitutional position of Scotland, Wales and Northern Ireland; on the process of repatriation of powers from the EU and the implications for the devolved institutions; on the balance between powers that are devolved and are exercised centrally; on the role of the devolved institutions in connection to the Repeal Bill and connected legislation; on the effectiveness of the engagement and consultation mechanisms between Whitehall, Westminster and the devolved institutions; and on the desirability, and likelihood, of differential arrangements for UK withdrawal that would respect the priorities of the nations and regions of the UK, while respecting the overall vote to leave.
14. With regard to Scotland and Wales, we heard evidence from their respective Governments, the leaders and representatives of opposition parties, a former

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4 Rt Hon Theresa May MP, speech on ‘The Government’s negotiating objectives for exiting the EU’, 17 January 2017: <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech> [accessed 20 June 2017]

5 Office for National Statistics, *Population Estimates for UK, England and Wales, Scotland and Northern Ireland: mid-2016* (22 June 2017): <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/annualmidyearpopulationestimates/latest> [accessed 5 July 2017]

First Minister and Deputy First Minister of Scotland, former leaders of political parties, former Secretaries of State, and from academic and legal experts. The Committee also visited Edinburgh and Cardiff, where it heard evidence from politicians, academics, legal experts and representatives of business, industry and sectors likely to be most affected by Brexit.

15. Given the political situation in Northern Ireland, it was not possible to take evidence from the Northern Ireland Executive or from leaders of the political parties at Stormont in the context of this new inquiry. Nevertheless, the particular importance that we attach to the implications of Brexit for Northern Ireland was demonstrated by our earlier report on *Brexit: UK-Irish relations*, which focused heavily on Northern Ireland. That report took account of evidence heard in autumn 2016 in London and on a visit to Belfast and Dublin. This report builds upon the evidence received and the conclusions which we drew in that report.
16. In that context, the Committee heard evidence from a panel of former Northern Ireland party leaders, including a former First Minister and deputy First Minister, from representatives of the DUP and the SDLP, from a former Secretary of State for Northern Ireland, and from an academic expert on Northern Ireland. We have also taken account of written evidence received from witnesses familiar both with the situation in Northern Ireland, and with the devolution settlements more broadly.
17. Our findings are based on evidence received during February and March 2017. The Committee was due to hear evidence from the Secretary of State for Exiting the European Union, Rt Hon David Davis MP, on 22 March 2017. However, this session was postponed because of the Westminster terrorist attack that day, and efforts to reschedule the meeting were forestalled by the general election, which also delayed publication of the report. We finally met the Secretary of State on 11 July, the same day the report was agreed, and we have briefly quoted from his evidence in this report. We have also sought to reflect other relevant developments, but we have not been able to comment on the Government's Repeal Bill, which was published just after our report was agreed.
18. The Committee has throughout taken account of the important work undertaken by the House of Lords Constitution Committee, not least in its 2016 report on *The Union and devolution*<sup>6</sup> and its 2017 report on *The 'Great Repeal Bill' and delegated powers*.<sup>7</sup>
19. Chapter 2 considers over-arching issues, including the nature of devolution in the UK. The next three chapters focus on the distinctive issues affecting Northern Ireland, Wales and Scotland. Chapters 6 and 7 identify the issues in common that link the three devolved nations, and address the process and policy implications of the repatriation of powers from Brussels, the involvement of the devolved institutions in the Repeal Bill, and the process of intergovernmental consultation and interparliamentary engagement between London and the devolved institutions.
20. **We make this report for debate.**

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<sup>6</sup> Constitution Committee, *The Union and devolution* (10th Report, Session 2015–16, HL Paper 149)

<sup>7</sup> Constitution Committee, *The 'Great Repeal Bill' and delegated powers* (9th Report, Session 2016–17, HL Paper 123)

## CHAPTER 2: DEVOLUTION, THE UK AND THE EU

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### The devolution settlements: general principles

21. Within the UK constitution the Westminster Parliament is sovereign. But under the devolution settlements, certain powers are exercised by devolved administrations and their respective legislatures.
22. The way in which these powers have been devolved has evolved over time. The primary model today is the ‘reserved powers’ model. Under section 29 of the Scotland Act 1998<sup>8</sup>, the Scottish Parliament may not legislate on the ‘reserved matters’ which are defined in Schedule 5. The presumption, therefore, is that the Scottish Parliament may legislate on any matter that is not explicitly reserved to Westminster.
23. In contrast, the Government of Wales Act 1998 devolved specific (and more limited) powers to the National Assembly for Wales: the presumption was that all powers not explicitly devolved remained with the UK Parliament. Only after the Silk Commission’s<sup>9</sup> second report in 2014, implemented by means of the Wales Act 2017, did Wales follow Scotland in moving to a ‘reserved powers’ model.
24. The Northern Ireland devolution settlement, which is underpinned by the 1998 Belfast/Good Friday Agreement,<sup>10</sup> follows a similar but not identical model. The Northern Ireland Assembly possesses full power to legislate on ‘transferred matters’, which are defined as all matters that are neither ‘excepted’ nor ‘reserved’. ‘Excepted matters’ are matters of national importance, such as defence, which can only be dealt with by the UK institutions. ‘Reserved matters’ (including a disparate range of matters such as civil aviation or financial services) generally rest with Westminster, but the Northern Ireland Assembly may legislate with the consent of the Secretary of State. Uniquely, the Northern Ireland Act 1998 also declares that “Northern Ireland in its entirety remains part of the United Kingdom”, and that it “shall not cease to be so without the consent of a majority of the people of Northern Ireland”, expressed in a referendum on Irish unification.<sup>11</sup>
25. There is thus a presumption, under all three devolution settlements, that the devolved legislatures may legislate on any matter not formally reserved to Westminster. Put starkly, this seems to imply a binary relationship between each of the devolved legislatures and the Westminster Parliament—as if the devolved legislatures are free to do anything they want, as long as it is not expressly forbidden. The reality is more complicated, for two main reasons.
26. The first complicating factor is that the three devolution settlements are framed in the context of the UK’s pre-existing EU membership, and reflect the supremacy of EU law: they reflect not a one-to-one relationship between the UK and devolved institutions, but a three-sided relationship, in which

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8 Scotland Act 1998, [section 29](#)

9 The Commission on Devolution in Wales, established in 2011 to review the financial and constitutional arrangements in Wales, and chaired by Sir Paul Silk. See Commission on Devolution in Wales (2017): <http://webarchive.nationalarchives.gov.uk/20140605075122/http://commissionondevolutioninwales.independent.gov.uk/> [accessed 22 June 2017]

10 We recognise the political sensitivities around certain phrases in the context of the politics of Northern Ireland. We have, wherever possible, sought to use what we understand to be politically neutral terminology, save where we cite evidence, where we adopt the terminology used by witnesses themselves.

11 Northern Ireland Act 1998, [section 1](#)

many key powers are exercised neither in Westminster, nor in Edinburgh, Cardiff and Belfast, but in Brussels. A common feature of all the devolved settlements is that the devolved legislatures are prohibited by statute from legislating contrary to EU law.<sup>12</sup> Thus the EU has, in effect, been the glue holding together the United Kingdom's single market. In the words of Dr Jo Hunt, Reader in Law, Cardiff University:

“Devolution post 1997, and the scope for regulatory divergence that could be there in the powers given to Scotland, Wales and Northern Ireland, have to be exercised within a framework of EU law that requires free movement of goods and persons. That does the work for the United Kingdom in its own economic union and internal markets.”<sup>13</sup>

Against this backdrop, the reservation or devolution of powers in areas such as agriculture, which may have had less significance up until 23 June 2016, will become highly significant after Brexit.

27. The second complicating factor is that, as Professor Adam Tomkins MSP, the Conservative Spokesperson for Constitutional Affairs in the Scottish Parliament, told us, there are also “shared powers”. The example he gave was of personal taxation: Schedule 5 of the Scotland Act 1998 reserves to Westminster the power to set fiscal, economic and monetary policy, including taxation rates, but this is qualified by Part 4A of the Act, as amended, which confers upon the Scottish Parliament the power to set specific ‘devolved taxes’ (including income tax). The effect, as Professor Tomkins described it, is that national insurance, income tax on non-earned income and the personal tax allowance are reserved, but “all the rates, thresholds and bands of income tax are devolved in full to the Scottish Parliament”.<sup>14</sup>
28. Such ‘shared competences’ increased substantially with the passage of the Scotland Act 2016, which implemented the recommendations of the Smith Commission,<sup>15</sup> and the political commitments made ahead of the 2014 referendum on Scottish independence. In response, the House of Lords Constitution Committee highlighted the “increased complexities of the overlapping and shared competences that will result from the Scotland Act 2016”,<sup>16</sup> echoing its earlier observation that “the hitherto fairly straightforward demarcation between reserved powers and those devolved to the Scottish Parliament” would be complicated by the extension of shared competences.<sup>17</sup>
29. A key feature of such ‘shared competences’ in the UK system is that they are set out in minute detail in legislation enacted by the Westminster Parliament: while powers may overlap in complex ways, there is a statutory basis for determining whether any particular exercise of devolved competences is lawful. The Westminster Parliament remains constitutionally supreme, and,

12 For instance, Scotland Act 1998, [section 29\(2\)\(d\)](#)

13 [Q 71](#)

14 [Q 6](#)

15 The Smith Commission for further devolution of powers to the Scottish Parliament, chaired by Lord Smith of Kelvin, was established in September 2014, immediately after the Scottish independence referendum. The Smith Commission, *Report of the Smith Commission for further devolution of powers to the Scottish Parliament* (November 2014): [http://webarchive.nationalarchives.gov.uk/20151202171017/http://www.smith-commission.scot/wp-content/uploads/2014/11/The\\_Smith\\_Commission\\_Report-1.pdf](http://webarchive.nationalarchives.gov.uk/20151202171017/http://www.smith-commission.scot/wp-content/uploads/2014/11/The_Smith_Commission_Report-1.pdf) [accessed 22 June 2017].

16 Constitution Committee, *The Union and devolution* (10th Report, Session 2015–16, HL Paper 149), para 304

17 Constitution Committee, *Proposals for the devolution of further powers to Scotland* (10th Report, Session 2014–15, HL Paper 145), para 20

as Dr Tobias Lock, Senior Lecturer, Edinburgh Law School, University of Edinburgh, reminded us, can and does set the rules: “The Scotland Act is itself subject to express repeal. If Westminster so decrees, it can do so.”<sup>18</sup>

30. ‘Shared competences’, as they exist within the United Kingdom constitutional settlement, are thus very different from ‘shared competence’, as it is understood within the EU. Under EU law, the ‘principle of conferral’ means that the EU possesses only the competences conferred upon it by the treaties. Some of these competences are exclusive (such as the customs union, or the negotiation and conclusion of international trade agreements), so only the EU has the power to legislate, while others are shared between the EU and the Member States. In areas of shared competence (such as the environment, the regulation of the internal market, or agriculture) the EU may legislate, subject to the principles of subsidiarity and proportionality. Subsidiarity means that the EU legislates only where the objective cannot be sufficiently achieved by the EU Member States acting individually, but can be better achieved at EU level. Proportionality means that EU action should not go beyond what is necessary to achieve the objectives set out in the Treaties. Where these tests are met, EU law is supreme. But where the EU has not legislated the Member States are free to do so.
31. Professor Roger Scully, Professor of Political Science, Cardiff University, and acting Director of the Wales Governance Centre, argued that, underlying this different approach to shared competence, and the adherence in the UK to a highly prescriptive, binary model, was a reluctance in central Government to contemplate the sharing of sovereignty:
 

“There is a substantial understanding in London of the dimension of devolution that scholars would generally term self-rule ... of the granting of powers to devolved Governments and Parliaments in Edinburgh, Cardiff, Northern Ireland and so on. There is very little understanding, let alone enthusiasm, for creating the dimension of what scholars call shared rule, where the individual constituent units would participate in their own right in the sharing of powers across the whole state.”<sup>19</sup>
32. Moreover, even though EU law is supreme, in many cases it takes the form of Directives, which are not directly applicable, but need to be implemented by means of national laws in the 28 Member States. Such Directives may allow Member States significant discretion: they may, for instance, set minimum standards, leaving the Member States to set higher standards if they so wish. This flexibility extends to the sub-national level: where a Directive relates to an area of devolved competence, its implementation is a matter for the devolved legislatures. Thus it is possible for, say, the National Assembly for Wales to implement EU Directives in a way that reflects the specific circumstances of Wales, which may differ from those in the other nations of the United Kingdom.
33. Finally, under the EU system of ‘shared competence’ there is an umpire, the Court of Justice of the European Union (CJEU), whose decision is final. The Court is responsible for determining not only whether EU legislative acts are lawful (whether they are consistent with the principles of conferral, subsidiarity, and proportionality), but whether the Member States (who are

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18 [Q 20](#)

19 [Q 96](#)



responsible, in turn, for the implementing acts of sub-national authorities) have implemented them properly.

34. It will be clear from this brief overview that the repatriation of powers following Brexit will have far-reaching constitutional consequences for the United Kingdom. The Prime Minister, in her Lancaster House speech on 17 January, promised “to deliver a Brexit that works for the whole of the United Kingdom”. This, she said, would mean “working very carefully to ensure that—as powers are repatriated from Brussels back to Britain—the right powers are returned to Westminster, and the right powers are passed to the devolved administrations of Scotland, Wales and Northern Ireland”. Her “guiding principle” would be “to ensure that ... no new barriers to living and doing business within our own Union are created”. This would mean “maintaining the necessary common standards and frameworks for our own domestic market”.<sup>20</sup>

### Conclusions

35. **The devolution settlements affecting Northern Ireland, Wales and Scotland have developed incrementally and asymmetrically since 1997, as increasing powers have been conferred upon the devolved institutions over time. In the absence of any over-arching concept of ‘shared competence’, or of ‘subsidiarity’, as these are understood at EU level, these changes have been set out in a piecemeal series of Acts of Parliament, each amending its predecessors. This has led the House of Lords Constitution Committee to warn of the increasing complexity of “overlapping and shared competences”.**
36. **Against this backdrop, the European Union has been, in effect, part of the glue holding the United Kingdom together since 1997. The supremacy of EU law, and the interpretation of that law by the Court of Justice of the EU, have in many areas ensured consistency of legal and regulatory standards across the UK, including in devolved policy areas, such as environment, agriculture and fisheries. In practice, the UK internal market has been upheld by the rules of the EU internal market.**
37. **Brexit therefore presents a risk that the complex overlapping competences within the UK could become increasingly unstable. It is not for the European Union Committee to recommend answers to these essentially domestic constitutional questions. We note, however, that the UK Government, in its pre-election published statements on Brexit and on the Repeal Bill, did not address the fundamental constitutional challenges now facing the whole United Kingdom. The new Government must now do so, working in a spirit of partnership and cooperation with the devolved legislatures and governments.**

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<sup>20</sup> Rt Hon Theresa May MP, speech on ‘The Government’s negotiating objectives for exiting the EU’, 17 January 2017: <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech> [accessed 12 April 2017]

## CHAPTER 3: NORTHERN IRELAND

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### The political context

38. The main political parties in Northern Ireland were split in their positions during the Brexit referendum. The largest unionist party, the Democratic Unionist Party (DUP), argued for a vote to leave, whereas its then partner in the Northern Ireland Executive (and the largest nationalist party), Sinn Féin, was pro-remain. The three largest opposition parties, the Ulster Unionist Party, the SDLP and the Alliance Party, were all pro-remain. Smaller parties in the Northern Ireland Assembly took a variety of positions.
39. The referendum saw a majority of votes cast in Northern Ireland for remain (55.8%), albeit on the lowest turnout (62.7%) of any of the constituent parts of the UK. Unionist-dominated voting areas tended to vote to leave, while nationalist-dominated areas tended to vote to remain. Professor Jonathan Tonge, Professor of Politics at the University of Liverpool, and Director of the Economic and Social Research Council's 2010 and 2015 Northern Ireland Westminster election surveys, told us that statistical analysis indicated that:
 

“89% of nationalists voted to remain, against only 35% of unionists. Some 88% of those identifying as Irish identify as having voted to remain, against 38% of British identifiers. Some 85% of Catholics, against only 41% Protestants, voted to remain; 86% of Sinn Féin voters, against only 30% of DUP voters; and 92% of SDLP voters, against 46% of UUP voters [voted to remain]. So the binary divide is being reinforced in Northern Ireland by Brexit.”<sup>21</sup>
40. Immediately after the referendum, Sinn Féin called for a border poll on a united Ireland, and has subsequently argued that Northern Ireland should have ‘special status within the EU’. The DUP has rejected both propositions. The Secretary of State for Northern Ireland, Rt Hon James Brokenshire MP, said in the House of Commons on 1 February 2017 that “concepts of special status are the wrong approach. It is rather about looking at special factors and special circumstances and dealing with them effectively”.<sup>22</sup> On 14 March, the Prime Minister told MPs that “the Secretary of State for Northern Ireland has looked at this issue and it is not right to have a border poll at this stage”.<sup>23</sup>
41. Notwithstanding their different positions, in August 2016 the then First Minister of Northern Ireland, DUP Leader Arlene Foster, and the then deputy First Minister, Sinn Féin's Martin McGuinness, wrote to the Prime Minister to set out their concerns over the implications of Brexit for Northern Ireland. They reiterated their “full commitment to achieving the best possible outcome for the people of Northern Ireland”, and welcomed the Prime Minister's commitment “that we will be fully involved and represented in the negotiations on the terms of our future relationships with the EU and other countries”. The letter set out five key issues:
  - The Irish land border, in particular the need to ensure that the movement of people, goods and services is not impeded, that criminal justice and crime-fighting are not compromised, that an incentive is

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<sup>21</sup> Q 92

<sup>22</sup> HC Deb, 1 February 2017, [col 1007](#)

<sup>23</sup> HC Deb, 14 March 2017, [col.188](#)

not provided for those who wish to undermine the peace process, and the need to bear in mind the consequences for the agri-food sector and for cross-border workers.

- The need to retain business competitiveness and to retain as far as possible the ease of trade with EU Member States and access to labour.
- The need to ensure that the Irish energy market is not undermined.
- Uncertainty around the future of EU funding; and
- The importance of the agri-food sector, which is “uniquely vulnerable both to the loss of EU funding, and to potential tariff and non-tariff barriers to trade”.

The letter also stressed the importance of proactively seeking opportunities in any new arrangements “that would be of benefit to the UK and its regions. No doubt each region will have its own priorities.”<sup>24</sup>

42. No further official statement or overarching paper on Brexit was forthcoming from the Northern Ireland Executive. In January 2017, Martin McGuinness resigned as deputy First Minister following the Renewable Heat Initiative controversy.<sup>25</sup> This led to an early Assembly election on 3 March. The DUP and Sinn Féin were returned as the largest unionist and nationalist parties, while Sinn Féin came close to overtaking the DUP as the largest party. At the time of writing, efforts to re-establish the Northern Ireland Executive continue.
43. At the June 2017 general election, the DUP won 10 seats and, after the election resulted in a hung Parliament, found itself in a key position in ensuring that the Conservative Government could remain in office. Prior to the confidence and supply agreement being announced on 26 June, the DUP leader in the House of Commons, Nigel Dodds MP, went on record as follows:

“There are special circumstances in Northern Ireland and we will try to make sure these are recognised. As regards demands for special status within the European Union, no, because that would create tariffs and barriers between Northern Ireland and our single biggest market which is the rest of the United Kingdom. While we will focus on the special circumstances, geography and certain industries of Northern Ireland, we will be pressing that home very strongly. Special status however within the European Union is a nonsense. Dublin doesn’t support it. Brussels doesn’t support it. The member states of the EU would never dream of it because it would open the door to a Pandora’s box of independence movements of all sorts. The only people who mentioned this are Sinn Féin.”<sup>26</sup>

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24 Letter to the Prime Minister, the Rt Hon Theresa May MP from the First Minister and deputy First Minister of the Northern Ireland Executive, dated 10 August 2016: <https://www.executiveoffice-ni.gov.uk/sites/default/files/publications/execoffice/Letter%20to%20PM%20from%20FM%20%26%20dFM.pdf> [accessed 30 November 2016]

25 Sinn Féin, ‘Martin McGuinness announces resignation as deputy First Minister’ (9 January 2017): <http://www.sinnfein.ie/contents/42984> [accessed 20 June 2017]

26 ‘DUP leader Arlene Foster vows to bring stability to UK with Conservatives’, *The Guardian* (9 June 2017): <https://www.theguardian.com/politics/2017/jun/09/theresa-may-reaches-deal-with-dup-to-form-government-after-shock-election-result-northern-ireland> [accessed 20 June 2017]



44. Sinn Féin won seven seats at the general election, but its MPs do not take their seats. None of the other parties in Northern Ireland won any seats,<sup>27</sup> with the result that no nationalist MPs sit in the new House of Commons.
45. Prior to agreement being reached, nationalist parties and some other observers warned that a deal between the Conservative Party and the DUP could compromise the Government's ability to act with "rigorous impartiality" under the terms of the Belfast/Good Friday Agreement. Sinn Féin went further, arguing that a deal with the DUP would put the UK Government in breach of the Agreement.

### **Brexit: UK-Irish relations report**

46. In December 2016 the Committee published a report on *Brexit: UK-Irish relations*. Although the report examined UK-Irish relations in their entirety, it emphasised the implications of Brexit for Northern Ireland. We found that the economic consequences for Northern Ireland were significant, particularly given the extent of cross-border trade and the agri-food sector's reliance on EU funding. We also found that there could be a negative impact on the free movement of goods and people, significant consequences for the open Irish land border, and uncertainties regarding the future of the Common Travel Area and the right of the people of Northern Ireland to Irish (and therefore EU) citizenship.
47. The report concluded that Brexit could have an impact on political stability in Northern Ireland, and in particular on the confidence of both communities that their interests and aspirations are being respected. It also stated that, just as any undermining of the current open land border would be economically, politically and socially unacceptable, so strengthened checks at the sea boundary between Northern Ireland and Great Britain would be politically divisive and inherently undesirable.
48. Although we did not advocate 'special status' for Northern Ireland, we called on all parties to the negotiations, the EU institutions as well as the Member States, to give official recognition to the special, unique nature of UK-Irish relations in their entirety, including the position of Northern Ireland, and the North-South and East-West structure and institutions established under the Belfast/ Good Friday Agreement. We identified a number of key objectives:
  - Maintenance of the current open land border between the UK and Ireland, as well as of the ease of movement across the sea boundary between Northern Ireland and the rest of the UK.
  - Maintenance of the current Common Travel Area arrangements, and the right of free movement of UK and Irish citizens between the jurisdictions.
  - Maintenance of the right of UK and Irish citizens to reside and work in each other's countries.
  - The retention of rights to Irish (and therefore EU) citizenship for the people of Northern Ireland.

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27 One independent MP was elected in Northern Ireland, Lady Sylvia Hermon in North Down.

- In the event that the UK leaves the customs union, a customs and trade arrangement between the two countries, subject to the agreement of the EU institutions and Member States.
- Consideration of whether the Northern Ireland Executive should be granted devolved powers to make decisions about the free movement of EU workers within its jurisdiction.
- Reaffirmation by both the UK and Irish Governments of their commitment to the Belfast/Good Friday Agreement and subsequent agreements, including continued support for existing cross-border cooperation.
- Continued access for cross-border projects to EU funding programmes.

The present inquiry gave us an opportunity to explore these issues further.

### **The impact of Brexit on Northern Ireland**

49. We heard a range of views about the impact of Brexit on Northern Ireland. The former First Minister of Northern Ireland and former leader of the Ulster Unionist Party, Lord Trimble, saw no difficulty with the Common Travel Area continuing to operate. He thought that checks on illegal movement by non-UK and non-Irish citizens could be conducted largely electronically without significant road checks or border posts. He argued that, even if tariffs were imposed on the EU side, the UK should not reciprocate, thus obviating the need for UK customs installations on the north side of the Irish land border.<sup>28</sup>
50. Lord Trimble said that the impact of the imposition of tariffs on goods would be greater for the Republic of Ireland than for Northern Ireland, because 65% of the Republic's exports went to Great Britain: "The really big trade takes place east-west."<sup>29</sup> Lord Trimble said that EU regional funds had not worked satisfactorily from Northern Ireland's point of view.<sup>30</sup>
51. Sammy Wilson MP, representing the DUP, was also sceptical that Northern Ireland benefited from EU funding to the extent that was suggested.<sup>31</sup> He argued that Northern Ireland, and the UK as a whole, stood to benefit from being freed from the constraints of EU environmental and agricultural regulation, and that new trade deals would present opportunities for the agri-food sector in particular.<sup>32</sup>
52. Mr Wilson acknowledged that leaving the EU created some problems in relation to the Irish land border, but was confident that electronic surveillance could be used to monitor the movement of goods across the border, and across the Irish Sea. While he thought that a totally frictionless border was unlikely, he pointed to examples of borders across Europe (including light-touch customs arrangements on the Sweden-Norway border) that allowed for the free movement of goods without long delays.<sup>33</sup>

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28 [Q 141](#)

29 [Q 143](#)

30 [Q 141](#)

31 [QQ 115–116](#)

32 [Q 116](#)

33 [QQ 115, 117–119](#)

53. Some other witnesses expressed greater concerns about the impact of Brexit on Northern Ireland. Former Secretary of State for Northern Ireland, Lord Hain, cited his amendment during consideration of the European Union (Notification of Withdrawal) Bill, which had sought to draw attention to the particular consequences of Brexit for Northern Ireland.<sup>34</sup> He argued that no answers had been given as to how a frictionless border could be retained, and whether it would be the external customs frontier of the EU. He also expressed his fears about the impact of Brexit on the peace process, and on the continued confidence of the nationalist and republican communities.
54. Lord Hain argued that, while number plate monitoring technology might be acceptable, any physical border controls that affected, for instance, animal movements on farms that straddle the border, or which were perceived as “a kind of security check on people who may be moving about their ordinary life”, would be “fraught with dangers”.<sup>35</sup>
55. Former deputy First Minister of Northern Ireland, and former leader of the SDLP, Mark Durkan, criticised the UK Government for conflating the Good Friday Agreement with the Common Travel Area, and for “issuing platitudes about a border that will be as seamless and inspectionless as possible that nobody really trusts anyway”.<sup>36</sup> With regard to the cross-border movement of goods, Mr Durkan argued that ‘solutions’ around electronic tracking and avoiding border posts would not remove the impact on border communities and local businesses. He pointed out that the milk used in dairy products can cross the border up to five times, while “there is a wee carousel for pigs—they go round and round”. For some types of livestock, the processing plants were on one side of the border, while for others they were on the other side.<sup>37</sup>
56. Professor Tonge argued that maintaining the Common Travel Area was a realisable goal, but acknowledged that “we will see the return of some kind of border in Ireland, but the nature of it is a matter for technical and political resolution”.<sup>38</sup>
57. The Centre for Cross Border Studies warned of the potential for increased political division in Northern Ireland as a consequence of Brexit, and in particular the threat that any imposition of a border either between Northern Ireland and the Republic of Ireland or between Northern Ireland and Great Britain would pose to the delicate balance achieved by the Good Friday Agreement.<sup>39</sup>
58. Academics Dr Sylvia de Mars, Colin Murray, Dr Aoife O’Donoghue and Dr Ben Warwick argued that the impact of Brexit would “fall most heavily on Northern Ireland, because of its unique historical, political and geographical situations”. In their view, it would not be possible after Brexit to maintain the open border as it exists at present in terms of goods. They feared that the return of physical manifestations of the border would act as a lightning rod to dissident republicans.<sup>40</sup>

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34 HL Deb, 27 February 2017, [cols 590–594](#)

35 [Q 131](#)

36 [Q 142](#)

37 [Q 143](#)

38 [Q 92](#)

39 Written evidence from the Centre for Cross Border Studies ([DEV0016](#))

40 Written evidence from Sylvia de Mars, Colin Murray, Aoife O’Donoghue and Ben Warwick ([DEV0004](#))

59. Dr de Mars *et al* noted that Northern Ireland received a proportion of the UK's total EU agricultural support payments three times greater than its proportion of the UK population, and was also in receipt of substantial INTERREG and PEACE IV programme funds.<sup>41</sup>
60. Dr Viviane Gravey, Dr Katy Hayward and Professor Dagmar Schiek, Queen's University Belfast, also argued that Northern Ireland would be the most affected part of the UK as a result of Brexit. They observed that the Northern Ireland economy was heavily dependent on trade with the EU, in particular with Ireland. In sectors such as energy, agriculture and agri-food,<sup>42</sup> and manufacturing, Northern Ireland was part of all-island supply chains. As well as the possibility of customs checks or tariffs, non-coordinated regulatory changes on either side of the border, for instance in fields such as animal welfare or waste management, would present a risk to cross-border trade.
61. Dr Gravey *et al* observed that the border region already suffered from elevated levels of unemployment, overcrowding, financial dependency and over-representation of declining and low-value added industries, exacerbated by its peripheral location in relation to the hubs of Belfast and Dublin. As well as regional funding, they noted that Northern Ireland received 10% of all CAP funding to the UK, with payments from the EU accounting for 87% of annual farm incomes. Northern Ireland was thus particularly vulnerable to the withdrawal of EU funding. They also noted the importance of cross-border healthcare and higher education provision.<sup>43</sup>
62. Professor Feargal Cochrane, Professor of International Conflict Analysis, University of Kent, warned of the potential for political instability and the reopening of questions of identity politics and sectarian divisions. Professor Cochrane believed that Brexit would require some level of border checks on the movement of goods and people, which, as well as being politically contentious, would "inevitably cause some level of delay, frustration and inconvenience to people moving across the border and is also likely to result in significant economic costs for Irish businesses and legal complication for energy suppliers and other public utilities".<sup>44</sup>
63. The British Academy highlighted the impact on agriculture, the energy market (including the single Irish electricity market), the fishing industry, the position of cross-border workers and access to migrant labour. They also cited cross-border policing and security cooperation, access to public procurement, cross-border social and environmental partnerships, access to healthcare, cross-border infrastructure projects and access to research funding.<sup>45</sup>
64. Hospitality Ulster called for recognition of the "unique circumstances" of Northern Ireland's hospitality and tourism industry. They argued that the Northern Ireland economy was inextricably linked to the economies of both Great Britain and the Republic of Ireland, and that it had a unique set of

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41 Written evidence from Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick ([DEV0004](#))

42 Issues relating to agriculture across the UK are covered in more detail in the European Union Committee, *Brexit: agriculture* (20th Report, Session 2016–17, HL Paper 169).

43 Written evidence from Dr Viviane Gravey, Dr Katy Hayward and Professor Dagmar Schiek ([DEV0014](#))

44 Written evidence from Professor Feargal Cochrane ([DEV0015](#))

45 Written evidence from the British Academy, the Royal Society of Edinburgh and the Learned Society of Wales ([DEV0020](#))

circumstances in relation to access for visitors, access to labour, access for goods and services, its regulatory environment, EU funding, access by air and sea, and promotion of tourism.<sup>46</sup>

### Reflecting Northern Ireland's interests

65. We asked our witnesses how Northern Ireland's interests could be addressed in the Brexit negotiations.
66. Sammy Wilson MP stressed that the referendum was a UK-wide decision that should be abided by.<sup>47</sup> He welcomed the notion that "we will all be leaving the EU on the same terms", and did not wish to see a political distinction emerge between Northern Ireland and the rest of the UK. On the other hand, he acknowledged that Northern Ireland would be affected by Brexit "in a different, or perhaps in a more concentrated, way" than other parts of the UK. But he argued that these impacts could be addressed "without special status being conferred on Northern Ireland".<sup>48</sup>
67. In contrast, Lord Hain argued that "Northern Ireland definitely needs some kind of special arrangement to be negotiated over the border and over its trade and increasingly integrated economic relationships between both parts of the island of Ireland".<sup>49</sup>
68. Mark Durkan said that the negotiations should take due account of "the different dimensions of our circumstances". These included Northern Ireland's unique ability automatically to rejoin the EU as part of a united Ireland, should the people of Ireland, North and South, so decide.<sup>50</sup> Likewise, Northern Ireland was unique because its people could elect to be citizens of an EU Member State.<sup>51</sup> He was concerned, however, that "Northern Ireland is constantly caught behind the Scottish question. It is clear to us that often the reason why UK Government Ministers do not want to concede anything special in relation to Northern Ireland ... is because they are afraid of detonating some run of claims in respect of Scotland."<sup>52</sup>
69. Mr Durkan suggested that the terms of Strand 2 of the Good Friday Agreement might need to be changed to take account of the fact that the UK and Ireland would no longer have common membership of the EU,<sup>53</sup> a point also made by Professor Tonge.<sup>54</sup> Mr Durkan argued that the Good Friday Agreement offered a potential toolkit for responding to the challenges of Brexit. For instance, the British-Irish Intergovernmental Conference provided a mechanism for the two Governments to discuss sovereign matters, including Brexit-related issues. Similarly, Strand 2 of the Agreement provided for defined areas of North-South cooperation. He suggested that the EU's Chief Brexit Negotiator, Michel Barnier, was open to Northern Ireland continuing to receive EU funding,<sup>55</sup> and that Strand 2 "could provide a basis whereby Northern Ireland could have a lean-to arrangement with the Republic as far as certain EU programmes were concerned, at least in certain

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46 Written evidence from Hospitality Ulster ([DEV0008](#))

47 [Q 116](#)

48 [Q 117](#)

49 [Q 131](#)

50 [Q 141](#)

51 *Ibid.*

52 [Q 142](#)

53 [Q 140](#)

54 [QQ 92–93](#)

55 [Q 140](#)



sectors, and potentially for customs union equivalence”. He suggested that Northern Ireland could continue to receive PEACE IV and INTERREG funding.<sup>56</sup>

70. The former Leader of the Alliance Party, and former Speaker of the Northern Ireland Assembly, Lord Alderdice, noted that the UK was not a homogeneous entity, and regretted the notion that there needed to be one homogeneous model for Brexit, particularly given that the UK and Ireland already had special arrangements within the EU. He called for a “flexible and creative” approach, citing the Nordic Council (which consists of EU and non-EU States) as a model.<sup>57</sup>
71. Lord Alderdice suggested that “there could be a case for identifying the goods on which you would be particularly careful not to have tariffs developing ... maybe it will be possible to negotiate for specific goods and services that are indigenous”.<sup>58</sup> He also commented on the reliance of border communities on cross-border transport, education and healthcare provision: “If the EU is to pay attention to the needs of people in distant parts of the Republic of Ireland, at the border and in Donegal, it will have to be prepared for some kind of cross-border operation and potentially the funding of it.”<sup>59</sup>
72. Professor Tonge argued that, while the Secretary of State for Northern Ireland had ruled out ‘special status’ for Northern Ireland, “there will be a *de facto* special status, because if the common travel area is preserved there is, to all intents and purposes, a distinctive immigration policy for Northern Ireland”. The difficulty would be in extending this notion to tariff-free trade, because it would make it possible to circumvent the EU common external tariff.<sup>60</sup>
73. Professor Tonge said that there was acute awareness within the EU of the specific problems that Brexit presented for Northern Ireland. However, “if the UK Government are not going to ask for special status for Northern Ireland, the EU will not give it. To some extent that particular ball is batted back into the UK Government’s court. Then the EU’s response will be properly tested.”<sup>61</sup>
74. The Centre for Cross Border Studies warned the UK Government against the adoption of “entrenched positions from which it cannot accommodate the expressed needs of the devolved nations. This will mean either ensuring continued UK membership of the Single Market and the customs union, or exploring differentiated solutions for the devolved jurisdictions.” Failure to take account of these differences could “place the Union that is the United Kingdom in jeopardy”.<sup>62</sup>
75. Dr Gravey *et al* argued that Northern Ireland was in a unique situation because of the need to consider policy coordination on the island of Ireland as well as with Great Britain. They stressed the need to maintain an all-island perspective for economic integration, cooperation and integration of public services. They suggested that “maintaining a pocket of EU law compliance

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56 [Q 141](#)

57 [QQ 140–141](#)

58 [Q 143](#)

59 [Q 141](#)

60 [Q 95](#)

61 [Q 101](#)

62 Written evidence from the Centre for Cross Border Studies ([DEV0016](#))

in Northern Ireland would be advantageous as it would contribute to minimising regulatory discord between Ireland and Northern Ireland”.<sup>63</sup>

76. They observed that “the notion of ‘special status’ implies a difference between ‘mainland’ Great Britain and Northern Ireland—a gap that unionists are wary of highlighting, particularly in the context of wider uncertainty and local instability”. Nevertheless, they noted that the future possibility of Northern Ireland rejoining the EU as part of a united Ireland meant that it would need to be treated as a pre-accession region, in contrast to the rest of the UK. They argued that “territorial differentiation” (different arrangements for different parts of a state *vis-à-vis* its relationship with the EU) was the most direct way of meeting the challenges that Brexit poses for Northern Ireland.<sup>64</sup>
77. In Professor Cochrane’s view, creating a “spongy frontier” in Northern Ireland was the only means of leaving the Single Market and the customs union while avoiding political complications in Northern Ireland. This would involve moving the UK border to Great Britain and allowing a semi-permeable frontier between North and South on the island of Ireland, with checks on goods and people kept to a minimum. Professor Cochrane acknowledged that this might mean people moving from Northern Ireland to Great Britain having to pass through customs and immigration controls, which would be unacceptable to unionists, and would also lead to economic complications, such as a need to monitor imports and exports between Northern Ireland and Great Britain.<sup>65</sup>
78. The British Academy argued that, while the UK had ruled out ‘special status’ if that meant Northern Ireland remaining in the EU, other options were possible, including “an off-the-peg ‘solution’”, such as Northern Ireland membership of the EEA, or a “bespoke ‘solution’”, in which each of the issues arising would be negotiated from scratch, with Northern Ireland allowed different rules from the rest of the UK.<sup>66</sup>
79. Giving evidence on 11 July, the Secretary of State, Rt Hon David Davis MP, confirmed that his aim was to open negotiations on Northern Ireland “soon”, but continued: “We do not expect to finish it until quite close to the end because of the other technical issues to be resolved ... It will also depend on the final outcome on customs, free trade, citizens’ rights and so on.”<sup>67</sup>

### Northern Ireland’s input into the process

80. Prior to the general election, several of our witnesses expressed concern that, given the ongoing political *impasse*, Northern Ireland’s interests would not be adequately represented in the Brexit negotiations. Lord Trimble said that Northern Ireland would be disadvantaged in the Brexit negotiations if the Assembly and Executive were not functioning.<sup>68</sup> He said that the Government needed to find ways to consult political parties and others in Northern Ireland in the absence of an Executive.<sup>69</sup> Lord Hain went further, accusing Northern Ireland’s politicians of a “dereliction of duty” in allowing

63 Written evidence from Dr Viviane Gravey, Dr Katy Hayward and Professor Dagmar Schiek ([DEV0014](#))

64 *Ibid.*

65 Written evidence from Professor Feargal Cochrane ([DEV0015](#))

66 Written evidence from the British Academy, the Royal Society of Edinburgh and the Learned Society of Wales ([DEV0020](#))

67 Oral evidence taken on 11 July 2017 (Session 2017–19) [Q 1](#) (Rt Hon David Davis MP)

68 [Q 145](#)

69 [Q 142](#)

a “huge vacuum to open up in which their own inputs to the vital future of Northern Ireland following Brexit are simply not being registered at all. It is another reason why it is vital to get the institutions back up and running”.<sup>70</sup>

81. Sammy Wilson MP also said that, without a functioning Executive, Northern Ireland’s formal input into the Brexit negotiations would be greatly diluted.<sup>71</sup> On the other hand, he welcomed the bilateral engagement between the UK and Irish Governments, who had a common interest in persuading the EU to look to solutions.<sup>72</sup>
82. Lord Alderdice feared that Northern Ireland “will find it very difficult to get any look-in at all” in the Brexit negotiations, and called for the Northern Ireland Assembly to continue, even if the Executive was suspended, to enable Ministers in London to engage with Assembly members.<sup>73</sup>
83. Professor Tonge was particularly scathing in his assessment of the effectiveness of the Northern Ireland Executive:

“We have an Executive who at times resemble something of a pantomime horse with the head and the legs not always going in the same direction, with a DUP-Sinn Féin axis. Clearly they have diametrically opposed views on Brexit and it is very difficult to co-ordinate any response.”<sup>74</sup>
84. The Centre for Cross Border Studies viewed it as a matter of “grave concern” that not only had the Northern Ireland Executive been unable to set out a comprehensive position ahead of the UK Government’s negotiations with the EU, but that there was no longer an Executive in place to do so. They called on the Secretary of State for Northern Ireland to establish a consultative mechanism properly to reflect Northern Ireland’s interests.<sup>75</sup> Dr de Mars *et al* also stressed the need, in the absence of an Executive, for formal mechanisms to ensure that the implications of Brexit for the people of Northern Ireland were fed into the Brexit discussions.<sup>76</sup>
85. Mr Davis, in his evidence on 11 July, told us that notwithstanding the failure to establish an Executive and the result of the general election, the Government had tried “to talk to both sides”. He said that there was “no controversy” over the desirability of retaining an open land border, and confirmed that in due course the Government would “try to make arrangements to speak to both the major would-be components of the Executive”.<sup>77</sup>

### Northern Ireland and the Brexit negotiations

86. The need to take account of the implications of Brexit for Northern Ireland, and for UK-Irish relations as a whole, has been acknowledged by both sides in the Brexit negotiations.

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70 [Q 131](#)

71 [Q 116](#)

72 [Q 117](#)

73 [Q 147](#)

74 [Q 94](#)

75 Written evidence from the Centre for Cross Border Studies ([DEV0016](#))

76 Written evidence from Sylvia de Mars, Colin Murray, Aoife O’Donoghue and Ben Warwick ([DEV0004](#))

77 Oral evidence taken on 11 July 2017 (Session 2017–19) [Q 8](#) (Rt Hon David Davis MP)



87. In her 29 March letter triggering Article 50, the Prime Minister stated:

“We must pay attention to the UK’s unique relationship with the Republic of Ireland and the importance of the peace process in Northern Ireland. The Republic of Ireland is the only EU member state with a land border with the United Kingdom. We want to avoid a return to a hard border between our two countries, to be able to maintain the Common Travel Area between us, and to make sure that the UK’s withdrawal from the EU does not harm the Republic of Ireland. We also have an important responsibility to make sure that nothing is done to jeopardise the peace process in Northern Ireland, and to continue to uphold the Belfast Agreement.”<sup>78</sup>

88. The then Irish Taoiseach, Enda Kenny, stated:

“I will do my best to put forward the interests of the North in the Brexit negotiations. I will defend the Good Friday Agreement, in its spirit as well as its letter. The Irish Government will oppose a hard border, argue for free movement on this island, seek EU funding for cross-border projects and protect the right of EU citizens, whether from North or South. But this requires the support of all strands of opinion if we are to succeed.”<sup>79</sup>

89. The European Council Brexit negotiation guidelines, published in draft following the UK’s notification under Article 50 and agreed by the EU 27 on 29 April, stated:

“The Union has consistently supported the goal of peace and reconciliation enshrined in the Good Friday Agreement in all its parts, and continuing to support and protect the achievements, benefits and commitments of the Peace Process will remain of paramount importance. In view of the unique circumstances on the island of Ireland, flexible and imaginative solutions will be required, including with the aim of avoiding a hard border, while respecting the integrity of the Union legal order. In this context, the Union should also recognise existing bilateral agreements and arrangements between the United Kingdom and Ireland which are compatible with EU law.”<sup>80</sup>

90. The European Council agreed the following statement in the minutes to the agreement:

“The European Council acknowledges that the Good Friday Agreement expressly provides for an agreed mechanism whereby a united Ireland may be brought about through peaceful and democratic means; and, in this regard, the European Council acknowledges that, in accordance

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78 Rt Hon Theresa May MP, ‘Letter to Donald Tusk triggering Article 50’, 29 March 2017: <https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50/prime-ministers-letter-to-donald-tusk-triggering-article-50> [accessed 10 July 2017]

79 An Taoiseach Enda Kenny, ‘Address to the IIEA: Ireland at the heart of a changing European Union’, 15 February 2017: <http://www.iiea.com/news/taoiseach-addresses-the-iiea> [accessed 10 July 2017]

80 European Council, *European Council (Art. 50) guidelines for Brexit negotiations*, (29 April 2017): <http://www.consilium.europa.eu/en/press/press-releases/2017/04/29-euco-brexit-guidelines/> [accessed 10 July 2017]

with international law, the entire territory of such a united Ireland would thus be part of the European Union.”<sup>81</sup>

91. The European Parliament resolution on negotiations with the United Kingdom, agreed on 4 April, stated that:

“The European Parliament is especially concerned by the consequence of the United Kingdom’s withdrawal from the European Union on Northern Ireland and its future relations with Ireland ... in that respect, it is crucial to safeguard peace and therefore to preserve the Good Friday Agreement in all its parts, which was brokered with the active participation of the Union.”<sup>82</sup>

92. The EU has made clear that it expects the implications of Brexit for Ireland, North and South, to be addressed early in negotiations, before wider discussions can begin on the terms of the UK’s future relationship with the EU. In contrast, the Secretary of State for Exiting the EU, Rt Hon David Davis MP, has said that it is “wholly illogical” to separate border issues from a trade deal: “How on earth do you resolve the issue of the border unless you know what the customs agreement is, what the free trade agreement is, whether you need to charge tariffs at the border?”<sup>83</sup> The terms of reference for the Article 50 negotiations, agreed between the UK and the EU on 19 June, stated that “a dialogue on Ireland/Northern Ireland has been launched under the authority of the Coordinators”.<sup>84</sup> However, the Secretary of State repeated that the issue of the Irish land border may not be settled until the end of the process, when the UK’s trade relationship with the EU is agreed.<sup>85</sup>

### Conclusions

93. **Northern Ireland’s distinctive geographical, historical, political, and (in the context of the 1998 Belfast/Good Friday Agreement) constitutional circumstances mean that it will be profoundly affected by Brexit. There will be a significant impact, including on cross-border trade, the agri-food sector, energy, transport, fisheries, access to EU labour, healthcare provision, tourism, and police and security cooperation.**
94. **It also appears that the Brexit debate has undermined political stability and exacerbated cross-community divisions, contributing to the collapse of the Northern Ireland Executive and the calling of an early Assembly election. At the time of writing, the power-sharing institutions have yet to be restored. This, together with the appointment of a new Irish Taoiseach, the Conservative-DUP**

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81 European Council, *Minutes of Special meeting of the European Council (Art.50) held on 29 April 2017* (23 June 2017): <http://data.consilium.europa.eu/doc/document/XT-20010-2017-INIT/en/pdf> [accessed 10 July 2017]

82 European Parliament, resolution on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union (2017/2593(RSP))

83 Quoted on 14 May 2017: BBC, ‘David Davis voices concern over EU border plan’ (14 May 2017): [www.bbc.co.uk/news/world-europe-39915364](http://www.bbc.co.uk/news/world-europe-39915364) [accessed 16 June 2017]

84 Department for Exiting the European Union, ‘Terms of reference for the Article 50 negotiations between the United Kingdom and the European Union’ (19 June 2017): [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/620409/Terms\\_of\\_reference\\_for\\_the\\_Article\\_50\\_negotiations\\_between\\_the\\_United\\_Kingdom\\_and\\_the\\_European\\_Union.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/620409/Terms_of_reference_for_the_Article_50_negotiations_between_the_United_Kingdom_and_the_European_Union.pdf) [accessed 5 July 2017]

85 BBC, ‘Brexit negotiations: Barnier rules out “concessions”’ (19 June 2017): <http://www.bbc.co.uk/news/uk-politics-40321271> [accessed 5 July 2017]

confidence and supply agreement at Westminster, and the fact that no nationalist MPs have taken their seats in the new Parliament, has created new uncertainty, underlining the fragility of the political settlement in Northern Ireland.

95. The Belfast/Good Friday Agreement established a delicate equilibrium, encapsulated in the power-sharing institutions, and the mechanisms for enhanced North-South and East-West cooperation. It is imperative that Brexit does not weaken this equilibrium or the commitment and confidence of both unionist and nationalist communities in the political process. While the agreement between the Conservative Government and the DUP provides an opportunity for Northern Ireland's interests to gain attention and prominence, the Government must also take account of the interests of the nationalist community, in order to maintain its confidence. Political stability in Northern Ireland must not be allowed to become 'collateral damage' of Brexit.
96. Our December 2016 report on *Brexit: UK-Irish relations* called for all parties to the negotiations to give official recognition to the special, unique nature of UK-Irish relations in their entirety, including the position of Northern Ireland, and the North-South and East-West structure and institutions established under the Belfast/Good Friday Agreement.
97. We are therefore heartened by the statements by the Prime Minister, the Irish Government, the European Council and the European Parliament, all expressing a commitment to protect the achievements of the peace process and to seek to avoid the imposition of a hard border on the island of Ireland. We also welcome the European Council's statement that "the Union should also recognise existing bilateral agreements and arrangements between the United Kingdom and Ireland which are compatible with EU law" as an indicator that it will not stand in the way of retention of the Common Travel Area, which predates either UK or Irish EU membership and which benefits all communities across these islands.
98. 'Special status' is a politically contentious term in Northern Ireland, and we acknowledge the unionist community's concerns that no aspect of the Brexit negotiations should undermine Northern Ireland's ties to the rest of the UK. Yet at the same time, the specific circumstances in Northern Ireland give rise to unique issues that will need to be addressed during the Brexit negotiations.
99. As we concluded in our December 2016 report, the unique nature of UK-Irish relations necessitates a unique solution. We welcome the European Council's commitment to seek "flexible and imaginative solutions", and call on the UK Government to work with the EU negotiators to identify and outline such solutions as a matter of priority.

## CHAPTER 4: WALES

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### The political context

100. The Welsh Government, together with a majority of members of the National Assembly for Wales (including Labour Party, Plaid Cymru and Liberal Democrat, and some Conservative, AMs), supported the UK remaining in the EU. A substantial minority of Assembly members (all UKIP and some Conservatives) supported the UK leaving the EU.
101. The referendum result in Wales resulted in a majority of votes (52.5%) cast for leave. Turnout was 71.7%, which, while lower than in England, was the highest of any of the devolved nations. Wales was the only one of the three devolved nations where a majority voted to leave.
102. In response to the result, the First Minister of Wales, Rt Hon Carwyn Jones AM, outlined “six priorities [for Wales] arising from these changed circumstances”:
  - Protect jobs and economic confidence
  - Play a full part in discussions on EU withdrawal
  - Retain access to the European Single Market
  - Negotiate continued involvement in major EU funding programmes, such as for farming and poorer areas
  - Revise the Treasury’s funding formula for the Welsh Government budget
  - Put the relationship between the devolved administrations and the UK Government on an “entirely different footing”.<sup>86</sup>
103. On 23 January 2017 (six days after the Prime Minister’s Lancaster House speech), the Welsh Government and Plaid Cymru published a joint White Paper entitled *Securing Wales’ Future*.<sup>87</sup> The White Paper described itself as “not just a shopping list of demands from Wales, but a pragmatic starting point for negotiations that can deliver for all parts of the United Kingdom”. It set out six key priorities:
  - Continued participation in the Single Market to support businesses, and secure jobs and the future prosperity of Wales
  - A balanced approach to immigration linking migration to jobs and good properly-enforced employment protection
  - On finance and investment, UK Government assurances that Wales would not lose funding as a result of the UK leaving the EU
  - A fundamentally different constitutional relationship between the devolved governments and the UK Government, based on mutual respect and consent

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86 BBC, ‘EU referendum: Jones fears for jobs after Brexit vote’ (24 June 2016): [www.bbc.co.uk/news/uk-politics-eu-referendum-36618878](http://www.bbc.co.uk/news/uk-politics-eu-referendum-36618878) [accessed 20 June 2017]

87 Welsh Government, *Securing Wales’ Future* (January 2017): [https://beta.gov.wales/sites/default/files/2017-01/30683%20Securing%20Wales%C2%B9%20Future\\_ENGLISH\\_WEB.pdf](https://beta.gov.wales/sites/default/files/2017-01/30683%20Securing%20Wales%C2%B9%20Future_ENGLISH_WEB.pdf) [accessed 20 June 2017]

- Maintenance of social and environmental protections and values, in particular workers' rights
- Consideration of transitional arrangements to avoid a 'cliff edge' in the UK's economic and wider relationship with the EU.

104. The Welsh Government Cabinet Secretary for Finance and Local Government (with responsibility for Brexit-related issues), Mark Drakeford AM, told us that, while the Welsh Government's mind was "not closed on differentiated solutions", its White Paper "provides for a single UK proposition", rather than different terms of the relationship with the EU for the nations of the UK.<sup>88</sup> He said that the White Paper was "essentially focused on Welsh priorities, but we have tried to frame them within what we believe will be a successful outcome for the whole of the United Kingdom. In many ways, the primary purpose of our paper has been to try to help shape the UK's negotiating position as Article 50 is triggered."<sup>89</sup>

### Wales and the Single Market

105. Mr Drakeford stressed that the Welsh Government's "overriding priority is to secure full and unfettered access to the single market post Brexit":

"We say that because we believe that free and frictionless trade, free of tariff barriers, non-tariff barriers and with regulatory equivalence, is in the best interests of Welsh businesses and the Welsh economy. Two-thirds of exports from Wales go to the European Union. We think anything that makes that trade more difficult will be damaging to the Welsh economy."<sup>90</sup>

106. Leanne Wood AM, Leader of Plaid Cymru, which co-authored the White Paper, said that membership of the Single Market was important for Welsh jobs and its economy.<sup>91</sup> While Plaid Cymru sought membership of the Single Market, the Welsh Government had called for full and unfettered access to the Single Market. The White Paper was a compromise between these two positions: the priority was to "try to keep that relationship as close to what it is as at present".<sup>92</sup>

107. Andrew RT Davies AM, Leader of the Welsh Conservatives, agreed that a good trading relationship with the EU was important both for Wales and the UK, but argued that membership of the Single Market was incompatible with the referendum result. He said that the authors of the White Paper had been unable to explain what "participation" in the Single Market meant—everyone had access to the Single Market, but "it just depends on what rate you have to pay to get into that market or whether you are an actual member".<sup>93</sup>

108. The former leader of Plaid Cymru, Lord Wigley, argued that the EU Single Market was more important to Wales than to the rest of the UK. He noted that the EU accounted for 67% of all Welsh exports, and that, in 2016, Wales had a £2.25 billion trade surplus with EU countries and a £2.3 billion

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88 [Q 134](#)

89 [Q 132](#)

90 *Ibid.*

91 [Q 55](#)

92 [Q 57](#)

93 *Ibid.*

trade deficit with non-EU countries. A failure to reach a comprehensive free trade agreement with full participation in the Single Market, in particular for US companies operating out of Wales, would be disastrous for Welsh manufacturing, which was worth £9 billion to the Welsh economy. The alternative of trading under WTO terms would be equally disastrous for Welsh exporters, as food exporters would face a tariff of 15% on exports to the EU, while car manufacturers would face a tariff of 10%.<sup>94</sup>

109. Dr Rachel Minto, Research Associate, Cardiff University, agreed that “Wales has a particular relationship with the single market. It is a small nation, and for small nations the single market has particular importance for securing foreign direct investment.”<sup>95</sup>
110. Sir Emyr Jones Parry GCMG, Chancellor of Aberystwyth University, and former UK Permanent Representative to the UN and to NATO, believed that Single Market access for Wales was crucial, but added that the problem with the language of “unfettered access to the Single Market is that the conditionality attached to it immediately hits the very things you do not want to accept”, such as free movement.<sup>96</sup> While he could conceive of different arrangements for access to EU research programmes, or freedom of movement in certain sectors, more broadly he argued in favour of a United Kingdom position “that reflects as much of the interests of everyone as possible”.<sup>97</sup>
111. Dr Victoria Winckler, Director, Bevan Foundation, added that businesses that did not export might still be affected because they were part of supply chains which relied on exports, or were beneficiaries of a multiplier effect from those businesses.<sup>98</sup> She was concerned about the impact of Brexit on jobs and social protection, environmental protection and community relationships.<sup>99</sup>
112. The leader of UKIP in the National Assembly for Wales, Neil Hamilton AM, also believed that membership of the Single Market was out of the question. In his view:

“Wales is part of the United Kingdom, and this is a United Kingdom negotiation. Eighty per cent of the people of Wales would not vote for independence from the rest of the United Kingdom and so we have to see this in the United Kingdom context.”<sup>100</sup>

### **The Welsh farming and manufacturing sectors**

113. We heard broad agreement that the Welsh economy, thanks to its reliance upon manufacturing and agriculture, was particularly reliant upon tariff-free access to the EU Single Market. In the words of Mark Drakeford AM:

“Our emphasis on the single market is because of the Welsh economy. We have a larger proportion of manufacturing in the Welsh economy

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94 [Q 124](#), European Union Committee, *Brexit: the options for trade* (5th Report, Session 2016–17, HL Paper 72), *Brexit: trade in goods* (16th Report, Session 2016–17, HL Paper 129) and *Brexit: trade in non-financial services* (17th Report, Session 2016–17, HL Paper 134)

95 [Q 71](#)

96 [Q 63](#)

97 [QQ 69–70](#)

98 [Q 84](#)

99 [Q 85](#)

100 [QQ 55–56](#)



than other parts of the United Kingdom, and those manufacturers' goods pass across the border absolutely routinely."<sup>101</sup>

114. Neil Hamilton AM also acknowledged the importance of the Single Market to these sectors, noting that a large proportion of lamb exports from Wales went to the EU, and that automotive manufacturing was a big part of the Welsh economy.<sup>102</sup> This was borne out by economist Gerald Holtham, who pointed out that the Welsh economy was comparatively small, and was not as diversified as the UK economy as a whole, specialising in areas dependent on European trade, notably the automotive industry, the aerospace industry and farming.<sup>103</sup>
115. Professor Scully agreed that Wales depended heavily on a small number of export-oriented manufacturing businesses and livestock agriculture.<sup>104</sup> The economic implications of a loss of Single Market membership were thus "profoundly concerning for Wales".<sup>105</sup>
116. Mary Williams, Acting Political Officer, Unite Wales, said that tariff-free access to the Single Market was a priority for its members across the automotive, aerospace, and steel and metal industries. She cited the Ford plant in Bridgend, which produced engines which were shipped to Cologne as part of the Ford Fiesta—the number one selling car in the UK. The imposition of tariffs on shipments to Cologne and back could thus put jobs at risk. Likewise, Airbus in north Wales had a workforce of 6,000 creating wings for the A380 aircraft, which were transported to Spain and then to France for assembly.<sup>106</sup>
117. Mr Holtham noted that there were two engine plants in Wales that exported between 80% and 90% of their product to the EU, and imported about 70% of parts or material used in the construction of engines from the EU. There was also a "very tangled supply chain in that industry, which is absolutely dependent on being able to shuffle stuff back and forth across the border without bureaucracy, as well as without tariffs". He suggested that long-term investment in the automotive sector would suffer if Wales no longer had free access to the Single Market.<sup>107</sup>
118. Although the farming industry was less significant in GDP terms, Mr Holtham cited its cultural importance, in particular as a bastion of the Welsh language, and the potential impact on dependent and economically vulnerable rural communities.<sup>108</sup> The consequences of a disadvantageous trade deal for Welsh agriculture would be catastrophic, and could lead to the depopulation of rural areas.<sup>109</sup>
119. Sir Emyr Jones Parry agreed that agriculture in Wales was precarious, with "almost subsistence economy in the upland areas", and noted that 92% of its exports went to the EU. Wales' climate and topography meant that it was highly dependent on sheep farming, which had benefited from CAP

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101 [Q 133](#)

102 [Q 56](#)

103 [Q 63](#)

104 [Q 92](#)

105 *Ibid.*

106 [QQ 84, 88](#)

107 [Q 63](#)

108 *Ibid.*

109 [Q 66](#)

funding—serious thought needed to be given to the post-Brexit support system for farmers.<sup>110</sup> Nicholas Fenwick, Head of Policy, Farmers’ Union of Wales, pointed out that 80% of Wales was an EU-designated Less Favoured Area,<sup>111</sup> and that the risks for Welsh farmers were correspondingly greater than for English farmers.<sup>112</sup>

120. Witnesses also raised a longer-term issue, namely the impact of future free trade agreements on Wales, and on the Welsh farming sector in particular. Mr Drakeford stressed Wales’ distinct interests in any future free trade agreements with non-EU countries:

“We would need to have a differentiated approach to it. We wince a little bit every time we hear a UK Minister say in a throwaway remark how great it would be to have a free trade deal with New Zealand, for example. If we get the wrong free trade deal with New Zealand, it will be the end of Welsh hill farming and sheep farming.”<sup>113</sup>

121. Mr Fenwick noted concerns about the standards applied in countries with which the UK may seek to reach trade agreements, as well as the additional competition that would be introduced.<sup>114</sup> Sir Emyr Jones Parry warned that “if there were a free trade agreement that brought in New Zealand lamb, the impact on Wales would be disastrous”. He said that trade negotiations with non-EU countries on agriculture, as well as automobile, aeronautics and steel, should not proceed if the impact on Wales was disproportionate and there was no consultation.<sup>115</sup>

### Access to EU labour

122. Several witnesses stressed the importance of EU labour to the Welsh economy. Dr Minto pointed to data indicating that EU citizens made a notable contribution to the agrifoods industry and the healthcare sector in Wales.<sup>116</sup> Leanne Wood AM drew on the same data, saying that there were 79,000 EU nationals living in Wales, a relatively low figure, but concentrated in the NHS, agriculture, tourism and some manufacturing sectors. She feared the “dangers to those sectors if freedom of movement was suddenly completely ended”. She cited the experience of firms such as Airbus, which relied on freedom of movement to move its workers between Wales and France, often at short notice. That was why the White Paper had advocated a “compromise to continue with freedom of movement but link it more to work”.<sup>117</sup>

123. Neil Hamilton AM called for a UK-wide solution to the free movement issue:

“If it is true, as Leanne says, that we need specific types of skills in Wales that would not be available without immigration from other parts of the EU, let us identify those areas and needs, and feed that into the

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110 [Q 63](#)

111 These are areas where farming is handicapped by geography, topography or climate and in which farmers are eligible for compensation for the extra costs incurred or income foregone.

112 [Q 85](#)

113 [Q 135](#)

114 [Q 85](#)

115 [Q 66](#)

116 [Q 82](#)

117 [Q 56](#)



Government's decisions, which they will have to make, on the kind of immigration policy that we want for the United Kingdom.”<sup>118</sup>

Andrew RT Davies AM also did not think it was in Wales' interests to have a separate immigration policy from the rest of the UK.<sup>119</sup>

### EU funding

124. Several witnesses were concerned about the impact on Wales of the loss of EU funding. Mr Drakeford pointed out that, while the UK as a whole was a net contributor to the EU, Wales was a net beneficiary:

“It would be a very difficult message to give to people in Wales that they are going to do less well out of their membership of the United Kingdom than they would have done out of their continuing membership of the European Union. We say that funds flowing into Wales today as a direct result of our EU membership must continue to flow, and to flow in full, to Wales once Brexit is accomplished ... Simply putting into the baselines of the devolved Administrations the sums that currently come through EU membership would be a pragmatic and practical way of addressing this issue.”<sup>120</sup>

125. Mary Williams gave the example of £350 million of EU funding available for regeneration in Ebbw Vale. Of this, £33.5 million went towards Coleg Gwent, which contributed to 29,000 Welsh apprenticeships, and £111 million for transport and infrastructure projects. She wished for such investment to continue after Brexit.<sup>121</sup>
126. Leanne Wood AM noted that, while the UK Government funded Wales on the basis of population, EU funding to Wales was on the basis of need, “so there is a question there about how that money would be allocated post-Brexit”.<sup>122</sup> Neil Hamilton AM said that UKIP argued that “every single penny of British taxpayers' money that is currently spent in Wales ought to come to Wales after Brexit”.<sup>123</sup>
127. Mr Holtham noted that the allocation of EU funding was on a needs-based formula, whereas “the Barnett Formula answers with a shrug if you ask whether it is fair”.<sup>124</sup> Lord Wigley agreed that the Barnett Formula was “singularly inappropriate” to support the specific needs of Wales (such as highland farming or tackling poverty in the old industrial areas) post-Brexit, because “any formula that is not needs-geared is going to lead to a significant loss”.<sup>125</sup>
128. Lord Hain stressed that there should be no shortfall in funding for Wales as a result of Brexit, and argued that the Barnett Formula as presently constituted was inadequate.<sup>126</sup> Dr Winckler agreed that the prospect of Brexit exposed

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118 [Q 57](#)

119 *Ibid.*

120 [Q 133](#)

121 [Q 85](#)

122 [Q 60](#)

123 [Q 59](#)

124 [Q 64](#)

125 [Q 125](#)

126 [Q 126](#)

the inadequacies of the Barnett Formula as a means of allocating funding, and it was “time to bite the bullet” and address the issue.<sup>127</sup>

129. Mr Fenwick told us that 80% of Welsh farm income also came from EU funds—application of the Barnett Formula to farming subsidies would be extremely disadvantageous.<sup>128</sup> He added that businesses that were supported by EU funding in turn spent over £1 billion in their wider communities: “We are looking at complete rural collapse if funding is not maintained, including structural funds as well.” This could lead to depopulation and would have a significant negative impact on the Welsh language: “In large areas of Wales, [farming] is the one industry within which Welsh is used almost at 100%”.<sup>129</sup> Professor Scully agreed that the loss of CAP subsidies, structural funds and other EU funding could have an impact on rural and valley communities.<sup>130</sup>
130. Looking to the future, Dr Minto suggested a model whereby an amount of money could be added to the block grants by calculating how much Wales would have received were it to continue to be part of the European Regional Development Fund and the Common Agricultural Policy.<sup>131</sup>

### Reflecting Wales’ interests

131. Lord Hain, a former Secretary of State for both Wales and Northern Ireland, noted the different political imperatives, given that Scotland and Northern Ireland voted to remain and Wales voted to leave:

“We have an asymmetric structure of devolution in the UK. It is very different in each of the three cases. I do not see why there could not be different solutions for each of Wales, Northern Ireland and Scotland appropriate to their interests and their needs ... I think we should start from the presumption that there is not a uniform, one-size-fits-all approach to this. It has to be tailored to the particular needs of each of the nations.”<sup>132</sup>

Lord Hain also argued that it would be in Wales’ interests to have some form of special arrangement.<sup>133</sup>

132. Another former Secretary of State for Wales, Lord Hunt of Wirral, urged respect for the overall referendum result. Nevertheless, he too thought that it was possible to have different terms across the constituent parts of the UK. He cited Wales’ distinctive culture, language and economy, and its character as an “outward-looking place”.<sup>134</sup>
133. Dr Hunt contrasted the Scottish Government’s approach of “asking for things that will be incredibly difficult to deliver legally, politically and economically”, with Wales, which “tended to take a more collaborative and co-operative line on this and has not pressed itself. It is seeking positions where it can come together with the UK Government.”<sup>135</sup>

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127 [Q 90](#)

128 [Q 85](#)

129 [Q 87](#)

130 [Q 92](#)

131 [QQ 71, 73](#)

132 [Q 124](#)

133 [Q 131](#)

134 [Q 125](#)

135 [Q 71](#)

134. Dr Hunt said that “legally, politically and economically, it is incredibly difficult to see how” different arrangements for future relations with the EU between the nations of the UK would work, but saw potential for continued participation in various international networks, to the extent that Wales (or the other devolved administrations) had the capacity to do so. She suggested that the National Assembly could seek to legislate in devolved areas according to EU standards, for instance on the environment.<sup>136</sup>
135. Lord Wigley called for a “willingness to avoid a one size fits all model”, but was concerned that the Prime Minister had not shown sufficient sensitivity to the different needs and aspirations across the nations of the UK.<sup>137</sup> Sir Emyr Jones Parry went further, commenting that “it is difficult for little old Wales with 3.2 million [people] to imagine that it can be the tail to wag the larger dog”. Nevertheless, he told us, “if you want to preserve the unity of the kingdom, due regard has to be given” to the views and interests of the devolved nations.<sup>138</sup> Echoing witnesses from Northern Ireland, he worried that fears in Whitehall about the political situation in Scotland prejudiced Wales’ relationship with London.<sup>139</sup>
136. Gerald Holtham was concerned that “the brute political fact is that we just do not matter ... We do not have an oilfield and we do not have a successful national party threatening to secede.” He feared that “the Welsh interest will be overridden. That is the basic fact of life.”<sup>140</sup> Professor Scully agreed that, from a political point of view, “Wales is possibly the least problematic of the devolved nations in the sense that it has nothing that it can credibly threaten London with”.<sup>141</sup>
137. Dr Winckler summed up the political challenge facing Wales as follows:
- “Wales is in a different and difficult position in that it has very limited leverage over the UK Government. It is not in the same position as Scotland; it is in a different position economically. It will be very difficult for Welsh representatives to make their voices heard, particularly if decisions are not in its interests.”<sup>142</sup>

### Conclusions

138. **Wales could be profoundly affected by Brexit. The Welsh economy is highly reliant on membership of the EU Single Market, in particular in the fields of manufacturing (which is a proportionately larger sector of the Welsh economy than in other parts of the UK, and where a small number of exporting companies in the automotive and aerospace industries are principal economic drivers) and agriculture. Two-thirds of Welsh exports go to the EU, and Single Market membership has been an important driver of foreign direct investment. The Welsh economy is therefore particularly vulnerable to the effects of any diminution in the UK’s unfettered access to and ability to trade freely with the Single Market.**

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136 [Q 74](#)

137 [QQ 124–25](#)

138 [Q 65](#)

139 [Q 70](#)

140 [Q 64](#)

141 [Q 92](#)

142 [Q 85](#)

139. **Welsh farming is particularly at risk. Eighty per cent of Welsh land is designated as an EU Less Favoured Area, and Wales' topography and climate means that Welsh farming is dominated by hill farming and sheep farming—sectors that are particularly dependent on EU funding, through the Common Agricultural Policy, and EU markets. The rural communities that rely on the farming sector, which make an important contribution to Welsh culture and language, are also at risk.**
140. **Overall, Wales is a substantial net beneficiary of EU funds, including via Common Agricultural Policy payments and EU structural funds. This places it in a vulnerable position, and we note the strong arguments put to us that Wales should not lose out financially as a result of Brexit. In particular, we note widespread concern that the Barnett Formula is ill-suited to recompensing Welsh communities for the loss of needs-based EU funding.**
141. **While the numbers of EU workers in Wales are comparatively low, the NHS, agriculture, tourism and some parts of the manufacturing sectors are heavily dependent on EU labour. Restrictions upon the free movement of EU workers could place these sectors under strain.**
142. **But while Brexit presents major challenges to Wales, it appears to have less leverage over the UK Government than either Northern Ireland or Scotland. We heard general concern that, because of its size, because the situation in Wales does not give rise to such complex political and constitutional questions as in Scotland and Northern Ireland, and because, unlike the other devolved jurisdictions, most votes cast in Wales were in favour of leaving the EU, the interests of Wales may be overlooked in the Brexit negotiations. The UK Government needs to take action to assuage these fears.**
143. **The Welsh Government has made clear that it wishes to work constructively with the UK Government to ensure that Wales' interests and priorities are reflected in the terms of a UK-wide Brexit agreement. The UK Government needs to reciprocate this good faith and to seek to protect Wales' interests in the Brexit negotiations. If this does not prove possible, then the case for identifying other means by which Wales' particular interests can be defended may become more compelling.**

## CHAPTER 5: SCOTLAND

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### The political context

144. At the 23 June 2016 referendum, 62% of votes cast in Scotland were for remain, the highest percentage of any of the nations of the UK. There was a broadly consistent picture across Scotland, with a majority for remain in each of the counting areas though this was on a relatively low turnout of 67.2%—lower than the turnout in England and Wales, and over 17 percentage points lower than the turnout for the 2014 Scottish independence referendum. The Scottish Government and all the main political parties in Scotland were pro-remain, as were a majority of Members of the Scottish Parliament (MSPs).
145. The morning after the referendum, the First Minister of Scotland, Rt Hon Nicola Sturgeon MSP, announced her intention “to take all possible steps and explore all options to give effect to how people in Scotland voted—in other words, to secure our continuing place in the EU and in the single market in particular”. She also announced that a second referendum on Scottish independence was “on the table” because of “a significant and material change in the circumstances that prevailed in 2014”.<sup>143</sup>
146. In December 2016, the Scottish Government published a paper entitled *Scotland’s Place in Europe*, setting out its view of the importance of continued European Single Market membership for Scotland, and arguing that this was also the best outcome for the UK as a whole. The Scottish Government’s preferred option was for an independent Scotland to remain an EU Member State, but failing this, it argued that the UK as a whole should remain within the European Single Market—as part of the European Economic Area (EEA)—and within the EU customs union. The paper then set out how, if that were not possible, Scotland could remain a member of the EU Single Market and retain some key benefits of EU membership even if the rest of the UK were to leave.<sup>144</sup>
147. The Prime Minister’s Lancaster House speech (and the subsequent UK Government White Paper) ruled out UK membership of the Single Market. She stated that the Scottish Government’s paper would “be considered as part of this important process”,<sup>145</sup> but on 13 March the First Minister accused the UK Government of having ruled out UK membership of the Single Market without any prior consultation with the Scottish Government and other devolved administrations. Ms Sturgeon announced her intention to seek a second independence referendum: “To make sure that Scotland will have a choice at the end of this process—a choice of whether to follow the UK to a hard Brexit, or to become an independent country able to secure a real partnership of equals with the rest of the UK and our own relationship with Europe.”<sup>146</sup>

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143 BBC, ‘Brexit vote: Nicola Sturgeon statement in full’ (24 June 2016): <http://www.bbc.co.uk/news/uk-scotland-36620375> [accessed 20 June 2017]

144 Scottish Government, *Scotland’s Place in Europe* (December 2016): <http://www.gov.scot/Resource/0051/00512073.pdf> [accessed 20 June 2017]

145 Rt Hon Theresa May MP, speech on ‘The Government’s negotiating objectives for exiting the EU’, 17 January 2017: <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech> [accessed 20 June 2017]

146 Scottish Government, *Scotland must have choice over future* (13 March 2017): <https://news.gov.scot/news/scotland-must-have-choice-over-future> [accessed 20 June 2017]

148. On 28 March, the Scottish Parliament voted in favour of mandating the Scottish Government to open formal talks with the UK Government on the details of a ‘Section 30 order’,<sup>147</sup> to enable an independence referendum to take place.

149. In response to the First Minister’s announcement, the Prime Minister stated that “now is not the time” for a second referendum:

“Just at this point, all our energies should be focused on our negotiations with the European Union about our future relationship. To be talking about an independence referendum will make it more difficult for us to be able to get the right deal for Scotland, and the right deal for the UK. And more than that, I think it wouldn’t be fair to the people of Scotland because they’re being asked to make a crucial decision without all the necessary information—without knowing what the future partnership would be, or what the alternative of an independent Scotland would look like.”<sup>148</sup>

150. Following the general election on 8 June, when the SNP lost 21 seats, the First Minister conceded that “the issue of an independence referendum was a factor in this election result”, and stated that she would “reflect” on this, leading to speculation that she would shelve her proposal for a second independence referendum.<sup>149</sup> In the wake of the indecisive result across the UK, she also called for UK membership of the Single Market and of the customs union to be reconsidered as post-Brexit options.<sup>150</sup>

151. Subsequently, on 27 June, the First Minister announced the Scottish Government’s intention to “reset” its plan, by not seeking to introduce the legislation for an independence referendum immediately, but rather to seek to “influence the Brexit talks in a way that protects Scotland’s interests”, and to build support for the proposals set out in its *Scotland’s Place in Europe* paper. She added:

“At the end of the period of negotiation with the EU, which is likely to be around next autumn, when the terms of Brexit will be clearer, we will come back to Parliament to set out our judgment on the best way forward at that time, including our view on the precise timescale for offering people a choice over the country’s future.”<sup>151</sup>

### Scottish independence and EU membership

152. The Scottish Government’s preferred option is thus for Scotland to retain EU membership as an independent state. This raises important questions of EU law: during the 2014 Scottish independence referendum campaign, the then Commission President, José Manuel Barroso, stated (in what has

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147 An Order in Council made under Section 30 of the Scotland Act 1998, by which power would be conferred upon the Scottish Parliament to legislate for an independence referendum.

148 ITV, “Now is not the time”: May rules out Sturgeon’s call for IndyRef2 (16 March 2017): <http://www.itv.com/news/2017-03-16/may-rules-out-sturgeons-call-for-second-scottish-referendum-saying-now-is-not-the-time/> [accessed 20 June 2017]

149 BBC, ‘General election 2017: Sturgeon says Indyref2 ‘a factor’ in SNP losses’ (9 June 2017): <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-40216748> [accessed 20 June 2017]

150 BBC, ‘Nicola Sturgeon says hard Brexit “dead in the water”’ (12 June 2017): [http://www.bbc.co.uk/news/uk-scotland-scotland-politics-40245650?intlink\\_from\\_url=http://www.bbc.co.uk/news/live/election-2017-40231623&link\\_location=live-reporting-story](http://www.bbc.co.uk/news/uk-scotland-scotland-politics-40245650?intlink_from_url=http://www.bbc.co.uk/news/live/election-2017-40231623&link_location=live-reporting-story) [accessed 20 June 2017]

151 Scottish Parliament Official Report, 27 June 2017: <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11035> [accessed 10 July 2017]



become known as the ‘Barroso Doctrine’) that an independent Scotland would become a “third country with respect to the EU”, and would therefore need to apply for EU membership.<sup>152</sup> Although the circumstances have now changed (in that an independent Scotland, rather than becoming the 29th EU Member State, would be seeking to remain within the EU while the rest of the UK left), statements from the Commission since the 2016 referendum have suggested that the Barroso doctrine still applies.<sup>153</sup>

153. The question of how an independent Scotland could secure membership of the EU is beyond the scope of this inquiry. Nevertheless, we note the observation of the former First Minister of Scotland, Lord McConnell of Glenscorrodale, that any decisions on the status of a newly independent Scotland would be political as well as legal:

“You cannot completely avoid the rules. If there were an independent Scotland or if it voted to be independent, the rules are that you do not just become a successor state. That, to me, is pretty clear, but you also cannot avoid the political reality. If Scotland were an independent country and wanted to be a member of the European Union, I think the European Union would find a way of dealing with that pretty quickly. There are rules and there is political reality. Both would come into play, but a decade from now we would look back and say, ‘That was sorted’.”<sup>154</sup>

### **The Scottish Government’s proposal for “a differentiated solution for Scotland”**

154. The central proposal in the Scottish Government’s paper on *Scotland’s Place in Europe* was that, in the event that the UK as a whole did not remain in the Single Market, a “differentiated solution for Scotland”, through Scottish membership of the European Economic Area (EEA) and European Free Trade Association (EFTA), should be adopted. The paper envisaged:

“An integrated solution for Scotland which ensures continued membership of the European Single Market, and collaboration with EU partners on key aspects of policy and participation in EU programmes such as Horizon 2020 ... Beyond the common aspects of these relationships (which relate to the implementation of the European Single Market), Scotland would also seek the opportunity to collaborate in a wider range of policy areas such as energy and justice, which would add to our ability to work with European partners beyond a relationship based solely on free trade. Other differentiated options would also be open to Scotland ... whereby Scotland could seek to remain part of particular EU policies and initiatives (i.e. Horizon 2020, Erasmus, Europol).”<sup>155</sup>

155. The paper recognised that there would be “significant practical challenges” with this model, but argued that “there is already a range of asymmetric and

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152 Letter from José Manuel Barroso to Lord Tugendhat, dated 10 December 2012: [https://www.parliament.uk/documents/lords-committees/economic-affairs/ScottishIndependence/EA68\\_Scotland\\_and\\_the\\_EU\\_Barroso%27s\\_reply\\_to\\_Lord\\_Tugendhat\\_101212.pdf](https://www.parliament.uk/documents/lords-committees/economic-affairs/ScottishIndependence/EA68_Scotland_and_the_EU_Barroso%27s_reply_to_Lord_Tugendhat_101212.pdf) [accessed 12 July 2017]

153 Statement by Commission spokesperson Margaritis Schinas, widely reported on 13 March 2017. See for instance <http://www.independent.co.uk/news/uk/politics/scottish-eu-independence-referendum-scotland-join-queue-membership-apply-a7627201.html> [accessed 15 June 2017]

154 Q 156

155 Scottish Government, *Scotland’s Place in Europe* (December 2016): <http://www.gov.scot/Resource/0051/00512073.pdf> [accessed 20 June 2017]

differentiated arrangements within the EU and single market framework”.<sup>156</sup> It stated that flexible arrangements would be required for Northern Ireland and Gibraltar, and should also be considered for Scotland. The Scottish Government stressed that its proposal sought “to secure the benefits of the European Single Market for Scotland in addition to—not instead of—free trade across the UK”.<sup>157</sup>

156. The Scottish Government Minister for UK Negotiations on Scotland’s Place in Europe, Michael Russell MSP, gave evidence to us in February 2017. He stressed that the Scottish Government was seeking to reach a compromise with the UK Government. He acknowledged that the Scottish Government’s proposal for Scotland to remain in the Single Market by means of the EFTA/EEA option was “not easy”, but insisted that it was “viable”.<sup>158</sup> He said that this would in turn require the devolution of powers in relation to employment law and health and safety legislation.<sup>159</sup> Mr Russell acknowledged the political challenges, but argued that it was “a matter of political will to achieve it”.<sup>160</sup>
157. Mr Russell said that there were three reasons to justify a differential arrangement for Scotland:
- A democratic argument based on the referendum vote: “Scotland as a distinct unit voted 62% to 38% ... There is a view that Scotland should remain in the EU.”
  - The strengthened democratic mandate given to the Scottish Government, both by the referendum and by the fact that the Scottish Parliament had twice voted strongly in favour of remaining in the Single Market.
  - The profound economic challenges that Brexit presented to Scotland: “Substantial economic damage will be done if we are ... not members of the single market.”<sup>161</sup>

### The UK Government’s response

158. On 29 March 2017 (the day that Article 50 was triggered), the Secretary of State for Exiting the EU, Rt Hon David Davis MP, wrote to the Scottish Government setting out the UK Government’s response to its proposals. He stated:

“There are clear barriers to making your proposals a reality. Scotland’s accession to EFTA, and then the EEA, would not be deliverable and, importantly, would require the consent of all EFTA and EU member states. Any divergence between EU and UK law—as a result, perhaps, of new EU regulation—could lead to the creation of new barriers to trade within our Union, which could take the form of additional controls and checks on trade within the United Kingdom. Given that trade with the rest of the UK is worth four times trade with the EU, I do

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156 David Martin MEP and Alyn Smith MEP, *Variable Geometry Within the EU*: [https://d3n8a8pro7vhmx.cloudfront.net/alynsmith/pages/1200/attachments/original/1486730001/Variable\\_Geometry.pdf](https://d3n8a8pro7vhmx.cloudfront.net/alynsmith/pages/1200/attachments/original/1486730001/Variable_Geometry.pdf) [accessed 10 July 2017].

157 Scottish Government, *Scotland’s Place in Europe* (December 2016): <http://www.gov.scot/Resource/0051/00512073.pdf> [accessed 20 June 2017]

158 [Q 35](#)

159 [Q 37](#)

160 [Q 38](#)

161 [Q 41](#)



not believe that such significant disruption to the internal UK market is in Scotland's—or the UK's—best interests. And Scotland's businesses could face a confusing mix of regulatory regimes.”

159. He argued that the “better way to achieve the objectives we have in common” was the Prime Minister’s intention to seek “a new, bold and ambitious free trade agreement, which may take in elements of existing Single Market arrangements, where it is in our interests to do so”.<sup>162</sup>

### Scotland and the Single Market

160. Prior to publication of the UK Government’s response, we sought the views of our witnesses on the Scottish Government’s proposals, and in particular on whether Scotland, in isolation, could remain in the Single Market as proposed.
161. Professor Tomkins told us that while the Scottish Conservatives were calling for the fullest possible access to the Single Market, seeking to retain membership of the Single Market would fail to respect the result of the referendum.<sup>163</sup> He was sceptical that the Scottish Government’s proposal was either practically possible or economically desirable, saying that the Scottish Government had been “unable to identify even a single discretely Scottish national interest that would require a differentiated deal for Scotland and other parts of the UK”. He also argued that the interests of farmers, manufacturers, the financial services industry and universities in Scotland were the same as for their counterparts elsewhere in the UK.<sup>164</sup>
162. Professor Tomkins also noted that the value of Scotland’s trade within the UK was four times greater to the Scottish economy than the value of Scottish exports to the EU, and argued that a differentiated deal involving Single Market membership would jeopardise the coherence, stability and value to the Scottish economy of the UK’s domestic market. Neither did he think it practicable to propose Scottish membership of the EEA, as this would require Scotland to be an independent state.<sup>165</sup>
163. Former Secretary of State for Scotland, Lord Forsyth of Drumlean, also stressed that the referendum was a UK-wide vote. He thought it “absurd” to argue that Scotland “should have some kind of opt-out and be in the single market while the rest of the UK was not ... There is no provision in EU law for this kind of arrangement.”<sup>166</sup>
164. Lord Forsyth told us that the Scottish Government’s proposals would inevitably result in trade and regulatory divergence between Scotland and the rest of the UK.<sup>167</sup> He also argued that Single Market membership was not in Scotland’s economic interest, given that only 5% of its businesses were exporters. He suggested that the proposal was part of the Scottish

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162 Letter from Michael Russell MSP, Minister for UK Negotiations on Scotland’s Place in Europe, dated 27 April 2017 to Joan McAlpine MSP, Convener, European and External Relations Committee: [http://www.parliament.scot/S5\\_European/General%20Documents/CTEER\\_Minister\\_M\\_Russell\\_2017.04.27.pdf](http://www.parliament.scot/S5_European/General%20Documents/CTEER_Minister_M_Russell_2017.04.27.pdf) [accessed 10 July 2017]

163 [Q 1](#)

164 [Q 3](#)

165 *Ibid.*

166 [Q 103](#)

167 *Ibid.*

Government's desire to "pick a fight and find a grievance", in order to make the case for Scottish independence.<sup>168</sup>

165. The former Deputy First Minister of Scotland, Lord Wallace of Tankerness QC, agreed that the UK-wide result needed to be respected. He doubted the practicability of the Scottish Government's proposals, which he too believed had been "put up to be knocked down and to stoke up resentment when it does not happen". Lord Wallace also commented on the Scottish Government's proposal for Scotland to become a member of EFTA/EEA:

"There will be huge potential political and legal difficulties. ... If Scotland was part of the single market and had to observe all its rules without any locus in determining those rules, how would we have trade within the United Kingdom? ... If England and Wales ... outwith the single market decided that they would have regulations that were less onerous than those that Scottish manufacturers and service providers had to adhere to, how would Scottish manufacturers get on in trying to export to England, where there might be a lower ceiling and cheaper manufacturing? It could not work."<sup>169</sup>

166. Lord McConnell of Glenscorrodale also thought that the Scottish Government's proposal for Scottish membership of the Single Market was neither politically nor legally possible.<sup>170</sup>

167. Professor Christina Boswell, Director of Research, School of Social and Political Science, University of Edinburgh, described seeking to retain Single Market membership for Scotland alone as "very implausible legally and politically".<sup>171</sup> Professor Jim Gallagher, Visiting Professor, University of Glasgow, and former Cabinet Office Director-General for Devolution, agreed that the proposals were "utterly implausible":

"There would be a market barrier at the border. It would not be a customs barrier necessarily, but one set of trade rules and one set of product rules would apply north of the border and another would apply south of the border. That is exactly the problem of leaving the single market for the EU. You would create a single market problem between Scotland and England."<sup>172</sup>

168. Josh Hardie, CBI Deputy Director-General for Policy and Campaigns, also argued for a whole-UK approach: "Because the economy is so intertwined—sectors work with each other and regions work with each other—if you start to break it up at the very beginning, it becomes harder to get the best possible deal." Given that 60% of Scotland's exports were to the rest of the UK, the key was to ensure that there was not a detrimental effect on the UK single market.<sup>173</sup> United Against Separation also expressed strong opposition to any attempt to keep Scotland within the EU Single Market, arguing that it would be unworkable and would undermine the status of the UK. They told us that "the whole United Kingdom must leave the EU together on the same terms, negotiated by the British Government."<sup>174</sup>

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168 [QQ 103–104](#); written evidence from Lord Forsyth of Drumlean ([DEV0019](#))

169 [Q 103](#)

170 [Q 150](#)

171 [Q 18](#)

172 [Q 26](#)

173 [Q 50](#)

174 Written evidence from United Against Separation ([DEV0009](#))

169. Dr Lock, on the other hand, argued that the Scottish Government's proposal was legally deliverable, though acknowledging that it was politically very difficult:
- “It would lead almost to quasi-independence, because you would have to split up the internal market of the UK ... If you want to join EFTA, you have to sign up to all EFTA trade deals. If you do that, unless the UK does the same thing, you cannot be in a proper customs union with the UK because you will have different customs tariffs as regards third countries.”
170. Dr Lock added that, while customs checks at the English/Scottish border would not be required if there was agreement on zero tariffs, at least some rules of origin declarations would need to be made for goods crossing the border. While he thought the EFTA countries might be able to show more flexibility than the EU, this would amount to “asking them not only to admit Scotland as a non-independent state but to waive the requirement for Scotland to sign up to all those agreements, which is a requirement in the foundational treaty”.<sup>175</sup>
171. Professor Nicola McEwen, Professor of Territorial Politics and Associate Director, Centre on Constitutional Change, University of Edinburgh, also believed that the Scottish Government's model of a differentiated solution would be “complex and extremely difficult, and probably unlikely”. Nevertheless, it was not implausible, she told us, if there was political will to work through the complexities.<sup>176</sup>
172. Professor Sionaidh Douglas-Scott, Co-Director of the Centre for Law and Society in a Global Context, Queen Mary University of London, argued that Scotland could have “some sort of differentiated relationship” that included Single Market membership, but was clear that this would require treaty-making powers, a legal personality (for which see below, paragraph 193), and the devolution of competences in relation to the free movement of goods, persons, services and capital. She acknowledged the need to address tariffs and regulatory barriers within the UK, but noted the precedents of Liechtenstein and Switzerland, which are both part of the EU customs union, even though one is in the EEA and one is not.<sup>177</sup> In her view, the most difficult aspect of the Scottish Government's proposals was the potential for different trade deals to be struck on either side of the border.<sup>178</sup>
173. Professor (now Sir) Anton Muscatelli, Principal, University of Glasgow, led the Standing Council of experts appointed by the Scottish Government to advise it on the implications of Brexit. He believed it was technically feasible to have a differentiated solution, given that “Europe is full of variable geometries”. He conceded that the Scottish Government's proposals were challenging on a number of grounds, including how to maintain two parallel single markets and the impact on competition law, but maintained that keeping UK regulations around markets and products tethered to the Single Market through Scotland could be advantageous. Whether it was politically feasible was another matter.<sup>179</sup>

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175 [Q 21](#)

176 [Q 31](#)

177 [Q 95](#) and [Q 98](#)

178 [Q 98](#)

179 [Q 50](#)

174. The British Academy and the Royal Society of Edinburgh identified the following issues attaching to the Scottish Government's proposals:

- The need for different rules governing the treatment of goods entering the UK from EU Member States, depending on whether they were destined for Scotland or for England and Wales.
- The need for certification at the final point of sale of such goods.
- The need for rules of origin if intermediate goods were passing through England and Wales *en route* for Scotland.
- The likely existence of a virtual border in services to the degree that EU and UK rules diverged after Brexit.
- The need for controls to ensure that EU workers did not come into Scotland and then cross the border to work in England.
- The need for provision to define a Scottish worker, for the purposes of rights to work in Member States of the EEA.<sup>180</sup>

### **The case for different arrangements**

175. While the weight of evidence cast doubt on the practicality and deliverability of the Scottish Government's proposal for Scotland alone to remain within the Single Market, several witnesses argued that more modest differentiation for Scotland in the Brexit negotiations might be both possible and desirable.

176. Lord McConnell of Glenscorrodale put the disagreement between the UK and Scottish Governments into political context:

"Every time Prime Ministers and other senior figures in the UK Government have talked about Scotland in the last 15 years, they have been reacting defensively to a situation that they have seen emerging and felt was potentially getting out of control. They need instead to embrace the diversity of the UK and find positive solutions rather than trying to be defensive and trying to find some 'one nation' that no longer exists ...

"In Scotland there was a clear political expression, not just in the public vote but across the five main political parties in Scotland, that we had a closer relationship with Europe, and with some of the ideals of the European Union, than was perhaps the case elsewhere in the UK. The British Government would be very wise to find ways of accommodating that, not in a defensive, negative or fearful sense but in a positive sense that celebrates the diversity of the shared sovereignty of the UK. It is possible to do it. It just needs effort and good will."<sup>181</sup>

177. Lord Wallace of Tankerness also said that the differences between the nations of the UK could not be ignored, and that imaginative thinking was needed.<sup>182</sup> Professor Gallagher saw scope for a differentiated approach to Scotland (as well as Wales and Northern Ireland), albeit not on the model proposed by the Scottish Government,<sup>183</sup> while Professor Douglas-Scott argued for a

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180 Written evidence from the British Academy, the Royal Society of Edinburgh and the Learned Society of Wales ([DEV0020](#))

181 [Q 150](#)

182 [Q 103](#)

183 [Q 26](#)

differentiated arrangement, given that 62% of voters in Scotland voted to remain.<sup>184</sup>

### Access to EU labour

178. The issue most frequently cited by our witnesses as a case for a differentiated approach was access to EU labour. Mr Russell stressed the particular importance to Scotland of freedom of movement in the context of the demographic challenge facing parts of Scotland of a declining population. He also stressed its importance to areas of the Scottish economy and national life. He noted that as many as 24% of workers in cutting-edge research in the NHS in Scotland came from other EU countries. He concluded: “There is a view in Scotland that this has been a good thing; we regard migration as positive for us.”<sup>185</sup>
179. Academic evidence underlined the demographic challenges facing Scotland. Professor Boswell told us that “EU immigration since 2000 is estimated to have contributed 50% of net population growth in Scotland, which is a more significant contribution compared with the rest of the UK”. EU nationals were also a higher proportion of foreign nationals (61%) than the UK average (56%). Dr Graeme Roy, Senior Lecturer in EU Law, University of Strathclyde, agreed that “We have an ageing population and the working age population is expected to fall”.<sup>186</sup>
180. Professor Boswell was therefore concerned that a “UK-wide system might not necessarily cater for the particular benefits of EU immigration under a framework of free movement that has particularly benefited Scotland”, and concluded: “It would be desirable to have a regionalised decentralised approach to immigration.”<sup>187</sup>
181. Lord Wallace of Tankerness noted that there was already a separate list of job specifications for Scotland with regard to Tier 2 visas for skilled workers from non-EU countries. He also cited the ‘Fresh Talent—Working in Scotland Scheme’, which until its replacement by Tier 1 in 2008 granted foreign student graduates of Scottish universities visas for two years to enable them to work or set up a business. Nevertheless, he acknowledged that it would be difficult to have a separate immigration policy in Scotland, largely because of the complexity of monitoring movement between Scotland and England—though he also suggested that employers could have responsibility for checking employment status, “by national insurance number or something to do with HMRC, so that someone who turned up in England who had been given their number in Scotland would be spotted immediately because that number would be known”.<sup>188</sup>
182. Lord McConnell of Glenscorrodale also noted that there were different criteria in Scotland for (non-EU) immigration, partly reflecting the different demographics and economic challenges facing Scotland, and suggested that this could be extended.<sup>189</sup> On the other hand, Lord Forsyth of Drumlean

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184 [Q 96](#)

185 [Q 41](#)

186 [Q 11](#)

187 [QQ 11–12](#)

188 [Q 104](#)

189 [Q 150](#)



thought that different immigration rules within the UK could place undue burdens on employers.<sup>190</sup>

183. Professor Gallagher thought that in-country control of migration could be devolved, if it were managed by point control (involving work permits, capacity to take up jobs, capacity to claim benefits and registering for public services) rather than the right to enter a territory. In his view, “There are good arguments for differential migration controls in a part of the UK whose issue is reducing population—or relatively reducing population—and those areas where there is pressure.”<sup>191</sup> He also suggested this model should be applied in Northern Ireland.<sup>192</sup>
184. Professor Boswell cited the Canadian immigration system (in particular in the Province of Québec, which has its own points-based system) as a potential model for Scotland. This could include criteria based on particular occupational or sectoral shortages. One of the conditions for such a system, which Scotland could fulfil, was that “there are sufficiently robust and mature political decision-making institutions and mechanisms so that decision-makers are accountable and there is effective deliberation”.<sup>193</sup>
185. Professor Boswell also pointed out that the Canadian model was designed to attract people to settle in regions that were often sparsely populated and did not attract much immigration. This reflected the position in parts of Scotland, but would require migration figures to be disaggregated. In addition, issues around retention and onward movement of migrants would need to be addressed.<sup>194</sup>
186. A paper co-authored by Professor Boswell was published in June 2017, setting out various models for a differentiated approach to immigration. The report found that the schemes best suited to address Scotland’s economic and demographic needs—such as the points-based system used in Australia and Canada—are potentially the most difficult to sell politically. While these offer a flexible tool for selecting immigrants, and foster integration through allowing generous access to permanent residence, they would require a substantial shift in public perceptions and in the position of the UK Government, which favours reducing immigration. The report concluded that more politically feasible options include making smaller adjustments to the current immigration system to meet skills and labour shortages. Options include adjusting current Tier 2 schemes to allow lower skills or salary thresholds for Scottish employers, or reintroducing a post-study work scheme. The report warns against regulating lower-skilled immigration through temporary and seasonal schemes that offer limited rights and protection for workers. It is in lower-skilled jobs—the part of the economy that employs most EEA nationals—where labour gaps are most likely to appear post-Brexit.<sup>195</sup>
187. Several witnesses focused on particular sectors. Dr Roy noted that the Scottish food and drink and hospitality sectors were heavily reliant on EU

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190 [Q 103](#)

191 [Q 33](#)

192 *Ibid.*

193 [Q 23](#)

194 [Q 18](#)

195 Christina Boswell, Sarah Kyambi and Saskia Smellie, *Scottish and UK Immigration Policy after Brexit: Evaluating Options for a Differentiated Approach*, June 2017: <https://www.scer.scot/wp-content/uploads/SCER-Policy-Note-2.pdf> [accessed 10 July 2017]



migrants, and proposed a solution that would give Scotland access to higher levels of skilled migration from the EU or elsewhere.<sup>196</sup> Councillor David O'Neill, President, Convention of Scottish Local Authorities (COSLA), noted that the Scottish healthcare and social care sectors were reliant on EU labour: "We can see some sectors being absolutely decimated and suffering to the extent that they may actually suffer critical failure if they do not have these individuals here."<sup>197</sup>

188. The National Farmers Union Scotland focused on the Scottish farming and food processing industry, noting that the seasonal nature of the work made it difficult to employ local people. They estimated that between 5,000 and 15,000 seasonal workers from the EU were employed in the Scottish agricultural sector at any one time, and warned that no Scottish fruit farms could operate without access to overseas workers. They cited the Scottish Association of Meat Wholesalers' estimate that 50% of the workforce of some Scottish abattoirs and meat processing plants were from outside the UK. They called for a visa or work permit solution to allow the movement of skilled and unskilled labour for permanent positions within the sector.<sup>198</sup>

### **The Scottish agricultural sector**

189. As well as highlighting labour mobility, Scott Walker, Chief Executive Officer, National Farmers Union Scotland, argued for a differentiated approach in the field of agriculture more broadly. He stressed the importance to the Scottish agri-food sector of exports to the EU, and the threat posed by a reversion to WTO rules. Echoing witnesses from Wales, he noted that 85% of land in Scotland was designated by the EU as Less Favoured Area land, compared to only 15% in England. Areas such as Orkney, Shetland, and Dumfries and Galloway were particularly dependent on agriculture, and the potential impact of Brexit on these areas, as on Scotland as a whole, was profound.<sup>199</sup>
190. The National Farmers Union Scotland noted that, during the current Multiannual Financial Framework, lasting from 2014 to 2020, Scotland was scheduled to receive €4.6 billion of CAP funding, accounting for around two-thirds of total net farm income in Scotland. Again echoing witnesses from Wales, they noted that, if the Barnett Formula were applied to farming support post-Brexit, Scotland's share of support would be cut from some 16% of the overall UK total to 8 or 9%. They warned, however, that significantly divergent agricultural policies across the UK were not desirable at this stage, and could lead to distortion across the UK.<sup>200</sup>
191. The National Farmers Union Scotland also noted that Scottish food and drink exports to the EU were valued at £1,900 million in 2015 (approximately 39% of the total of Scotland's overseas food and drink exports), while food exports were £724 million in 2015 (69% of Scotland's overseas food exports). They stated that access to the EU market without barriers and any new obstacles remained a priority.<sup>201</sup>

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196 [Q 11](#)

197 [Q 47](#)

198 Written evidence from the National Farmers Union Scotland ([DEV00001](#))

199 [QQ 49–50](#)

200 Written evidence from the National Farmers Union Scotland ([DEV00001](#))

201 *Ibid.*

### Other issues

192. Witnesses cited a range of other issues where specific Scottish interests needed to be accommodated or where differentiated arrangements might be possible.
193. Michael Russell MSP suggested that the UK Government might not in future be able to negotiate fishing quotas on behalf of Scotland. He acknowledged that a necessary pre-condition, for Scotland to negotiate its own international agreements, would be “to allow Scotland to have legal personality”.<sup>202</sup> Professor Douglas-Scott also argued that creating a legal personality would be necessary if Scotland were to negotiate trade deals, but described this as “quite a big ask ... Scotland being part of a trade deal would give rise to problems with the rest of the UK ... From my perspective, that is perhaps the most difficult issue to reconcile”.<sup>203</sup>
194. The Scottish legal system, in contrast, has its own distinct history and identity. Professor Douglas-Scott highlighted the desirability of continuing cooperation between Scotland and the EU on justice, “in relation both to criminal matters, such as the European Arrest Warrant, and to civil and family law matters.”<sup>204</sup> Former Advocate General for Scotland Lord Wallace of Tankerness asked rhetorically: “Is it beyond the wit of man or woman that Scotland could have an arrangement with the European Union countries with regard to the arrest warrant?”<sup>205</sup> Lord McConnell of Glenscorrodale also stressed the significant implications of Brexit for Scottish criminal and civil law, including cross-border adoptions, wills and contracts.<sup>206</sup> In contrast, Lord Forsyth of Drumlean argued that continued participation in the European Arrest Warrant should be on a UK-wide basis.<sup>207</sup>
195. Lord Wallace further suggested that Scotland could reach its own arrangement with EU countries in relation to education policy, including the Erasmus+ student exchange programme, and the Horizon 2020 research funding—areas which he said would “not detract from the fundamental position of leaving the European Union”.<sup>208</sup> Dr Roy also cited access to EU research funding as a Scottish priority.<sup>209</sup>
196. In respect of research, one option post-Brexit is that research funding should be provided from central UK sources, in line with the Chancellor’s guarantee that any EU funding agreed prior to the point at which the UK leaves the EU, up until 2020, will be matched from central UK funds.<sup>210</sup> Such an approach could eventually lead to the UK Government setting priorities, thereby limiting the ability of the devolved governments to operate an autonomous education policy. Another option would be to seek an agreement with the EU allowing universities across the whole of the UK to continue to bid for EU funds. Professor Tomkins, though, raised the possibility that the Scottish Government could negotiate such agreements independently: “Would it

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202 [Q 37](#)

203 [Q 98](#)

204 [Q 96](#)

205 [Q 103](#)

206 [Q 150](#)

207 [Q 103](#)

208 *Ibid.*

209 [Q 21](#)

210 HM Treasury and Department for Exiting the European Union, ‘Further certainty on EU funding for hundreds of British project’ (3 October 2016): <https://www.gov.uk/government/news/further-certainty-on-eu-funding-for-hundreds-of-british-projects> [accessed 20 June 2017]

be possible as a matter of UK law or EU law to negotiate access to those programmes for Glasgow, Edinburgh, St Andrews and the other institutions in Scotland? Yes, it would.”<sup>211</sup>

197. As for other areas, Professor Gallagher gave workers’ rights, working hours and continued reciprocal rights to healthcare as examples of areas where a differentiated approach could be adopted.<sup>212</sup> Commenting on the European Health Insurance Card, Lord Wallace of Tankerness suggested that the Scottish Government, exercising its devolved powers in respect of health, could independently seek “reciprocal health rights” with the EU.<sup>213</sup> Dr Roy cited access to EU structural funds.<sup>214</sup>
198. Professor Tomkins suggested elements of differentiation might be possible in relation to fisheries.<sup>215</sup> Although we did not receive detailed evidence on this issue during this inquiry, we refer to the analysis of the specific characteristics of the Scottish fishing industry in our report on *Brexit: fisheries*, and our conclusion that these would need to be accommodated both in the Brexit negotiations and in future trade negotiations.<sup>216</sup>
199. Lord McConnell of Glenscorrodale also argued that the Scottish Government should be fully involved in negotiating trade agreements where the Scottish interest was particularly strong, such as whisky exports.<sup>217</sup> Such involvement would be quite distinct from the Scottish Government’s proposal that Scotland should be granted legal personality, with a view to negotiating its own trade agreements separately from the rest of the UK.
200. It remains to be seen how the result of the recent general election, in which the Conservative Party won 13 seats in Scotland (12 more than in 2015), will affect the UK Government’s approach to differentiated arrangements for Scotland.

## Conclusions

201. **We note the Scottish Government’s earlier stated aim that a newly independent Scotland should remain an EU Member State. We also note the First Minister’s announcement on 27 June that any independence referendum would be delayed until after UK withdrawal in 2019. It is not for this Committee to comment substantively on the Scottish Government’s policy, but we note the European Commission’s consistent view that, under EU law, an independent Scotland would be treated as a third country, and would have to apply for accession to the EU.**
202. **We also note the Scottish Government’s preference, should Scotland remain part of the UK, for the whole UK to continue within the EU Single Market as part of the European Economic Area. This option was ruled out by the previous Government, and it is now for the new**

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211 [Q 4](#)

212 [Q 26](#)

213 [Q 103](#)

214 [Q 21](#)

215 [Q 4](#)

216 See European Union Committee, *Brexit: fisheries* (8th Report, Session 2016–17, HL Paper 78), paras 71–83

217 [Q 150](#)

**Government, and Parliament, to decide whether this remains the position.**

203. **We conclude, on the basis of the weight of evidence submitted to this inquiry, that the Scottish Government's further proposal, for continued Scottish membership of the Single Market, through the European Economic Area, while the rest of the UK leaves the Single Market, is politically impracticable, legally highly complex and economically potentially disruptive to the functioning of the UK single market.**
204. **Nevertheless, we urge the Government to respect the particular circumstances in Scotland. While we acknowledge that the referendum was a UK-wide vote, giving a UK-wide result, the Government needs to recognise the fact that the vote to remain in Scotland, at 62%, was the largest and most decisive (either in favour of remaining or leaving) in any nation of the UK.**
205. **We therefore consider that, in the event that the UK Government does not secure a UK-wide agreement that adequately reflects Scotland's specific needs, there is a strong political and economic case for making differentiated arrangements for Scotland.**
206. **The Scottish economy has particularly pressing needs, including its reliance on access to EU labour, which is acute in sectors such as health and social care, agriculture, food and drink, and hospitality. We also note Scotland's demographic needs, and its reliance upon EU migration to enable its population (and in particular, that of working age) to grow. Scotland's more sparsely populated regions are disproportionately reliant both on EU migration and EU funding. Many of our witnesses argued that the most pressing case, in view of Scotland's economic and demographic circumstances, would be for a standalone approach to immigration policy. We address this issue in the next chapter.**
207. **Our witnesses have also suggested that differentiated arrangements could be reached in fields such as energy policy, justice and home affairs cooperation, participation in Europol, access to EU structural or research funds, participation in such programmes as Horizon 2020 or Erasmus, reciprocal healthcare provision, workers' rights and working hours, and agriculture and fisheries.**
208. **The uncertainty over the outcome of the Brexit negotiations means that it is not possible at this stage to reach definitive conclusions about the feasibility or desirability of achieving differentiated arrangements across all these various policy areas. Many (for instance, continuing cooperation on justice and home affairs) raise difficult issues of EU law, which we have addressed in separate reports. Moreover, we note that several of these policy areas are already devolved competences, while others are reserved.**
209. **We note further that achieving differentiated arrangements in some of these areas would depend upon the Scottish Government securing legal personality for Scotland, thus enabling Scotland to negotiate its own agreements with the EU or with third countries in areas of**

**devolved competence. We agree with evidence suggesting that such a development would have profound and unpredictable constitutional and political consequences.**

- 210. Finally, we reiterate that maintenance of the integrity and efficient operation of the UK single market must be an over-arching objective for the whole United Kingdom. But that objective does not preclude differentiated arrangements for Scotland in some areas, and nor does it justify excluding the Scottish Government from the Brexit process. Close cooperation between the UK and Scottish Governments is paramount: it is incumbent on both Governments to set aside their differences and work constructively together to protect the interests of the citizens of Scotland in the final Brexit deal.**

## CHAPTER 6: A NEW DEVOLUTION SETTLEMENT?

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### The impact of Brexit upon devolved competences

211. In previous chapters we have outlined the evidence received in relation to each of the devolved nations. In this chapter we seek to synthesise that evidence, drawing conclusions for the UK as a whole. We consider where existing EU competences (whether devolved or reserved within the UK's existing devolution settlements) will be exercised in future, and outline some of the risks and opportunities that will arise as this process unfolds.
212. It is important to emphasise that the division of competences between the UK Parliament and the devolved legislatures is already set out in full in successive Acts of Parliament. Thus a statutory framework exists, which will automatically apply at the date of Brexit unless the Westminster Parliament in the meantime enacts further legislation. What this means in practice is that any areas of policy that in the relevant Acts are not explicitly reserved to the Westminster Parliament will, at the moment the UK ceases to be an EU Member State (00.01 on 29 March 2019, unless another date is set in the withdrawal agreement), become devolved competences. There is no intermediate step: any EU competence that is reserved (such as employment law) will revert to Westminster, while any EU competence that is devolved (such as animal health) will revert to the devolved legislatures.
213. This has profound political and constitutional implications. On the one hand, any attempt to amend the existing devolution settlements to 're-reserve' powers to Westminster would be highly controversial. The Welsh Government Cabinet Secretary for Finance and Local Government (with responsibility for Brexit-related issues), Mark Drakeford AM, described the issue as "fundamentally important", and we quote his words at length:

"Devolved powers in relation to agriculture, environment and regional policy, for example, have since 1999 been in Cardiff, Belfast and Edinburgh, and they will stay there throughout this process. We choose at the moment to exercise those competencies through our membership of the European Union. When the European Union is no longer there, these powers do not somehow come back to London to be handed on. They just remain where they have been for nearly two decades now at the devolved level ...

"I sometimes think that some UK Ministers, certainly, believe that, when the European Union is not there, these powers will somehow be free-floating and that if they grab them first they will be able to make decisions and the devolved Administrations will have to live with those decisions. That is absolutely not the way that we see it ... The point I make to UK Ministers is that, if they wish to operate in that way, they will have to legislate to take powers away from the devolved Administrations."<sup>218</sup>

214. In a similar context, Mark Durkan highlighted the impact of the requirement for cross-community support in the Northern Ireland Assembly:

"Clearly, there would be sensitivity on the part of the devolved Administrations that there was a temptation for Whitehall and



Westminster essentially to keep powers in a holding pattern, and maybe dilute rights and standards first and then devolve. That could be a particularly sensitive issue in Northern Ireland ... If prior to devolution there was dilution of what people regarded as EU rights on labour law and employment law, because that is devolved in Northern Ireland, or environmental standards, you could top up to EU standard again only with cross-community support, whereas if on day one the EU powers went straight to devolution, and did not pass go and did not collect £200, those standards could be diminished only with cross-community support.”<sup>219</sup>

215. On the other side of the equation, we recall the conclusion of the Constitution Committee, in its 2016 report on *The Union and devolution*:

“There is no evidence of strategic thinking in the past about the development of devolution. There has been no guiding strategy or framework of principles to ensure that devolution develops in a coherent or consistent manner and in ways which do not harm the Union. Instead, successive Governments have responded individually to demands from each nation. Devolution has thus developed in an ad hoc fashion, with different constitutional conversations taking place separately in different parts of the country.”<sup>220</sup>

The absence of any “guiding strategy” for devolution creates a real risk that the acquisition by the devolved legislatures and administrations of substantial new powers, already devolved but in reality exercised in Brussels, could fundamentally disrupt the UK’s constitutional settlement.

*EU competences that already fall to the devolved legislatures*

*The environment, agriculture and fisheries*

216. As Professor Tomkins noted, the most substantial EU competences that are currently devolved competences within the UK are “agriculture, fisheries and the environment.”<sup>221</sup> Although Professor Tomkins was speaking about the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly exercise similar though less extensive competence in these areas. As Environment Links UK and Greener UK noted, in a joint submission, areas that would, by default, revert to the devolved legislatures include “at minimum ... agriculture, fisheries, and at least some elements of environmental policy (e.g. nature protection)”.<sup>222</sup>
217. Yet even in these three areas, the full exercise of devolved competence, without the guiding hand of the EU, will not necessarily be straightforward. Professor Douglas-Scott raised “the question of how a common UK agriculture policy, and for fisheries and so on, would be worked out”,<sup>223</sup> while Dr Lock commented: “If you had different agricultural policies throughout the United Kingdom with different levels of subsidy, provided the money comes with it, which is quite important, you might create different markets,

219 [Q 144](#)

220 House of Lords Constitution Committee, *The Union and devolution* (10th Report, Session 2015–16, HL Paper 149), para 99

221 [Q 6](#)

222 Written evidence from Environment Links UK and Greener UK ([DEV0012](#))

223 [Q 98](#)

or some sort of market disruption within the UK.”<sup>224</sup> Sir Emyr Jones Parry gave a specific example: “If you have four different sets of animal health, you do not have a single market and freedom to move cattle without restriction across the United Kingdom.”<sup>225</sup>

218. With respect to fisheries, there is the specific issue of negotiating quotas with third countries—hitherto an exclusive EU competence. As we noted in our report on *Brexit: fisheries*, following Brexit the UK will become “an independent coastal state under the UN Convention on the Law of the Sea”, and will therefore be required under international law “to manage the living resources and fishing activities within its Exclusive Economic Zone in a sustainable way”. If it is to do this, the Government, acting on behalf of the UK, will need to respect the legitimate interests of the devolved administrations, and we therefore concluded: “It is vital that the UK Government develops a unified negotiating position that represents the interests of the Devolved Administrations and industries prior to engaging in international fisheries negotiations, both in the context of Brexit and beyond.”<sup>226</sup> In marked contrast, the Scottish Government Minister for UK Negotiations on Scotland’s place in Europe, Michael Russell MSP, commenting on the strong views of fishing communities in Scotland, believed that a coordinated UK approach to negotiating fishing quotas “may not be possible”.<sup>227</sup>
219. Lord Hain raised a further complication, namely the “external element between the nations [of the United Kingdom]”<sup>228</sup>—in effect, the risk that the nations of the United Kingdom might end up competing to get the best share of UK fishing stocks, including in shared waters such as the Irish Sea or the Bristol Channel. Environment Links UK and Greener UK noted remarks by both the Welsh and Northern Ireland Ministers highlighting the need to secure what the Welsh Government has called “a fairer rebalancing of UK fishing quotas”.<sup>229</sup>

*Other devolved competences*

220. We also received evidence on four other areas of EU competence that are already devolved. The first is justice: both Scotland and Northern Ireland have their own legal systems, which long predate the devolution settlements of the late 1990s, and several witnesses mentioned justice and home affairs as an area of EU competence that was currently devolved, particularly in the Scottish context.
221. The extent to which the Scottish Parliament may seek to use its devolved competence to develop a bespoke approach to Brexit, and the implications for the rest of the United Kingdom, are unclear. Although, as we have seen, Lord Wallace of Tankerness raised the possibility that “Scotland could have an arrangement with the European Union countries with regard to the arrest warrant”,<sup>230</sup> our report on *Brexit: future UK-EU security and police cooperation*

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224 Q 24

225 Q 67

226 European Union Committee, *Brexit: fisheries* (8th Report, 2016–17, HL Paper 78), paras 33 and 82

227 Q 38

228 Q 126

229 Written evidence from Environment Link UK and Greener UK (DEV0012); the words quoted are drawn from the Welsh Government/Plaid Cymru White Paper, *Securing Wales’ Future* (January 2017) p 30: [https://beta.gov.wales/sites/default/files/2017-01/30683%20Securing%20Wales%20C2%B9%20Future\\_ENGLISH\\_WEB.pdf](https://beta.gov.wales/sites/default/files/2017-01/30683%20Securing%20Wales%20C2%B9%20Future_ENGLISH_WEB.pdf) [accessed 12 July 2017]

230 Q 103

concluded that “the most promising avenue” for the Government would be “to seek a bilateral extradition agreement with the EU that mirrors the EAW’s provisions as far as possible”.<sup>231</sup> Even though criminal justice is a devolved matter, it is difficult to see how Scotland could either remain bound by specific provisions of EU law post-Brexit, or, without legal personality, negotiate a separate agreement with the EU.

222. A second area of devolved competence is education. The EU’s competence in education is limited, and primary responsibility rests with the Member States. The EU does, though, sponsor programmes such as Erasmus+, which seeks to improve the employability of young people, and it is a major funder of research—UK higher education centres benefit substantially from the Horizon 2020 programme, worth a total of close to €80 billion over seven years.
223. A third area is health. Health is in part a shared competence at EU level, and the EU has legislated to set EU-wide standards for certain medical products (such as medicines) and services. This is supported by an EU regulatory and enforcement regime (notably the European Medicines Agency, which is currently located in London). There are also reciprocal health rights, such as those exercised by citizens moving freely in both directions across the Irish land border,<sup>232</sup> and these are reflected in the European Health Insurance Card (EHIC), which entitles EU citizens to access state-provided healthcare in other EU Member States. The future regulation of medicines and other medical products falls outside the scope of this report, though we note that, along with areas such as animal health, intra-UK divergence could have significant implications for the UK single market.
224. The final area is regional policy. As Professor Gallagher pointed out, before joining the European Economic Community, “the UK used to have regional economic development policies, but they were all replaced by the EU framework”—a framework that is financed by European Structural and Investment Funds, and which provides vital support to regions across the nations of the United Kingdom. Responsibility for regional policy (in other words, for securing and disposing of EU funds to support regional development) is devolved, and, as we have seen, the Chancellor of the Exchequer has undertaken to match any EU funding agreed prior to the point at which the UK leaves the EU, up until 2020, from central UK funds.<sup>233</sup> While this commitment has been broadly welcomed, Professor Gallagher commented that this switch from EU to UK funding could be used to build a case for the UK Government taking a more prominent role going forward:

“That, on the face of it, is a devolved matter but, of course, go back to resource. The money, to the extent that there is any, will reside in Westminster and Whitehall, and there is a good argument for saying that the UK Government at the centre should be able to allocate money to those parts of the UK that are the poorest. That is what regional economic policy is about.”<sup>234</sup>

231 European Union Committee, *Brexit: future UK-EU security and police cooperation* (7th Report, Session 2016–17, HL Paper 77), para 141

232 See European Union Committee, *Brexit: UK-Irish relations* (6th Report, Session 2016–17, HL Paper 76) and [Q 141](#) (Lord Alderdice)

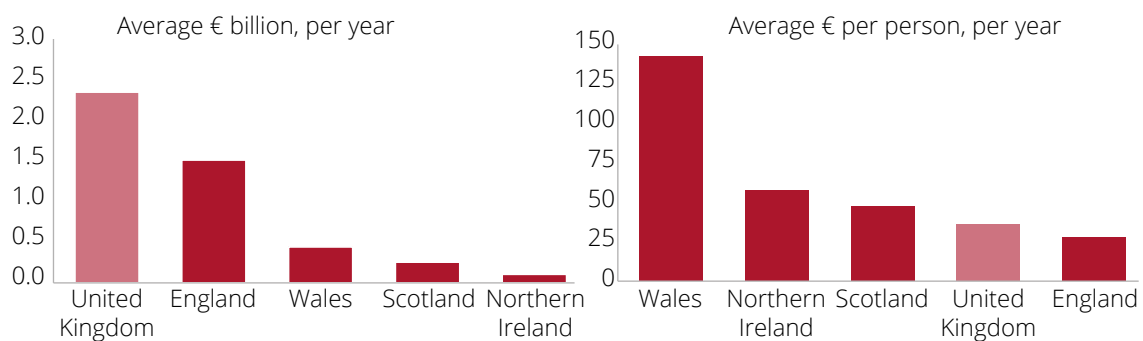
233 HM Treasury and Department for Exiting the European Union, ‘Further certainty on EU funding for hundreds of British projects’ (3 October 2016): <https://www.gov.uk/government/news/further-certainty-on-eu-funding-for-hundreds-of-british-projects> [accessed 20 June 2017]

234 [Q 33](#)

*Replacement of EU funding*

225. Professor Gallagher's comments highlight the possibility that the movement of budgets from Brussels to London could, in effect, lead to the rolling back of certain elements of the devolution settlements. It would also, as we have noted several times in preceding chapters, raise significant questions over the current funding model for the devolved nations.
226. Figure 1 sets out the distribution of European Structural and Investment (ESI) Funds across the UK within the current 2014–2020 Multiannual Financial Framework. While England receives the highest amount in absolute terms, it receives the lowest amount per capita (€28 per person, per year). By contrast, Wales receives €142 per person, per year, reflecting the fact that 63% of the population of Wales lives in an EU-designated Less Favoured Area. While Scotland and Northern Ireland receive less per person than Wales, the figures are still well above that for England.

**Figure 1: Distribution of ESI funding across the UK, 2014–2020<sup>235</sup>**

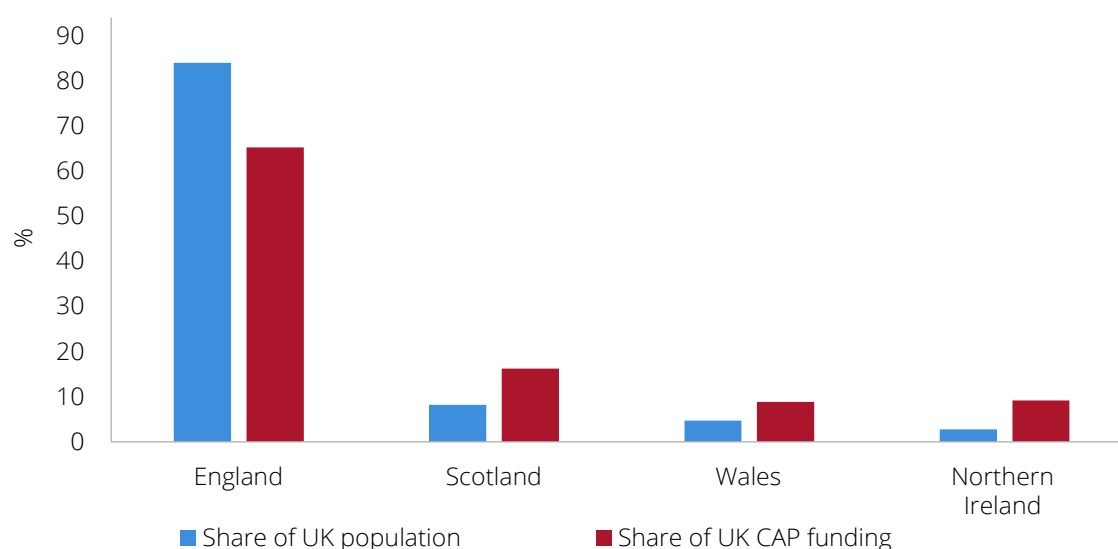


227. Figure 2 sets out the distribution, in percentage terms, across the nations of the UK of direct payments (pillar 1) under the Common Agricultural Policy, as announced in 2013, compared to their share of population.<sup>236</sup> It can be seen that Scotland and Wales receive, almost double the share of UK CAP payments as compared to their population share, while Northern Ireland receives over three times the share of CAP payments as compared to its population share.

<sup>235</sup> House of Commons Library, *UK Funding from the EU*, Briefing Paper, [Number 7847](#), 29 December 2016

<sup>236</sup> Department for Environment, Food and Rural Affairs, Northern Ireland Office, Scotland Office and the Office of the Secretary of State for Wales, 'UK CAP allocations announced', (8 November 2013): <https://www.gov.uk/government/news/uk-cap-allocations-announced> [accessed 10 July 2017]

**Figure 2: Distribution of direct payments (pillar 1) under the Common Agricultural Policy 2013 compared to share of UK population<sup>237</sup>**



228. In its response to our report on *Brexit: agriculture*, the Government stated that it would “continue to commit the same cash total in funds for farm support until the end of the parliament and will work closely with the Devolved Administrations to develop future policy for farming”.<sup>238</sup> This echoed the terms of the confidence and supply agreement between the Government and the DUP, which stated that “The parties agree to continue to commit the same cash total in funds for farm support until the end of the Parliament. Further discussions will take place on the future framework for farming support.”<sup>239</sup> It is notable that this agreement modifies the Chancellor’s previous guarantee: although the duration of the Parliament is unclear, it means that UK Government could potentially underwrite farm support up to 2022, whereas regional and structural funds are guaranteed only until 2020.
229. EU funding (both agricultural subsidies and structural funds) is needs-based, and witnesses were clear that farmers and deprived regions in the devolved nations would lose heavily were UK subsidies, once the UK Government’s guarantees to match EU funding have run their course, to be granted in accordance with the population-based Barnett Formula. The complexities of the Barnett Formula have defied reform for many years, but we note the comment of Dr Winckler, that thanks to Brexit it is now “time

237 Department for Environment, Food and Rural Affairs, Northern Ireland Office, Scotland Office and the Office of the Secretary of State for Wales, ‘UK CAP allocations announced’, (8 November 2013): <https://www.gov.uk/government/news/uk-cap-allocations-announced> [accessed 5 July 2017] and Office for National Statistics, ‘Population Estimates for UK, England and Wales, Scotland and Northern Ireland: mid-2016’, (22 June 2017): <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/annualmidyearpopulationestimates/latest> [accessed 5 July 2017]

238 Letter from George Eustice MP, Minister of State for Agriculture, Fisheries and Food to Lord Teverson, dated 29 June 2017: <http://www.parliament.uk/documents/lords-committees/eu-energy-environment-subcommittee/Brexit-agriculture/Gov-response-Brexit-Ag.pdf> [accessed 12 July 2017]

239 Prime Minister’s Office, ‘Confidence and Supply Agreement between the Conservative and Unionist Party and the Democratic Unionist Party’, (26 June 2017): <https://www.gov.uk/government/publications/conservative-and-dup-agreement-and-uk-government-financial-support-for-northern-ireland/agreement-between-the-conservative-and-unionist-party-and-the-democratic-unionist-party-on-support-for-the-government-in-parliament> [accessed 10 July 2017]

to bite the bullet” and address this issue.<sup>240</sup> We also recall the words of the House of Lords Select Committee on the Barnett Formula, which reported as long ago as 2009:

“A new system which allocates resources to the devolved administrations based on an explicit assessment of their relative needs should be introduced. Those devolved administrations which have greater needs should receive more funding, per head of population, than those with lesser needs. Such a system must above all be simple, clear and comprehensible. It must also be dynamic: able to be kept up to date in order to respond to changing needs across the United Kingdom.”<sup>241</sup>

### *New devolved competences?*

#### *Migration*

230. We heard several suggestions for areas of EU competence that, though not currently devolved, could be devolved post-Brexit.
231. It will be clear from previous chapters that migration is the most complex and controversial area. At present immigration is a reserved matter under the devolution settlements, but this is subject to the crucial caveat that, as an EU Member State, the UK is bound to respect the four freedoms that support the EU Single Market, including the free movement of persons. Thus while Westminster is responsible for migration policy in respect of non-EU citizens, the movement of EU citizens is in practice governed by EU rather than national law.
232. As we discussed in our report on *Brexit: UK-EU movement of people*, Brexit is an opportunity for the UK to devise a new immigration policy covering all non-UK citizens, EU and non-EU alike. Under the current devolution model, responsibility for devising that policy will reside with the UK Government and the Westminster Parliament. Yet, as our evidence has made clear, views on EU migration vary widely across the UK, and the reliance upon EU workers, both to satisfy the needs of the labour market and to cope with demographic change, is particularly acute in the devolved nations.
233. Against this backdrop, we note the precedents for differentiated arrangements within the UK. As we have already noted, there is a separate list of job specifications for Scotland with regard to Tier 2 visas for skilled workers from non-EU countries. Lord Wallace of Tankerness also cited the ‘Fresh Talent—Working in Scotland Scheme’, which until its replacement by Tier 1 in 2008 granted foreign student graduates of Scottish universities visas for two years to enable them to work or set up a business. Building on these precedents, the UK Government could in principle implement a UK-wide immigration policy for EU nationals that included sufficient flexibility, and operational autonomy, for the devolved nations to be able to meet their economic and demographic needs. The alternative, suggested by some of our witnesses, would be to devolve responsibility for immigration policy fully to the devolved governments. Both options present significant challenges.

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240 Q 90

241 Select Committee on the Barnett Formula, *The Barnett Formula* (1st Report, Session 2008–09 HL Paper 139), Summary



*Other areas*

234. We also heard suggestions for other areas of policy that could be devolved post-Brexit. Dr Lock noted that the Scottish Government, as part of its proposal, examined in Chapter 5, for Scotland to remain in the Single Market, had called for Scotland “to have powers over employment law and consumer law”. He suggested that the devolution of consumer law “would not be a big deal”, given that Scots law is already devolved, but warned that devolving employment law could create problems for the UK’s “common labour market”.<sup>242</sup> Professor Tomkins agreed, noting that the Smith Commission had decided not to recommend the devolution of employment law, and concluding: “It is better for Scotland to be part of a single United Kingdom labour market.”<sup>243</sup>

235. Professor Tomkins also suggested that VAT should be added to the list of devolved competences in Scotland:

“The Smith commission agreed to assign a share of VAT receipts in Scotland to the Scottish Government but not to devolve VAT, for the simple reason that the devolution of VAT within a single member state is contrary to European law. As we are leaving the European Union, that may very well no longer be an aspect of European law that we need to stick with.”<sup>244</sup>

*Conclusions and recommendations*

236. **We heard much evidence both on existing devolved competences that should remain with the devolved legislatures, but the exercise of which needed to be coordinated at UK level, and on new competences that could potentially be devolved post-Brexit. In this context, we recall the words of the House of Lords Constitution Committee, in its report on *The Union and Devolution*, that hitherto “There has been no guiding strategy or framework of principles to ensure that devolution develops in a coherent or consistent manner and in ways which do not harm the Union.” Thanks to Brexit, it is now more important than ever that reform of the devolution settlements should be underpinned by a clear and agreed framework of guiding principles.**

237. **We note also that the Acts of Parliament establishing the devolution settlements set out in full those competences that are in each case either reserved or devolved. On the day of Brexit, competences currently exercised at EU level will, by default, be exercised in accordance with these pre-existing statutory provisions. It follows that without any change in UK law, Brexit will lead to a significant increase in the powers and responsibilities of the devolved institutions.**

238. **Any attempt to amend the devolution settlements ahead of Brexit would be complex and politically controversial, and we doubt that either the UK Government or Parliament has the capacity to undertake such a task at the same time as achieving a successful Brexit. On balance, we therefore conclude that, for the duration of the Brexit process, the statutory balance of competences between the UK Parliament and the devolved legislatures should as far as possible be**

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242 [Q 24](#)

243 [Q 3](#)

244 [Q 6](#)

unchanged. This is not the time to embark on controversial domestic constitutional reform, either by conferring additional competences upon the devolved institutions or by ‘re-reserving’ competences previously devolved.

239. But while we do not recommend devolving additional competences upon the devolved institutions, we endorse the weight of evidence heard in this inquiry, that the specific labour market and demographic needs of the devolved nations should be accommodated in the context of Brexit. We therefore call on the UK Government, in bringing forward its forthcoming Immigration Bill, to look for opportunities to enhance the role of the devolved institutions in managing EU migration. Local and regional economic and demographic needs, rather than central targets, should drive decision-making. There is already differentiation in respect of non-EU migration, for instance in the provision of Tier 2 visas to meet sectoral requirements, and we urge the Government, in devising a post-Brexit immigration policy for EU nationals, to ensure that maximum flexibility is granted to the UK’s nations and regions.
240. The issue of powers and competences is inextricably bound up with the allocation of funding. We welcome, as far as it goes, HM Treasury’s assurance that existing EU funding commitments (including structural and agricultural funding) made under the current Multiannual Financial Framework until 2020 will be met from domestic funds. But at the same time we note that each of the devolved jurisdictions receives significantly more EU funding per capita than England. This has led to acute concern from across the UK that in the longer term farmers and deprived regions in the devolved jurisdictions would lose heavily were needs-based EU funding to be replaced by UK subsidies granted in accordance with the population-based Barnett Formula.
241. We therefore reiterate the central conclusion of the 2009 Select Committee on the Barnett Formula: “A new system which allocates resources to the devolved administrations based on an explicit assessment of their relative needs should be introduced.” This will be a complex task, but the prospect of Brexit means that reform of the Barnett Formula can be delayed no longer.

### **The need for coordination and partnership**

242. One of the themes of this inquiry has been the interaction between devolved and reserved competences—an interaction that will intensify in the wake of Brexit. For instance, as we noted in our report on *Brexit: agriculture*, the evolution of agriculture policy across the devolved nations will be heavily influenced by the terms of any free trade agreements that the Government, exercising a reserved power on behalf of the whole United Kingdom, can negotiate, either with the EU or, post-Brexit, with other countries.<sup>245</sup> This interaction works both ways: if England (represented by Westminster), Scotland, Wales and Northern Ireland were to pursue divergent agricultural policies (for instance, adopting different standards on the use of pesticides), both the free movement of agricultural produce within the UK single market,

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<sup>245</sup> European Union Committee, *Brexit: agriculture* (20th Report, Session 2016–17, HL Paper 169)

and the ability of the Government to negotiate free trade agreements with third countries on behalf of the UK, could be compromised.

243. We therefore reached the following conclusions in our report on *Brexit: agriculture*:

- Farming landscapes vary significantly across the UK, and agriculture is rightly a devolved policy area. Though implementation of CAP policies already varies, Brexit will allow the devolved administrations to tailor agriculture policies even more closely to their farmers and land.
- But the UK has an internal single market, in which agri-food plays a significant role. It is in the interest of all in the agri-food sector, as well as of consumers, that the integrity of the UK market be preserved. This will require either a UK-wide framework or the negotiation of co-ordinated agricultural policies by the UK Government and the Devolved Administrations. We encourage the Government to pursue dialogue on this issue as a matter of urgency.
- Trade policy is a reserved matter, so the sum of agricultural policy across the UK must respect the UK's external trade commitments. The UK Government will need to work closely with the Devolved Administrations to ensure that this is the case.<sup>246</sup>

244. In this inquiry we have considered more broadly the means by which an appropriate level of coordination could be achieved—one that respects the diversity within the UK while not undermining either the integrity of the UK single market or the UK Government's ability to represent the UK internationally. Such coordination will require good will, in the spirit of what in EU law is called 'sincere cooperation'.<sup>247</sup> It cannot simply be dictated by the UK Government. As Professor Gallagher stated: "The mistake that my former colleagues in Whitehall sometimes make is thinking that UK co-ordination means that they decide it, which is not the same thing."<sup>248</sup> Sir Emyr Jones Parry also emphasised the need for all parts of the UK to work together in identifying priorities for free trade agreements:

"I submit that the trade negotiations externally ... cannot be done if the impact on Wales is disproportionate and there is no consultation and no account is taken of ... the interests of Wales. It is fairly obvious what people should be doing; they should be sitting down together and working out what is the best policy overall for the Kingdom. You will not be able to accommodate all the Welsh interests or all the English interests, but in the end, if you cannot accommodate an interest, what will you do to mitigate the disadvantage of something else?"<sup>249</sup>

Lord McConnell of Glenscorrodale made a similar plea for a collaborative approach: "There ... needs to be a positive approach by both Governments to describe how they will use those new and additional powers in a co-operative way."<sup>250</sup>

246 European Union Committee, *Brexit: agriculture* (20th Report, 2016–17, HL Paper 169), paras 189–191

247 See article 4(3) Treaty on the Functioning of the European Union, [OJ C 326](#) (consolidated version of 26 October 2012)

248 [Q 26](#)

249 [Q 66](#)

250 [Q 152](#)

245. Such collaboration will be needed not just during the Brexit process, but beyond. To take another example, in our report on *Brexit: environment and climate change* we noted that environmental pollution does not respect national boundaries, and highlighted the need for continued cooperation between the UK and the EU: “The transboundary nature of most environmental pollution means that failure to co-operate with the EU post-Brexit could have significant consequences for both the UK’s and the EU’s natural environment.” The principles that justify international cooperation apply equally strongly to intra-UK cooperation, and we therefore welcomed the acknowledgement by both devolved administrations and the UK Government of “the increased need to achieve an appropriate level of policy coordination, while allowing for some variation to reflect local or regional circumstances”.<sup>251</sup>
246. This begs the question of whether either the UK Government or the devolved governments are ready for what Professor Scully, in an answer from which we have already quoted, called “shared rule”, or whether the UK Government will, through the Westminster Parliament, simply legislate to prescribe the level of coordination that it deems necessary to maintain the core interests of the United Kingdom. Professor Scully continued:

“Who defines and decides what is right? That is a fundamental question. Under the concept of self-rule I spoke about, maybe Westminster and Whitehall can decide which powers to grant. If we have a more genuinely co-operative arrangement, maybe there could be a broader attempt to discuss and agree the allocation of powers, but at the moment this Parliament essentially can pass legislation that can change those divisions. Doing that in an ungenerous way, as was recently seen with Wales, could cause some problems for Welsh devolution. It could cause far greater political problems for Northern Ireland and Scotland.”<sup>252</sup>

### Legislating for Brexit: legislative consent

247. The previous Government’s approach to the repatriation of EU competences was set out in its White Paper, *Legislating for the United Kingdom’s withdrawal from the European Union*, published in March 2017.<sup>253</sup> The White Paper was clear that certain frameworks, currently operating at EU level, will need to be maintained post-Brexit. It gave two examples, namely frameworks “to protect the freedom of businesses to operate across the UK single market and to enable the UK to strike free trade deals with third countries”. It stated the Government’s intention to “replicate the current frameworks provided by EU rules through UK legislation”, and continued: “In parallel we will begin intensive discussions with the devolved administrations to identify where common frameworks need to be retained in the future, what these should be, and where common frameworks covering the UK are not necessary.”
248. Finally, the White Paper noted that “Legislation that is within the competence of the devolved legislatures or ministers giving effect to EU law will also need to be amended as we leave the EU”. It therefore proposed that ministers in the devolved administrations should be granted a delegated power to enable

251 European Union Committee, *Brexit: environment and climate change* (12th Report, 2016–17, HL Paper 109), paras 132 and 187

252 Q 98

253 Department for Exiting the European Union, *Legislating for the United Kingdom’s withdrawal from the European Union*, Cm 9446, March 2017: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/604516/Great\\_repeal\\_bill\\_white\\_paper\\_accessible.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf) [accessed 12 April 2017]

them to make technical amendments to such legislation, in line with the power that will be conferred upon UK Ministers.

249. In outline, therefore, the Government's intention appears to be to enshrine in UK legislation the 'common frameworks' that it regards as necessary to protect people's ability to live and do business freely within the United Kingdom. What those frameworks are is still unclear: of the two examples given, one (the ability to negotiate free trade deals) is currently an exclusive EU competence, and will naturally fall to the UK Government; the other (protecting the freedom of businesses to operate across the UK single market) is, as we have seen, open-ended, and could potentially overlap with many aspects of what are currently devolved competences, such as agriculture and environment.
250. Indeed, in an earlier paragraph the White Paper stated: "In areas where the devolved administrations and legislatures have competence, such as agriculture, environment and some transport issues, the devolved administrations and legislatures are responsible for implementing the common policy frameworks set by the EU." Read alongside the other passages we have quoted, this might imply that the Government will invite the Westminster Parliament to take on the coordinating role of the EU and set 'common frameworks' for what are currently devolved competences.
251. The White Paper therefore appeared to reflect the top-down approach described by Professor Gallagher, where UK coordination means that Westminster decides. There is no formal bar to such an approach—indeed, the Westminster Parliament has often legislated on devolved matters in recent years. Indeed, the 2013 revision of the 2001 Memorandum of Understanding between the UK Government, the Scottish and Welsh Ministers, and the Northern Ireland Executive Committee states in terms that "The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not."<sup>254</sup>
252. Such authority is, though, conditioned by the Sewel Convention, that Parliament will not normally legislate with regard to devolved matters without the consent of the relevant devolved legislature. That convention has now been codified in statute, in section 2 of the Scotland Act 2016 and section 2 of the Wales Act 2017. However, the Supreme Court in *Miller* concluded that it remained a convention, and that "the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary".<sup>255</sup>
253. The Secretary of State for Exiting the EU, Rt Hon David Davis MP, when asked on 30 March, the day the White Paper was published, whether the Repeal Bill would require legislative consent motions, responded:

"At this stage we do not know, because we do not know the final format of the Bill. That is the simple truth."<sup>256</sup>

It was only early in the new Parliament, on 26 June, that Mr Davis clarified the Government's position, telling the House of Commons: "Given that the

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254 Memorandum of Understanding between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee, October 2013, para 14: <https://www.gov.uk/government/publications/devolution-memorandum-of-understanding-and-supplementary-agreement> [accessed 14 April 2017]

255 *R (Miller) v Secretary of State for Exiting the European Union* [2017] **UKSC 5**, at para 151

256 HC Deb, 30 March 2017, **col 441**



Bill will affect the powers of the devolved institutions and that it legislates in devolved areas, we will seek the consent of the devolved legislatures for the Bill.”<sup>257</sup>

254. This belated clarification confirmed the weight of the evidence heard in this inquiry, that legislative consent would be required in respect of the Repeal Bill, insofar as it seeks to set common frameworks for the exercise of what are currently devolved competences. Professor Douglas-Scott spoke for the majority in stating: “It is clear that Westminster could not legislate a great repeal Bill including environment and agriculture without asking for consent.”<sup>258</sup> Lord Wallace of Tankerness agreed: “The great repeal Bill—or the great re-enactment Bill, as it is probably more accurate to call it—will deal with issues that are unequivocally devolved ... and that triggers the legislative consent Motion.”<sup>259</sup> Michael Russell MSP, giving evidence to the Scottish Parliament Culture, Tourism, Europe and External Relations Committee on 11 May, put the point still more forcefully: “It is inconceivable to me that there would not be a legislative consent process, given that the bill will cover areas in which we legislate. We must have a legislative consent process, but it is not clear that that will be the case, because the UK Government has not said whether it will be.”<sup>260</sup>
255. Lord Forsyth of Drumlean, in contrast, while emphasising that he did not speak “as a lawyer”, warned that a requirement for legislative consent would be used by the Scottish Government to “wreck the Brexit process”, and therefore concluded: “The Bill that will basically put all European legislation extant into position post our leaving the European Union cannot be described as normal ... I do not believe that a legislative consent Motion is required in this case.”<sup>261</sup>
256. Lord Forsyth’s comments raise the further, political question of how and whether, if legislative consent is required, the Government will obtain it. This in turn begs the question of how much legislation will be enacted by Parliament in Westminster, and how much by the devolved legislatures. Lord McConnell of Glenscorrodale did not believe that a single Repeal Bill could cover the entirety of devolved responsibilities, and also envisaged “a great repeal Bill in the Scottish Parliament”.<sup>262</sup> Michael Russell MSP, though, told us that the Scottish Government had “reserved [its] position” in respect of legislative consent, highlighting a number of unresolved issues, in particular around the amount of secondary legislation, and whether that secondary legislation would take place in Westminster or in Holyrood.<sup>263</sup>
257. So far as Wales is concerned, Lord Hain told us that “I do not think the Government should proceed without legislative consent Motion agreement from the Welsh Assembly”. Securing such agreement would require “a process of negotiation”.<sup>264</sup> Lord Wigley believed it was the UK Government’s “political duty to respect the Sewel convention to uphold whatever decisions have been taken by devolved institutions”. He drew attention to Plaid Cymru’s

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257 HC Deb, 26 June 2017, [col.374](#)

258 [Q 99](#)

259 [Q 111](#)

260 See Scottish Parliament Official Report, 11 May 2017: <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10941> [accessed 15 June 2017]

261 [Q 108](#)

262 [Q 149](#)

263 [Q 44](#)

264 [Q 127](#)



proposal for a Welsh ‘EU Continuity Bill’, to enshrine EU law relating to devolved matters in Welsh law. Mark Drakeford AM expressed the Welsh Government’s determination “to make the [Repeal] Bill a success”, but expressed frustration at the “lack of engagement” from the UK Government. In the absence of such engagement, the Welsh Government was “having to plan on the basis that we will need Welsh primary and secondary legislation and that legislative consent Motions ... will undoubtedly be a feature of the great repeal Bill”.<sup>265</sup>

258. As for Northern Ireland, Mark Durkan was clear that the Assembly “would have to indicate its assent in any area affecting its powers”. He saw this as a positive: “I see it as the Assembly assenting to take on those wider powers. I see it as part of incentivising the parties as well.”<sup>266</sup> Sammy Wilson MP, while questioning whether the Northern Ireland Assembly would be in place in time, agreed that, if it were, there would be “no great difficulty in [legislative consent] being granted”.<sup>267</sup> Professor Tonge, in contrast, was “fairly sure that the requirement for cross-community consent would not be fulfilled for such a Bill”.<sup>268</sup>
259. Unsurprisingly, the Secretary of State’s statement to the House of Commons on 26 June, confirming that legislative consent would be sought, did not explain the consequences that would follow, were that legislative consent to be refused. Giving evidence on 11 July, he refused to go down “hypothetical routes”, noting that “we will not get to that point until, I would have thought, early next year”.<sup>269</sup> In the absence of any indication from the Government, we underline the conclusion reached by the Supreme Court, in *Miller*, that the consequences of a refusal by a devolved legislature to grant legislative consent, and of a decision by the UK Government to legislate on devolved matters notwithstanding, would be political rather than legal.

### Capacity in the devolved institutions

260. Both the process of repatriating EU powers and absorbing them into devolved competences, and the exercise of those powers post-Brexit, will place demands upon the capacity of the devolved institutions. These demands will come on the back of recent extensions of devolved competence, thanks to the Scotland Act 2016 and the Wales Act 2017, at a time when Northern Ireland has no Executive, and when public spending generally is constrained.
261. With respect to Scotland, Professor Gallagher, while acknowledging that “institution-building” was under way, expressed some concern: “We have had an avalanche of new powers in a short period ... I watch with some concern the capacity of my former colleagues in St Andrew’s House to cope with them.”<sup>270</sup> Lord McConnell of Glenscorrodale also noted “a need for additional new capacity and skills”, and expressed concern that the regular interchange between the UK and Scottish civil services, which could help in building capacity, had been undermined by “the breakdown in relations between the two levels of government in the last 10 years”.<sup>271</sup>

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265 [Q 136](#)

266 [Q 145](#)

267 [Q 121](#)

268 [Q 99](#)

269 Oral evidence taken on 11 July 2017 (Session 2017–19) [Q 7](#) (Rt Hon David Davis MP)

270 [Q 34](#)

271 [Q 152](#)

262. So far as Wales is concerned, Leanne Wood AM was confident: “I do not think that would be a major issue.”<sup>272</sup> For the Welsh Government, Mark Drakeford AM described it as “a significant challenge but not a step change”.<sup>273</sup> Andrew RT Davies AM, on the other hand, while agreeing that Wales had a “very strong Government”, was concerned that the Assembly was “not necessarily a very strong legislature”.<sup>274</sup> Professor Scully went further: “The National Assembly for Wales is preposterously under-resourced in its elected membership<sup>275</sup> and its support staff. There simply will not be the capacity in terms of specialism, expertise and person hours to do a proper job of scrutinising all the many Welsh dimensions of Brexit.”<sup>276</sup>
263. As for Northern Ireland, Dr Viviane Gravey, Dr Katy Hayward and Professor Dagmar Schiek, in a joint submission, observed that administrative capacity was a UK-wide issue, but argued that “administrative capacity issues are particularly acute in Northern Ireland”, noting that Northern Ireland had “struggled to roll-out existing European policies at the same pace as Great Britain”.<sup>277</sup> Professor Tonge said that reducing the size of the Northern Ireland Assembly from 108 to 90 members was “a mistake” in the wake of Brexit, and predicted that its workload would increase significantly.<sup>278</sup> Sammy Wilson MP said that the issue was not the capacity of the Assembly, but rather that of the Northern Ireland Civil Service.<sup>279</sup>

### Arbitration

264. We have noted that, under the EU system of ‘shared competence’, the Court of Justice of the European Union (CJEU) acts as umpire. It both determines whether EU legislative acts are lawful (whether they are consistent with the principles of conferral, subsidiarity and proportionality), and also whether the Member States (including any sub-national authorities) have implemented them properly. The CJEU has thus, since the devolution of responsibility for policy areas such as agriculture and the environment, held the ring between the constituent parts of the United Kingdom, by ensuring that they all act in those areas in a manner consistent with EU law.
265. One of the Government’s fundamental objectives in delivering Brexit is to end the jurisdiction of the CJEU, but it is not yet clear whether, in the wake of Brexit, any new mechanism will be established to resolve potential disputes between the UK Government and the devolved institutions in the exercise of overlapping or shared competences. The UK Supreme Court already acts in some cases as ‘umpire’, having “jurisdiction to hear and determine questions relating to the powers and functions of the legislative and executive authorities established” under the devolution settlements.<sup>280</sup> In this context, the Supreme Court can overturn legislation enacted by the devolved legislatures. But, as we noted in Chapter 2, within the UK constitution the Westminster Parliament is sovereign: in determining such questions the Supreme Court is interpreting and applying the law enacted in

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272 Q 60

273 Q 135

274 Q 61

275 The National Assembly for Wales currently has 60 members.

276 Q 99

277 Written evidence from Dr Viviane Gravey, Dr Katy Hayward and Professor Dagmar Schiek (DEV0014)

278 Q 100

279 Q 123

280 Supreme Court, ‘Practice direction 10’, para 10.1.1: <https://www.supremecourt.uk/procedures/practice-direction-10.html> [accessed 23 June 2017]

Westminster. It has no authority to strike down that law, though it may, by means of judicial review, overturn the acts of UK Ministers. The Supreme Court's ability to act as an impartial umpire, therefore, is more constrained than that of the CJEU.

266. Lord Wigley suggested therefore that there might be a need for “mechanisms of discussion and even arbitration”<sup>281</sup> post-Brexit, while Lord McConnell of Glenscorrodale proposed that “where there is a dispute, there should be some form of independent adjudication over the allocation of powers within that settlement”.<sup>282</sup> We note, however, that the establishment of a body possessing authority to arbitrate or adjudicate between the devolved institutions and the Westminster Parliament would be a constitutional change of the first order of magnitude.

### Conclusions and recommendations

267. **We agree with the Prime Minister's statement, in her speech on 17 January, that certain “common standards and frameworks” will be needed to maintain the integrity of the UK internal market post-Brexit. It is regrettable that the Government has hitherto failed to explain clearly and coherently how it will work with the devolved governments to achieve this desired outcome.**
268. **Any durable solution will need the consent of all the nations of the United Kingdom, and of their elected representatives. We are encouraged by the openness to dialogue and to compromise of the Welsh Government and, while the current political crisis in Northern Ireland is a grave concern, we hope, as we outlined in our report on *Brexit: UK-Irish relations*, that the over-riding need to preserve the peace process, and to defend the economic and social interests of communities on both sides of the land border, will contribute to achieving an outcome commanding cross-community consent.**
269. **We are concerned by the apparent deterioration of relations between the UK and Scottish Governments. Statements by Ministers, and in the Government's White Paper on *Legislating for the United Kingdom's withdrawal from the European Union*, seem to imply that the UK Government is considering a top-down approach to establishing the necessary frameworks and standards in law at UK level.**
270. **The Scottish Government, in contrast, is seeking substantial additional powers post-Brexit, including powers that the Smith Commission, established after the 2014 independence referendum, concluded should continue to be reserved. It seeks these powers with a view to implementing its preferred approach to Brexit for Scotland, which would involve continuing membership of the EU Single Market. In the absence of any agreement on this approach, it holds out the possibility of a further independence referendum.**
271. **We call on the UK Government and the devolved Governments to work together to put in place the frameworks needed to ensure consistency at UK level, thereby preserving the integrity of the UK**

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281 [Q 126](#)

282 [Q 149](#)

**single market, while respecting national, regional and local diversity, and the autonomy of the devolved institutions. We note the suggestion of some witnesses that, in the long term, some form of impartial internal arbitration between the constituent parts of the United Kingdom may be required to ensure the integrity of the UK single market.**

- 272. A successful settlement cannot be imposed by the UK Government: it must be developed in partnership with the devolved Governments. We welcome the Secretary of State's belated confirmation that the legislative consent of the devolved legislatures will be sought in respect of the Repeal Bill. The political and constitutional consequences, were legislative consent to be withheld, while unclear, are likely to be serious. We therefore call on the UK Government and the devolved governments to engage positively in developing solutions that work for the whole of the UK and all its constituent nations and territories.**
- 273. The Brexit process, and the new powers and responsibilities to be exercised by the devolved institutions post-Brexit, will place extra demands on their time and resources. We call on the UK Government and the devolved administrations to work together to ensure that the devolved institutions are properly resourced and equipped for this vital work. This should include more regular interchange between civil servants in the devolved administrations and Whitehall.**

## CHAPTER 7: ENGAGEMENT WITH THE DEVOLVED INSTITUTIONS

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### The Joint Ministerial Committee

274. Under the memorandum of understanding between the UK and the devolved Governments, which was reissued in 2013, a Joint Ministerial Committee (JMC) was established, to provide “central co-ordination” of relations between the UK Government and the devolved Governments.<sup>283</sup> Plenary meetings of the JMC, chaired by the Prime Minister, and attended by the First Ministers (and deputy First Minister of Northern Ireland), are to be held at least once a year. Two meetings have been held since the referendum, on 24 October 2016 (after a two-year gap) and 30 January 2017. The JMC may also meet in “other ‘functional’ formats”,<sup>284</sup> chaired and attended by responsible Ministers. At the October meeting of the JMC, a Joint Ministerial Committee (EU Negotiations)—JMC (EN)—was established, chaired by the Secretary of State for Exiting the EU. The JMC (EN) first met on 9 November 2016, and agreed to meet monthly. It met a second time on 7 December, and has met twice since, most recently in February 2017. The terms of reference of the JMC (EN) are:

“Through the JMC (EN) the governments will work collaboratively to:

- discuss each government’s requirements of the future relationship with the EU;
- seek to agree a UK approach to, and objectives for, Article 50 negotiations; and
- provide oversight of negotiations with the EU, to ensure, as far as possible, that outcomes agreed by all four governments are secured from these negotiations; and,
- discuss issues stemming from the negotiation process which may impact upon or have consequences for the UK Government, the Scottish Government, the Welsh Government or the Northern Ireland Executive.”<sup>285</sup>

275. The JMC is not a decision-making body: it is appointed “to consider non-devolved matters which impinge on devolved responsibilities, and devolved matters which impinge on non-devolved responsibilities”, along with other matters, such as disputes between the administrations. Sir Emyr Jones Parry told us that “It was conceived to have exchanges of view, to be a talking shop if you like”,<sup>286</sup> while Lord Hain described it as “pretty ineffectual and

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283 Memorandum of Understanding between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee, October 2013, para 23: <https://www.gov.uk/government/publications/devolution-memorandum-of-understanding-and-supplementary-agreement> [accessed 14 April 2017]

284 Memorandum of Understanding between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee, October 2013, para A1.4: <https://www.gov.uk/government/publications/devolution-memorandum-of-understanding-and-supplementary-agreement> [accessed 14 April 2017]

285 HM Government, *Joint Ministerial Committee communiqué*: (24 October 2016): [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/562364/joint-ministerial-committee-communique-24-october-2016.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/562364/joint-ministerial-committee-communique-24-october-2016.pdf) [accessed 10 July 2017]

286 Q 68

useless”.<sup>287</sup> On the other hand, Dr Rachel Minto told us that the prospect of Brexit had led to “a re-ignition of the JMC Plenary”,<sup>288</sup> while Ben Cottam, Head of External Affairs, FSB Wales, felt that there was “a key role for it as an entity that brings together the different political and governmental interests across the UK”.<sup>289</sup>

276. The JMC (EN) is more directly relevant to Brexit. Its establishment was widely welcomed by witnesses, as a sign of the UK Government’s intention to involve devolved governments in the development of its thinking on Brexit. Lord Hain, for instance, despite his negative view of the JMC, hoped that the new body could be “really central in a positive way”,<sup>290</sup> and it was also welcomed by Lord Hunt of Wirral and Lord Trimble.<sup>291</sup>
277. On 8 February Michael Russell MSP, giving evidence to the House of Commons Exiting the European Union Committee, was asked how often it had met. His response was scathing:

“Today’s is the fourth. It meets this afternoon, though I am afraid I could not tell you where, because such is the process of setting these meetings that I do not even know, at this moment, where that meeting is taking place. I think it is somewhere within the environs of this building, but we do not know.”

The JMC (EN) has not met since. Asked whether the JMC (EN) had discussed a draft of the Government’s letter formally triggering Article 50, Mr Russell replied that it had not:

“We have not seen a draft letter. We do not know the date of submission of that letter. We have not seen a paper that proposes content for that letter, and indeed the forward work programme for the committee, which we received this morning at about 8.30, which does not give an awful lot of time to consider it, does not have the formal consideration of that draft letter on it as yet.”<sup>292</sup>

278. Mr Russell’s criticisms were borne out by another member of the JMC (EN), Mark Drakeford AM, who offered a detailed and thoughtful critique:

“It needs to be better run. It is not encouraging when agendas arrive less than 24 hours before the meeting takes place. When you leave Cardiff to attend a meeting, there is not even a room identified where the meeting is going to happen. Minutes are not produced, so we are unable to track progress against things that have been agreed. So there is the basic business about putting more effort into giving these meetings the sort of administrative back-up that they need if they are going to be able to do the job. It needs a proper work programme. There is a constant frustration at the JMC (EN) that we never seem to manage to get a clear sense of what that forum needs to tackle next. We have never had on our

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287 [Q 128](#)

288 [Q 78](#)

289 [Q 85](#)

290 [Q 128](#)

291 [Q 142](#)

292 Oral evidence taken before House of Commons Exiting the European Union Committee, 8 February 2017 (Session 2016–17), [QQ 888–889](#)



agenda an item that is actually about triggering Article 50. That seems fairly extraordinary, really.”<sup>293</sup>

279. Describing the Welsh Government’s experience as “disappointing”, Mr Drakeford offered the following reasons:

- There was a gap between the ambition set for the JMC (EN), namely to come to an agreement on the UK Government’s negotiating objectives, and the reality.
- It had given the devolved Governments an opportunity to air their views, but “any sense that we have moved beyond that genuinely to try to come to a four-way agreement on the negotiations has not been achieved”.
- It could be seen as “a vehicle for managing and suppressing difficult issues rather than addressing and engaging with them”. As a result, the frustration of members spilled over into arguments about process, rather than substance.<sup>294</sup>

280. Mr Russell highlighted the imbalance in representation between the UK and devolved Governments, telling us that it was “not a process in which the four nations of the UK sit down together for an equal discussion”. He noted that, in the absence of Ministers from Northern Ireland, he and his Welsh counterpart “could be sitting there facing what looks like a very large and rather distinguished interviewing panel”, and entered a plea for more “equal decision-making”.<sup>295</sup> Dr Minto echoed his concern: “it is not a meeting of equal partners. The UK is very much the dominant partner.”<sup>296</sup>

281. Professor Douglas-Scott told us that “the problem is that it is not an executive body. It is for an exchange of information. What the devolveds want is a much greater participation and, if possible, some sort of legal or political guarantee.” She acknowledged that this raised a broader constitutional question, comparing the role of equivalent bodies in federal states such as Germany, where the Länder are represented in the second chamber, the Bundesrat, and “have the ability to say, ‘This affects our devolved competencies. We want this done’.”<sup>297</sup>

282. It will be clear from the criticisms we have summarised that the JMC (EN) needs to improve. Mr Drakeford saw an important role for the JMC in the period following the triggering of Article 50, and regretted that the JMC had not yet had such a discussion. He said that the UK Government should be more open in sharing evidence and in discussing the policy choices based on that evidence. He believed that “devolved Administrations ought to be at the table in [Brexit] negotiations when devolved competencies are directly at stake and being discussed”, and saw the JMC facilitating this.<sup>298</sup> Lord McConnell of Glenscorrodale also advocated a much more structured approach to the JMC (EN), designed to feed into the negotiations themselves:

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293 [Q 137](#)

294 [Q 137](#)

295 [Q 43](#)

296 [Q 78](#)

297 [Q 101](#)

298 [Q 137](#)

“There needs to be direct civil-servant-to-civil-servant and Minister-to-Minister negotiations for each of the three devolved nations in the UK. The papers and agreements from those discussions could then be ratified by a JMC on European negotiations that then went up through the process in Whitehall or wherever, but that bilateral agreement is critical for getting right into the detail of this as opposed to the general process and strategy.”<sup>299</sup>

283. Following the general election, both the Welsh and Scottish Governments have stressed the urgent need for more effective consultation mechanisms to be established.

284. The First Minister of Wales stated:

“The leaders across Great Britain and Northern Ireland must meet face-to-face to jointly consider how to take forward the Brexit process. This is why we urgently need a meeting of the JMC. I have made repeatedly clear my government’s willingness to work with the UK government and the devolved administrations to agree common approaches—through discussion, not diktat—to prevent friction within our own internal market. If the Prime Minister accepts this approach, she will find us reliable and constructive partners. If she does not—and, instead, attempts to ride roughshod over devolution and impose a more monolithic and centralised UK upon the devolved nations, we will have no choice but to oppose such steps.”<sup>300</sup>

285. On 15 June, the Welsh Government published a policy paper on *Brexit and devolution*, which proposed replacing the JMC with a new UK Council of Ministers that would take forward negotiations, reach binding decisions and help resolve disputes. The Council, served by an independent secretariat and a structured work programme, would bring the four governments together to negotiate and agree binding UK frameworks in devolved areas where they are needed, as well as considering non-devolved policies, such as state aid. The paper also proposed a convention on the future of the United Kingdom.<sup>301</sup>

286. Meanwhile, the First Minister of Scotland wrote to the Prime Minister on 14 June, stating that:

“The Joint Ministerial Committee on EU Negotiations should be re-convened immediately and work to fulfil its original terms of reference to agree a UK approach to and objectives for the negotiations. The Scottish Government stands ready to engage fully and constructively in that committee, which must operate on the basis of trust and a genuine opportunity to influence the UK approach. To broaden support for the negotiating position this should be accompanied by the establishment of a cross-party advisory group, comprising those parties represented at Westminster and parties from both sides of the political debate in Northern Ireland, alongside the UK and devolved governments. Secondly, the negotiating team must include representation from the

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299 Q 154

300 Welsh Government, ‘The Prime Minister must not gamble with people’s jobs and livelihoods’, (13 June 2017): <http://gov.wales/newsroom/firstminister/2017/170613-prime-minister-must-not-gamble-with-livelihoods/?lang=en> [accessed 22 June 2017]

301 Welsh Government, ‘First Minister sets out a way forward for devolution post-Brexit’, (15 June 2017): <http://gov.wales/newsroom/firstminister/2017/170615-fm-sets-out-way-forward-for-devolution-post-brexit/?lang=en> [accessed 22 June 2017]

devolved governments. It will not be possible for the UK to effectively implement the outcome of Brexit negotiations without the co-operation of devolved governments. It is therefore essential that we are part of the negotiating process.”<sup>302</sup>

287. On 15 June, Michael Russell MSP and Mark Drakeford AM wrote a joint letter to Rt Hon David Davis MP, calling for a “radical reshaping of the UK Government’s approach to building a broad-based consensus on the approach to the Brexit negotiations”. They sought in particular:

- Agreement that the devolved administrations should be represented at the negotiating table when devolved issues are discussed, and that they should be ‘in the room’ for other sessions.
- Resumption of meetings of the JMC (EN) at the earliest opportunity, and a forward programme of regular meetings, in line with the cycle of negotiating meetings with the Commission, “so as to ensure that we both have meaningful discussions on the outcome of the most recent session and can collectively shape the UK’s negotiating position in advance of the subsequent session”.
- A clear forward agenda, including the proposed response to the EU Negotiation Guidelines and Directives, and full discussion of: the constitutional basis for any joint framework which may be necessary; any replacement funding for EU funding streams; future immigration policy; and analysis of the economic impact of various scenarios, including ‘no deal’ and reverting to WTO rules, leaving the Single Market and withdrawing from the Customs Union.
- Agreement of JMC (EN) agendas at the previous meeting, circulation of papers at least five days in advance, and significantly reducing the number of attendees from the UK Government.
- Greater trust that the devolved administrations will respect the confidentiality of the JMC (EN) discussions.
- Regular bilateral meetings to complement the JMC (EN) mechanism.
- Improved consultation and engagement in advance of publication of the Repeal Bill and other Brexit-related bills.

288. The opening paragraph of the Queen’s Speech, delivered on 21 June 2017, expressed the Government’s commitment to “working with Parliament, the devolved administrations, business and others to build the widest possible consensus on the country’s future outside the European Union”.<sup>303</sup> Mr Davis, giving evidence on 11 July, robustly defended the Government’s record, telling us that “We have bent over backwards ... to pay attention to the interests of the people of Scotland, the people of Wales and, of course, particularly the people of Northern Ireland”.<sup>304</sup> He did not respond to specific criticisms made in the joint letter, for instance over the failure to circulate agendas for JMC (EN) meetings. It thus remains to be seen whether the

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302 Scottish Government, ‘First Minister writes to Prime Minister ahead of Brexit negotiations’, (14 June 2017): <https://news.gov.scot/news/first-minister-writes-to-prime-minister-ahead-of-brexit-negotiations> [accessed 11 July 2017]

303 HL Deb 21 June 2017, [col 5](#)

304 Oral evidence taken on 11 July 2017 (Session 2017–19) [Q 7](#) (Rt Hon David Davis MP)

Government will engage with the devolved administrations in the ways they have proposed.

### Interparliamentary dialogue

289. The JMC and the JMC (EN) are intergovernmental bodies. We also asked about the scope for enhanced interparliamentary dialogue within the UK, to support the work of the JMC. We note that some interparliamentary fora already exist, notably the British-Irish Parliamentary Assembly. There are also less formal bodies, such as the ECUK forum, which involves chairs of committees with responsibility for EU matters from across the legislatures of the UK, and meets on average twice a year. Lord Wallace of Tankerness, though, was clear that interparliamentary relations needed to be closer, citing “simple things like passes for MPs to go into the Scottish Parliament and for MSPs to come to Westminster”.<sup>305</sup> Lord Hain agreed that “increased dialogue would be a very positive thing. Especially on a project like Brexit, it would be really important.”<sup>306</sup> Lord McConnell of Glenscorrodale envisaged the possibility of “a joint parliamentary committee” on an issue such as agriculture, bringing together members of all the legislatures across the UK.<sup>307</sup>

### Conclusions

290. **We have called on all the Governments of the UK to work together to develop a common approach to Brexit. If this is to happen, they will need a forum within which ideas can be shared and common positions agreed.**
291. **The Joint Ministerial Committee has been re-energised by Brexit, and we also welcome the establishment of the Joint Ministerial Committee (European Negotiations). We note, however, the concerns expressed by the Scottish and Welsh Ministers that the JMC (EN) is not fulfilling its terms of reference, and it is clear that at a basic level its meetings are not being treated with respect or organised efficiently. This needs to change: if the UK Government wishes the JMC (EN) to make a useful contribution, it must give it appropriate support, both in political and resource terms.**
292. **More generally, we note that the JMC and the JMC (EN) are not decision-making bodies, and that there is a perception in some quarters that they are used to manage disagreements, rather than to engage with issues and find solutions. This is exacerbated by the perception that the participants are not doing so on equal terms.**
293. **We therefore endorse the view of most of our witnesses that the UK Government needs to raise its game to make the JMC (EN) effective. This means better preparation, including bilateral discussions ahead of meetings, a structured work programme, greater transparency, and a willingness to accept that the JMC (EN), even if not a formal decision-making body, is more than a talking-shop—that it should be authorised to agree common positions on key matters affecting devolved competences in time to inform the UK Government’s negotiating position.**

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305 [Q 112](#)

306 [Q 129](#)

307 [Q 155](#)

294. **Given the four-week negotiating cycle structure announced for the Brexit negotiations, we further recommend that a long-term programme of meetings of the JMC (EN) should be adopted, with the meetings coinciding with the fourth week in each cycle. This would enable the Government both to report on progress in the preceding cycle, and to identify and agree common positions on devolved issues arising in the forthcoming cycle.**
295. **We note the suggestion by the Governments of Wales and Scotland that they should have a seat at the negotiating table with the EU when devolved matters are being discussed, and that they should be ‘in the room’ throughout. We call on the UK Government to respond to this suggestion as a matter of urgency, and at all events before the negotiations turn to the future relationship between the UK and the EU, where issues of strong devolved interest, such as fisheries, are likely to arise.**
296. **The devolved governments, and some of our witnesses, have also argued that fundamental reform is needed to give the devolved institutions a more formal role in UK decision-making post-Brexit, analogous to that of regions and states in federal systems. While there may be merit in such proposals, this would be a far-reaching constitutional reform, which falls outside the scope of this report and the remit of this Committee.**
297. **We recommend that the structures for interparliamentary dialogue and cooperation be strengthened, and invite the House to consider how this might be achieved. In the short term, the priority is to engage in closer interparliamentary dialogue regarding the Brexit negotiations themselves and the accompanying domestic legislation. We will therefore seek to develop and broaden our well-established mechanisms for collaboration with our colleagues in the devolved legislatures. Working in conjunction with other Committees of the House, we will propose more regular joint meetings with members of cognate Committees with responsibility for Brexit-related issues in the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly, and in the House of Commons, for the duration of the Brexit negotiations. These joint meetings could provide an opportunity to hear informally from UK and devolved Government Ministers, and to discuss issues of mutual interest and concern.**
298. **In the longer term, we also see a need for a strengthened forum for interparliamentary dialogue within the post-Brexit United Kingdom. The resourcing of this forum, and its relationship with existing bodies (notably the British-Irish Interparliamentary Assembly) will require careful consideration by the House and more widely. We hope to contribute to that consideration in coming months.**

## SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

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### Devolution, the UK and the EU

1. The devolution settlements affecting Northern Ireland, Wales and Scotland have developed incrementally and asymmetrically since 1997, as increasing powers have been conferred upon the devolved institutions over time. In the absence of any over-arching concept of ‘shared competence’, or of ‘subsidiarity’, as these are understood at EU level, these changes have been set out in a piecemeal series of Acts of Parliament, each amending its predecessors. This has led the House of Lords Constitution Committee to warn of the increasing complexity of “overlapping and shared competences”. (Paragraph 35)
2. Against this backdrop, the European Union has been, in effect, part of the glue holding the United Kingdom together since 1997. The supremacy of EU law, and the interpretation of that law by the Court of Justice of the EU, have in many areas ensured consistency of legal and regulatory standards across the UK, including in devolved policy areas, such as environment, agriculture and fisheries. In practice, the UK internal market has been upheld by the rules of the EU internal market. (Paragraph 36)
3. Brexit therefore presents a risk that the complex overlapping competences within the UK could become increasingly unstable. It is not for the European Union Committee to recommend answers to these essentially domestic constitutional questions. We note, however, that the UK Government, in its pre-election published statements on Brexit and on the Repeal Bill, did not address the fundamental constitutional challenges now facing the whole United Kingdom. The new Government must now do so, working in a spirit of partnership and cooperation with the devolved legislatures and governments. (Paragraph 37)

### Northern Ireland

4. Northern Ireland’s distinctive geographical, historical, political, and (in the context of the 1998 Belfast/Good Friday Agreement) constitutional circumstances mean that it will be profoundly affected by Brexit. There will be a significant impact, including on cross-border trade, the agri-food sector, energy, transport, fisheries, access to EU labour, healthcare provision, tourism, and police and security cooperation. (Paragraph 93)
5. It also appears that the Brexit debate has undermined political stability and exacerbated cross-community divisions, contributing to the collapse of the Northern Ireland Executive and the calling of an early Assembly election. At the time of writing, the power-sharing institutions have yet to be restored. This, together with the appointment of a new Irish Taoiseach, the Conservative-DUP confidence and supply agreement at Westminster, and the fact that no nationalist MPs have taken their seats in the new Parliament, has created new uncertainty, underlining the fragility of the political settlement in Northern Ireland. (Paragraph 94)
6. The Belfast/Good Friday Agreement established a delicate equilibrium, encapsulated in the power-sharing institutions, and the mechanisms for enhanced North-South and East-West cooperation. It is imperative that Brexit does not weaken this equilibrium or the commitment and confidence of both unionist and nationalist communities in the political process.



While the agreement between the Conservative Government and the DUP provides an opportunity for Northern Ireland's interests to gain attention and prominence, the Government must also take account of the interests of the nationalist community, in order to maintain its confidence. Political stability in Northern Ireland must not be allowed to become 'collateral damage' of Brexit. (Paragraph 95)

7. Our December 2016 report on *Brexit: UK-Irish relations* called for all parties to the negotiations to give official recognition to the special, unique nature of UK-Irish relations in their entirety, including the position of Northern Ireland, and the North-South and East-West structure and institutions established under the Belfast/Good Friday Agreement. (Paragraph 96)
8. We are therefore heartened by the statements by the Prime Minister, the Irish Government, the European Council and the European Parliament, all expressing a commitment to protect the achievements of the peace process and to seek to avoid the imposition of a hard border on the island of Ireland. We also welcome the European Council's statement that "the Union should also recognise existing bilateral agreements and arrangements between the United Kingdom and Ireland which are compatible with EU law" as an indicator that it will not stand in the way of retention of the Common Travel Area, which predates either UK or Irish EU membership and which benefits all communities across these islands. (Paragraph 97)
9. 'Special status' is a politically contentious term in Northern Ireland, and we acknowledge the unionist community's concerns that no aspect of the Brexit negotiations should undermine Northern Ireland's ties to the rest of the UK. Yet at the same time, the specific circumstances in Northern Ireland give rise to unique issues that will need to be addressed during the Brexit negotiations. (Paragraph 98)
10. As we concluded in our December 2016 report, the unique nature of UK-Irish relations necessitates a unique solution. We welcome the European Council's commitment to seek "flexible and imaginative solutions", and call on the UK Government to work with the EU negotiators to identify and outline such solutions as a matter of priority. (Paragraph 99)

## Wales

11. Wales could be profoundly affected by Brexit. The Welsh economy is highly reliant on membership of the EU Single Market, in particular in the fields of manufacturing (which is a proportionately larger sector of the Welsh economy than in other parts of the UK, and where a small number of exporting companies in the automotive and aerospace industries are principal economic drivers) and agriculture. Two-thirds of Welsh exports go to the EU, and Single Market membership has been an important driver of foreign direct investment. The Welsh economy is therefore particularly vulnerable to the effects of any diminution in the UK's unfettered access to and ability to trade freely with the Single Market. (Paragraph 138)
12. Welsh farming is particularly at risk. Eighty per cent of Welsh land is designated as an EU Less Favoured Area, and Wales' topography and climate means that Welsh farming is dominated by hill farming and sheep farming—sectors that are particularly dependent on EU funding, through the Common Agricultural Policy, and EU markets. The rural communities

that rely on the farming sector, which make an important contribution to Welsh culture and language, are also at risk. (Paragraph 139)

13. Overall, Wales is a substantial net beneficiary of EU funds, including via Common Agricultural Policy payments and EU structural funds. This places it in a vulnerable position, and we note the strong arguments put to us that Wales should not lose out financially as a result of Brexit. In particular, we note widespread concern that the Barnett Formula is ill-suited to recompensing Welsh communities for the loss of needs-based EU funding. (Paragraph 140)
14. While the numbers of EU workers in Wales are comparatively low, the NHS, agriculture, tourism and some parts of the manufacturing sectors are heavily dependent on EU labour. Restrictions upon the free movement of EU workers could place these sectors under strain. (Paragraph 141)
15. But while Brexit presents major challenges to Wales, it appears to have less leverage over the UK Government than either Northern Ireland or Scotland. We heard general concern that, because of its size, because the situation in Wales does not give rise to such complex political and constitutional questions as in Scotland and Northern Ireland, and because, unlike the other devolved jurisdictions, most votes cast in Wales were in favour of leaving the EU, the interests of Wales may be overlooked in the Brexit negotiations. The UK Government needs to take action to assuage these fears. (Paragraph 142)
16. The Welsh Government has made clear that it wishes to work constructively with the UK Government to ensure that Wales' interests and priorities are reflected in the terms of a UK-wide Brexit agreement. The UK Government needs to reciprocate this good faith and to seek to protect Wales' interests in the Brexit negotiations. If this does not prove possible, then the case for identifying other means by which Wales' particular interests can be defended may become more compelling. (Paragraph 143)

### Scotland

17. We note the Scottish Government's earlier stated aim that a newly independent Scotland should remain an EU Member State. We also note the First Minister's announcement on 27 June that any independence referendum would be delayed until after UK withdrawal in 2019. It is not for this Committee to comment substantively on the Scottish Government's policy, but we note the European Commission's consistent view that, under EU law, an independent Scotland would be treated as a third country, and would have to apply for accession to the EU. (Paragraph 201)
18. We also note the Scottish Government's preference, should Scotland remain part of the UK, for the whole UK to continue within the EU Single Market as part of the European Economic Area. This option was ruled out by the previous Government, and it is now for the new Government, and Parliament, to decide whether this remains the position. (Paragraph 202)
19. We conclude, on the basis of the weight of evidence submitted to this inquiry, that the Scottish Government's further proposal, for continued Scottish membership of the Single Market, through the European Economic Area, while the rest of the UK leaves the Single Market, is politically impracticable, legally highly complex and economically potentially disruptive to the functioning of the UK single market. (Paragraph 203)

20. Nevertheless, we urge the Government to respect the particular circumstances in Scotland. While we acknowledge that the referendum was a UK-wide vote, giving a UK-wide result, the Government needs to recognise the fact that the vote to remain in Scotland, at 62%, was the largest and most decisive (either in favour of remaining or leaving) in any nation of the UK. (Paragraph 204)
21. We therefore consider that, in the event that the UK Government does not secure a UK-wide agreement that adequately reflects Scotland's specific needs, there is a strong political and economic case for making differentiated arrangements for Scotland. (Paragraph 205)
22. The Scottish economy has particularly pressing needs, including its reliance on access to EU labour, which is acute in sectors such as health and social care, agriculture, food and drink, and hospitality. We also note Scotland's demographic needs, and its reliance upon EU migration to enable its population (and in particular, that of working age) to grow. Scotland's more sparsely populated regions are disproportionately reliant both on EU migration and EU funding. Many of our witnesses argued that the most pressing case, in view of Scotland's economic and demographic circumstances, would be for a standalone approach to immigration policy. We address this issue in the next chapter. (Paragraph 206)
23. Our witnesses have also suggested that differentiated arrangements could be reached in fields such as energy policy, justice and home affairs cooperation, participation in Europol, access to EU structural or research funds, participation in such programmes as Horizon 2020 or Erasmus, reciprocal healthcare provision, workers' rights and working hours, and agriculture and fisheries. (Paragraph 207)
24. The uncertainty over the outcome of the Brexit negotiations means that it is not possible at this stage to reach definitive conclusions about the feasibility or desirability of achieving differentiated arrangements across all these various policy areas. Many (for instance, continuing cooperation on justice and home affairs) raise difficult issues of EU law, which we have addressed in separate reports. Moreover, we note that several of these policy areas are already devolved competences, while others are reserved. (Paragraph 208)
25. We note further that achieving differentiated arrangements in some of these areas would depend upon the Scottish Government securing legal personality for Scotland, thus enabling Scotland to negotiate its own agreements with the EU or with third countries in areas of devolved competence. We agree with evidence suggesting that such a development would have profound and unpredictable constitutional and political consequences. (Paragraph 209)
26. Finally, we reiterate that maintenance of the integrity and efficient operation of the UK single market must be an over-arching objective for the whole United Kingdom. But that objective does not preclude differentiated arrangements for Scotland in some areas, and nor does it justify excluding the Scottish Government from the Brexit process. Close cooperation between the UK and Scottish Governments is paramount: it is incumbent on both Governments to set aside their differences and work constructively together to protect the interests of the citizens of Scotland in the final Brexit deal. (Paragraph 210)

### A new devolution settlement?

27. We heard much evidence both on existing devolved competences that should remain with the devolved legislatures, but the exercise of which needed to be coordinated at UK level, and on new competences that could potentially be devolved post-Brexit. In this context, we recall the words of the House of Lords Constitution Committee, in its report on *The Union and Devolution*, that hitherto “There has been no guiding strategy or framework of principles to ensure that devolution develops in a coherent or consistent manner and in ways which do not harm the Union.” Thanks to Brexit, it is now more important than ever that reform of the devolution settlements should be underpinned by a clear and agreed framework of guiding principles. (Paragraph 236)
28. We note also that the Acts of Parliament establishing the devolution settlements set out in full those competences that are in each case either reserved or devolved. On the day of Brexit, competences currently exercised at EU level will, by default, be exercised in accordance with these pre-existing statutory provisions. It follows that without any change in UK law, Brexit will lead to a significant increase in the powers and responsibilities of the devolved institutions. (Paragraph 237)
29. Any attempt to amend the devolution settlements ahead of Brexit would be complex and politically controversial, and we doubt that either the UK Government or Parliament has the capacity to undertake such a task at the same time as achieving a successful Brexit. On balance, we therefore conclude that, for the duration of the Brexit process, the statutory balance of competences between the UK Parliament and the devolved legislatures should as far as possible be unchanged. This is not the time to embark on controversial domestic constitutional reform, either by conferring additional competences upon the devolved institutions or by ‘re-reserving’ competences previously devolved. (Paragraph 238)
30. But while we do not recommend devolving additional competences upon the devolved institutions, we endorse the weight of evidence heard in this inquiry, that the specific labour market and demographic needs of the devolved nations should be accommodated in the context of Brexit. We therefore call on the UK Government, in bringing forward its forthcoming Immigration Bill, to look for opportunities to enhance the role of the devolved institutions in managing EU migration. Local and regional economic and demographic needs, rather than central targets, should drive decision-making. There is already differentiation in respect of non-EU migration, for instance in the provision of Tier 2 visas to meet sectoral requirements, and we urge the Government, in devising a post-Brexit immigration policy for EU nationals, to ensure that maximum flexibility is granted to the UK’s nations and regions. (Paragraph 239)
31. The issue of powers and competences is inextricably bound up with the allocation of funding. We welcome, as far as it goes, HM Treasury’s assurance that existing EU funding commitments (including structural and agricultural funding) made under the current Multiannual Financial Framework until 2020 will be met from domestic funds. But at the same time we note that each of the devolved jurisdictions receives significantly more EU funding per capita than England. This has led to acute concern from across the UK that in the longer term farmers and deprived regions in

the devolved jurisdictions would lose heavily were needs-based EU funding to be replaced by UK subsidies granted in accordance with the population-based Barnett Formula. (Paragraph 240)

32. We therefore reiterate the central conclusion of the 2009 Select Committee on the Barnett Formula: “A new system which allocates resources to the devolved administrations based on an explicit assessment of their relative needs should be introduced.” This will be a complex task, but the prospect of Brexit means that reform of the Barnett Formula can be delayed no longer. (Paragraph 241)
33. We agree with the Prime Minister’s statement, in her speech on 17 January, that certain “common standards and frameworks” will be needed to maintain the integrity of the UK internal market post-Brexit. It is regrettable that the Government has hitherto failed to explain clearly and coherently how it will work with the devolved governments to achieve this desired outcome. (Paragraph 267)
34. Any durable solution will need the consent of all the nations of the United Kingdom, and of their elected representatives. We are encouraged by the openness to dialogue and to compromise of the Welsh Government and, while the current political crisis in Northern Ireland is a grave concern, we hope, as we outlined in our report on *Brexit: UK-Irish relations*, that the over-riding need to preserve the peace process, and to defend the economic and social interests of communities on both sides of the land border, will contribute to achieving an outcome commanding cross-community consent. (Paragraph 268)
35. We are concerned by the apparent deterioration of relations between the UK and Scottish Governments. Statements by Ministers, and in the Government’s White Paper on *Legislating for the United Kingdom’s withdrawal from the European Union*, seem to imply that the UK Government is considering a top-down approach to establishing the necessary frameworks and standards in law at UK level. (Paragraph 269)
36. The Scottish Government, in contrast, is seeking substantial additional powers post-Brexit, including powers that the Smith Commission, established after the 2014 independence referendum, concluded should continue to be reserved. It seeks these powers with a view to implementing its preferred approach to Brexit for Scotland, which would involve continuing membership of the EU Single Market. In the absence of any agreement on this approach, it holds out the possibility of a further independence referendum. (Paragraph 270)
37. We call on the UK Government and the devolved Governments to work together to put in place the frameworks needed to ensure consistency at UK level, thereby preserving the integrity of the UK single market, while respecting national, regional and local diversity, and the autonomy of the devolved institutions. We note the suggestion of some witnesses that, in the long term, some form of impartial internal arbitration between the constituent parts of the United Kingdom may be required to ensure the integrity of the UK single market. (Paragraph 271)
38. A successful settlement cannot be imposed by the UK Government: it must be developed in partnership with the devolved Governments. We welcome the Secretary of State’s belated confirmation that the legislative consent of

the devolved legislatures will be sought in respect of the Repeal Bill. The political and constitutional consequences, were legislative consent to be withheld, while unclear, are likely to be serious. We therefore call on the UK Government and the devolved governments to engage positively in developing solutions that work for the whole of the UK and all its constituent nations and territories. (Paragraph 272)

39. The Brexit process, and the new powers and responsibilities to be exercised by the devolved institutions post-Brexit, will place extra demands on their time and resources. We call on the UK Government and the devolved administrations to work together to ensure that the devolved institutions are properly resourced and equipped for this vital work. This should include more regular interchange between civil servants in the devolved administrations and Whitehall. (Paragraph 273)

### **Engagement with the devolved institutions**

40. We have called on all the Governments of the UK to work together to develop a common approach to Brexit. If this is to happen, they will need a forum within which ideas can be shared and common positions agreed. (Paragraph 290)
41. The Joint Ministerial Committee has been re-energised by Brexit, and we also welcome the establishment of the Joint Ministerial Committee (European Negotiations). We note, however, the concerns expressed by the Scottish and Welsh Ministers that the JMC (EN) is not fulfilling its terms of reference, and it is clear that at a basic level its meetings are not being treated with respect or organised efficiently. This needs to change: if the UK Government wishes the JMC (EN) to make a useful contribution, it must give it appropriate support, both in political and resource terms. (Paragraph 291)
42. More generally, we note that the JMC and the JMC (EN) are not decision-making bodies, and that there is a perception in some quarters that they are used to manage disagreements, rather than to engage with issues and find solutions. This is exacerbated by the perception that the participants are not doing so on equal terms. (Paragraph 292)
43. We therefore endorse the view of most of our witnesses that the UK Government needs to raise its game to make the JMC (EN) effective. This means better preparation, including bilateral discussions ahead of meetings, a structured work programme, greater transparency, and a willingness to accept that the JMC (EN), even if not a formal decision-making body, is more than a talking-shop—that it should be authorised to agree common positions on key matters affecting devolved competences in time to inform the UK Government’s negotiating position. (Paragraph 293)
44. Given the four-week negotiating cycle structure announced for the Brexit negotiations, we further recommend that a long-term programme of meetings of the JMC (EN) should be adopted, with the meetings coinciding with the fourth week in each cycle. This would enable the Government both to report on progress in the preceding cycle, and to identify and agree common positions on devolved issues arising in the forthcoming cycle. (Paragraph 294)
45. We note the suggestion by the Governments of Wales and Scotland that they should have a seat at the negotiating table with the EU when devolved matters



are being discussed, and that they should be ‘in the room’ throughout. We call on the UK Government to respond to this suggestion as a matter of urgency, and at all events before the negotiations turn to the future relationship between the UK and the EU, where issues of strong devolved interest, such as fisheries, are likely to arise. (Paragraph 295)

46. The devolved governments, and some of our witnesses, have also argued that fundamental reform is needed to give the devolved institutions a more formal role in UK decision-making post-Brexit, analogous to that of regions and states in federal systems. While there may be merit in such proposals, this would be a far-reaching constitutional reform, which falls outside the scope of this report and the remit of this Committee. (Paragraph 296)
47. We recommend that the structures for interparliamentary dialogue and cooperation be strengthened, and invite the House to consider how this might be achieved. In the short term, the priority is to engage in closer interparliamentary dialogue regarding the Brexit negotiations themselves and the accompanying domestic legislation. We will therefore seek to develop and broaden our well-established mechanisms for collaboration with our colleagues in the devolved legislatures. Working in conjunction with other Committees of the House, we will propose more regular joint meetings with members of cognate Committees with responsibility for Brexit-related issues in the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly, and in the House of Commons, for the duration of the Brexit negotiations. These joint meetings could provide an opportunity to hear informally from UK and devolved Government Ministers, and to discuss issues of mutual interest and concern. (Paragraph 297)
48. In the longer term, we also see a need for a strengthened forum for interparliamentary dialogue within the post-Brexit United Kingdom. The resourcing of this forum, and its relationship with existing bodies (notably the British-Irish Interparliamentary Assembly) will require careful consideration by the House and more widely. We hope to contribute to that consideration in coming months. (Paragraph 298)

## APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

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### Members

Baroness Armstrong of Hill Top  
 Lord Boswell of Aynho (Chairman)  
 Baroness Brown of Cambridge  
 Baroness Browning  
 Lord Crisp (from 27 June 2017)  
 Lord Cromwell (from 27 June 2017)  
 Baroness Falkner of Margravine  
 Lord Green of Hurstpierpoint (until 3 May 2017)  
 Lord Jay of Ewelme  
 Baroness Kennedy of The Shaws  
 The Earl of Kinnoull  
 Lord Liddle  
 Baroness Neville-Rolfe (from 27 June 2017)  
 Baroness Prashar (until 3 May 2017)  
 Lord Selkirk of Douglas  
 Baroness Suttie  
 Lord Teverson  
 Lord Trees (until 3 May 2017)  
 Baroness Verma  
 Lord Whitty  
 Baroness Wilcox

### Declarations of interest

Baroness Armstrong of Hill Top  
*Chair, Changing Lives (a charity based in Tyneside which may benefit from European Union funds)*  
*Member, Advisory Board, GovNet Communications (publisher and event organiser)*  
*Trustee, Africa Governing Initiative Trustee, Voluntary Service Overseas*  
*Joint owner of a property in Spain*  
 Lord Boswell of Aynho (Chairman)  
*In receipt of salary as Principal Deputy Chairman of Committees, House of Lords*  
*Shareholdings as set out in the Register of Lords' Interests*  
*Income is received as a Partner (with wife) from land and family farming business trading as EN & TE Boswell at Lower Aynho Grounds, Banbury, with separate rentals from cottage and grazing*  
*Land at Great Leighs, Essex (one-eighth holding, with balance held by family interests), from which rental income is received*  
*House in Banbury owned jointly with wife, from which rental income is received*  
*Lower Aynho Grounds Farm, Northants/Oxon; this property is owned personally by the Member and not the Partnership*  
 Baroness Brown of Cambridge  
*Vice Chancellor of Aston University (to September 2016): significant research income, ERDF Funding from EU. Large number of EU (non-UK) staff and students. EIB Loan*  
*Vice Chair, Committee on Climate Change*

*Chair, Adaptation Sub-Committee, Committee on Climate Change*  
*Chair, Henry Royce Institute for Advanced Materials*  
*Chair, STEM Learning Ltd*  
*Non-Executive Director, Green Investment Bank Non-Executive Director,*  
*Offshore Renewable Energy Catapult*

**Baroness Browning**

*Chair of the Advisory Committee on Business Appointments*

**Lord Crisp**

*No relevant interests declared*

**Lord Cromwell**

*Vice-President, Barclays Wealth and Investment Management (private banking services to individuals, families and charities) (interest ceased 15 June 2016)*

*Partner (not Head of Holding) in a farming partnership in Leicestershire with remuneration exceeding the registration threshold (from 6 April 2016)*

*Divisional Director, Brewin Dolphin plc (private client investment management) (from 1 January 2017)*

*Shareholdings as set out in the Register of Lords' Interests*

**Baroness Falkner of Margravine**

*Visiting Professor, King's College London*

*Member, Advisory Board, Cambridge YouGov Stone (market research and events agency)*

*Member, British Steering Committee: Koenigswinter, The British-German Conference*

*Vice President, Liberal International: The International Network of Liberal Parties (interest ceased in May 2017)*

*Member, Advisory Board, Demos*

*Ownership of a house in Italy, jointly owned with member's husband*

*Member, House of Lords Foreign Policy Network*

**Lord Green of Hurstpierpoint**

*President, Institute of Export and International Trade*

*Member of informal advisory group on Brexit and trade convened by CEO of the Engineering Employees Federation (EEF)*

**Lord Jay of Ewelme**

*Trustee (Non-Executive Director) Thomson Reuters Founders Share Company Chairman, Positive Planet (UK)*

*Member, European Policy Forum Advisory Council*

*Member, Senior European Experts Group*

*Patron, Fair Trials International*

**Baroness Kennedy of The Shaws**

*Chair, Justice*

**Earl of Kinnoull**

*Executive Consultant, Hiscox Group (insurance)*

*Trustee, Blair Charitable Trust (running of Blair Castle and estate; a farm subsidy is received under the EU farm subsidy scheme)*

*Trustee, Red Squirrel Survival Trust and Director of associated private company (in receipt of EU funds)*

*Director, Horsecross Arts Limited (Perth) and trustee of related registered charity (in receipt of EU funds)*

*Member of Supervisory Board, Fine Art Fund Group funds*

*Farmland and associated cottages in Perthshire from which rental income is received and a farm subsidy is received under the EU farm subsidy scheme*  
*Shareholdings in Hiscox Ltd and Schroders PLC (fund management)*

**Lord Liddle**

*Co-Chair, Policy Network and Communications Ltd (think-tank)*  
*Member, Cumbria County Council*  
*Pro-Chancellor (chair of Board), Lancaster University*  
*Personal assistant at Policy Network carries out secretarial work which includes work in relation to the member's parliamentary duties*

**Baroness Neville-Rolfe**

*Governor, London Business School*

**Baroness Prashar**

*Deputy Chair, British Council*

**Lord Selkirk of Douglas**

*Director, Lennoxlove House Limited (remunerated as a Director)*  
*Chairman of Directors, and Director, Douglas-Hamilton (D Share) Ltd (small family company: agriculture and property; the Member's financial interest derives from his directorship, which is now paid as an annual sum above the registration threshold)*  
*President, Scottish Veterans' Garden City Association (national charity)*  
*Chairman, Scottish Advisory Committee, Skill Force (national charity)*  
*Diversified investment portfolio in McInroy & Wood Income Fund managed by third party*

**Baroness Suttie**

*Liberal Democrat Lords Spokesperson (Northern Ireland)*  
*Associate with Global Partners Governance Limited*  
*Trustee, Institute for Public Policy Research (IPPR)*

**Lord Teverson**

*In receipt of a pension from the European Parliament*  
*Director, KCS Trade Print Ltd (card & label products)*  
*Director, Wessex Investors Ltd*  
*Director, Wessex Hotel Operators Limited (interest ceased 27 April 2016)*  
*Director, KCS Holdings Ltd*  
*Director, Anchorwood Developments Limited (property)*  
*Board Member, Marine Management Organisation*  
*Trustee, Regen SW (renewable energy agency for South West England)*  
*Board Member, Policy Connect (think-tank)*

**Lord Trees**

*Chair, Moredum Research Institute, Edinburgh (independent animal health research institute) which applies for competitive research grants from the EU*

**Baroness Verma**

*No relevant interests declared*

**Lord Whitty**

*President, Road Safety Foundation*  
*Chair, Cheshire Lehmann Fund*  
*President, Environmental Protection UK*  
*Member, GMB*  
*Vice President, Local Government Association*  
*Vice President, Chartered Institute for Trading Standards*

**Baroness Wilcox**

*Shareholdings as set out in the Register of Lords' Interests*

**Lord Woolmer of Leeds**

*No relevant interests declared*

A full list of Members' interests can be found in the Register of Lords Interests:  
[http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/  
register-of-lords-interests/](http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/)

## APPENDIX 2: LIST OF WITNESSES

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Evidence is published online at <http://www.parliament.uk/brexit-devolution-lords-inquiry> and available for inspection at the Parliamentary Archives (020 7219 3074).

Evidence received by the Committee is listed below in chronological order of oral evidence session and in alphabetical order. Those witnesses marked with \*\* gave both oral and written evidence. Those marked with \* gave oral evidence and did not submit written evidence. All other witnesses submitted written evidence only.

### Oral evidence in chronological order

*	Professor Adam Tomkins MSP	<a href="#">QQ 1–10</a>
*	Professor Christina Boswell, Director of Research, Social and Political Science, University of Edinburgh	<a href="#">QQ 11–24</a>
*	Dr Tobias Lock, Senior Lecturer, University of Edinburgh	
*	Dr Graeme Roy, Senior Lecturer in EU Law, University of Strathclyde	
*	Professor Jim Gallagher, Nuffield College Oxford and University of Glasgow	<a href="#">QQ 25–34</a>
*	Professor Nicola McEwen, Associate Director, Centre on Constitutional Change, University of Edinburgh	
*	Professor Alan Page, Professor of Public Law, University of Dundee	
*	Michael Russell MSP, Minister for Negotiations on Scotland's Place in Europe	<a href="#">QQ 35–44</a>
*	Frank Strang, Deputy Director of the EU Hub and Analysis team, Scottish Government	
*	Josh Hardie, Deputy Director-General for Policy and Campaigns, CBI	<a href="#">QQ 45–54</a>
*	Professor Anton Muscatelli, Principal, University of Glasgow	
**	Councillor David O'Neill, President, Convention of Scottish Local Authorities	
**	Scott Walker, CEO, NFU Scotland	
*	Andrew RT Davies AM, Leader, Welsh Conservatives	<a href="#">QQ 55–62</a>
*	Neil Hamilton AM, leader of UKIP in the National Assembly of Wales	
*	Leanne Wood AM, Plaid Cymru Leader	
*	Gerald Holtham, Economist	<a href="#">QQ 63–70</a>
*	Sir Emyr Jones Parry, Chancellor, Aberystwyth University and former UK Ambassador to NATO and to the UN	



★	Dr Jo Hunt, Reader in Law, Cardiff University	<a href="#">QQ 71–82</a>
★	Dr Rachel Minto, Research Associate, Cardiff University	
★	Ben Cottam, Head of External Affairs, FSB Wales	<a href="#">QQ 83–91</a>
★	Nicholas Fenwick, Head of Policy, Farmers' Union of Wales	
★	Mary Williams, Acting Political Officer, Unite Wales	
★	Dr Victoria Winckler, Director, the Bevan Foundation	
★	Professor Sionaidh Douglas-Scott, Co-Director of the Centre for Law and Society in a Global Context, Queen Mary University of London	<a href="#">QQ 92–101</a>
★	Professor Roger Scully, Professor of Political Science, Cardiff University	
★★	Professor Jonathan Tonge, Professor of Politics, University of Liverpool	
★★	Lord Forsyth of Drumlean	<a href="#">QQ 102–114</a>
★	Lord Wallace of Tankerness QC	
★	Sammy Wilson MP, Democratic Unionist Party	<a href="#">QQ 115–123</a>
★	Lord Hain	<a href="#">QQ 124–131</a>
★	Lord Hunt of Wirral	
★	Lord Wigley	
★★	Mark Drakeford AM, Cabinet Secretary for Finance and Local Government, Welsh Government	<a href="#">QQ 132–139</a>
★	Lord Alderdice	<a href="#">QQ 140–148</a>
★	Mark Durkan	
★	Lord Trimble	
★	Lord McConnell of Glenscorrodale	<a href="#">QQ 149–156</a>

### **Alphabetical list of all witnesses**

	38 Degrees	<a href="#">DEV0018</a>
★	Lord Alderdice ( <a href="#">QQ 140–148</a> )	
★	Dr Victoria Winckler, Director, the Bevan Foundation ( <a href="#">QQ 83–91</a> )	
★	Professor Christina Boswell, Director of Research, Social and Political Science, University of Edinburgh ( <a href="#">QQ 11–24</a> )	
	The British Academy	<a href="#">DEV0020</a>
★	Josh Hardie, Deputy Director-General for Policy and Campaigns, CBI ( <a href="#">QQ 45–54</a> )	
	Centre for Cross Border Studies	<a href="#">DEV0016</a>

	Professor Feargal Cochrane, University of Kent	<a href="#"><u>DEV0015</u></a>
	Cornwall Council	<a href="#"><u>DEV0007</u></a>
	Country Land & Business Association	<a href="#"><u>DEV0003</u></a>
	Dr Sylvia de Mars, Newcastle University	<a href="#"><u>DEV0004</u></a>
*	Sammy Wilson MP, Democratic Unionist Party ( <a href="#"><u>QQ 115–123</u></a> )	
*	Professor Sionaidh Douglas-Scott, Co-Director of the Centre for Law and Society in a Global Context, Queen Mary University of London ( <a href="#"><u>QQ 92–101</u></a> )	
*	Mark Durkan ( <a href="#"><u>QQ 140–148</u></a> )	
*	Gerald Holtham, Economist ( <a href="#"><u>QQ 63–70</u></a> )	
	Environment Links UK	<a href="#"><u>DEV0012</u></a>
*	Nicholas Fenwick, Head of Policy, Farmers' Union of Wales ( <a href="#"><u>QQ 83–91</u></a> )	
**	Lord Forsyth of Drumlean ( <a href="#"><u>QQ 102–114</u></a> )	<a href="#"><u>DEV0019</u></a>
*	Ben Cottam, Head of External Affairs, FSB Wales ( <a href="#"><u>QQ 83–91</u></a> )	
*	Professor Jim Gallagher, Nuffield College Oxford and University of Glasgow ( <a href="#"><u>QQ 25–34</u></a> )	
	Dr Viviane Gravey, Queen's University Belfast	<a href="#"><u>DEV0014</u></a>
	Greener UK	<a href="#"><u>DEV0012</u></a>
*	Lord Hain ( <a href="#"><u>QQ 124–131</u></a> )	
	Dr Katy Hayward, Queen's University Belfast	<a href="#"><u>DEV0014</u></a>
	Hospitality Ulster	<a href="#"><u>DEV0008</u></a>
*	Lord Hunt of Wirral ( <a href="#"><u>QQ 124–131</u></a> )	
*	Dr Jo Hunt, Reader in Law, Cardiff University ( <a href="#"><u>QQ 71–82</u></a> )	
	Immigration Law Practitioners Association	<a href="#"><u>DEV0017</u></a>
	The Law Society of Scotland	<a href="#"><u>DEV0013</u></a>
	The Learned Society of Wales	<a href="#"><u>DEV0020</u></a>
*	Dr Tobias Lock, Senior Lecturer, University of Edinburgh ( <a href="#"><u>QQ 11–24</u></a> )	
*	Lord McConnell of Glenscorrodale ( <a href="#"><u>QQ 149–156</u></a> )	
*	Professor Nicola McEwen, Associate Director, Centre on Constitutional Change, University of Edinburgh ( <a href="#"><u>QQ 25–34</u></a> )	
	Monica McWilliams, Emeritus Professor of Women's Studies, Transitional Justice Institute	<a href="#"><u>DEV0010</u></a>
*	Dr Rachel Minto, Research Associate, Cardiff University ( <a href="#"><u>QQ 71–82</u></a> )	

	James Murphie, Abertay University	<a href="#"><u>DEV0006</u></a>
	Colin Murray, Newcastle University	<a href="#"><u>DEV0004</u></a>
*	Professor Anton Muscatelli, Principal, University of Glasgow ( <a href="#"><u>QQ 45–54</u></a> )	
**	NFU Scotland ( <a href="#"><u>QQ 45–54</u></a> )	<a href="#"><u>DEV0001</u></a>
	Dr Aoife O’Donoghue, Durham University	<a href="#"><u>DEV0004</u></a>
**	Councillor David O’Neill ( <a href="#"><u>QQ 45–54</u></a> )	<a href="#"><u>DEV0002</u></a>
*	Professor Alan Page, Professor of Public Law, University of Dundee( <a href="#"><u>QQ 25–34</u></a> )	
*	Sir Emyr Jones Parry, Chancellor, Aberystwyth University and former UK Ambassador to NATO and to the UN ( <a href="#"><u>QQ 63–70</u></a> )	
*	Leanne Wood AM, Plaid Cymru Leader ( <a href="#"><u>QQ 55–62</u></a> )	
	Professor Colin T. Reid, University of Dundee	<a href="#"><u>DEV0011</u></a>
*	Dr Graeme Roy, Senior Lecturer in EU Law, University of Strathclyde ( <a href="#"><u>QQ 11–24</u></a> )	
	The Royal Society of Edinburgh	<a href="#"><u>DEV0020</u></a> <a href="#"><u>DEV0021</u></a>
*	Michael Russell MSP, Minister for Negotiations on Scotland’s Place in Europe	
*	Frank Strang, Deputy Director of the EU Hub and Analysis team, Scottish Government ( <a href="#"><u>QQ 35–44</u></a> )	
	Professor Dagmar Schiek, Queen’s University Belfast ( <a href="#"><u>QQ 35–44</u></a> )	<a href="#"><u>DEV0014</u></a>
*	Professor Roger Scully, Professor of Political Science, Cardiff University ( <a href="#"><u>QQ 92–101</u></a> )	
	Dr Anne Smith, Lecturer, Transitional Justice Institute, Ulster University	<a href="#"><u>DEV0010</u></a>
*	Professor Adam Tomkins MSP ( <a href="#"><u>QQ 1–10</u></a> )	
**	Professor Jonathan Tonge ( <a href="#"><u>QQ 92–101</u></a> )	<a href="#"><u>DEV0005</u></a>
*	Lord Trimble ( <a href="#"><u>QQ 140–148</u></a> )	
*	Neil Hamilton AM, leader of UKIP in the National Assembly of Wales ( <a href="#"><u>QQ 55–62</u></a> )	
*	Mary Williams, Acting Political Officer, Unite Wales ( <a href="#"><u>QQ 83–91</u></a> )	
	United Against Separation	<a href="#"><u>DEV0009</u></a>
*	Lord Wallace of Tankerness QC ( <a href="#"><u>QQ 102–114</u></a> )	
	Dr Ben Warwick, University of Birmingham	<a href="#"><u>DEV0004</u></a>
	Dr Michelle Weldon-Jones, Abertay University	<a href="#"><u>DEV0006</u></a>
*	Andrew RT Davies AM, Leader, Welsh Conservatives ( <a href="#"><u>QQ 55–62</u></a> )	

★★ Welsh Government ([QQ 132–139](#))

[DEV0022](#)

★ Lord Wigley ([QQ 124–131](#))