



Brexit and the Devolved Administrations

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Introduction

Defence and Foreign Affairs are areas of competence reserved for Westminster and the British Government under the various devolution arrangements. It will be the British Government which will invoke Article 50 of the Treaty of European Union. Whether it can do so without the consent of Parliament is now a matter before the courts. But it is HM Government which will be responsible for the negotiation of the terms of departure, the new relationship with the EU, and the other international agreements which will be necessary. However that distinction between policy areas reserved for Westminster and those that have been devolved is no longer clear, as EU competence is often matched by devolution of powers within the UK, particularly to Scotland. Of course devolution stems from Acts of the Westminster Parliament and Parliament is considered sovereign. However, practicalities and the fact that devolution to Scotland and Wales has been endorsed in referendums, which some argue has brought its own form of sovereignty, certainly complicates the consideration as of course it does the politics. Scotland's First Minister has argued that Scots – who voted by 62 per cent to Remain in the EU – should not be forced to leave the EU against their will, and that if Brexit does not take sufficient account of Scotland's interests this could be a trigger for holding a second referendum on independence.

In this paper, we consider some of the issues raised by a British exit from the European Union for the devolved nations. Many of these are issues of concern to all three but some are specific to Scotland, to Wales or to Northern Ireland.

Devolution & the Brexit Negotiations

Thousands of EU directives are now enshrined in the laws applied in the United Kingdom. The implementation of these directives has fallen to Westminster, to the legislatures of Scotland, Northern Ireland and Wales, or to combinations of the four. Their collective fate has to be an interest for all four legislatures. In addition, EU regulations and instruments having direct application in the United Kingdom will no longer be applicable post Brexit, until there is domestic legislation to replace them. How this process is carried out will depend on the division of competences within the UK. Many, at least in the devolved nations, consider that there is a strong argument that all parts of the UK must be involved in consideration of how these complicated issues are to be treated. They are no longer the exclusive responsibility of Westminster. A process of consideration and debate involving Westminster and the three nations will therefore be needed before decisions are taken. The

Prime Minister has promised full consultation with the three devolved administrations but how real involvement in the negotiating process can be achieved is not clear.¹

Before invoking Article 50, it's desirable that the different interests within the UK are identified and negotiating strategies agreed, with a process for conducting those negotiations which involves interested governments. It is already clear that there are widely different views (for example over membership of the Single Market) and reconciling them will be a herculean task. Action by HM Government to invoke Article 50 will impact on the exercise of powers in the devolved legislatures. Successive British Governments have volunteered (the so called Sewel Convention) that they would only propose legislation having an effect in the devolved nations (which is often accepted as desirable by all) if their legislatures have given their prior agreement through Legislative Competence Motions. There is already talk of withholding consent (although it is not clear that would have any legal effect in practice).² The Government and the devolved administrations will need to reach an understanding on a process which will allow consideration of the different opinions. The issues are legally and constitutionally complex and will present severe political challenges, even to the UK state itself.

The demands on policy making capacities will be huge and constructive answers required before the UK leaves the EU. Yet resources are scarce, even in Whitehall. The Government and the devolved administrations will need here too to work closely together to help identify and develop coherent policy options where all the respective administrations can decide which elements or variants of each should then be implemented in their countries. This will obviously have to take account of emerging international trade obligations where again consultation will be required.

Common Issues

Food & Farming

Some areas of policy making, notably agriculture, remain dominated by EU policies. In Wales, for example, 70-80 per cent of farming income is linked to the Common Agricultural Policy (CAP). Exiting the CAP will require its replacement by UK national policies. Agricultural and rural policies involve a multitude of individual complex policies in areas that are already largely devolved but are based on a common EU framework. In so far as it is possible, it would make sense to continue to have common standards. For example, for animal health within the UK and, if possible, with the EU. In addition, there will be concern that differently targeted support systems do not distort competition. The devolved administrations have a direct interest in continued access to European markets, and more broadly to the terms of trade negotiations negotiated by the UK.

The EU Budget & Regional Funding

Much was made in the referendum debate of the UK's contribution to the EU budget and the use which could be made of these sums domestically. This is of key interest to the devolved

¹ A cross-nations forum on the Brexit negotiations, chaired by the Secretary of State for Exiting the European Union, is to be established and will include representatives of the devolved administrations. See HM Government, 'Joint Ministerial Committee 24 October 2016: statement', 24 October 2016

² 'Can Scotland really stop Britain leaving the EU?', *Financial Times*, 20 July 2016

administrations. As recipients of Structural Fund support they are keen to see expenditure at least sustained at current levels. Some limited assurances have been given by the Chancellor but it is not clear that Parliament will choose to maintain the same geographical division of funds even if it maintained the same level of funding.³ But the key point is that EU expenditure is largely needs based, whereas the domestic allocation of funding according to the Barnett formula is based on population shares, and less advantageous.

Universities, Science & Research

Higher education and science is a devolved matter but the UK Research Councils are not. There is extensive collaboration between UK universities, the Research Councils and the EU. This includes UK universities making bids for EU funding in co-operation with institutions in other EU Member States. As this funding is an important source of income to UK universities, and they are disproportionately successful in obtaining EU funding for their research and innovation projects, this will be a key issue in the Brexit negotiations.⁴ In the case of Scotland, EU funding amounted to 13 per cent of all its research funding in 2013/14.⁵ In general, some 18 per cent of current EU spending in the UK supports research. The devolved administrations will want to influence the Government's approach to the issue, not least because funds for science and research also come through the EU's Structural Funds.

Immigration

All the devolved administrations have an interest in the nature and scale of any future UK immigration controls on EU citizens. These will have an economic impact, for example both because of the supply of labour and because of the potential impact on tourism. Other sectors, such as higher education, also have an interest in immigration policy.

Individual Issues

Scotland

Fisheries – while Scotland has less than 10 per cent of the UK's population, its fishing industry lands over 60 per cent of the total UK catch.⁶ Scottish Ministers attend EU Fisheries Council of Ministers meetings. They will want to play a similar role in discussing the UK's future relationship with the EU (and indeed with key non-EU countries that fish the same stocks as UK fishermen, such as Norway and Iceland) during the Brexit negotiations.

Crime and justice – Scotland has its own legal system and its own police force. The future of EU legal measures to tackle cross-border crime, will be of interest to the Scottish authorities. They will want to ensure that Scotland can still issue European Arrest Warrants. Continuing intelligence and other co-operation will also be important to Police Scotland.

Northern Ireland

Border controls – this is the overriding issue of concern to Northern Ireland. There are two aspects to the issue: immigration controls on people crossing the border and customs

³ HM Treasury, 'Chancellor Philip Hammond guarantees EU funding beyond date UK leaves the EU', 13 August 2016

⁴ See Carlos Frenk et al., *UK research and the European Union: The role of the EU in funding UK research*, Royal Society, 18 December 2015

⁵ Universities Scotland, *The impact of the EU referendum on Scotland's higher education sector*, 4 July 2016

⁶ Royal Society of Edinburgh, *Inquiry into the Future of the Scottish Fishing Industry*, 27 February 2004, p. i

controls on goods. The former are not necessary at present because the UK and Ireland have been in a joint border control zone, called the Common Travel Area (CTA), since 1923. After Brexit however, the border between North and South in Ireland will be an external border of the EU and under EU policy would need to be policed by the Irish authorities. The UK would also want to be certain that the border within Ireland maintains protection against illegal migration. The British and Irish Governments have been discussing an alternative approach to immigration controls in which the UK's controls would shift to ports and airports in the Republic of Ireland. Given the Good Friday agreement, reintroducing border controls on people crossing the border would not just restrict movement but also be of political importance, with the potential to jeopardise political understandings in the island as well as between the UK and the Republic of Ireland.

If the UK leaves the Single Market and/or the customs union when it leaves the EU, then customs controls, abolished in 1993, would need to be restored. This would impede the large number of cross-border vehicle movements (as they would need to be searched), further inconveniencing local people and disrupting business.

Crime and justice – a key benefit of EU membership has been the way in which the EU's developing justice and home affairs policy has enabled the UK and the Republic of Ireland to normalise co-operation against terrorism and other cross-border crime. The European Arrest Warrant has removed political involvement from extradition decisions, ending the rows of the past between the UK and Ireland over wanted persons. Both countries will want to maintain a high level of co-operation and to avoid extradition once again becoming politically controversial.

Wales

As well as the general issues raised above, access to EU markets for agricultural exports, financial services, and the aeronautical industry will be key issues.

Conclusion

The issues arising from Brexit are constitutionally challenging within the United Kingdom and require the active positive involvement of the four governments and co-ordination of approach. How these are resolved will have important implications for the future of the United Kingdom.

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Senior European Experts

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