



## Leaving the EU: Role of the Devolved Administrations and Implications for the Union Debate on 25 January 2018

### Summary

On 25 January 2018, the House of Lords is due to debate a motion moved by Lord McInnes of Kilwinning (Conservative) that “that this House takes note of the role of the devolved administrations in the process of withdrawal from the European Union and future opportunities for strengthening the union of the United Kingdom”.

A majority of 51.9 percent voted to leave the European Union in the June 2016 referendum. There were regional variations in the vote, particularly among the constituent nations of the UK with majorities in both Scotland and Northern Ireland voting to remain. Following proceedings brought in the *Miller* case, the Supreme Court judged that an Act of Parliament was required to empower the Government to invoke Article 50, the means by which the UK could notify the European Council of the UK’s intention to withdraw. The Court also ruled that the devolved administrations had no legal basis on which to veto withdrawal. On 2 February 2017, the Government published its initial plans for Brexit based on twelve guiding principles, including a pledge to strengthen the Union through securing a deal that worked for the whole of the UK. The Joint Ministerial Committee for EU Negotiations (JMC (EN)) was established to facilitate collaboration and oversight of negotiations and ensure, as far as possible, agreed outcomes were secured from these negotiations. The JMC (EN) has been criticised by representatives of the devolved administrations for the frequency and content of meetings. However, more recent meetings have seen some progress around the contentious issue of common frameworks.

The European Union (Withdrawal) Bill, introduced in the House of Lords on 18 January 2018, would give effect to the UK’s decision to leave the EU. The Bill would repeal the European Communities Act 1972, ensuring continuity by converting the body of European legislation into UK law. The Government has explained that devolution provisions in the Bill are intended as transitional arrangements, with decisions to be taken on long-term common policy approaches later. Both the Scottish and Welsh Governments have described the Bill as drafted as a “power grab”, a position rejected by the Government. They submitted several amendments which sought, as they put it, to correct the deficiencies in the Bill as they relate to devolution. Following debate these were rejected by the House of Commons but the Government has since said it would come back with its own amendments in response to the criticisms.

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## 1. Introduction

On 25 January 2018, the House of Lords is due to debate a motion moved by Lord McInnes of Kilwinning (Conservative) that “that this House takes note of the role of the devolved administrations in the process of withdrawal from the European Union and future opportunities for strengthening the union of the United Kingdom”.

This Briefing will set out the process of withdrawing from the European Union (EU) in accordance with Article 50 of the Treaty on European Union, as amended. It will then set out chronologically the steps which the UK Government has taken to date to bring about the UK’s withdrawal following the referendum, including the invocation of Article 50 and the introduction and progress to date of the European Union (Withdrawal) Bill. In this context, the Briefing examines the role of the devolved administrations throughout the process to date and sets out the mechanisms through which they will participate before the UK formally withdraws from the EU. It concludes by highlighting recent House of Lords committee reports that have considered the UK as a union, together with some suggested further reading that consider existing and future opportunities and challenges for it.

## 2. Process of Withdrawing from the European Union

The Treaty of Lisbon amended the Treaty on European Union (TEU), adding an explicit clause (Article 50) enabling the voluntary withdrawal of a member state from the EU.<sup>1</sup> In addition to permitting member states to withdraw from the EU,<sup>2</sup> Article 50 sets out the formal procedure for a withdrawal:

- A Member State which decides to withdraw shall notify the European Council, thereby triggering a period of up to two years to negotiate a withdrawal agreement, which will include issues such as a framework for the departing member state’s future relationship with the EU.<sup>3</sup>
- Membership of the EU ends automatically after the two-year negotiating period, unless the European Council and the member state concerned jointly decide to extend this period.<sup>4</sup>

## 3. Referendum

A referendum was held on 23 June 2016, under the European Union Referendum Act 2015, where UK citizens were asked “Should the United

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<sup>1</sup> European Parliament, [UK Withdrawal from the European Union: Legal and Procedural Issues](#), March 2017.

<sup>2</sup> Official Journal of the European Union, ‘[Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of The European Union \(2008/C 115/01\)](#)’, Article 50(1), accessed 15 January 2018.

<sup>3</sup> *ibid*, Article 50(2).

<sup>4</sup> *ibid*, Article 50(3).

Kingdom remain a member of the European Union or leave the European Union?”. A majority of 51.9 percent voted to leave.<sup>5</sup>

In a report published before the referendum Robert Hazell and Alan Renwick, from University College London’s (UCL) Constitution Unit, examined the potential impact of Brexit upon devolution and the union.<sup>6</sup> They pointed to evidence which suggested that:

- the referendum result could be divisive as views on Brexit vary across the UK—while Northern Ireland and Scotland are seen as ‘pro-remain’, England and Wales are ‘pro-leave’;
- the process of withdrawal could be complicated by devolution and could have profound constitutional implications for the devolved nations and the Union; and
- Brexit could increase scope for policy differentiation between the nations, as well as differentiated future relationships with the EU.

In terms of the vote, their prediction held up:

- Both Scotland and Northern Ireland (NI) were among the strongest supporters of remaining in the EU with majorities of 62 percent and 55.8 percent respectively.
- In Wales 52.5 percent voted to leave the EU; while in England, while 60 percent of Londoners voted to remain, an overall majority of 53.4 percent in England voted to leave the EU.<sup>7</sup>

The impact which this will have on devolution remains to be seen and will be influenced by the negotiating process which will be set out in this Library Briefing. However, the outcome of the vote has led some commentators and analysts to question the future of UK, suggesting the Brexit votes reveals and embodies a deep divide in the UK.<sup>8</sup> Some have argued that the vote is a demonstration of English nationalism,<sup>9</sup> whilst it has fuelled calls from both Scottish<sup>10</sup> and Northern Irish nationalists/republicans to accelerate plans for their own independence/reunification referendums.<sup>11</sup>

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<sup>5</sup> Electoral Commission, ‘[EU Referendum Results](#)’, accessed 15 January 2018.

<sup>6</sup> Robert Hazell and Alan Renwick, *Brexit: Its Consequences for Devolution and the Union*, May 2016.

<sup>7</sup> Electoral Commission, ‘[EU Referendum Result Visualisations](#)’, accessed 18 January 2018.

<sup>8</sup> John Rennie Short, ‘[The Geography of Brexit: What the Vote Reveals about the Disunited Kingdom](#)’, *The Conversation*, June 25 2016.

<sup>9</sup> Suzanne Moore, ‘[Brexit was an English Vote for Independence—You Can’t Begrudge the Scots the Same](#)’, *Guardian*, 15 March 2017.

<sup>10</sup> BBC News, ‘[Sturgeon to Decide on Pushing for Indyref2 by End of Year](#)’, accessed 16 January 2018.

<sup>11</sup> RTE News, ‘[SDLP’s Eastwood Calls for United Ireland Referendum](#)’, accessed 16 January 2018; and BBC News, ‘[Michelle O’Neill Calls for ‘Urgent’ Referendum on Irish Unity](#)’, accessed 16 January 2018.

## 4. Invoking Article 50

Following the result of the referendum, the Prime Minister, Theresa May, speaking at the Conservative Party conference in October 2016, indicated her intention was to trigger Article 50 before the end of March 2017.<sup>12</sup> However, after a successful challenge in the High Court, subsequently upheld by the Supreme Court, it was ruled that it would not be lawful for the Government to use prerogative powers to notify the European Council of the UK's intention to withdraw from the EU. The judgment also stated that primary legislation would be required to confer powers on the Government to give the Article 50 notice.<sup>13</sup>

### 4.1 Devolution Issues

In its judgment on the *Miller* case, the Supreme Court considered devolution issues relating to the Government's power to trigger Article 50, noting that:

Most of the devolution issues arise from the contention that the terms on which powers have been statutorily devolved to the administrations of Scotland, Wales and Northern Ireland are such that, unless Parliament provides for such withdrawal by a statute, it would not be possible for formal notice of the United Kingdom's withdrawal from the EU Treaties to be given without first consulting or obtaining the consent of the devolved legislatures.<sup>14</sup>

The application of Sewel Convention, whereby the Westminster Parliament does not normally legislate with regard to devolved matters except with the agreement of the devolved legislature, was noted.<sup>15</sup> However, the decision of the Court was that the devolved legislatures did not have a veto on the UK's decision to withdraw from the EU.<sup>16</sup> The Court added:

In reaching this conclusion we do not underestimate the importance of constitutional conventions, some of which play a fundamental role in the operation of our constitution. The Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures. But the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law.<sup>17</sup>

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<sup>12</sup> Conservative Party, '[Theresa May Conservative Party Conference Speech 'Britain After Brexit: A Vision of a Global Britain'](#)', 2 October 2016.

<sup>13</sup> *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC, para 101.

<sup>14</sup> *ibid*, para 6.

<sup>15</sup> *ibid*, paras 136–152.

<sup>16</sup> *ibid*, paras 150–152.

<sup>17</sup> *ibid*, para 151.

## 4.2 European Union (Notification of Withdrawal) Act

Following the Supreme Court ruling, the European Union (Notification of Withdrawal) Bill was introduced in the House of Commons on 26 January 2017.<sup>18</sup> This two-clause Bill was intended to give the Prime Minister the power to notify the European Council of the UK's intention to withdraw from the European Union under the terms of Article 50 of the Treaty on European Union. It did not contain an obligation to exercise this power, nor any deadline or timescale for exercising it. Following agreement by both Houses on the text of the Bill it received royal assent on 16 March 2017, becoming an Act of Parliament.<sup>19</sup>

## 5. Brexit White Paper

On 2 February 2017, the Government published a white paper, formally setting out its strategy for exiting the EU.<sup>20</sup> The white paper was based on twelve guiding principles, which were first set out by the Prime Minister Theresa May in a speech at Lancaster House the previous month.<sup>21</sup> The white paper summarised the principles as:

1. Providing certainty and clarity.
2. Taking control of our own laws and statute book.
3. Strengthening the Union by securing a deal that works for the whole of the UK.
4. Maintaining the common travel area and protecting our strong historic ties with Ireland.
5. Controlling immigration from the European Union.
6. Securing the rights for European Union citizens already living in the UK and the rights of UK nationals living in the European Union.
7. Protecting and enhancing existing workers' rights.
8. Ensuring free trade with European markets, forging a new strategic partnership with the EU including a bold and ambitious free trade agreement and mutually beneficial new customs agreement.
9. Forging ambitious free trade agreements with other countries across the world.
10. Ensuring the United Kingdom remains the best place for science and innovation.
11. Co-operating in the fight against crime and terrorism.

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<sup>18</sup> [HC Hansard, 26 January 2017, col 473.](#)

<sup>19</sup> [HL Hansard, 16 March 2017, col 1949.](#)

<sup>20</sup> HM Government, [The United Kingdom's Exit From and New Partnership with the European Union](#), February 2017, Cm 9417.

<sup>21</sup> Prime Minister's Office, [The Government's Negotiating Objectives for Exiting the EU: PM Speech 17 January 2017](#), updated 3 February 2017.

## 12. Delivering a smooth, orderly exit from the European Union.<sup>22</sup>

There was a mixed response to the white paper. Following a statement by David Davis, Secretary of State for Exiting the European Union, on the publication of the white paper, Keir Starmer, the Shadow Secretary of State for Exiting the European Union, criticised the document, commenting that it “says nothing”, adding that it had been produced too late for “meaningful” scrutiny.<sup>23</sup> The time given to review the white paper was further criticised by Stephen Gethins, the Shadow SNP Spokesperson (Europe), who described its publication as “just another panicked U-turn”.<sup>24</sup>

Among the parties from Northern Ireland, the DUP Deputy Leader Nigel Dodds, who campaigned to leave the EU, welcomed the plan, as in his view it set out the opportunities withdrawal from the EU offered to strengthen the Union. He commented: “this is why the DUP supported Brexit, and this is precisely what Brexit lets the UK do”.<sup>25</sup> In contrast both the Social Democratic and Labour Party (SDLP) and Sinn Féin, who both campaigned to remain within the EU, were critical of the paper with Mark Durkan (then SDLP MP for Foyle) saying it was “padded out with platitudes” and there was “not a lot of solid content”.<sup>26</sup>

### 5.1 Establishing a Role for the Devolved Administrations

The UK Government acts in the interests of the whole UK with regards international relations, including in its negotiations to withdraw the UK from the EU. However, the Government has stated its intention to fulfil Brexit responsibilities in close consultation with the devolved administrations.<sup>27</sup>

One of the twelve guiding principles of the white paper is the Government’s intention to “strengthen the Union” by securing “a deal that works for the whole of the UK”.<sup>28</sup> Chapter 3 of the white paper, ‘Strengthening the Union’, discusses the role of the devolved administrations, stating that:

We have ensured since the referendum that the devolved administrations are fully engaged in our preparations to leave the EU and we are working with the administrations in Scotland, Wales and Northern Ireland to deliver an outcome that works for the whole of the UK. In seeking such a deal, we will look to secure the specific

<sup>22</sup> HM Government, [The United Kingdom’s Exit From and New Partnership with the European Union](#), February 2017, Cm 9417, pp 5–6.

<sup>23</sup> [HC Hansard, 2 February 2017, col 1218](#).

<sup>24</sup> *ibid*, col 1220.

<sup>25</sup> BBC News, [‘Brexit: Mixed reaction to White Paper from NI Politicians’](#), accessed 18 January 2017.

<sup>26</sup> *ibid*.

<sup>27</sup> Prime Minister’s Office, [‘The Government’s Negotiating Objectives for Exiting the EU: PM Speech 17 January 2017’](#), updated 3 February 2017.

<sup>28</sup> HM Government, [The United Kingdom’s Exit From and New Partnership with the European Union](#), February 2017, Cm 9417, p 7.

interests of Scotland, Wales and Northern Ireland, as well as those of all parts of England. A good deal will be one that works for all parts of the UK.<sup>29</sup>

## 5.2 Joint Ministerial Committee

The primary means of engaging with the devolved administrations has been through meetings of the Joint Ministerial Committee (JMC), which brings together the leaders of the devolved administrations of Scotland, Wales and Northern Ireland. In the first meeting after the referendum it was agreed to set-up a Joint Ministerial Committee on EU Negotiations (JMC (EN)), so ministers from each of the devolved administrations could contribute to the process of planning for the UK's withdrawal from the EU. In the absence of Ministers from the Northern Ireland Executive, a senior civil servant from the Northern Ireland Civil Service has attended meetings.<sup>30</sup>

The JMC (EN) was established in October 2016. The terms of reference for the committee were as follows:

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;
- 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>31</sup>

Representatives from the devolved administrations have been critical of the JMC (EN), both for the lack of meetings<sup>32</sup>—it had met five times between October 2016 and September 2017<sup>33</sup>—but also for the level of engagement in the meetings. Speaking in the House of Commons, Peter Grant, Shadow SNP Spokesperson (Europe), stated, “the governments of the devolved nations have attended a JMC that was a total and utter waste of time, for

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<sup>29</sup> HM Government, [The United Kingdom's Exit From and New Partnership with the European Union](#), February 2017, Cm 9417, p 17, para 3.1.

<sup>30</sup> Joint Ministerial Committee (EU Negotiations), [Joint Ministerial Committee \(EU Negotiations\) Communique](#), 16 October 2017.

<sup>31</sup> Joint Ministerial Committee (EU Negotiations), [Joint Ministerial Committee Communique](#), 24 October 2016.

<sup>32</sup> Scottish Government, '[Clarity Needed on Withdrawal from EU](#)', 10 November 2017.

<sup>33</sup> House of Commons, '[Written Question: Joint Ministerial Committee](#)', 5 September 2017, 8707.

they went and spent 45 minutes being told what the UK Government had decided”.<sup>34</sup> Hywel Williams, Shadow Plaid Cymru Spokesperson (Brexit), criticised the JMC (EN) quoting a participant who stated the “Joint Ministerial Committee on Exiting the EU is less organised than a community council”.<sup>35</sup> Speaking in November 2017, Nicola Sturgeon, the Scottish First Minister stated:

We remain cut out of decisions on key issues and the impact the UK Government believe Brexit will have on Scotland and our economy [...] the clock is ticking on Brexit and it is essential that the UK Government live up to its promises to give devolved administrations a genuine role on what is by far the most important issue facing every corner of these islands.<sup>36</sup>

At its meeting in October 2017, agreement was reached on principles for ‘common frameworks’ between the UK and devolved governments in areas currently governed by EU law.<sup>37</sup>

### 5.3 Common Frameworks

At present the devolved administrations are required to comply with EU law. Therefore, even in devolved areas, such as environmental regulation, agriculture and transport “the policy autonomy of the devolved institutions is significantly constrained in practice”.<sup>38</sup> However, when the UK leaves the EU, if no changes were made other than to remove the statutory requirement to comply with EU law, these policy areas would fall completely under devolved control allowing for policy differentiation within the UK in areas where EU law has previously provided a common legal framework.<sup>39</sup>

There is now perhaps even greater scope for potential policy differentiation as the withdrawal process evolves. Michael Russell, Scotland’s Minister for UK Negotiations on Scotland’s Place in Europe, has been quoted as saying that “the UK Government had ‘conceded’ in principle that the I I I powers that touch on devolved responsibilities, such as fishing and farming, should lie with the Scottish Parliament and not Westminster”.<sup>40</sup> However, it is unclear to what extent the Scottish and indeed the other devolved nations would have the autonomy to create new laws, particularly in areas like agriculture and fishing, when significant policy divergence could have the potential to impact on any future trade agreements to which the UK Government is the

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<sup>34</sup> [HC Hansard, 26 June 2017, col 417.](#)

<sup>35</sup> [HC Hansard, 14 March 2017, col 192.](#)

<sup>36</sup> Scottish Government, ‘[Brexit Negotiations](#)’, 10 November 2017.

<sup>37</sup> Joint Ministerial Committee (EU Negotiations), [Joint Ministerial Committee \(EU Negotiations\) Communiqué](#), 16 October 2017.

<sup>38</sup> Institute for Government, ‘[Brexit, Devolution and Common Frameworks](#)’, accessed 16 January 2018.

<sup>39</sup> *ibid.*

<sup>40</sup> Simon Johnson, ‘[SNP Brexit Minister: UK Government Has ‘Conceded’ Scotland Will Get Powers](#)’, *Telegraph* (£), 14 January 2018.

main signatory.<sup>41</sup>

To prevent or limit divergence the JMC (EN) has agreed the need for common frameworks in certain policy areas. The Communiqué, from October 2017, set out three principles for the common frameworks:

- Common frameworks will be established where they are necessary to:
  - enable the functioning of the UK internal market, while acknowledging policy divergence;
  - ensure compliance with international obligations;
  - ensure the UK can negotiate, enter into and implement new trade agreements and international treaties;
  - enable the management of common resources;
  - administer and provide access to justice in cases with a cross-border element;
  - safeguard the security of the UK.
- Frameworks will respect the devolution settlements and the democratic accountability of the devolved legislatures, and will therefore:
  - be based on established conventions and practices, including that the competence of the devolved institutions will not normally be adjusted without their consent;
  - maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules;
  - lead to a significant increase in decision-making powers for the devolved administrations.
- Frameworks will ensure recognition of the economic and social linkages between Northern Ireland and Ireland and that Northern Ireland will be the only part of the UK that shares a land frontier with the EU. They will also adhere to the Belfast Agreement.<sup>42</sup>

As introduced, the European Union (Withdrawal) Bill does not specifically mention common frameworks. However, recent Institute for Government analysis has shown the Bill would prevent the devolved administrations from modifying ‘retained EU law’, meaning only the UK Government would have

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<sup>41</sup> Institute for Government, [‘Brexit, Devolution and Common Frameworks’](#), accessed 16 January 2018.

<sup>42</sup> Joint Ministerial Committee (EU Negotiations), [Joint Ministerial Committee \(EU Negotiations\) Communiqué](#), 16 October 2017.

the power to legislate to replace existing EU frameworks.<sup>43</sup>

## 6. European Union (Withdrawal) Bill

The Article 50 process gives effect to the UK's withdrawal as a matter of EU law. However, new primary legislation is required to ensure that the domestic statute book reflects the UK's withdrawal from the EU, and to ensure an orderly transition from EU membership.<sup>44</sup> The European Union (Withdrawal) Bill was introduced in the House of Commons on 13 July 2017 to give effect to the UK's decision to leave the EU.<sup>45</sup>

The Bill would repeal the European Communities Act 1972 (ECA 1972) (clause 1), repatriating all powers to legislate for the UK to Parliament:

- The Bill provides that after exit day EU law would no longer have supremacy over legislation passed by the UK Parliament and rulings made by UK courts.
- Laws made by Parliament post-Brexit would no longer be subject to the principle of the supremacy of EU law.
- It provides for legal certainty by establishing a mechanism to retain, for the time being, the corpus of EU law which presently applies to the UK.
- Domestic courts would, when interpreting retained EU law, no longer be bound to follow the judgments of the Court of Justice of the European Union handed down after exit day (clauses 5 and 6).<sup>46</sup>

In legislating for the UK's withdrawal from the EU, the Government decided to convert the body of European legislation into UK law, with the intention that "wherever possible, the same rules and laws apply on the day after we leave the EU as before" to provide maximum certainty when the UK leaves the EU.<sup>47</sup> This new category of domestic law would be called retained EU law, which may subsequently be amended, replaced or repealed by Parliament.<sup>48</sup>

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<sup>43</sup> Institute for Government, '[Brexit, Devolution and Common Frameworks](#)', accessed 16 January 2018.

<sup>44</sup> Department for Exiting the European Union, '[Legislating for the UK's Withdrawal from the European Union](#)', March 2017.

<sup>45</sup> [HC Hansard, 13 July 2017, col 464](#).

<sup>46</sup> House of Commons Library, '[European Union \(Withdrawal\) Bill](#)', 1 September 2017.

<sup>47</sup> Department for Exiting the European Union, '[Legislating for the United Kingdom's Withdrawal from the European Union](#)', March 2017, p 14.

<sup>48</sup> House of Commons Library, '[European Union \(Withdrawal\) Bill](#)', 1 September 2017.

## 6.1 Devolution

The main provisions in the European Union (Withdrawal) Bill dealing with devolution are clauses 10 and 11, and schedules 2 and 3:

- Clause 10 has the sole function of giving effect to schedule 2, which provides for corresponding and concurrent powers for devolved authorities to those given to UK ministers in clauses 7, 8 and 9, to correct deficiencies in domestic devolved legislation that arise from withdrawal from the EU.
- Clause 11 would make changes to the Scotland Act 1998 (section 29), Government of Wales Act 2006 (section 108A) and Northern Ireland Act 1998 (section 6) removing the restriction preventing devolved institutions from legislating in a way incompatible with EU law, replacing it with a new restriction on devolved institutions that they cannot modify retained EU Law.
- Schedule 3 would make corresponding changes to the Scotland Act 1998 (section 57), Government of Wales Act 2006 (section 80) and Northern Ireland Act 1998 (section 24), which replace the restriction on devolved authorities not to make subordinate legislation or act incompatibly with “EU Law” with a new restriction not to modify retained EU law.<sup>49</sup>

In the explanatory notes to the Bill, the UK Government explained that devolution provisions in the Bill are intended as transitional arrangements, with decisions to be taken on long-term common policy approaches later.<sup>50</sup> Clause 11 includes a provision to “release areas from the limit on modifying retained EU law” through an Order in Council. This would enable powers to be returned to devolved institutions in areas where it is decided that the common approach existing under EU law did not need to be maintained.<sup>51</sup>

Without the inclusion of clause 11 on the face of the Bill, the powers currently held at EU level, to legislate in areas of devolved competency in Northern Ireland, Scotland and Wales, would return to the devolved legislatures and governments. However, according to Michael Keating of the Centre for Constitutional Change, it is generally accepted there will be a need for UK-wide common frameworks in the absence of European ones:

Agricultural support and fisheries management are devolved but international agreements in these fields are reserved. If future international trade agreements include agriculture, there will be a need for provisions on permissible levels of support and subsidy. Agreements in fisheries will include the management of stocks. There

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<sup>49</sup> House of Commons Library, [European Union \(Withdrawal\) Bill](#), 1 September 2017, p 92.

<sup>50</sup> [Explanatory Notes to the European Union \(Withdrawal\) Bill](#), para 34.

<sup>51</sup> House of Commons Public Administration Committee, [Devolution and Exiting the EU and Clause 11 of the European Union \(Withdrawal\) Bill: Issues for Consideration](#), 29 November 2017, HC 484 of session 2017–19.

will need to be arrangements for a level playing field across the UK in industrial aid and agriculture support. Environmental policy spills over the borders of the UK nations, calling for cooperation.<sup>52</sup>

### ***Reaction of Devolved Administrations***

While accepting that common frameworks to replace certain EU laws may be needed, the First Minister of Wales, Carwyn Jones, and First Minister of Scotland, Nicola Sturgeon, released a joint statement immediately after the publication of the European Union (Withdrawal) Bill on 13 July 2017, describing it as a “naked power grab, an attack on the founding principles of devolution [that] could destabilise our economies”.<sup>53</sup> They continued:

The European Union (Withdrawal) Bill does not return powers from the EU to the devolved administrations, as promised. It returns them solely to the UK Government and Parliament, and imposes new restrictions on the Scottish Parliament and National Assembly for Wales. On that basis, the Scottish and Welsh Governments cannot recommend that legislative consent is given to the bill as it currently stands.

The explanatory notes to the Bill explain that several of the provisions of the Bill fall within the legislative competence of the devolved legislatures.<sup>54</sup> Therefore, under the Sewel Convention there is a requirement for the Government to seek a legislative consent motion (LCM) from each of the devolved legislatures for the Bill, which the Government has made clear it will do.<sup>55</sup>

### ***Withholding Legislative Consent***

Both the Scottish and Welsh Governments have made it clear that they would not present legislative consent motions (LCMs) for the Bill in the form in which it was introduced.<sup>56</sup> This would not be an attempt to veto Brexit, as it has been established there was no legal means to do so, according to Michael Russell, Scotland’s Minister for UK Negotiations on

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<sup>52</sup> Michael Keating, ‘[To Devolve or Not to Devolve](#)’, Centre on Constitutional Change, accessed 12 January 2017.

<sup>53</sup> Welsh Government website, ‘[Joint statement from First Ministers of Wales and Scotland in reaction to the EU \(Withdrawal\) Bill](#)’, 13 July 2017.

<sup>54</sup> [Explanatory Notes to the European Union \(Withdrawal\) Bill](#), para 34

<sup>55</sup> House of Commons Public Administration Committee, [Devolution and Exiting the EU and Clause 11 of the European Union \(Withdrawal\) Bill: Issues for Consideration](#), 29 November 2017, HC 484 of session 2017–19.

<sup>56</sup> Scottish Government, [Legislative Consent Memorandum: European Union \(Withdrawal\) Bill](#), 12 September 2017; and Carwyn Jones, First Minister of Wales, ‘[Written Statement—European Union \(Withdrawal\) Bill](#)’, 13 July 2017.

Scotland's Place in Europe. Rather, as Mr Russell explained, it was about preparing responsibly for the consequences of Brexit.<sup>57</sup>

### **Proposed Amendments**

On 19 September 2017, the Welsh Government and Scottish Government jointly published a set of amendments they wished to see made to the European Union (Withdrawal) Bill, which “seek to correct the deficiencies in the Bill as they relate to devolution”. The proposed amendments are summarised as follows:<sup>58</sup>

- The Scottish and Welsh Government are concerned powers to make statutory instruments provided in clauses 7 to 9 of the Bill remove the requirement for consent established by the Sewel Convention. Therefore, proposed amendments 1 and 2 would prevent the power to correct deficiencies in retained EU law and the power to ensure compliance with international obligations being used to amend the Scotland Act 1998 and the Government of Wales Act 2006, unless consent is sought (proposed amendment 3).
- Proposed amendments 4 to 6 would mean that UK ministers would be required to secure the consent of the Welsh ministers or the Scottish ministers, before making provision which would be within those ministers' devolved competence. Devolved ministers would then be accountable to their legislatures for any decision to consent to the UK ministers legislating on such a basis.
- The Welsh Government and Scottish Government consider that these provisions made in clause 11 of the Bill that amend both devolution acts by inserting a new restriction on the competence of the devolved legislatures, preventing them from passing legislation which modifies retained EU law, “fundamentally cut across the principles of the devolution settlements, and they are strongly opposed to them”. Proposed amendments 7 and 8 would remove these new restrictions in clause 11 and schedule 3.
- The Welsh Government and Scottish Government believe that devolved ministers should have the same powers in respect of matters falling within devolved competence as UK ministers are being given. Therefore, proposed amendments 9 to 19 seek to bring the powers of devolved ministers into line with those being given to UK ministers and remove the requirements imposed on Scottish and Welsh ministers to seek UK ministers' consent in certain circumstances.

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<sup>57</sup> Scottish Parliament Official Report, '[Statement by the Minister for UK Negotiations on Scotland's Place in Europe: European Union \(Withdrawal\) Bill](#)', 12 September 2017.

<sup>58</sup> Scottish Government, '[The Proposed Amendments to the European Union \(Withdrawal\) Bill](#)', 19 September 2017.

### **Scottish Affairs Committee Consideration of Withdrawal Bill**

The House of Commons Scottish Affairs Committee has examined the implications of the Bill on devolution. In its report published in November 2017, it cited concern among witnesses around the approach taken in the Bill to repatriate powers from the EU to the UK, centring around the restriction on the devolved legislatures to legislate on areas of decision-making being repatriated from Brussels.<sup>59</sup> However, it noted the Government's position that the approach taken in the Bill was intended to allow for discussions to take place about where common UK frameworks might need to apply to policy areas being repatriated from the EU, by:

- replicating the current frameworks provided by EU rules through UK legislation; and
- beginning 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.<sup>60</sup>

It noted the UK Government's rebuttal that the Bill represents a "power grab", and that the Bill would "maintain the scope of devolved decision-making powers immediately after Exit".<sup>61</sup>

The Committee recommended that the Government should come to agreement with the devolved administrations on what areas should be subject to common frameworks and which ones can be devolved. This should be on the basis that all powers should be devolved unless there is good reason to reserve them.<sup>62</sup> The Committee noted a key point gathered during evidence that common frameworks should be agreed between the UK Government and devolved administrations, rather than imposed and that governance of them should be on the basis of co-decision making.<sup>63</sup> The Committee noted a report from the House of Lords European Union Committee on Brexit and devolution which similarly concluded that: "Any durable solution will need the consent of all the nations of the United Kingdom, and of their elected representatives [...] a successful settlement cannot be imposed by the UK Government: it must be developed in partnership with the devolved Governments".<sup>64</sup>

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<sup>59</sup> House of Commons Scottish Affairs Committee, [European Union \(Withdrawal\) Bill: Implications for Devolution](#), 14 November 2017, HC 375 of session 2017–19, p 4.

<sup>60</sup> *ibid*, p 5.

<sup>61</sup> *ibid*.

<sup>62</sup> *ibid*, p 7.

<sup>63</sup> *ibid*, p 7, para 19.

<sup>64</sup> House of Lords European Union Committee, [Brexit: Devolution](#), 19 July 2017, HL Paper 149 of session 2017–19, para 268.

### **Consideration of Clauses 10 and 11 in the House of Commons**

No amendments were made to clauses 10 and 11 of the Bill, or schedules 2 and 3, at the Bill's Commons committee stage on 4 December 2017.<sup>65</sup> This included consideration of the amendments proposed by the Welsh and Scottish Governments, which were defeated at division.<sup>66</sup> Clause 11 and schedule 3 were later passed by 315 votes to 290.<sup>67</sup> Prior to the votes, the then Minister for the Constitution, Chris Skidmore, had reiterated to MPs the Government's position that clause 11 was "about delivering certainty while guaranteeing all the existing powers of the devolved institutions".<sup>68</sup> He stated that the Government were "determined to approach the clause with a view to consensus".<sup>69</sup>

However, in answer to an oral question on 6 December 2017, the Secretary of State for Scotland, David Mundell, stated that the Government would bring its own amendments to clause 11 at the Bill's report stage in the House of Commons.<sup>70</sup> On 9 January 2018, BBC News reported Mr Mundell as saying that amendments to clause 11 would be brought forward in the House of Lords "allowing for further discussions to take place between the UK Government and the Scottish Government".<sup>71</sup> He stated that he regretted the delay, but said that the Government's "commitment to improve the Bill remains absolute".<sup>72</sup> Responding for the Government at the Bill's report stage on 16 January 2018, the Minister for the Cabinet Office and Chancellor of the Duchy of Lancaster, David Lidington, said that the Government was "disappointed that [it had] been unable to reach agreement with the Governments of Scotland and Wales to make amendments to clause 11 on an agreed basis".<sup>73</sup> He stated that this was still the Government's ambition, with a view to bringing forward amendments in the House of Lords.<sup>74</sup>

In a written statement, the Welsh First Minister, Carwyn Jones, described the Government's failure to bring forward amendments to clause 11 as "unacceptable".<sup>75</sup> Mr Jones said that the Welsh Government would continue to discuss, with the UK Government, ways in which the Bill might be amended as it moves to the House of Lords (with a particular reference to clause 11). However, Mr Jones also stated that the Welsh Government had been developing a 'Continuity Bill' which he would present

<sup>65</sup> House of Commons Library, [The European Union \(Withdrawal\) Bill 2017–19: Summary of Commons Committee Stage](#), 9 January 2018, pp 14–17.

<sup>66</sup> BBC News, ['Welsh and Scottish Ministers' Brexit Bill Changes Rejected](#), 5 December 2017.

<sup>67</sup> [HC Hansard, 4 December 2017, cols 845–48.](#)

<sup>68</sup> *ibid*, col 808.

<sup>69</sup> *ibid*.

<sup>70</sup> [HC Hansard, 6 December 2017, col 1021.](#)

<sup>71</sup> BBC News, ['Delay to Brexit Bill Amendments Confirmed](#)', 9 January 2018.

<sup>72</sup> *ibid*.

<sup>73</sup> [HC Hansard, 16 January 2018, col 836.](#)

<sup>74</sup> *ibid*, col 835.

<sup>75</sup> Welsh Government, ['Written Statement: EU \(Withdrawal\) Bill](#)', 16 January 2018.

to the National Assembly for Wales' Presiding Officer should an agreement not be reached by the end of January. Such a Continuity Bill would seek to transpose EU law that falls within the Assembly's competence into Welsh law.<sup>76</sup> On 17 January 2018, the Assembly agreed a motion to note the proposal for a continuity bill.<sup>77</sup> The Scottish Government has also said that it was preparing a similar bill for Scotland.<sup>78</sup> Scottish First Minister, Nicola Sturgeon, also expressed disappointment that amendments to clause 11 were not tabled by the UK Government, and argued that tabling such amendments during the Bill's House of Lords stages raised "its own democratic issues".<sup>79</sup>

On 18 January 2018, MSPs from the Scottish Parliament's Finance and Constitution Committee, Delegated Powers and Law Reform Committee, and Culture, Tourism, Europe and External Relations Committee attended an Inter-Parliamentary Forum on Brexit meeting at the House of Lords, chaired by the Senior Deputy Speaker, Lord McFall of Alcluith, to discuss amendments to clause 11.<sup>80</sup> Reports of the meeting emerged later, with Bruce Crawford, the Scottish Parliament constitution committee convener, apparently stating that MSPs would "unanimously reject" consent for the Bill unless agreement was reached with the Scottish Government on "wholesale changes to clause 11".<sup>81</sup> The *Scotsman* noted that warning "was heard by Chloe Smith, the new Minister for the Constitution".<sup>82</sup>

A statement was issued through the House of Lords European Union Committee at the conclusion of the meeting. It said:

As the European Union (Withdrawal) Bill completes its House of Commons stages, today's meeting provided a timely opportunity for us to share information on the work that each of our Committees and legislatures is undertaking. We have focused in particular on the implications of Clause 11 of the Bill for the devolution settlements, and discussions on potential future UK-wide frameworks, and we recognise the strong views of members of the Scottish Parliament and National Assembly for Wales on these issues. We met Chloe Smith MP, Minister for the Constitution, Cabinet Office, and have made clear to her our various perspectives on these important questions. We urge the Government to take all of these points of view into account as the House of Lords begins its scrutiny of the legislation in the coming weeks.

<sup>76</sup> National Assembly for Wales Sennedd Research, '[In Brief: A Continuity Bill: Why and When?](#)', 5 January 2018.

<sup>77</sup> National Assembly for Wales, '[Debate on a Member's Legislative Proposal](#)', 17 January 2018.

<sup>78</sup> Scottish Government, '[Returning EU Powers](#)', 12 December 2017.

<sup>79</sup> Scottish Government, '[Scotland After Brexit](#)', 16 January 2018.

<sup>80</sup> Scottish Parliament, '[Senior MSPs to set out concerns at House of Lords talks on EU Withdrawal Bill](#)', 18 January 2018.

<sup>81</sup> *Scotsman*, '[Brexit Powers Row: Theresa May Can't Overrule House of Lords](#)', 18 January 2018.

<sup>82</sup> *ibid.*

The Forum will meet again in March 2018, when we will again review the progress of the Brexit negotiations and the parallel domestic legislation.<sup>83</sup>

## 7. Regulatory Alignment and the Irish Border

The UK Government's position on the Irish Border is that the UK will leave both the single market and customs union following Brexit but will avoid a 'hard' Irish Border—two positions which have been described by one observer as incompatible.<sup>84</sup> The House of Commons Exiting the European Union Committee, in its report on negotiations published in December 2017, also stated it did “not currently see how it will be possible to reconcile there being no border with the Government's policy of leaving the single market and the customs union, which will inevitably make the border between Northern Ireland and the Republic of Ireland the EU's customs border with the UK”.<sup>85</sup>

The House of Commons Library Briefing, [Brexit Negotiations: The Irish border Question](#), provides a detailed analysis of the issues around the Irish border including how people will move between the two countries, and how the Common Travel Area might be maintained. It also looks at the complexities of avoiding a 'hard' border, the stated position of both the EU and the UK, while still adhering to EU rules on moving goods between itself and countries outside the single market and customs union.

### **Phase One Agreement**

A joint report from the negotiators of the European Union and the UK Government on progress during phase one negotiations, was published on 8 December 2017.<sup>86</sup>

It stated: “The United Kingdom remains committed to protecting North-South cooperation and to its guarantee of avoiding a hard border”.<sup>87</sup> Moreover, the “United Kingdom's intention is to achieve these objectives through the overall EU-UK relationship. Should this not be possible, the United Kingdom will propose specific solutions to address the unique circumstances of the island of Ireland”. However, “in the absence of agreed solutions”, the UK would “maintain with those rules of the internal market and the customs union, which, now or in the future, support North-South cooperation, the all island economy and the protection of the 1998

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<sup>83</sup> House of Lords European Union Committee, '[Interparliamentary Forum on Brexit Holds Second Meeting](#)', accessed 19 January 2018.

<sup>84</sup> Daniel Thornton, '[Leaving the EU Customs Union: What is Involved?](#)' Institute for Government, 28 July 2016.

<sup>85</sup> House of Commons Exiting the European Union Committee, [The Progress of the UK's Negotiations on EU Withdrawal](#), 1 December 2017, HC 372 of session 2017–19, p 5, para 10.

<sup>86</sup> Gov.uk, [Joint Report from the Negotiators of the European Union and the UK Government on Progress During Phase One Negotiations](#), 8 December 2017.

<sup>87</sup> *ibid*, para 49.

Agreement’<sup>88</sup>.

The Democratic Unionist Party (DUP) Leader, Arlene Foster, had said that her Party would not accept any Brexit deal that “separates” Northern Ireland from the rest of the UK.<sup>89</sup> The final text of the agreed report therefore included a commitment by the UK to preserve the integrity of its internal market and Northern Ireland’s place within it, as the United Kingdom leaves the European Union’s Internal Market and Customs Union.<sup>90</sup> This means no customs border between Northern Ireland and the rest of the UK. However, while the agreement sets out the objectives in relation to the Irish border there is little detail about how they are to be achieved.<sup>91</sup>

The publication of the report was also accompanied by the following commitments to Northern Ireland made by the Prime Minister, Theresa May, on behalf of the Government:

First, we will always uphold and support Northern Ireland’s status as an integral part of the United Kingdom, consistent with the principle of consent. The Government I lead will never be neutral when it comes to expressing our support for the Union.

Second, we will fully protect and maintain Northern Ireland’s position within the single market of the United Kingdom. This is by far the most important market for Northern Ireland’s goods and services and you will continue to have full and unfettered access to it.

Third, there will be no new borders within the United Kingdom of Great Britain and Northern Ireland. In addition to no hard border between Northern Ireland and Ireland, we will maintain the Common Travel Area throughout these islands.

Fourth, the whole of the United Kingdom, including Northern Ireland, will leave the EU customs union and the EU single market. Nothing in the agreement I have reached alters that fundamental fact.

Fifth, we will uphold the commitments and safeguards set out in the Belfast Agreement regarding North-South Co-operation. This will continue to require cross-community support.

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<sup>88</sup> Gov.uk, [Joint Report from the Negotiators of the European Union and the UK Government on Progress During Phase One Negotiations](#), 8 December 2017, paras 49–50.

<sup>89</sup> BBC News, [‘UK and EU Fail to Strike Brexit Talks Deal’](#), 4 December 2017.

<sup>90</sup> Gov.uk, [Joint Report from the Negotiators of the European Union and the UK Government on Progress During Phase One Negotiations](#), 8 December 2017, para 45.

<sup>91</sup> House of Commons Library, [Brexit: ‘Sufficient Progress’ to Move to Phase 2](#), 18 December 2017.

Sixth, the whole of the United Kingdom, including Northern Ireland, will no longer be subject to the jurisdiction of the European Court of Justice.<sup>92</sup>

At First Minister's Question Time on 14 December 2017, Nicola Sturgeon stated that were a differential deal be available to one part of the UK, it should be available to others. She told MSPs "As we have made very clear to the UK Government, it would be entirely wrong and unfair for Scotland to be placed at a competitive disadvantage".<sup>93</sup>

## 8. Brexit and the Union

### 8.1 House of Lords Committee Reports

Before the EU referendum, the House of Lords Constitution Committee, examined the risks to the Union, noting the growing concerns about the effect that devolution had had on the stability of the Union, particularly in light of the Scottish independence referendum in 2014.<sup>94</sup>

The Committee expressed its concerns over the way in which the devolution of powers had taken place.<sup>95</sup> It was critical of the "ad hoc" nature by which the devolution settlements for each country had evolved and called on the UK Government to fundamentally reassess how it approached issues relating to devolution, giving full consideration to how a change in one country would affect the entire Union.<sup>96</sup> This was not a direct criticism of devolution itself. Rather it was an acknowledgment of the potential problems which could be caused by diverging policies, which the Committee suggested could bring rise to a real or perceived level of unfairness in respect of differing levels of service provision or government support potentially damaging to social solidarity.<sup>97</sup> The Committee made a number of recommendations, stating that "should any proposals for further devolution arise in the future, they should be considered within an appropriate framework of constitutional principles that safeguard the integrity of the Union".<sup>98</sup>

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<sup>92</sup> Prime Minister's Office, '[Prime Minister's Commitments to Northern Ireland](#)', 8 December 2017.

<sup>93</sup> Scottish Parliament, '[First Minister's Question Time: Brexit \(Regulatory Alignment\)](#)', 14 December 2017.

<sup>94</sup> House of Lords Constitution Committee, [The Union and Devolution](#), 25 May 2016, HL Paper 149 of session 2015–16, p 28, para 86.

<sup>95</sup> *ibid*, p 30, para 98.

<sup>96</sup> *ibid*, paras 99 and 101.

<sup>97</sup> *ibid*, para 141.

<sup>98</sup> *ibid*, p 3.

Following the EU referendum, the House of Lords European Union Committee, in its report *Brexit: Devolution* published in July 2017, concluded with regard to the Union:

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”.

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.

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.<sup>99</sup>

In the summary of its report, the Committee observed:

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.

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<sup>99</sup> House of Lords European Union Committee, [Brexit: Devolution](#), 19 July 2017, HL Paper 9 of session 2017–19, p 12, para 35–7.

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.<sup>100</sup>

## 8.2 Further Reading

- House of Lords Constitution Committee, [Inter-governmental Relations in the United Kingdom](#), 27 March 2015, HL Paper 146 of session 2014–15, and [Government Response](#), 17 January 2017
- Robert Hazell and Alan Renwick, [Brexit: Its Consequences for Devolution and the Union](#), May 2016
- Institute for Government, [Four-nation Brexit: How the UK and Devolved Governments Should Work Together on Leaving the EU](#), October 2016
- Richard Rawlings, [Brexit and the Territorial Constitution: Devolution, Reregulation and Inter-governmental Relations](#), Constitution Society, 2017

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<sup>100</sup> House of Lords European Union Committee, [Brexit: Devolution](#), 19 July 2017, HL Paper 9 of session 2017–19, p 4.