



DEBATE PACK

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Devolved governments and negotiations on the UK leaving the EU

This Debate Pack has been prepared for the Westminster Hall Debate on Thursday 21 July 2016 at 1.30pm initiated by Ian Murray MP.

The debate is on the motion: That this House has considered devolved governments and negotiations on the UK leaving the EU; Westminster Hall

The subject for this debate was determined by the Chairman of Ways and Means.

Summary

The role of the devolved administrations in Brexit preparation is as uncertain at the moment as the role of the Westminster Parliament, but the new Prime Minister has pledged that the devolved administrations will be involved in the Brexit preparations – the question is: how?

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1. Background

1.1 Introduction

The UK-wide referendum on membership of the European Union produced a result with significant regional variations. Scotland and Northern Ireland, two areas with devolved government, voted to remain in the EU, as did London. Devolution has been shaped in part by EU law and commitments, and suggestions have been made that the devolved legislatures may have a role in approving legislation associated with leaving. In Scotland support for independence from the UK rose above 50%, when undecideds were excluded, in some polls after the vote.¹ The First Minister is exploring options to keep Scotland in the EU, while in Northern Ireland the deputy First Minister has spoken of a mandate in Northern Ireland to remain.

The results of the referendum are analysed in [European Union Referendum 2016](#), CBP 7639, 29 June 2016.

The new UK Prime Minister Theresa May visited Scottish First Minister Nicola Sturgeon on 15 July 2016. She said

I've been very clear with the first minister today that I want the Scottish government to be fully engaged in our discussion.

I have already said that I won't be triggering Article 50 until I think that we have a UK approach and objectives for negotiations - I think it is important that we establish that before we trigger Article 50.²

On 18 July 2016 she visited Cardiff and said,

I want the Welsh Government to be involved and engaged in the discussions we are having, along with other devolved administrations. That's why I'm here today.³

1.2 Leaving the EU and Government structures

The new Brexit unit is based in the Cabinet Office and will report to the Cabinet Office. It brings together officials from that department, from the FCO, BIS, the Treasury and others. It will also engage with departments across Whitehall on relevant issues and will work "closely with officials from the devolved administrations" ([The Spectator, 27 June 2016](#), quoting PM spokesperson).

In a debate on 5 July 2016 on the outcome of the EU referendum, Baroness Stowell [spoke about](#) Brexit preparations, of maintaining

Britain's reputation as an open, outward-looking nation, maintaining our strong partnerships in Europe, continuing to play

our role on the world stage, holding fast to our values of tolerance and respect, and showing that Britain remains open for business. That is something that we in Government will do with the input of all the devolved Administrations.⁴

Lord Wallace asked:

How will the Government consult the devolved institutions, by which I mean the Parliaments and the Assembly as well as the Administrations, to ensure that the needs of Scotland, Wales and Northern Ireland are properly reflected in the negotiations? Will Scottish, Welsh and Northern Ireland government officials be seconded to work in the special Cabinet Office unit?⁵

Lord Boswell, chair of the Lords European Union Select Committee, spoke of building on “our existing good links with the devolved legislatures and Administrations”.⁶

The Scottish Secretary, David Mundell, said the PM would want Scotland to be “at the heart” of negotiations over Brexit ([BBC News, 13 July 2016](#)) and that Mrs May planned to have “very early engagement” with Scotland's First Minister, Nicola Sturgeon.

Theresa May has already held meetings with the Scottish and Welsh leaders. On 15 July she met Nicola Sturgeon to discuss Scotland's role in the Brexit talks (see BBC News, 15 July 2016, [Brexit: PM is 'willing to listen to options' on Scotland](#)). She told the First Minister that she would not trigger the Article 50 process for leaving the EU until she had agreed a “UK approach”, but this would not amount to a Scottish veto. Many reports, however, seem to think Scotland could block triggering the formal process of notification (see e.g. [Independent, 18 July 2016](#)).

On 18 July the PM met the First Minister of Wales, Carwyn Jones, in Cardiff. She said she wants the Welsh Government to be “involved and engaged” in Brexit negotiations ([BBC News, 18 July 2016](#); see also Wales Online, 18 July 2016, [Carwyn Jones reveals he laid out Wales 'bottom line' on Brexit to Theresa May](#)). Again, we don't yet know how.

The PM also intends to visit Northern Ireland “soon”.

1.3 Role for devolved administrations?

For Scotland the reservation of foreign affairs is contained in paragraph 7 of Schedule 7, Part I, to the *Scotland Act 1998*. This refers, depending on the reading, to “the European Union” or “relations with ... the European Union”:

7(1) International relations, including relations with territories outside the United Kingdom, the European Union (and their institutions) and other international organisations, regulation of international trade, and international development assistance and co-operation are reserved matters.

⁴ HL Deb 5 July 2016, c1850

⁵ HL Deb 5 July 2016, c1858

⁶ HL Deb 5 July 2016, c1867

However, this does not reserve implementing international obligations and obligations under EU law:

7(2) Sub-paragraph (1) does not reserve—

(a) observing and implementing international obligations, obligations under the Human Rights Convention and obligations under EU law,

(b) assisting Ministers of the Crown in relation to any matter to which that sub-paragraph applies.

“EU law” is defined in s126(9) as

(a) all those rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the EU Treaties, and

(b) all those remedies and procedures from time to time provided for by or under the EU Treaties.

Scottish Ministers and the Scottish Parliament therefore have a basis to observe and implement obligations under EU law, including under rights, powers, liabilities, obligations and restrictions created by the Treaties or arising under them. This has been the basis for their implementing specific directives.

They have a basis to observe and implement obligations under the remedies and procedures provided for by or under the Treaties.

They also have a basis to assist UK Ministers in relation to the matters in para 7(1), including the EU or relations with the EU, depending on the reading.

If the UK Government sought to invoke Article 50 of the *Treaty on European Union*, some might seek to argue that it would be exercising a right or power created or arising by or under the EU Treaties, and/or engaging in a remedy or procedure provided for by those Treaties, bringing devolved powers into view as a result.

The *Government of Wales Act 2006* works in a different way, but the provisions in respect of Northern Ireland are broadly similar to those for Scotland.

1.4 Role for devolved legislatures?

The three main devolution Acts all include direct reference to EU law. It limits the competence of devolved institutions, and ministers in devolved areas implement some EU obligations. It is likely that those Acts would be amended to take account of a departure from the EU.

For instance, the legislative competence of the Scottish Parliament is set out in section 29 of the *Scotland Act 1998*.

An Act of the Scottish Parliament is “not law” insofar as any of its provisions fit within the restrictions in sub-section 29(2). These include s29(2)(d): “it is incompatible with any of the Convention rights or with EU law.” (The Convention rights are those in the ECHR.)

This means that EU law, and the separate matter of the ECHR, create a limit around the competence of the Scottish Parliament.

Virtually identical provisions are in place for Northern Ireland and Wales.

The matter of competence, and therefore of EU law, plays out in other ways throughout the main devolution Acts (for instance, as noted above, devolved ministers have the power to implement EU directives locally).

The question has been raised, would any UK legislation to do with leaving the EU – for instance, an Act to repeal the 1972 Act, be subject to the Sewel Convention? This Convention holds that the UK Government will not normally invite Parliament to legislate on devolved matters or on the extent of devolved powers without first obtaining the consent of the relevant devolved legislature.

The Sewel Convention was reflected in the *Scotland Act 2016*, and is in the Wales Bill currently going through the House of Commons. There are technical arguments about the nature of the wording used in the *Scotland Act*. Section 2 of that Act recognises that Parliament will not normally legislate “with regard to devolved matters” without consent. This is not quite the same as the Sewel Convention formula of not legislating on devolved matters nor on the extent of devolved powers. Some concerns were raised by the SNP during the passage of the *Scotland Act 2016* about the non-inclusion of an explicit undertaking to seek consent before changing the extent of devolved powers.⁷

Nevertheless, it is not absolutely clear that the Sewel Convention has been replaced by this statutory provision, and it would be open to interpretation as to whether “with regard to devolved matters” includes the extent of devolved powers. For Wales at present and for Northern Ireland, there is no statutory provision, only the existing Sewel Convention.

As noted above, the competences of the devolved legislatures and executives are circumscribed by EU law, and some positive responsibilities are placed upon the executives to implement that law. An argument might be made that the removal of these features on leaving the EU would *prima facie* alter devolved competence, and, insofar as it involved UK legislation, would require legislative consent from the devolved legislatures under the Sewel Convention.

Equally, an argument might be made that the Sewel Convention would apply if UK legislation were used to comply with, for instance, obligatory parts of the Article 50 process, or indeed the use of Article 50 if viewed as an obligatory mechanism for withdrawal. Again, this would turn on a reading of the devolved powers to assist UK Ministers, and to implement obligations.

One counter-argument would stress that international relations is a reserved matter. Sch 5, para 7(1), to the *Scotland Act 1998* states:

⁷ See HC Deb 15 June 2015, c97, and Angus Robertson’s contribution at cc102-3.

International relations, including relations with territories outside the United Kingdom, the European Union (and their institutions) and other international organisations, regulation of international trade, and international development assistance and co-operation are reserved matters.

Equally, the Sewel Convention, whether in general or as recognised in the *Scotland Act 2016*, holds that the Government will not “normally” legislate on devolved matters without consent: to what extent is the current situation “normal”?

It should be noted that, even if the Sewel Convention were applied, it does not in itself prevent the UK Parliament from legislating on whatever it wishes – it merely creates a political obstacle. At present the statements from the UK Prime Minister appear to be the more compelling basis for devolved involvement.

2. David Cameron's statement to Parliament on Brexit

Outcome of the EU Referendum

The Prime Minister (Mr David Cameron): [...] Turning to the devolved Administrations, we must ensure that the interests of all parts of our United Kingdom are protected and advanced, so as we prepare for a new negotiation with the European Union we will fully involve the Scottish, Welsh and Northern Ireland Governments. We will also consult Gibraltar, the Crown dependencies and overseas territories, and all regional centres of power including the London Assembly. I have spoken to the First Ministers of Scotland and Wales, as well as the First and Deputy First Ministers in Northern Ireland and the Taoiseach, and our officials will be working intensively together over the coming weeks to bring our devolved Administrations into the process for determining the decisions that need to be taken. While all the key decisions will have to wait for the arrival of the new Prime Minister, there is a lot of work that can be started now. For instance, the British and Irish Governments begin meeting this week to work through the challenges relating to the common border area. [...]

[HC Deb 27 June 2016 c22-6](#)

3. Press articles and blogs

[Theresa May suggests Brexit delay as she says no Article 50 until Scotland gives go-ahead](#)

Laura Hughes, Telegraph
25 July 2016

[Brexit brief: Negotiating the UK's exit from the EU](#)

Robyn Munro, The Institute for Government
19 July 2016

On the UK side, both sets of EU negotiations will be led by the Prime Minister, working closely with the new Secretary of State for Exiting the European Union, David Davis. Supporting the negotiations will be a challenge for the Civil Service, requiring new capabilities and skills in key areas such as trade negotiation. The terms of the deal will affect all parts of the UK; the Government has indicated its intention to involve the devolved administrations in the negotiations.

[Brexit and Northern Ireland: key issues and possible consequences](#)
[Alan Whysall, The Constitution Unit](#)

15 July 2016

[Brexit and Wales: what happens now?](#)

Dr Jo Hunt, The UK in a changing Europe
6 July 2016

The Prime Minister's resignation speech spoke of fully involving the devolved administrations in the withdrawal negotiations, to ensure that the interests of all parts of the UK are protected and advanced. There has been much criticism from the devolved nations about their effective exclusion from any involvement in the process running up to the referendum. They had no role to play in the renegotiation package reached between the UK and the EU in February, which would have formed the basis of the UK's future EU membership.

[Parliament must have a role in Brexit negotiations](#)

Stephen Kinnock MP
5 July 2016

We therefore propose that a new Special Parliamentary Committee (SPC) on EU Renegotiation be established, with membership including representatives from the House of Commons and House of Lords in line with a broadly proportional membership from both. We believe also that there should be a larger Standing Conference which includes the SPC, in addition to the wider stakeholders, including MEPs, business representatives, the TUC, universities, the Mayors of our mayoral cities, local government representatives and devolved administrations.

[Independent Scotland joining EU could be part of Brexit "package deal"](#)

Tom Gordon, Scottish Herald

3 July 2016

[UK, EU - or both? Scotland's options after Brexit](#)

Glenn Campbell, BBC News

30 June 2016

If the new UK prime minister triggers the withdrawal process, a new relationship between the UK (including Scotland) and the EU will also need to be negotiated.

David Cameron has promised the devolved administrations in Scotland, Wales and Northern Ireland will be involved in this process. The UK could potentially seek concessions for Scotland.

We simply don't know what form any new UK-EU deal would take and whether or not it would include access to the single market.

[Negotiating Brexit: with whom?](#)

Nehal Davison, Institute for Government

30 June 2016

'The devolved administrations must be involved in the negotiations. Local government will also want a seat at the negotiating table to ensure that individual councils' needs are met. At the same time, Whitehall departments will be vying to ensure their interests are represented, whether it's BIS over export, investment and trade; DEFRA on common agricultural and fisheries policy or the Home Office on continued access to cross-border security arrangements.

[Brexit consequential: why the UK must involve the devolved governments in the process of leaving the EU](#)

The Constitution Unit

25 June 2016

[Brexit: What Happens Next?](#)

Stephen Tierney, University of Edinburgh
Centre on Constitutional Change

24 June 2016

Implications for the Union? Already Scottish nationalists and Irish nationalists in Northern Ireland have made the point that this is not a popular decision in their territories, and that they will oppose exit. Calls for a second referendum on independence in Scotland may intensify, as could calls for a referendum under the Northern Ireland Act 1998 for reunification of Ireland. It is not clear that opposition to Brexit will translate automatically into majority support for Scottish independence (and far less likely for Irish reunification): does Scotland want to be the site of the EU's territorial border with England? But the devolved territories will offer strong views throughout the negotiation process, and the prospect of Scottish independence may well push the UK towards trying to retain an integrated relationship with the EU.

[Negotiating Britain's EU Departure: From Tears to Hard-Headed Calculations](#)

Jonathan Eyal, the Royal United Services Institute (think tank on international defence and security)

24 June 2016

The first interesting hint given by the Prime Minister is that the government may be thinking of including representatives of the Scottish, Welsh and Northern Irish devolved administrations in the negotiating team with Brussels, or at the very least instituting a formal mechanism of consultation between the British negotiating team and the devolved administrations. That is politically shrewd, for at least four reasons: it will allow these administrations a direct stake in the talks; it may actually increase the effectiveness and clout of the British team during the negotiations with Brussels; it could improve Britain's chances of getting a better deal from the rest of the EU; and, finally, it may help deflate some of the inevitable separatist pressures, particularly in Scotland.

[Brexit: Its Consequences for Devolution and the Union](#)

Robert Hazell and Alan Renwick, UCL Constitution Unit Briefing Paper
19 May 2016

<https://www.ucl.ac.uk/constitution-unit/research/europe/briefing-papers/briefing-paper-3>

Link? Date?

[Implications of a Brexit for UK National Governance and Local Government](#)

LSE European Institute

13 April 2016

Report of a hearing on 13 April 2016 at the LSE. Participants were invited for their expertise in relation to the governments of Scotland, Wales and English local authorities.

Follow this link '[Brexit: Its Consequences for Devolution & the Union - Briefing Paper & Video](#)' and choose this title if headline link not working.

[Overview to Scottish Parliament European and External Relations ...](#)

The United Kingdom could leave the EU altogether. It is also important that the devolved administrations have a role in the negotiations

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