



## DEBATE PACK

Number CDP 2018/0149, 18 June 2018

# UK constitutional machinery and the frameworks for intergovernmental cooperation

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## Summary

This pack has been produced ahead of the debate on the UK constitutional machinery and its frameworks for intergovernmental cooperation, to be held in Westminster Hall on Wednesday 20 June 2018 at 2.30pm and led by Hon Stephen Kerr MP.

This briefing provides an overview of the existing arrangements on intergovernmental frameworks, machinery and cooperation in the United Kingdom.

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# 1. Overview

With significant developments in the devolution settlements in Wales and Scotland, and with new challenges being presented by the UK's withdrawal from the European Union, intergovernmental relations have been put in the spotlight in the last 3-4 years.

The political and institutional structures that underpin those relations, or the "intergovernmental machinery" has been criticised, especially from the perspective of devolved institutions, for being too informal yet formalistic, lacking effective means of dispute resolution, and more broadly vesting too much ultimate decision-making power with the UK Government. Escalating political disputes are typically settled, where they are settled, outside of the "formal" forums intended to address them.

The need for clarity on intergovernmental machinery is arguably greater in the context of EU withdrawal. There are devolved policy areas which are currently constrained on a cross-border basis by virtue of EU law and common frameworks. As and when the UK seeks to replace those frameworks with UK-wide ones, there will be a need to establish both the content of those frameworks and the decision-making structures that underpin them. As an informal forum, the JMC currently operates by consensus, but if it is responsible for overseeing future common frameworks, it will likely need to confront more directly what should happen to these policy areas in the absence of agreement.

The UK Government has agreed (in principle) most of the areas that should be covered by these frameworks with the devolved institutions, following the publication of its [Framework Analysis](#) in March 2018. It has not yet provided, however, a detailed blueprint for how common frameworks would actually operate. Nor has it stipulated what influence devolved authorities would have in shaping common frameworks' content.

This paper provides an historical and structural overview of the intergovernmental machinery that currently exists in the UK and highlights key criticisms made of it and proposals for reform. It also provides some context as to how "Brexit" has created a greater perceived urgency for some of these reforms.

## 2. Historic and structural overview

### Summary

Most of the UK's intergovernmental machinery was created as a consequence of the creation of devolution settlements in 1998 for Scotland, Wales and Northern Ireland. The UK Government has "territorial offices" whose function is to facilitate relations with the Scottish Government, Welsh Government and Northern Ireland Executive. The Cabinet Office is also responsible for intergovernmental discussions where matters arise between them.

The key documents that underpin intergovernmental co-operation are:

- The Memorandum of Understanding and Supplementary Agreements<sup>1</sup>
- The Devolution Guidance Notes (supporting functions of civil servants)<sup>2</sup>
- Other ad-hoc intergovernmental agreements<sup>3</sup>

The parent forum for intergovernmental cooperation is the Joint Ministerial Committee (JMC). It consists of the respective Heads of Government in the United Kingdom and, where relevant, the Deputy Prime Minister and Secretaries of State for Scotland, Wales and Northern Ireland, but other Ministers may attend in certain circumstances where the relevant areas of policy discussion require it.

The JMC has several sub-committees, including two standing sub-committees (Europe and Domestic) and others formed on an ad-hoc basis, to address specific issues. The most notable of these in recent months has been the Joint Ministerial Committee on European Negotiations (JMC (EN)). It has handled intergovernmental discussions about the UK's withdrawal from the European Union and its impact on the devolution settlements.

### 2.1 Devolution and inter-governmental relations

Intergovernmental machinery was a necessary byproduct of devolution. The UK Government already had the (then) Scotland Office, Wales Office and Northern Ireland Office to administer affairs in what became the devolved nations.

In order to facilitate cooperation between governments, a [Memorandum of Understanding](#) was developed in 1999 (and revised several times since). It articulates broad commitments to joint working. This includes principles that govern, wherever relevant, information sharing and confidentiality in exchanges between officials and between ministers.

The MoU, and its accompanying Concordats, also underpin the main intergovernmental forum for cooperation and resolving disputes between governments, the Joint Ministerial Committee. This body is a purely political

<sup>1</sup> [Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee](#), October 2013 (this is the seventh iteration of this document, originally issued in October 1999)

<sup>2</sup> <https://www.gov.uk/government/publications/devolution-guidance-notes>

<sup>3</sup> e.g. the [Edinburgh Agreement](#), October 2012, committing to the holding of the Scottish independence referendum in 2014 and the [Intergovernmental Agreement on the European Union \(Withdrawal\) Bill](#), entered into by the UK and Welsh Governments in April 2018.

creation and has no statutory underpinning or powers, but is a political forum to which key decision-making and negotiations between governments can be escalated if thought necessary or expedient.

## 2.2 Territorial Offices and Secretaries of State

Following devolution, the role of the territorial offices (TOs) changed. Instead of being responsible for day-to-day administration of domestic affairs in Scotland, Wales and Northern Ireland, these departments are now intended to function as representatives for the interests of the respective devolved nations within the UK Government in reserved areas. Their role is now predominantly one of intergovernmental mediation and facilitation between UK Government departments and the devolved administrations. As the current Memorandum of Understanding states:

the Secretaries of State for Scotland, Wales and Northern Ireland are responsible for ensuring that the interests of those parts of the UK in non-devolved matters are properly represented and considered.<sup>4</sup>

Working closely with the Cabinet Office, the territorial offices have also assumed responsibility for legislative proposals to develop the devolution settlements further, including with regard to the *Scotland Acts 2012* and *2016* and the *Wales Acts 2014* and *2017*. The TOs are proactively involved in supporting the implementation of those new settlements, especially in policy areas where new powers are being transferred.

The (then) Scotland Office also had a prominent role in facilitating discussions with the Scottish Government leading to the Edinburgh Agreement on the Scottish independence referendum.

The Scotland and Wales Offices have recently been restyled as the Offices of the Secretaries of States of Scotland and Wales respectively, but its Northern Ireland equivalent is still called the Northern Ireland Office.

## 2.3 Memorandum of Understanding

In October 1999, the Governments published a Memorandum of Understanding. As the current version explains, it does not have the status of a “binding agreement” but is a “statement of intent” for how the Governments will approach areas where joint working and cooperation is necessary and/or expedient.<sup>5</sup>

Among the Memorandum’s reciprocal commitments are those to:

- “good communication” between governments (especially where responsibilities or interests overlap);
- timely and confidential exchange of information (where relevant and appropriate);
- cooperation in areas of mutual interest; and
- sharing of statistics and research where appropriate.

The Memorandum is supplemented by a series of Concordats in its Annex of “Supplementary Agreements”. These set-out the basis for intergovernmental cooperation through the Joint Ministerial Committee

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<sup>4</sup> Memorandum of Understanding (etc.), October 2013, p4

<sup>5</sup> Ibid.

structure and set out, for example, the approach to be taken for involving the devolved administrations in aspects of relationships with the European Union which impact upon devolved matters. Three of the Concordats cover:

- Co-ordination of European Union Policy Issues;
- Financial Assistance to Industry; and
- International Relations.

## 2.4 Joint Ministerial Committee

### Existing structure

The other Supplementary Agreement to the Memorandum concerns the Joint Ministerial Committee (JMC). This is an intergovernmental forum with the following remit:

- a) to consider non-devolved matters which impinge on devolved responsibilities, and devolved matters which impinge on non-devolved responsibilities;
- b) where the UK Government and the devolved administrations so agree, to consider devolved matters if it is beneficial to discuss their respective treatment in the different parts of the United Kingdom;
- c) to keep the arrangements for liaison between the UK Government; and the devolved administrations under review; and
- d) to consider disputes between the administrations.<sup>6</sup>

The main JMC forum is JMC (Plenary). It normally consists of the Heads of Government across the four administrations and the three territorial Secretaries of State. The Deputy Prime Minister (or equivalent Cabinet Office minister) may also attend in certain circumstances, as may other government ministers if the relevant areas of discussion require it. The Supplementary Agreement on the Joint Ministerial Committee expects JMC (Plenary) to meet at least once per year.<sup>7</sup> It last met on 14 March 2018.<sup>8</sup>

There are two standing sub-committees of the JMC: one for European matters and one for Domestic matters. These typically meet more frequently than the Plenary session and it is normal for these to involve subject-matter specific government ministers rather than the Heads of Government. JMC (Europe) has consistently met several times a year but JMC (Domestic) has not met since 2013.<sup>9</sup>

Additional ad hoc committees are set-up from time to time to deliver on specific objectives. Early on in the lifetime of devolution, ad hoc JMCs were set-up with a focus on Poverty, the Knowledge Economy, and Health, but none of these have reconvened since 2003.

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<sup>6</sup> Supplementary Agreement to the Memorandum of Understanding on Joint Ministerial Committee, p11

<sup>7</sup> Ibid

<sup>8</sup> [Joint Ministerial Committee \(Plenary\) Communiqué](#), 14 March 2018

<sup>9</sup> Institute for Government, [Devolution and the Joint Ministerial Committee](#), 23 February 2018

More relevant to current purposes is the JMC on EU Negotiations (JMC (EN)). This is a group created to facilitate discussions and negotiations on the impact of the UK's departure from the EU on the devolution settlements. It is typically attended by some or all of:

- Rt. Hon. David Lidington MP (Cabinet Office Minister and Chancellor of the Duchy of Lancaster);
- The three territorial offices' Secretaries of State;
- Rt. Hon. David Davis MP (Secretary of State for Exiting the European Union);
- Mike Russell MSP (Scottish Government Minister for UK Negotiations on Scotland's Place in Europe);
- Mark Drakeford AM (Welsh Government Cabinet Secretary for Finance and Local Government); and
- A senior civil servant from the Northern Ireland Civil Service (attending in the absence of the Northern Ireland Executive).

JMC (EN) has been the main forum for discussing changes to devolution that would be given effect to by the *European Union (Withdrawal) Bill*. It has met on nine occasions, last meeting on 2 May 2018.<sup>10</sup>

## 2.5 Other intergovernmental forums and cooperation

At a departmental level, interaction by the UK Government with the devolved administrations is underpinned by the guidance provided by the Cabinet Office in the Devolution Guidance Notes.<sup>11</sup> These are not "agreements" but articulate the UK Government's expectation as to working arrangements. They are publicly available but provide high level principles for interaction. Detailed working arrangements vary by department and by devolved nation based on operational needs.

Other intergovernmental forums exist at Departmental level to deliver on specific joint projects between governments. There are several concordats, arrived at bilaterally between UK Government departments and individual devolved administrations.<sup>12</sup>

One such example concerns the transfer of certain welfare powers to the Scottish Government under the *Scotland Act 2016*. There is a Joint Ministerial Working Group on Welfare, which was set-up in 2015. Ministers from the Department for Work and Pensions and the Scotland Office meet periodically with Scottish Government Ministers to agree implementation priorities and to resolve any disputes concerned with implementation of the *Scotland Act 2016* powers.<sup>13</sup> This ministerial forum is underpinned by groups of officials (i.e. civil servants) which are responsible for day-to-day implementation of key policy decisions in that shared space.

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<sup>10</sup> No Communique has been published with regard to the May 2018 meeting. See also [Communique of previous meeting](#), 8 March 2018

<sup>11</sup> See: <https://www.gov.uk/government/publications/devolution-guidance-notes>

<sup>12</sup> See, for instance, the published list of concordats agreed by the Welsh Government: <https://gov.wales/about/organisationexplained/intergovernmental/concordindex/?lang=en>

<sup>13</sup> Scotland Office, [Joint Ministerial Working Group on Welfare](#), 11 February 2015

## 2.6 British-Irish Council (BIC)

Under the terms of the Good Friday Agreement, which provided for a return to devolution in Northern Ireland with the support of the governments of the United Kingdom and Ireland, the British-Irish Council was created. This body consists of representatives from the:

- UK Government;
- Irish Government;
- Northern Ireland Executive;
- Scottish Government;
- Welsh Government;
- Isle of Man Government;
- States of Guernsey; and
- States of Jersey.

Paragraph 5 of Strand Three of the Good Friday Agreement sets out the function of the BIC:

The BIC will exchange information, discuss, consult and use best endeavours to reach agreement on co-operation on matters of mutual interest within the competence of the relevant Administrations. Suitable issues for early discussion in the BIC could include transport links, agricultural issues, environmental issues, cultural issues, health issues, education issues and approaches to EU issues. Suitable arrangements to be made for practical co-operation on agreed policies.

The BIC operates on the basis of consensus and all of its forms of agreed intergovernmental cooperation are expressly stated to be voluntary. Part V of the *Northern Ireland Act 1998* makes explicit reference to the British-Irish Council, including imposing on the Executive of Northern Ireland certain obligations as to attendance and determining how Northern Ireland is to be represented at that level where a power-sharing Executive exists.

## 3. Calls for reform of the JMC

### Summary

There have been several calls for reform, including from Committees of the UK Parliament, Scottish Parliament and Welsh Assembly, of intergovernmental machinery in the UK. Most of the criticism of the existing system concerns the extent to which the Joint Ministerial Committee does in fact provide an effective means of dispute resolution between administrations.

Common recommendations for reform typically focus on the JMC. Calls for reform typically include calls for it to:

- be put on a statutory footing;
- reform its sub-committee structure;
- strengthen its dispute resolution mechanisms; and
- give devolved authorities more control over its agenda.

There have also been calls to review and revise the Memorandum of Understanding and Concordats with a greater degree of regularity. The Scottish Parliament's Devolution (Further Powers) Committee has considered whether the role of legislatures needs to be developed in order more effectively to scrutinise intergovernmental activity.

It is expected that, with the UK's withdrawal from the EU, there will be a greater need for intergovernmental machinery to facilitate the relationship between the UK's four governments. The expectation is that UK "common frameworks" will replace arrangements that are currently common throughout the UK by virtue of its membership of the EU. For areas like agriculture, fisheries and the environment therefore, arrangements will need to be put in place to decide how powers returning from the EU should be used, and who should be able to exercise them.

### 3.1 Why reform intergovernmental machinery?

Several committees of the legislative chambers of the UK have considered the intergovernmental machinery that underpins relations between the devolved authorities and the UK Government. Much of this scrutiny was prompted by reforms to the Scottish and Welsh devolution settlements, through the *Scotland Acts 2012/2016* and *Wales Acts 2014/2017*.

The lack of legal underpinning of the Joint Ministerial Committee has contributed to a perception, especially in Wales, that the intergovernmental machinery is both too informal and too formalistic. In practice, disputes end up being resolved bilaterally and through political channels, rather than through those bodies set-up by the Memorandum of Understanding. Common calls for reform therefore typically include providing a "statutory footing" for the JMC and for independent dispute resolution procedures. The Welsh Government has even called for a UK Council of Ministers to be created, to give a more "summit-like" character to meetings of the Heads of Government.<sup>14</sup>

<sup>14</sup> Welsh Government, [Brexit and Devolution: Securing Wales' Future](#), June 2017, pp27-28

## 3.2 Relevance of Brexit

Brexit has brought a perceived urgency to reconsidering intergovernmental structures in the UK. In at least 24 of the areas where EU law has previously constrained policy freedom in devolved areas, the UK Government intends to legislate for “common frameworks”.<sup>15</sup> These would impose certain common standards across the UK in e.g. agriculture, fisheries and the environment.

It is not yet clear how it will be decided what the content of those frameworks should be, and how (or even by whom) they will be administered. The devolved authorities expressed concerns that these common frameworks, legally, could be imposed in the absence of agreement from the Scottish Parliament. Mike Russell MSP, the Scottish Government’s Minister for UK Negotiations on Scotland’s Place in Europe, re-iterated this concern when rejecting the “[Intergovernmental Agreement](#)” in April, agreed to by the UK and Welsh Governments.<sup>16</sup>

## 3.3 Legislative committee consideration of the need for reform

This section provides a summary of the findings of several Parliamentary and Assembly Committee reports into intergovernmental machinery.

### Public Administration and Constitutional Affairs Committee

The House of Commons Public Administration and Constitutional Committee [reported on intergovernmental machinery](#) in November 2016. Among its recommendations were:

- revitalisation of JMC Domestic to allow more policy issues to be raised at a substantive level than the timetable in JMC Plenary allows;
- consideration given to a Heads of Government “summit-style” arrangement where each government takes it in turn to shape the agenda of the meetings (along similar lines to the Council of the European Union’s meetings);
- under “summit-style” arrangements commit more time to these meetings;
- the creation of a taxation-focused JMC sub-committee and other (likely Brexit-related) sub-committees in the areas where common frameworks are being contemplated; and
- to consider revision of the Memorandum of Understanding to reflect the new challenges posed by EU exit.<sup>17</sup>

<sup>15</sup> Cabinet Office, [Framework Analysis](#), 9 March 2018

<sup>16</sup> SP OR 24 April 2018, c13; [Intergovernmental Agreement on the European Union \(Withdrawal\) Bill and the Establishment of Common Frameworks](#), 24 April 2018

<sup>17</sup> Public Administration and Constitutional Affairs Committee, [The Future of the Union, part two: Inter-institutional relations in the UK](#), Session 2016–17, HC 839, 29 November 2016, pp17-23

## Lords Constitution Committee

The House of Lords Constitution Committee has also published several reports addressing intergovernmental working arrangements. Among its key observations have been:

- the devolved administrations feel opportunities to raise issues are limited in the current system;
- the Domestic sub-committee is not fit for purpose and lacks a clear remit;
- consideration should be given to putting the JMC on a more formal (statutory) footing;
- the memorandum and concordats should be reviewed at least once during each Parliament;
- the government needs to set out a more comprehensive strategy for ensuring civil servants have experience of or training in working with devolved administrations; and
- change the culture within government to avoid the “devolve and forget” attitude.<sup>18</sup>

## Welsh Assembly Constitutional and Legislative Affairs Committee

A Welsh Assembly committee has also considered intergovernmental machinery in the UK, reporting in February 2018. Among its key observations and recommendations were that:

- the dispute resolution mechanisms lack teeth especially when devolved authorities seek to raise a grievance and should include greater independent arbitration;
- disputes at the moment are far more often resolved informally and behind closed doors than in JMC itself;
- the existing processes were too formalistic, bulky and unwieldy to respond to the challenges presented by Brexit;
- that a “completely new” approach to intergovernmental relations is urgent and necessary;
- the “summit” approach advocated by PACAC (see above) should be adopted;
- new Brexit-specific sub-committees of the JMC should be set-up;
- intergovernmental relations should be put on a statutory footing; and
- the JMC needs to be a genuine decision-making body.<sup>19</sup>

It was also sympathetic to the recommendation of the Welsh Government that, in the context of Brexit, a “UK Council of Ministers” should ultimately replace the existing JMC format.<sup>20</sup>

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<sup>18</sup> Lords Constitution Committee, [Inter-governmental relations in the United Kingdom](#), Session 2014-15, HL Paper 146, 27 March 2015, pp17-28; Lords Constitution Committee, [The Union and devolution](#), Session 2015-16, HL Paper 149, 25 May 2016, pp72-77

<sup>19</sup> National Assembly for Wales Constitution and Legislative Affairs Committee, [UK governance post-Brexit](#), February 2018, pp18-38

<sup>20</sup> Welsh Government, [Brexit and Devolution: Securing Wales' Future](#), June 2017, pp27-28

## Scottish Parliament Devolution (Further Powers) Committee

A committee of the Scottish Parliament considered slightly different questions in relation to intergovernmental machinery. Reporting in October 2015, its focus was the role of Parliamentary scrutiny of intergovernmental relations. Its main recommendations were concerned with the lack of transparency and accountability of agreements reached between governments by legislatures generally but especially the Scottish Parliament. It argued for a greater role for Parliaments in scrutinising proposed changes to the Memorandum of Understanding and Supplementary Agreements.<sup>21</sup>

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<sup>21</sup> Scottish Parliament Devolution (Further Powers) Committee, [Changing Relationships: Parliamentary Scrutiny of Intergovernmental Relations](#), SP Paper 809, 8<sup>th</sup> Report, 6 October 2015, p25-29

## 4. Useful materials

### 4.1 Reports into intergovernmental machinery

#### UK Parliament

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

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

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

#### Devolved institutions

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

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

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

#### Other reports

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

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

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

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

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

### 4.2 Press articles

[A new department for the Union could boost all of Britain](#)  
Stephen Kerr, 16 May 2018

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