

Brexit, devolution and common frameworks ^[1]



What happens to powers being ‘repatriated’ from the EU after Brexit? ^[2]

When Brexit occurs, subject to the terms of our future relationship with the European Union (EU), most of the powers exercised at the EU level will be ‘repatriated’ to the UK.

Many of these powers, for instance those relating to immigration, trade and competition policy, will become the sole preserve of Westminster.

In other areas, powers currently exercised by EU institutions will be devolved to Scotland, Wales and Northern Ireland.

However, [the UK and devolved Governments now agree](#) ^[3] that new ‘common frameworks’ will be needed with devolved governments to ensure policy consistency or coordination in some areas.

What is meant by ‘common frameworks’?

The legislation establishing the institutions in Edinburgh, Cardiff and Belfast specifies which policy areas are devolved.

In Scotland and Northern Ireland, this is done by listing the areas reserved to Westminster.

In Wales, the legislation lists which areas are conferred to Cardiff, but this will switch to the reserved powers model in 2018.

In all cases, the intention is to establish a clear divide between what is devolved and what is not.

However, the devolved institutions are legally bound to comply with EU law. As a result, in some nominally devolved areas – such as environmental regulation, agriculture, state aid for industry, [public procurement](#) ^[4] and aspects of justice, transport and energy – the policy autonomy of the devolved institutions is significantly constrained in practice.

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.

This would allow policy differentiation within the UK in areas where EU law has previously provided a common legal framework.

To prevent or limit divergence, common frameworks may therefore be created to "[set out a common UK, or GB, approach and how it will be operated and governed](#) ^[3]". Depending upon the policy area, "[this may consist of common goals, minimum or maximum standards, harmonisation, limits on action, or mutual recognition](#) ^[3]".

In what areas might common frameworks be created?

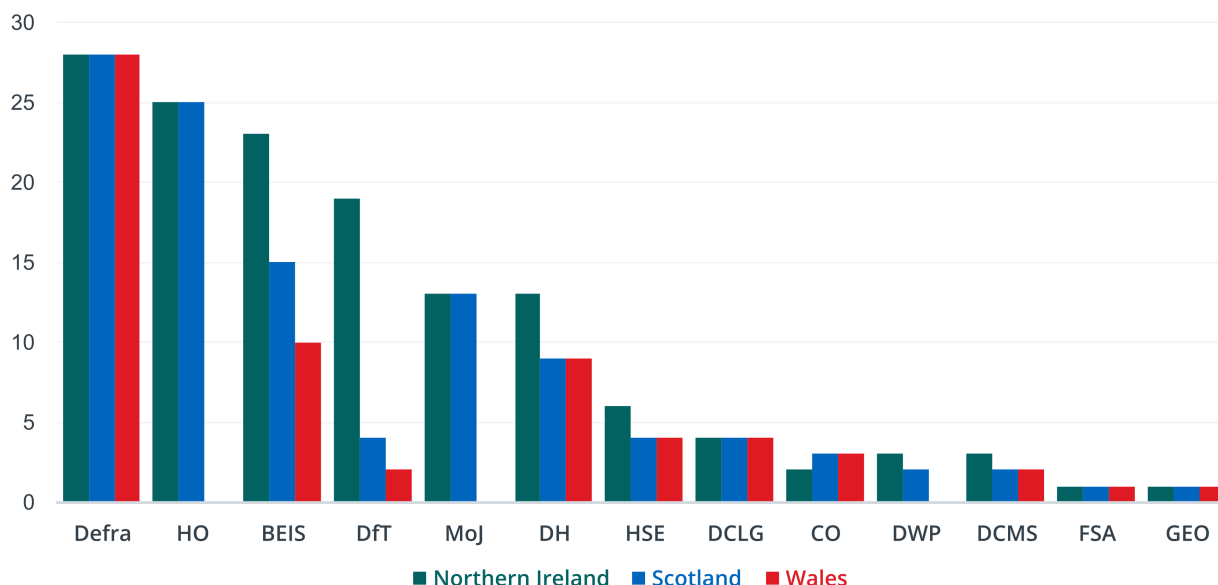
According to analysis conducted by the UK Government, there are a total of 142 distinct policy areas where EU law intersects with devolved powers in at least one of the three devolved nations.

In Scotland, there are 111 such policy areas. The departments with the greatest number of policy areas falling into this category are: 28 within the [Department for Environment, Food & Rural Affairs](#) ^[5] (Defra), 25 within the Home Office, 15 within the Department for Business, Energy and Industrial Strategy (BEIS) and 13 within the Ministry of Justice (MoJ).

For Wales, there are 64 such areas. The Welsh list is significantly shorter because policing, justice and certain energy and transport policy areas are not devolved to Cardiff.

The list is longest for Northern Ireland. There are 141 areas of overlap between EU and devolved powers. This includes almost all those areas on the Scottish list, plus various aspects of energy and transport regulation that are devolved to Belfast.

Policy areas where EU powers intersect with devolved competences



Source: Institute for Government analysis of letter from Michael Russell MSP to Scottish Parliament Finance and Constitution Committee (19 September 2017), UK Government document published in the Western Mail (28 September 2017), and UK Government document published by Northern Ireland Assembly Research and Information Service (6 November 2017).

New frameworks will not necessarily be required in all these areas. In some cases, full control is expected to be transferred to the devolved institutions, allowing policy divergence between the nations.

What principles will guide the development of common frameworks?

On 16 October, the UK and devolved governments announced that they had ["agreed the principles"](#)^[3] that will guide the development of common frameworks. Six different reasons were set out for why common frameworks in particular areas might be needed:

1. Ensure that the "effective functioning of the UK single market is maintained". For instance, it may be necessary to limit regulatory differences emerging in areas ranging from public procurement, rail franchising and animal welfare to the management of radioactive waste.
2. Enable the UK to conclude trade deals with other countries. The Government is concerned that regulatory divergence might make it harder for the UK to strike comprehensive trade deals, for instance if the devolved nations created more generous schemes for subsidising farmers or supporting local industry.
3. Ensure that the UK meets international obligations, including in areas relating to devolved policy competences. This might apply, for instance, in relation to international agreements on carbon emissions, management of fisheries in the North Sea or in allowing each other's citizens access to healthcare when abroad.
4. Manage common resources that naturally cross boundaries between the UK nations, including the water and air quality as well as fisheries.
5. Administer and provide ["access to justice in cases with a cross-border element"](#)^[3].
6. Continue cooperation where it is needed to ["safeguard the security of the UK"](#)^[3].

The UK Government also reiterated its commitment that Brexit will not reduce flexibility in devolved policy making areas where frameworks are created. The overall effect will be ["a significant increase in the decision making power of each devolved administration"](#)^[6].

What form might the new common frameworks take?

In principle there are at least four ways that common policy frameworks could be established. In many cases, a combination of these approaches may be needed.

First, the UK might agree to continue to comply with EU law as part of a new ["deep and special partnership"](#)^[7]. For instance, the UK might maintain EU-compliant state aid rules or remain within some arrangements for justice cooperation. Additional policy autonomy would not be devolved, but the UK and devolved governments would need to cooperate on implementation.

Second, in areas where the UK is definitively 'taking back control', but where regulatory consistency is deemed crucial, new frameworks could be set up by legislation at Westminster for the entire UK. This might apply to management of fisheries or subsidies for agriculture. Since these policy areas are already devolved in principle, the [Sewel Convention](#)^[8] would apply, meaning that the consent of the devolved bodies should be sought.

Third, there may be areas where coordination is required, but a binding legal framework is seen as unnecessary. In this case, powers might be devolved in full but with agreement about how the different governments will work together, perhaps to share best practice and data or to agree upon minimum standards, for instance in areas such as air or water pollution.

Fourth, the UK and devolved governments could create new intergovernmental structures to take binding decisions for the whole UK. The [Welsh Government has proposed a new UK Council of Ministers](#)^[9] to oversee issues such as agriculture-related aspects of trade negotiations. The Welsh propose that the UK Government should not be able to override the opposition of all three devolved governments in the event of disagreement.

What does the EU Withdrawal Bill say about common frameworks?

The [EU Withdrawal Bill](#)^[10] does not specifically mention common frameworks. But as [recent Institute for Government analysis has shown](#)^[11], the bill will prevent the devolved bodies from modifying 'retained EU law' – the body of EU law being imported into the domestic legal system to prevent a regulatory black hole after exit day.

The immediate effect will be that Westminster will have the sole power to legislate to replace EU frameworks in all the areas mentioned above. However, the bill also contains provision for additional powers to be devolved, at the discretion of UK ministers. This

might apply in areas where common frameworks are either unnecessary or where looser intergovernmental coordination is deemed sufficient.

The Welsh and Scottish governments have proposed amendments to the bill that would mean that the full list of policy areas shown in the chart above would fall fully within devolved competence after Brexit. Frameworks would then be negotiated between the governments - and if required - legislation could be passed at Westminster with devolved consent, to give the necessary legal underpinning to the new arrangements.

The Labour Party has [tabled a similar amendment](#) [12] that would return the intersecting powers straight back to the devolved administrations.

Unless compromise is reached, the [Welsh](#) [13] and [Scottish](#) [14] governments are set to withhold legislative consent for the EU Withdrawal Bill in its current form, which they have described as a "[power grab](#)" [15].

The UK Government therefore faces a choice between making concessions to satisfy the devolved governments and pushing through the bill without consent.

The latter option would be an unprecedented breach of the Sewel Convention, but would probably nonetheless be considered legal. The [Supreme Court declared in the Miller judgment](#) [16] in January 2017 that since Sewel is just a convention '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'.

Further information

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See [department abbreviations](#) [18]. Other abbreviations:

FSA - Food Standards Agency

GEO - Government Equalities Office

HSE - Health and Safety Executive

Update date:

Wednesday, November 22, 2017

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- [2] <http://twitter.com/intent/tweet?text=What%20happens%20to%20powers%20being%20E2%80%98repatriated%20from%20the%20EU%20after%20Brexit%3F>
- [3] <https://www.gov.uk/government/publications/joint-ministerial-committee-communicue-16-october-2017>
- [4] <https://www.instituteforgovernment.org.uk/explainers/public-procurement>
- [5] <https://www.gov.uk/government/organisations/department-for-environment-food-rural-affairs>
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- [11] <https://www.instituteforgovernment.org.uk/blog/eu-withdrawal-bill-has-serious-implications-devolution>
- [12] https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/amend/euwithdrawal_fm_cwh_1116.15-21.html
- [13] <http://www.assembly.wales/laid%20documents/lcm-ld11177/lcm-ld11177-e.pdf>
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